RECENT DEVELOPMENTS IN OTHER ANCOM COUNTRIES: PERU

The World Trade Institute
Seventh Annual Symposium
International Licensing
Technology
Transfer and Distribution
November 16-18, 1981
New York, N.Y.

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INTRODUCTION

In contrast to such other Andean countries as Colombia and Venezuela, to say nothing of Argentina, Brazil and Mexico, Peru gets little or no coverage in the literature and in seminars. See, for instance, PLI's course handbook on "Legal Aspects of Doing Business in Latin America..." (1980), Council of Americas' book on "The Andean Common Market ..." (1976) and LES Nouvelles' article on "Restrictions in Latin America" (Kantor, September 1977), where Peru is merely mentioned in passing as being one of the Andean group countries or one of the four largest countries in Latin America.

Fortunately, with Jose Barreda's "Peru Licensing Update" article in a recent issue of "LES Nouvelles" (September 1980), following Roberto Danino's piece in the March 1979 issue of "LES Nouvelles," entitled "Environment for Licensing in Peru" (also found in Monograph 2 of the ABA International Law Section on Technology Transfer in Latin America, 1978, p. 115), I did not have to start from the scratch.

In preparing this report, I have of course heavily relied on those two articles but in view of the general dearth of recently published material, I have had to draw considerably on discussions with Peruvian officials and other knowledgeable persons during my four trips to Lima these past two years. A particularly interesting source in this regards was ITINTEC's "First Seminar on Industrial

Property," which was held in Lima late last year and in which I was the lead-off speaker with the subject of "Transfer of Technology to Developing Countries from the Viewpoint of Developed Nations." The Seventh ASIPI Congress held last month in Acapulco was also quite interesting to me in this regard. Further I consulted Business International Corporation's "Investing, Licensing and Trading Conditions Abroad - Peru" (March 1980 and May 1981), especially regarding information on the general economic conditions.

BACKGROUND

POLITICAL AND ECONOMIC SCENE

During the last two years far-reaching changes and important developments have taken place in Peru in both the political and economic arena. Politically, the military regime has relinquished power and a civilian government has come in. General elections were held and a democratic government with Fernando Belaunde Terry as president (head of the centrist party "Accion Popular") was inaugurated last year.

Economically, Peru after facing one of its worst economic crises and being at the brink of "bankruptcy" (foreign bankers refused to even talk to the generals anymore), has experienced a dramatic improvement including an export boom. In fact, in 1979 Peru even had a positive trade balance of about $1.5 billions (exports $3.5 v. imports $2 billions), which was followed by a trade surplus of $1.1 billions in 1980. Increased petroleum production to the point where

Peru is not only producing all the oil it needs but is exporting a surplus of about 60 to 80,000 barrels a day and higher world market prices for oil, sugar, silver (?), gold and copper together with more aggressive marketing abroad of manufactured goods (non-traditional exports) and still very sizable fishmeal exports, caused this positive trade picture. Economic recovery has continued. The estimated GDP rose 4.5% in 1980 compared to 3.5% in 1979. The growth target for 1981 was 6%.

Furthermore, steps have been taken to return certain state-owned industries to private hands and to stimulate private-sector investment. Practically all price controls were eliminated and import tariffs cut ("Peru Lowers Tariffs on 909 Import News", "Business America", June 15, 1981, p. 27).

Some of the economic problems are likely to continue in the foreseeable future to some extent, namely, high inflation, mini-devaluations, austerity measures, labor and leftist disturbances, etc.

As regards foreign investment the government believes that such investment can make a positive contribution to development and progress but it exacts entry and operation in Peru still essentially on its terms. Thus, for foreign corporations and investors and importers things are looking up. "Dramatic Improvement in Economy and Balance of Payments Motivates Government to Open Market to More Imports", "Economic Stabilization Plan Bolsters Economic Prospects" and "Peru: Investment Prospects Improve" headlined "Business America", on May 5, 1980 (p. 36), July 28, 1980 (p. 53) and August 10, 1981 (p. 25), respectively.

The New York Times also has been a harbinger of "Good News From Peru" (October 12, 1981, A 23) and on August 30, 1981 (p. 6F) it carried an article entitled "A Third-World Cinderella - Peru was broke in 1978. Now it's an example of how a poorer nation can come back."

CONFIDE (Corporacion Financiera de Desarrollo is likely to be featured in such articles. It obviously plays a very active role and can get pamphlets on investment opportunites in Peru into your hands in no time.

Understandably, foreign company interest in Peru had lagged in past years; however - and this is equally comprehensible - foreign investors have started to come back. The list is like from Who's Who in Multinationals. A well-publicized example was that of Borg-Warner (New York Times, August 13, 1980).

Peru is a member of the Latin America Economic System (SELA), Latin America Integration Association (LAIA) (which replaced LAFTA at the end of 1980) and the Andean Common Market (ANCOM). Peru also adheres to the General Agreement on Tariffs and Trade (GATT).

LAW AND PRACTICE REGARDING TRANSFER OF TECHNOLOGY

As just mentioned, Peru belongs to the Andean Common Market and is a signatory ot the Cartagena Agreement of 1969. (Venezuela joined in 1973 but Chile withdrew in 1976 and there was a great deal of talk last year that Bolivia would withdraw. See e.g. "El Comercio", Lima, September 3, 1980, p. 1. But it is now understood that Bolivia will stay.)

How the Andean Pact is doing is apparently a matter of dispute. While the foreign press proclaims that the Andean Pact is crumbling (see, e.g. "Business Week", September 21, 1981, p. 46: "Why the Andean Pack is falling apart" and the Swiss paper "Finanz und Wirtschaft" under a Mexico City by-line dated June 7, 1980: "Andenpakt in Niedergang") the Latin American press heralds the strengthening of the Andean Group (see, e.g., the Mexican Magazine, "Vision", under a Lima by-line of July 14, 1980: "Se fortalece el Grupo Andino - En marcha su integracion economica.") Perhaps these seemingly contradictory predictions are tainted by bias and wishful thinking. Be that as it may, Peru however is apparently a solid member of the Subregional Andean Pact. As such it ratified not only Decision 24 in 1971 and Decision 84 in 1975 but also Decision 85 in 1979.

Decision 24, of 1970 vintage and styled "Common Regime of Foreign Capital and of Trademarks, Patents, Licenses and Royalties" or short "Andean Foreign Investment Code" (as amended by Decisions 37, 37a, 103 and 109), is in force in Peru through Decree Laws 18900 (1971) and 21826 (1977). The essence of Decision 24 was summarized by Danino (supra, p. 40) as follows:

"These rules require that all contracts for the importation of technology, patents and trademarks are to be examined and approved by each country's competent authority, In the case of Peru such authority is now CONITE. This body is required to evaluate the actual contribution of the imported good technology, patent and/or trademark, to estimate profits resulting from it, the prices of the goods incorporating it, and in general quantify its effects. CONITE should also evaluate the effect on the development of the Andean technology and the use of local services, occupational effects, and the effect on development plans and balance of payments, and on the environment."

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"Certain obligatory clauses are required by the Code in all contracts in regard to naming the parties, their relationship, defining the technology to be transferred, and the manner in which such will be done, as well as assigning a value to the transfer and a fixed-time period. Moreover, the Code states royalties may be paid for intangible technological contributions as if previously authorized by the competent body; however, such technological contributions may not be computed as capital contributions and if made between affiliated companies, royalties may not be paid, nor deducted for tax purposes.

> In addition to the aforementioned rules, there are prohibitions against the use of certain restrictive clauses which limit the actions of the licensee. Such prohibited clauses generally require the obligatory acquisition of capital goods, intermediate products, raw materials or other technologies from the licensor at prices above the prices above international standards, reserve the right to fix sale or resale prices of the product produced through the use of the licensed good, or obligate the transfer of inventions or improvements. Moreover, limitations on the use of other technologies, or on the exportation of products made under the technology patent or trademark in question, restrictions on the volume or structure or production, obligations to use home office personnel permamently, requirments of payment for unused patents or trademarks, and similar type clauses are prohibited. Submission to foreign Laws or jurisdictions is also forbidden."

Decision 84, passed in 1974 and entitled "Bases for a Technology Policy," is in effect in Peru by way of Decree Law 21170 (1975).

> "This decision, as well as certain parts of Decision 24, gives guidelines regarding what the Andean Pact countries regard as suitable technology policy to be implemented in the future. Such policies include requiring the recipient of the technology to indicate the alternatives sources which are available. In certain cases debundling (desegregation) of the technology package is also required; and the necessity to create a regional technology policy as well as method to improve information in this area is emphasized." (Danino, ibidem)

CONITE, mentioned in the above quote, is the National Commission of Foreign Investments and Technology and is in charge of approving and regulating contracts for the importation of technology and licences for trademarks and patents. Until mid-1977 ITINTEC (Institute for Industrial Technological Investigation and

Technical Norms) was in charge of the approval and regulation of such contracts. Therefore, much of the relevant experience on this subject was acquired by ITINTEC. According to Danino CONITE is following many of ITINTEC's practices; although in a more liberal vein.

As in other Andean countries, these regimes for the treatment of foreign investments and technology policy have been steadily evolving over the years toward greater flexiblity in Peru also. In fact, according to the Danino article, this evolution had reached a point already in 1979 in Peru where there was a perceptible contrast between law and reality. "In spite of the limited amount of time and experience of the practitioners in dealing with CONITE, it can be affirmed that this body has shown itself to be more flexible and less restrictive than ITINTEC, as well as quicker in getting approval to these contracts," concluded Danino (ibidem) and Barreda (supra) echoes this sentiment. The latter even indicates (idem at p. 203) - and recites three examples - that exceptions are made by CONITE (but never by ITINTEC before) with respect to prohibited clauses.

Also my observations and those of Henry Harman de Izcue of Business International Corporation, Lima confirms this. After returning from Lima last year I reported as follows:

"In practice, officials are becoming much more flexible and more diplomatic. It is possible to negotiate more favorable terms if there is justication. Almost anthing can nowadays be negotiated. Specifically, one can talk to CONITE where the who philosophy has changed from considering foreign mutlinationals as "wicked pirates" to providers of jobs. It is important in dealing with them to place emphasis on the job creation, employment and training aspects rather than on technology transfer as such. The royalty rate nowadays is quite negotiable and even minimum royalties are permitted. Still more can be accomplished if, for instance, 20% capital or technical assistance is provided. And of course Peru is now essentially a free exchange market by way of dollar certificates.

As regards the investment code, the restriction is not very significant anymore inasmuch as 20% plus 7% of invested capital can be repatriated after tax. At a net profit of 27% one cannot really talk about restrictivenss. The code was aimed at companies who took out excessive amounts. Besides, the code applies only to manufacturing industies. Mining, oil and banking are not included which for instance totals more than 80% in Peru.

Formerly, the code provided only for repatriation of 14% plus 5% but four years ago when Chile left the Andean Pact and the interest rate started to increase, liberalization and upward revision were indicated. Should the interest rate go further up, further liberalization would take place.

The creation of so-called "neutral capital", a combination of foreign and local capital, i.e. belonging to foreign non-profit institutions can also help."

Furthermore, both Danino and Barreda give illustrations of how to neutralize the regulations:

> "In practice many mechanisms have been devised to successfully circumvent the Code's restrictivness. 'Gentlemen's agreements,' manufacturing-and-obligatory-sale contracts, and several other arrangements, have become usual ways to successfully circumvent the Code's provisions. In fact, the world exists in two parts - that known and controlled by the authorities, and the peripheral agreements. In effect, the real authority of CONITE is almost reduced to determining the amount of remittable payments. All other provisions are often circumvented. In practice, it appears that their main worth resides in granting a better bargaining position to those licensees which deal at arm's length with their licensors." (Danino, idem, p. 41)

Barreda (ibidem) put it this way:

> "The restrictive nature of these rules has motivated investors to adopt several devices to obviate them. Aside from the continuation of transfer prices and 'gentlemen's agreements', be it verbal or written, but without value in court, the parties have also found that local payments for technology made in the name of a local corporation, subsidiary of a foreign company, and the subsequent remittance of the said payments under the form of dividends, once included in the balance sheet of the latter, is interpreted by many advisers as a legally accepted procedure. This can be done because there is no control on the validity of lateral and subsidiary agreements beween local corporations."

CONITE analyses agreements submitted for approval as to their economic consequences and from a legal point of view. Information regarding expected sales volumes of licensed products, projected profits derived from such licensed products and comparing both which the total sales of the licensee and the total profits; value of imported components and percentage of the same vis-a-vis total needed parts, materials or components; and, within the information of imported components, indication of source of imported components; total market share of the licensed products (real or expected), etc., all for a three-year period.

The royalty rate is determined from these data. In the words of Barreda (idem at p. 202):

> "If the licensee purchases most of the raw materials or components from the licensor or an affiliate of the licensor, CONITE will reduce the requested royalty. It is presumed that profit is made in selling the raw material and not by licensing technology or a patent or a trademark. The situation will be completely different (A) if the licensee buys all its components locally, (B) if, in addition, the total present production of the licensee (owned products or other licensed products or both) is far less important to the production to be obtained through a license; and (C) if in addition, the licensed product has a big share of the total market (exceeding 50%). Possible exportation of licensed products is also to be considered so as to obtain the best royalty return.

In addition, CONITE will grant a higher royalty if the licensed product is a raw material, part or component which previously was imported. It is understood that a royalty, however high it may be, is always a lower price than the cost of importation vis-a-vis the benefits of local manufacturing, labor requirements and other indirect consequences."

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"In the past, ITINTEC had adopted as a basic policy, rules which allowed the payment of royalties at a rate of 1% on gross sales for the use of a trademark, and up to 5% for technology (including the use of a trademark) with some variations.

In every contract, the parties were asked to set clearly the percentage to be paid for the use of trademarks, for technical assistance, for the use of patent and for technology transmission, with the purpose of reducing the amounts in future negotations.

Currently, CONITE maintains a similar policy, even though much more flexible and realistic. In general, approval of royalties of 5% in local sales and up to 8% on export sales, can be expected."

The Danino and Barreda articles are "incorporated herein by reference" for greater detail on the subjects covered above as well as on other points of interest in Peruvian Transfer of Technology law and practice.

DECISION 85 OF THE ANDEAN PACT

The Peruvian government ratified Decision 85 of the Catagena Agreement, the Andean Pact's Common Industrial Property Code by Decree Law 22432 on May 15, 1979. Though the opportunity to ratify it has existed since 1974 when Decision 85 came out only Ecuador and Colombia had done so before and only in 1978. This is an indication that things are moving slowly as there is considerable divergence of opinion and controversy about it, to say the least. In the Seminar in Lima which I attended last year it was critized severely by Peruvians themselves and opinions were voiced that changes will have to be effected. The same happened at the recent ASIPI Acapulco meeting and in fact they pleaded for input from us as regards needed modification ("total revision") of Decision 85.

Even before the adherence to Decision 85, the situation in the patent field in Peru left much to be desired. Peru's prior patent law of 1971 was already overly restrictive and stringent in terms of patentable subject matter, patent term, compulsory license, etc., and foreign corporations did not rush in to obtain patent protection. It could hardly get worse - but it did. The list of patentable subject matter was further restricted so that new pharmaceutical products, medicines, active therapeutical substances, drinks and food for human, animal or vegetable consumption are not patentable. This is also true of all foreign inventions

whose patent is applied for a year after the date the patent application was filed in the first country it was filed in. And the provision regarding compulsory licenses and importation of patented products are anything but liberalized.

While CIBA-GEIGY, for instance, filed about 10 applications per year through 1974, it has filed none or about 1 per year since then and it is anticipated that because of Decision 85 filings in Peru in the future will be very rare indeed. (In the U.S. CIBA-GEIGY files about 500 applications per year.) This is only one example, one company, yet it may be typical of other corporations, especially those in the chemical and pharmaceutical fields. But this is born out by Peruvian Patent Commissioner himself who allowed as how filing in the Peruvian Patent Office have dropped off drastically, obviously due to Decision 85, from a level of, e.g., 800 to 900 per year to about 200 to 300 a year, mostly on mechanical and industrial chemical inventions. (Oral communications from Dr. Carlos Sotelo Bambaren, Lima, July 21, and March 31, 1981).

In an attempt to moderate the overly restrictive Decision 85, the Peruvian Patent Commissioner, for example, construes the patent term provisions (Articles 29 and 34) as granting a ten-year life rather than only five years. (Personal communication to Colmenares, September 25, 1980.)

It is therefore not surprising that, for instance, among the license agreements approved by CONITE in its first year, 155 covered know-how, 134, trademarks and only 32, patents. (Pamphlet of the Cartagena Agreement Junta, "Transferencia de tecnologia de empresas extranjeras hacia el Grupo Andino," Lima 1979, p. 22).

CONCLUSION

The adoption of Decision 85 is indeed unfortunate because patents are an important element in stimulating the working of new and useful inventions and of complementary know-how, and consequently, facilitate and increase technology transfer. Therefore, strong rather than weak national patent laws in developing countries, such as Peru, are, under cost/benefit evaluations, the best method of contribution to an increased inflow of desired and suitable technology and know-how for the benefit of industrial and agricultral progress.

It is recognized that national patent laws may have to be adjusted to the specific needs and priorities of each country in line with a domestic policy that favors a fair internal distribution of income, quality of life, and indigenous culture. Nevertheless, the essential exclusivity of patent rights must be preserved. The first consequence of such an adequate patent system is an improved access to international technology and valuable nonpatented know-how. The inducement of protection for the benefit of local manufacture eases, as a second consequence and in the long run, balance and trade deficits by generating domestic "added values", possibly coupled with some exports of quality-controlled products.

The third consequence is, or at least may be, a spill-over effect on secondary industries and on the consumption of national resouces, leading also to more employment, professional training, and autonomous improvements. These net benefits cannot, however, be achieved without mutual understanding among all private and offical partners as regards the legitimate interest to be respected in support of any long-term cooperation for the exploitation of patented or confidential technology to the benefit of genuine economic and social progress.

In these circumstances, the recognition of effective patent protection is, on balance, an important element in encouraging and facilitating the acquisition and exploitation of suitable technology in developing countries, such as Peru. It brings about adaptions of the imported technology to local needs and in turn leads sooner or later and perhaps inevitably not only to export of products produced by this technology but also to export of the technology itself to lesser-developed countries.

November 10, 1981