



ABSTRACT

HARMONIZATION IN OTHER PARTS OF THE WORLD

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The subject of this conference is Harmonization in other parts of the World, and I will talk about harmonization in Latin America, more specifically, in the Andean Community.

When thinking about this subject and its reality, I could not help but start comparing what you, as Europeans have and what it actually exists in my part of the world....it is amazing how 27 different countries, with more than 20 languages achieved in a relatively short lapse of time and of course I will not loose time explaining that to you....but did you know that part of the Andean Community countries were once a single country named LA GRAN COLOMBIA right after Simón Bolívar obtained independence from Spain?.....so, talking about harmonization of four countries (sometimes five, sometimes six, sometimes four again) with a common language, with very similar culture and values would seem very easy....

And yet, no!

I will explain it shortly with an example of what happens with a trademark application:

I have a client who manufactures and sells clothing, Colombia is a well-known clothing manufacturing country.....so, this client starts in Colombia, then goes to Ecuador, then expands to Venezuela and then to Perú and Bolivia....trademark registration is obtained in Colombia, then in Ecuador, and applied in 2002 in Venezuela and in Bolivia....registration in Venezuela is still pending (11 years and counting) and in Bolivia, the application was denied because the Examiner decided that ARMI was similar to the point of causing confusion with WARMI, an expression which in the Quechua and Aymará languages means WOMAN....

And then, my client decided to file for a community trademark and in approximately six months, a trademark registration was obtained, covering 27 countries....

We have plenty of cases like this, decisions are everything but harmonized and sometimes we do feel a bit as if we were living in a place where the Magical Realism rules and all sorts of unreal facts happen and they are finally taken as normal Decisions in our Trademark Offices sometimes seem to be taken from any of García Marquez' books.

Anyway, and notwithstanding the fact that I would have preferred to continue with Garcia Marquez and his fantasy world, I have to come down to reality and talk about the legal aspect of harmonization in Industrial Property matters in the Andean Community, starting by telling you that the Andean Community it is a customs union comprising the South American countries of Bolivia, Colombia, Ecuador, and Peru. The trade bloc was called the Andean Pact until 1996 and came into existence with the signing of the Cartagena Agreement in 1969.

The original Andean Pact was founded in 1969 by Bolivia, Chile, Colombia, Ecuador, and Peru. In 1973 the pact gained its sixth member, Venezuela. In 1976 however, its membership was again reduced to five when Chile withdrew. Venezuela announced its withdrawal in 2006, reducing the Andean Community to four member states.



And, WHAT DO WE HAVE? We have a Common Regime on Industrial Property.

The Common Regime on Industrial Property is contained in Decision 486 of the Commission of the Andean Community (in force since December 1st 2000). It contains substantive aspects which were required by the TRIPS Agreement (such as Treatment of Nationals, Treatment of the Most Favored Nation) and specifically, regulates all aspects regarding registration and protection of patents, utility models, layout design for integrated circuits, industrial designs, trademarks, trade-names and geographical indications. It contains also regulations regarding border measures, criminal measures, preventive injunction measures and unfair competition related to industrial property.

It is important to clarify that this Decision 486 is a common regime, but it does not mean that the Andean Community has reached to a point of a community trademark such as the EU. The Decision contains general rules and aspects which are applicable in Industrial Property procedures in all Member Countries, but it does not replace their internal regulation.

There are some aspects that can be interpreted as attempts for harmonization, such as the following:

- Priority: Applications filed on Member Countries are accepted for claiming Paris Convention priority.
- Cancellation for non-use: A registration may be cancelled at the request of an interested party, when without a justified reason, the trademark has not been used IN AT LEAST ONE OF THE MEMBER COUNTRIES, by its proprietor, by a licensee or by any other person authorized for such purposes during the three consecutive years prior to the date in which the cancellation is filed. Use in one member country is enough to stop a non-use cancellation action in any of the other members.
- Andean opposition: A pending application in one of the member countries can be opposed by a previous application or registration valid in another member country. It is mandatory that the opponent credits its real interest in the market of the Member Country in which the opposition is filed, by filing an application for registration of the trademark basis of the opposition, at the time of filing such.
- Prejudgment action by the Court of Justice of the Andean Community: It is the Court's responsibility to make a prejudgment interpretation of the provisions comprising the legal system of the Andean Community, in order to ensure their uniform application in the territory of the Member Countries. National judges hearing a case in which one of the provisions comprising the legal system of the Andean Community should be applied or is litigated, may directly request the Court's interpretation of such provisions, providing that the verdict is susceptible to appeal under national law. The Court's interpretation must be limited to specifying the contents and scope of the provisions comprising the legal system of the Andean Community, which refer to the specific case. The Court may neither interpret the contents and scope of national law, nor judge the facts in dispute.

And, there are some aspects that can be interpreted as failed attempts for harmonization, such as the ones contained in the FINAL PROVISIONS of the Agreement, like implementing a Andean information system on industrial property rights, interconnecting their respective databases (ART. 270) or the obligation to the Member Countries to enter into cooperation agreements amongst the National Competent Offices, which has never happened.

All the other procedural aspects are regulated by internal laws and provisions, which are everything BUT harmonized as it shows in this chart.