

ANDEAN COMMUNITY ADOPTS NEW IPR LAW

GRAIN
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Last 14 September, the Andean Community -- composed of Bolivia, Colombia, Ecuador, Peru and Venezuela -- adopted a new intellectual property rights (IPR) system. Designated as 'Decision 486', the law sets out common rules for the granting, implementation and enforcement of a wide range of IPRs in the five Member States. It will come into force on 1 December 2000, replacing the regime defined in the Community's 'Decision 344' of 1993.

Decision 486 is specifically meant to bring the five countries' IPR systems in line with the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It does so with direct reference to the Convention on Biological Diversity (CBD).

With respect to ongoing conflicts over rights to genetic resources, biopiracy and the patentability of life forms, the Decision contains quite a number of provisions. The most noteworthy are perhaps the following (roughly translated from the Spanish, but not the legalese):

- The Member States recognise the rights and faculties of local, indigenous and afroamerican communities to decide over their collective knowledge [Art 3]
- Life forms, in whole or in part, as they are found in nature, natural biological processes, and biological material which exists in nature or which can be isolated from any life form, including genomes or germplasm, shall not be considered inventions [Art 15]
- Inventions whose commercial use should be prohibited to protect the health or life of people or animals, or to conserve plants or the environment, shall not be patentable. To this effect, the commercial use of an invention will not be considered contrary to the health of life of people or animals, or to the conservation of plants or the environment, merely because of a legal or administrative ruling which prohibits or regulates such use. [Art 20]
- Plants, animals and essentially biological processes, which are not non biological or microbiological processes, for the production of plants or animals shall not be patentable [Art 20]
- Any application for a patent on an invention, be it a product or process, obtained or developed from genetic resources, or their derived products, of which any of the Member States is country of origin shall include a copy of the access contract [Art 26]
- Any application for a patent on an invention, be it a product or process, obtained or developed from traditional knowledge of indigenous, afroamerican or local communities of any of the Member States, and for which the Member State is country of origin, shall include the copy of the document which accredits a license or authorization of use from the community, in conformity with what is established in Decision 391 and its modifications and valid regulations [Art 26]
- When the patent is on a self-replicating biological material, except for plants, the patent holder shall not have the right to prevent others from using it as the initial base to obtain a new viable material unless the repeated use of the patented material is required [Art 53]

- When the patent protects self-replicating biological material, the patent shall not extend to the biological material obtained by reproduction, multiplication or propagation [after it the product placed on the market] as long as the reproduction, multiplication or propagation is necessary to use the material in conformity with the purpose for which the product was placed on the market and where the derived material is not used for the purpose of multiplication or propagation [Art 54]
- Patents granted on inventions obtained or developed from genetic resources or traditional knowledge, of which any Member State is country of origin, without presentation of a copy of the proper access contract or license from the community shall be nullified [Art 75]
- Any mark referring to elements of the cultures of indigenous, afroamerican or local communities shall not be registered without the community's express consent [Art 136]
- Microorganisms shall be patentable pending the adoption of different measures as a result of the review of TRIPS Article 27.3(b). To this effect, the obligations assumed by the Member States under the Convention on Biological Diversity shall be taken into account. [Second Transitional Provision]

On the surface, some of these elements may look 'progressive'. After all, this is the first time that a group of developing countries has set up a new intellectual property regime in the name of TRIPS which directly incorporates elements from the Convention on Biological Diversity (CBD). Can harmony between the conflicting international treaties be achieved this way? According to Margarita Florez, a Colombian lawyer long involved in this debate in the subregion, we should be extremely cautious. In her view, the CBD-friendly provisions in Decision 486 do not carry the same weight as the intellectual property rights.

GRAIN concurs. This new move to accommodate community rights over traditional knowledge and sovereign control over access to genetic resources within an IPR regime is just that -- accommodation. Incorporating the language does not necessarily move anything forward for local communities themselves. In the case of Decision 486, what we see on paper is an initiative to involve indigenous people, afroamericans and rural folk of the Andean countries in the smooth running of a patent system which fundamentally serves to give exclusive commercial rights over local biodiversity to others. This is fine, if your objective is make patents on life more politically correct. But it's disempowering if your objective is to strengthen the rights of local people over their own knowledge, resources and livelihoods, and against the encroachment of bioprospectors and the greed of biopirates.

The adoption of Decision 486 should serve as an alarm bell to policy-makers and legislators in other developing countries. Rather than succumb to the contradictions within TRIPS (e.g. the obligation to review the provisions on biodiversity while these provisions should have been implemented last January), not to mention the conflicts between TRIPS and CBD, we need to fix the problem at its source. The review of TRIPS is going on and getting deeper into the issues. There have been proposals tabled from a good number of developing countries to suspend the implementation deadline and amend the treaty to exclude biodiversity from its purview. And there are excellent suggestions now for new language being circulated. The cards are in the hands of the South to stay on the offensive and pursue real change in their international obligations -- without falling into the trap the Andean Community fell into.

‘All the elements of human rights in Decision 486 are illusions’

GRAIN interview with Margarita Florez
Los Baños and Bogotá, 28 September 2000

[GRAIN] How do you read Decision 486?

[Margarita Florez] The key point is that this law takes the subregion ‘beyond TRIPS’, because it introduces the patenting of microorganisms when TRIPS is under review. As I see it, TRIPS prohibits members from excluding microorganisms from their patent laws. It does not oblige you to suddenly declare that microorganisms are patentable. Even less so when this provision is under active review, be it through the review of Article 27.3(b) or the review of the entire TRIPS Agreement.

[GRAIN] Decision 486 links the patentability of microorganisms to some kind of expectation that the review of 27.3(b) might result in a different ruling in this regard. What do you make of that?

[MF] I think this formulation has almost no effect. Microorganisms have now been declared patentable irrespective of a review of this very provision in TRIPS. How can our governments implement this obligation from TRIPS and at the same time anticipate a change in TRIPS that would undo the same obligation? What this amounts to is the Andean Community deciding to ignore the opportunity of the review. They’ve cut off the discussion by falling in line with ‘part one’ of 27.3(b). That’s what I mean by ‘beyond TRIPS’: our governments have accepted less than what was available to them.

[GRAIN] So you don’t see the Decision as an approach which tries to reconcile different realities: TRIPS as it stands, the review of 27.3(b) and the CBD?

[MF] No. In reality, Decision 486 was pushed on us by the United States and is entirely shaped in their interests. You have to bear in mind that the kind of pressure that the US is exerting on us -- in Ecuador, Colombia, throughout the subregion -- is tremendous these days. Just look at the ‘2000 Special 301 Report’ of the US Trade Representative Charlene Barshefsky. Decision 486 was not openly negotiated. There was no public debate. It is the US interfering, in one of so many profound and destabilising ways, in our laws and lives. We had options under TRIPS, even if they were restricted ones. Now? No more! But I want to stress: what makes me nervous about this law is the blatant contempt for multilateralism that it embodies. It was pushed on us by one country and pays no more than lip service to the rights we contracted under several international treaties, namely TRIPS and CBD.

[GRAIN] If it's to be viewed primarily as a US concoction, why does it distort patent law, so to speak, by carrying provisions on peoples' prior informed consent, contracts on access to genetic resources, biosafety regulations and rights of local communities over traditional knowledge? The US doesn't normally advocate the introduction of these kinds of things into patent law. In fact, they vehemently resist it at WTO.

[MF] It's nonsense. The parties to the Convention on Biodiversity, the developing countries in the TRIPS Council, even the United Nations Commission on Human Rights have all recognised the incompatibility between TRIPS and CBD. The Andean Community text simply embodies this problem. All the elements of what we would consider human rights in Decision 486 are illusions -- because the incompatibilities are not resolved. What matters, as a result, are the intellectual property rights that the new law affords. Look at the text carefully. The provisions on community rights, access, traditional knowledge and so forth are extremely weak! They're empty. On paper, yes, Decision 486 talks about 'the obligations assumed by the Member States under the CBD'. But in practice and in reality, they don't have the same legal weight as the IPRs provided for in the same regime. The reference to CBD is just a hollow carry-over from the principles we fought to get respected by Decision 344.

[GRAIN] Okay, let's compare. Decision 344 established that animals, naturally-occurring material, human genetic material and inventions related to essential medicines are not patentable. Decision 486 now says that microorganisms are patentable, plants are not (in addition to animals), and is silent on essential medicines and human genetic material. How should we interpret this?

[MF] In 1993, Decision 344 introduced into our countries the possibility of patenting plants. This was accompanied by Decision 345 which set up a separate IPR system on plant varieties, modelled after the UPOV Convention of 1991. What we, civil society groups, did at that time was fight hard for yet another regulation to implement CBD, so that the rights of the communities would be not be undermined by these new IPRs. And as a result, we got our access regime, Decision 391. Now what happens? In comes enormous pressure on our trade officials, with foreign companies saying, 'Look, our investments require that you guarantee us legal protection over other materials. Give us microorganisms.' Of course! If anything is commercially underexplored in the field of biodiversity it's microorganisms. So the trade-off is that we're now allowed to exclude plants from our patent system, but we have to grant the transnationals rights to microorganisms. This is a very uneven deal! Microorganisms represent a huge area of research and therefore IPR and profits for these companies. I'm convinced of that.

[GRAIN] So what can be done?

[MF] We have to work harder to secure the proper rights of local communities over their resources and traditional knowledge. Getting 'special effects' written into patent laws is no solution. It's superficial. And illusory. And therefore dangerous. As long as traditional knowledge and the rights of countries of origin don't have the same weight as IPR, the situation remains completely inequitable.

Margarita Florez Alonso is a Colombian lawyer, specialised in biodiversity law and indigenous peoples' rights. She is currently finalising a study to be co-published by the Gaia Foundation and GRAIN on how regional integration agreements, bilateral investment treaties and unilateral mechanisms determine intellectual property regimes in Latin America. She can be reached at debate@multi.net.co.

GOING FURTHER

‘Decisión 486: Régimen Común sobre Propiedad Industrial’, Comisión de la Comunidad Andina, Lima, 14 de setiembre 2000. (Texto completo.)

<http://www.comunidadandina.org/normativa/dec/D486.htm>

‘Andean Community approves new common intellectual property regime’, Press Release, Andean Community General Secretariat, Lima, 15 September 2000.

<http://www.comunidadandina.org/english/press/np15-9-00.htm>

United States Trade Representative, ‘2000 Special 301 Report’, USTR, Washington DC, May 2000.

<http://www.ustr.gov/html/special.html>

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