

In Ecuador, Bolivia and Peru, initiatives have been taken recently that raise hopes that mechanisms might be created to stop the further privatisation of knowledge and life. So far, progress has been disappointing, with fundamental problems remaining unsolved. Once again, it is up to local people to defend knowledge and biodiversity against destruction and privatisation.

# The struggle against IPR in the Andes

GRAIN

There has been much legislative action in Latin America recently around intellectual property rights (IPR), most of it under the direct pressure of Free Trade Agreements (FTA).

Examples include the following: Nicaragua extended the duration of patents on pharmaceuticals; the Dominican Republic signed UPOV 91; Costa Rica did the same, after having strengthened its intellectual property law to expand patents and copyrights, and weakened its biodiversity law to make the patenting of life-forms feasible, while the present government has tried to legalise the patenting of local knowledge through an executive order; Peru extended patentability by breaking a regional agreement with its partners in the Andean Community; Chile's Congress is discussing a new intellectual property law that will significantly expand and strengthen patentability, copyrights, and penal punishment for infringements (which include photocopying); Colombia has approved a three-year plan of action with goals almost identical to Chile's, a plan that will also imply breaking Andean Community agreements. And so on.

In this context, three new developments – in Ecuador, Bolivia and Peru – appear strikingly

different. They create expectations as to possible mechanisms that might stop the further privatisation of knowledge and life, but careful examination shows that the threats of IPR far from vanquished, and such expectations unrealistic.

There is much at stake in these processes. Ecuador, Bolivia and Peru are in the Andean region, culturally and biologically one of the richest regions in the world. It harbours a wide range of ecosystems, from cold highlands at over 4,000 metres in the Andes themselves, to tropical lowlands in the Amazon basin. The Quechua and Aymara are the indigenous peoples with the biggest populations in the area – densely populated for millennia – but more than thirty other indigenous peoples also have their territories there. Potatoes, sweet potatoes, several other tubers, cassava, tomatoes, quinoa, sweet peppers, beans, papayas are among the many edible species that either originate or have high diversity here. Andean peasants and communities have also produced unique varieties of corn, faba beans and onions. Llamas, alpacas, vicuñas and guinea pigs originated here too. The wealth of traditional medicinal knowledge is hard to exaggerate. Scientists estimate that there are more than 40,000 plant species in this region,



about half of them endemic (that is, occurring nowhere else).

### **Peru: a local attempt to stop biopiracy; national government sells out**

Cusco is the name of a region in the highlands of southern Peru, a province at the region's centre, and the regional and provincial capital city, which was the seat of government of the Inca empire before the arrival of European conquerors. Historically, the people of the area have cultivated steep mountains, achieving high yields and conserving soil by means of terraces, which were so widespread that the Andes were named after them (*andén* is a Spanish word meaning platform or terrace). The area is currently a tourism hotspot, with Cusco city and Machu Picchu as its most famous attractions. Despite centuries of aggression against them, local communities have been able to maintain an enormous biological and cultural wealth, which is still the basis of their livelihoods. Hundreds of local and native varieties can be seen in farmers' fields, and Quechua – the native language – is still the mother tongue for most people in rural areas. Not surprisingly, Cusco has suffered a great deal from outside intervention. Besides the ubiquity of tourism, bioprospecting and archaeological expeditions are a daily occurrence, and samples of Cusco's wealth are stored or being exploited all over the world. In contrast, Cusco region's population, especially its rural people, are among the poorest in Peru, and indeed in Latin America

On 31 December 2008, the Peruvian government passed a series of legal amendments to meet the requirements for the implementation of the FTA with the United States. The new rules overwhelmingly strengthen all forms of intellectual property, and further weaken the already weak protection of biodiversity and traditional knowledge. Such protection as there was formed part of Decision 486 of the Andean Community, which was adopted in September 2000.<sup>1</sup> The new regulations open up native biodiversity, and especially traditional knowledge of it, to bioprospecting and patenting.

On the very same day, the Cusco regional government struck out in the opposite direction, releasing an executive order the explicit purpose of which is to promote “the conservation and sustainable use of the biological and cultural patrimony of the region, to protect traditional knowledge, practices and innovations of local communities, and to respect the collective rights of those communities, as established in National legislation and treaties signed and ratified by

Peru”.<sup>2</sup> To do this, it establishes a system based on prior informed consent, compulsory benefit sharing and the right of communities to say no to bioprospecting. Every biodiversity-collecting activity must have a permit from the local authority, which in turn must ensure that all the requirements listed in the executive order are met. A governmental body at Cusco's regional level will have a mandate to monitor all collecting activities and to protect the interests of local communities when negotiating access and possible contracts. Detailed standards and procedures are set out, especially regarding the process of prior informed consent, and stricter requirements for any aspect related to access may apply in future.

The Cusco order differs from many other regulations regarding access to biodiversity and local knowledge. It seems to reflect a strong and sincere effort to protect local communities against possible abuses. It clearly states, for example, that traditional values and governance systems shall be respected; that consent must actually be given, and given in advance; government officers shall side with local communities in any case of conflict; if the regulation changes, it shall become stricter, not more lax, and so on. Unfortunately, it is far from clear whether any of these goals can be fulfilled, and there are some fundamental problems that remain unsolved.

To start with, the new regulation does not oppose, restrict or ban intellectual property rights over biodiversity and knowledge. It merely attempts to regulate the way in which patented materials and knowledge will be accessed and benefit-sharing negotiated. So it promises that bioprospection will be conducted according to rules, that local communities will be supported by government, and that communities will have the right to say no. However, it neither guarantees nor promises that disastrous contracts will not be signed, nor that destructive collecting expeditions will be prevented. Regarding patents specifically, the document is contradictory. Although it states that local knowledge and biodiversity are a collective patrimony that cannot be transferred, it simultaneously takes for granted that both local knowledge and biodiversity will be patented in the future.

Several other questions remain unanswered. How will this regulation be enforced? What will happen if someone breaks the rules? Nothing is said about this except that collection permits can be terminated. Situations such as a company violating signed agreements after bringing its collection out of Cusco – a perfectly likely event – are not even

<sup>1</sup> A “non-official” English translation of the text of Decision 486 can be found at Comunidad Andina, Treaties and Legislation. <http://tinyurl.com/q59du3>

<sup>2</sup> Cusco Government, Executive Order 048-2008-CR/GCR. CUSCO.



## The Andean Community

The Andean Community is an integration agreement that currently involves Peru, Bolivia, Ecuador and Colombia. First signed in 1969, it has also involved Chile and Venezuela. Chile withdrew in 1976 when the military junta began to implement neoliberal policies and considered the policies of the Andean Community to be incompatible with them. Venezuela, having joined in 1973, withdrew in April 2006, after Peru and Colombia signed FTAs with the US that Venezuela regarded as incompatible with previous commitments of the agreement. These two withdrawals mark a significant reorientation of the agreement: from protecting national economies to facilitating neoliberal policies.

Because of its biological and cultural wealth, the Andean region has been involved in struggles over its resources and intellectual property issues from early on. In 1996, as social opposition to trade-related intellectual property rights (TRIPS) and the World Trade Organisation (WTO) agreement was starting to spread in the region, the Andean Community secretly passed Decision 345, almost a carbon copy of the UPOV 91 Convention. Shortly after, it approved an Access Regime to Genetic Resources through Decision 391. These decisions provoked further opposition, even among government officials. When the Andean Community started to draft a common intellectual property regime under pressure from WTO and US representatives, the opposition became loud and public. Years of lobbying, negotiation and mobilisation followed.

Finally, in September 2000, a new IPR regime was created through Decision 486. This decision expanded patents and copyrights far beyond what had hitherto been allowed in the region, but it did not permit the patenting of plants, animals and essentially biological processes. Although it included paragraphs that left room for interpretive manoeuvre, and diluted the exclusions, many regarded it as a barrier to the expansion of IPR. The US Government lobbied persistently, and set the elimination of the exceptions as a non-negotiable condition for the approval of FTAs with the Andean Community. The Peruvian trade minister has said that negotiations with the European Union (EU) must meet the same conditions. These demands were resisted by Ecuador and Bolivia. Under further pressure from the US, Peru and Colombia sought changes to Decision 486. Community members did not reach consensus: against the opposition of Bolivia, they approved a new decision, which allows each country to change aspects of Decision 486 without consulting other members.

1. A "non-official" English translation of the text of Decision 345 can be found at Comunidad Andina, Treaties and Legislation. <http://www.comunidadandina.org/ingles/normativa/d345e.htm>
2. A "non-official" English translation of the text of Decision 391 can be found at Comunidad Andina, Treaties and Legislation. <http://www.comunidadandina.org/ingles/normativa/d391e.htm>

mentioned. Conflicts like these are already taking place, even in relation to Andean and national regulations that are not as strict as those set by Cusco region. Peru is currently challenging (still without success) several patents claimed in the US and Japan over indigenous tubers with well-known medicinal properties.<sup>3</sup> The plant samples were taken out of Peru in clear violation of a common access regime for the Andean Community that was approved in 1996 (see Box), and the patents were claimed in clear conflict with the IPR regime existing in Peru at the time. As national regulations move increasingly in favour of IPR, it can reasonably be expected that the situation will worsen.

Another big question concerns jurisdiction. Which will predominate in Cusco, the regional executive order or the national law? The executive order

was intended to be a clear message to central government that wide sectors of society do not want to allow the plundering of biodiversity and traditional knowledge. But in an era of FTAs, and with a submissive national government, it is likely that Cusco will be put under severe pressure to abide by the national law.

### **Ecuador: a huge step is taken, but there are many battles to come**

Social movements – especially those of peasants and indigenous peoples – have played a profound role in recent Ecuadorian history. Three of the last five presidents have ended their rule amid widespread social unrest, and two of them – including the present incumbent, Rafael Correa – have reached power with the strong support of social movements. The

3 Sylvia Bazán Leigh, *Casos de Biopiratería para Productos Naturales y Acciones Adoptadas*, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI), Lima, September 2006 (in Spanish). <http://tinyurl.com/osgukx> and INDECOPI, "Informe", May 2003 (in Spanish). <http://tinyurl.com/n2jp3e>



backdrop for these processes has been entrenched social inequity, widespread poverty and a sustained sense of pride and identity on the part of indigenous peoples and rural communities. Like Bolivia and Peru, Ecuador is biologically and culturally rich and diverse. Its economy is so transnationalised that the US dollar is now the national currency. Since 1972, oil production has been an important source of revenue for Ecuador, accounting for 60% of the value of its exports in 2008.<sup>4</sup> Bananas, cacao, shrimps and flowers are also important exports. Each one of these economic activities has entailed land and wealth concentration, massive pollution and environmental destruction, and equally massive and often violent displacement of rural communities. In parallel to the widely publicised growth of its gross domestic product, Ecuador has suffered intense emigration (estimated at more than 20% of its total population) due to displacement and poverty.

President Rafael Correa was elected in 2006, and his programme included the election of a Constitutional Assembly and the drafting of a new Constitution. These processes led to approval of the new Constitution in September 2008 by almost two thirds of the population.<sup>5</sup> Its text is broadly based on principles and values held by the many indigenous peoples of Ecuador. Two features stand out: one is the recognition of the rights of Nature, which is to be respected in its integrity, including the maintenance and restoration of its vital cycles, structure, functions and evolutionary processes. Respecting the rights of Nature, preserving a healthy environment, and utilising natural resources in a rational and sustainable way are defined by the new Constitution as basic duties of all Ecuadorians. The other outstanding feature is the identification of food sovereignty as a strategic goal and obligation of the State.<sup>6</sup>

Regarding biodiversity and intellectual property, the Constitution states very clearly that the private appropriation of collective knowledge and genetic resources is banned (Articles 322 and 402). Whether this ban will be respected and can be enforced remain open questions. The new Constitution requires a wide range of new laws and implementing rules, and some laws passed since the Constitution entered into force indicate that there are reasons to remain very wary.

So far, the new laws have either been drafted by the government, or have depended upon its strong support. The contents are sometimes far from encouraging, in so far as they contradict the Constitution. The mining law provoked several protests because of this (*see* page 13). The

law on food sovereignty has encountered serious problems too: the first two government drafts were withdrawn owing to opposition from social organisations. A third version, drafted by the Constitutional Assembly, was passed, but then partially vetoed by the President in order to allow – in serious contradiction with the Constitution – the introduction of transgenic crops and, possibly, Terminator seeds.

It cannot be ruled out, therefore, that future laws and implementing rules on intellectual property will contradict or disregard some of the best aspects of the Constitution, especially if such laws and rules are drafted under the influence of the more conservative sectors of the Ecuadorian government. The outcome will depend on how widely and how deeply local organisations and communities are involved in the development of new regulations.

### **Bolivia: social movements make gains, but the debate continues**

Almost two-thirds of Bolivia's people (and more than three-quarters of its rural population) are of indigenous descent, by far the highest proportion in Latin America.<sup>7</sup> With ecosystems that range from very cold highlands to lowland tropical rainforest, Bolivia is also home to tremendous biodiversity. Bolivia has abundant natural resources, especially minerals and natural gas, and the country has been the target of international greed and ruthless local exploitation. Bolivians suffer the second-worst poverty levels in Latin America (after Haiti). The Bolivian people also have a long history of organisation and resistance: early popular rebellions and uprisings against the Spanish conquerors, long strikes by mineworkers, and numerous huge peasant mobilisations are points of reference for social movements all over Latin America.

In December 2005, Bolivians elected Evo Morales as their president. Morales is an Aymara coca peasant, and a respected, well-known social leader. His election was the result of sustained social struggle, encompassing fighting for the right of indigenous peoples to remain in their territories, resisting the war against rural communities waged by the Bolivian and US armies under the guise of fighting cocaine production and smuggling, and campaigning for the recuperation of the natural resources exploited and depleted by transnational corporations, for better working conditions, better education, better health care, and so on.

One of the most important electoral promises of Morales' campaign was the drafting of a new Constitution. Despite a viciously racist opposition

4 Information derived from Ecuador en cifras website. <http://tinyurl.com/m2wqu6>

5 Maggy Ayala Samaniego, "La Constitución aprobada el domingo en Ecuador abre la puerta para las generales", *El Mundo.es Internacional*, 30 September 2008. <http://tinyurl.com/4xoadm> "Positive vote for the new Ecuadorian Constitution confirmed – a brief review", *International Law Observer*, 16 October 2008. <http://tinyurl.com/mojd8x>

6 The text of the new Constitution of Ecuador may be read (in Spanish) at: <http://tinyurl.com/nbe2s8>

7 J.L. Vivero and X. Erazo, "Derecho a la Alimentación, Políticas Públicas e Instituciones contra el Hambre", in J. Ortega, R. Pérez and R. Rivera (eds), *La inseguridad alimentaria en América Latina y la situación de los indígenas*, LOM, Santiago, 2009.



led by wealthy landlords and business people, a Constitutional Assembly was elected in June 2006, and the reformed Constitution was approved by a wide margin in January 2009.<sup>8</sup>

As in Ecuador, the new Constitution draws many principles and concepts from indigenous cultures. One such is “good living” (“vivir bien”), which implies respect and protection for the dignity and welfare of all persons and all beings, including Nature. Another fundamental principle is the right of indigenous people to self-determination and to their territory, which explicitly includes the right to maintain collective property forms.

Six articles of the Constitution deal directly with intellectual property rights. They are the following:<sup>9</sup>

- **Article 30** ... indigenous peoples have the following rights ... II. To collective intellectual property over their knowledge and sciences ...
- **Article 41** ... III. The right to access medicines cannot be restricted by intellectual property or commercial rights ...
- **Article 42** ... The promotion of traditional medicine shall incorporate a registry of natural medicines and their active substances, as well as the protection of the associated knowledge as intellectual, historical and cultural property, and as patrimony of indigenous nations and peoples.
- **Article 100** ... II. The State shall protect knowledge by means of a registry of intellectual property that safeguards the intangible rights of indigenous nations and peoples, and those of intercultural and Afro-Bolivian communities.
- **Article 102** The State shall register and protect the individual and collective intellectual property of the works [obras] and discoveries of authors, artists, musicians, inventors and scientists, according to conditions set by law.
- **Article 304** ... II. Indigenous autonomies have the following shared competences: ... safeguard and register collective intellectual rights related to knowledge on genetic resources, traditional medicine and germplasm, according to the law.

Additionally, Article 56 states that every person has the right to collective and individual private property, as long as such property has a social

function; private property is guaranteed only if its use does not harm the collective interest.

The Constitutional process in Bolivia is still open. New laws are needed to translate the new Constitution – in many ways revolutionary – into practical norms and regulations. This is a major, sophisticated social task. It is hard to predict what direction the new laws will take in relation to intellectual property. There are many reasons to be optimistic, such as the clear limits to private property, the active participation of social organisations in discussion, and the strong emphasis on the views, values and principles of indigenous and rural communities. But there are also at least three reasons for deep concern. First, the opposition is far from giving up, despite repeated defeats in national elections and votes. Their ties with transnational corporations are well known, and they will use their presence in Congress to draft regulations as close as possible to the US blueprint. Second, Andean Community agreements may take precedence. As part of the Community, Bolivia still accepts patents and the privatisation of knowledge and biodiversity, and it is legally bound to have an access- and benefit-sharing system. The new Bolivian Constitution is rather vague on these matters. Third, the Constitution recognises the concept of intellectual property rights, which are incompatible with its underlying principles; their contradictory inclusion is bound to create tensions. Will Bolivia become entangled in trying to achieve a “just” form of privatisation, or will it ensure that the use, conservation and enhancement of biodiversity and traditional knowledge is kept under the control, rules and values of local and indigenous communities? The outcome will again depend on how widely and how deeply local organisations and communities are involved in discussion of the new regulations.

### The international context: from bad to worse

The outcome of these developments will not depend exclusively on the struggles and power relations at national level. Foreign intervention and exploitation is not only part of the history of the Andean countries, but a growing scourge. The United States has signed FTAs with Colombia and Peru, and used the governments of both countries to put pressure on the more independent administrations led by Correa and Morales. Although Ecuador and Bolivia have resisted the pre-conditions demanded by the US, the European Union has managed to appear pliable, and negotiations have continued. But the EU’s requirements concerning intellectual property are unmistakable: they want “the highest possible



<sup>8</sup> Simon Romero, “Bolivians ratify new constitution”, *New York Times*, 25 January 2009. <http://tinyurl.com/magcbf>

<sup>9</sup> For a full text of the Constitution of Bolivia (in Spanish), see <http://tinyurl.com/mq9xo5>


standards”, just like the US. The EU seems to be willing to sign a basic agreement that remains vague, but numerous clauses leave powerful tools to impose the worst forms of IPR in the future. In turn, the World Intellectual Property Organisation (WIPO) has continued its campaign to strengthen IPR in the region, organising more than twenty courses and seminars in the last three years for government officials in the region on how to implement all forms of intellectual property.

With Colombia and Peru openly willing to be pawns in the game of “divide and conquer”, pressure to erase any advance in human and social rights will only grow, even at the risk of terminating the integration agreement in the region. When Bolivia refused to accept changes to Decision 486, the Peruvian foreign minister made a public statement more appropriate to countries in war than to old partners disagreeing.<sup>10</sup> Other measures taken by the Peruvian government have brought relations between Peru and Bolivia to its lowest point in years. Colombia, in turn, has strained its relationships with Ecuador to the limit, including militarily violating their common border.

### What lies ahead?

What is taking place in the Andean region goes beyond intellectual property rights. It is part of a centuries-long struggle between domination and resistance, economic exploitation and social justice. Sustained, profound social struggle has brought about the constitutional developments

discussed here, and it will take many more years to defend what has been achieved and to reach what the peoples of the Andean region are trying to achieve. The power of popular sectors is still frail, and conservative sectors are so entrenched in the state and economic apparatus that every step in legal and regulatory processes may encounter a setback or provoke a backlash.

Regarding IPR, the basic problems are far from solved. Peru has shown itself willing to submit to the demands of the US and the EU, so local attempts like that in Cusco will face strong central government resistance, if not repression. Even if the Cusco regional government is able to implement the new regulation, it will not escape the question of ownership of life and knowledge. In Ecuador, tensions between the most conservative government sectors and social organisations will continue, and only wide, vigorous debate and mobilisation will guarantee that the constitutional measures will translate into actual policies. The Bolivian government has given the strongest signs of a deep commitment to the needs, views and demands of local communities, but the fact that the concept of intellectual property is included in the Constitution creates unavoidable contradictions and potential conflicts. These can be expected to get worse, given the ferocity of opposition forces, and the disagreements with the US and EU over trade negotiations. Once again, the burden of defending knowledge and biodiversity against destruction and privatisation is in the hands of local people and their organisations. 

<sup>10</sup> “CAN aprobó modificatoria a Decisión 486 para implementación de TLC entre el Perú y Estados Unidos”, Andina news agency, 14 August 2008. <http://tinyurl.com/maff8g>



### GOING FURTHER

Elizabeth Peredo, Fundación Solon. Racismos estructurales. [http://funsolon.civiblog.org/blog/\\_archives/2009/5/6/4177230.html](http://funsolon.civiblog.org/blog/_archives/2009/5/6/4177230.html)

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