



UNIVERSITY OF AMSTERDAM

INTERNATIONAL SCHOOL FOR HUMANITIES AND SOCIAL SCIENCES

**The Politics of Trade and Intellectual Property Rights in
Developing Countries**

*A critical case study of Peru and Ecuador in negotiation
with the European Union*

Master Thesis

International Development Studies

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TLC
ASI NO



“UE negociará un TLC con países andinos: Negociaciones CAN-Unión Europea comenzarían en febrero de 2007”

“Colombia y Perú se acercan a la UE al margen de la CAN”

“Los andinos se fragmentan en negociación con la UE”

“Vamos al grano en torno a la decisión de la Comisión de dar paso a negociaciones comerciales con Perú y Colombia.”

“La ideología frena el acuerdo regional”

“Una palabra traba la negociación entre la CAN y la Unión Europea: "Biológico" o "genético”

“Los representantes de la sociedad civil de la CAN piden diálogo con la UE”

“Bolivia acusa a Perú y Colombia de complot para negociar con UE”

“Lipietz exhorta al Presidente de la CE negociar bloque a bloque con la CAN”

“Líderes sociales andinos hacen pública carta de protesta por cambio en negociación con UE”

“Correa niega negociación directa con UE”

“Propiedad intelectual en TLCs es negocio del siglo XXI para países desarrollados, según analista”

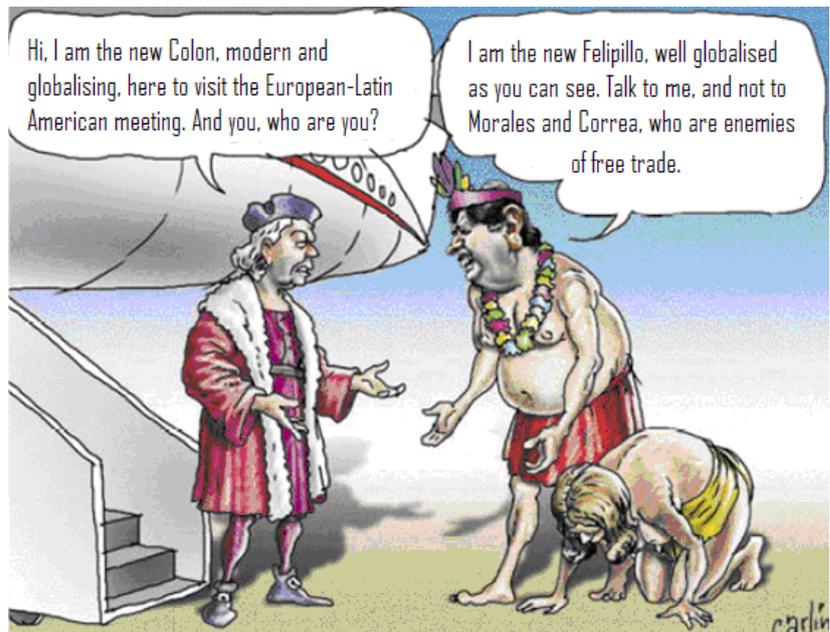
“Gasto en salud aumentaría US\$ 386 millones por año si se acepta propuesta de UE en TLC”

“Propuesta de UE en propiedad intelectual va más allá que normas OMC y leyes europeas”

“Agenda crucial con la UE: acceso al mercado y propiedad intelectual”

“Indígenas analizan en Perú efectos de TLC con Unión Europea”

“Biodiversidad es vista como un punto sensible por la UE”



(Translation: B. van Paassen)

Excerpts from assorted Andean media 2008-2009 (e.g. Comunidadandina, el Comercio, Bajo la Lupa and Bilaterals)

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Abbreviations

BO - Business Organisation

CAN - Comunidad Andina de Naciones (Community of Andean Nations)

CBD - Convention on Biological Diversity

EU – European Union

FTA - Free Trade Agreement

IPR - Intellectual Property Rights

NGO – Non-Governmental Organisation

NSA - Non-State Actor

MNC - Multinational Corporation

OECD - Organisation for Economic Cooperation and Development

POS – Political Opportunity Structures

SO - Social Organisation

TRIPs - (Agreement on) Trade Related Aspects of Intellectual Property Rights

WTO - World Trade Organisation

US - United States

SOCICAN- Acción con la Sociedad Civil para la Integración Andina

Most used abbreviations of organisations

AIS/HAI – Acción Internacional de Salud / Health Action International

ADIFAN – La Asociación de Industrias Farmacéuticas Nacionales

AIDSESP – Organización Nacional de los Pueblos Indígenas Amazonicos de Perú

ALAFARPE - La Asociación Nacional de Laboratorios Farmacéuticos (en el Peru)

ALAFAR - Asociación (Ecuatoriana) de Laboratorios Farmacéuticos

ASC – Alianza Social Continental

CAOI – Coordinadora Andina de Organizaciones Indigenas

CEE – Comité empresarial Ecuatoriano

CENI – Consejo Empresarial de Negociaciones Internacionales

COMEXI – Consejo de Comercio Exterior e Inversiones

CONAIE – Confederación de Nacionalidades Indígenas del Ecuador

DIGEMID – Dirección General de Medicamentos, Insumos y Drogas

ECUARUNARI – Confederación de los Pueblos de Nacionalidad Kichua del Ecuador

ED – Ecuador Decide

IEPI – Instituto Ecuatoriano de Propiedad Intelectual

INDECOPI – Instituto Nacional de Defensa de la Competencia y de la Protección de PI

RED-Ge – Red peruana por una Globalización con Equidad

SPDA – Sociedad Peruana de Derecho Ambiental

Abbreviations of other organisations

ADEX – Asociación de Exportadores del Perú

ALOP – Asociación Latinoamericana de Organizaciones de Promoción al Desarrollo

APRODEH – Asociación Pro Derechos Humanos (Peru)

CAAAP – Centro Amazónico de Antropología y Aplicación Práctica

CEAS – Comisión Episcopal de Acción Social (Peru)

CEPES - El Centro Peruano de Estudios Sociales

CamCom – Cámara de Comercio de Lima (Peru)

COMEX – Sociedad del Comercio Exterior del Perú

CONACAMI - Confederación Nacional de Comunidades del Perú Afectadas por la Minería

CONAP - La Confederación de Nacionalidades Amazónicas del Perú

CONCYTEC - Consejo Nacional de Ciencia, Tecnología y Innovación Tecnológica (Peru)

CONFIEP – Confederación Nacional de Instituciones Empresariales Privadas (Peru)

CORDES – Corporación de Estudios para el Desarrollo (Ecuador)

CORPEI – La corporación de promoción de exportaciones e inversiones (Ecuador)

FLACSO – Facultad Latinoamericana de Ciencias Sociales (Ecuador)

ILDIS - Instituto Latinoamericano de Investigaciones Sociales (Ecuador)

INIA - Instituto Nacional de Innovación Agraria (Peru)

INRENA - Instituto Nacional de Recursos Naturales (Peru)

IPE – Instituto Peruano de Economía

MSF – Médecins Sans Frontières (Doctors without borders)

RECALCA – Red Colombiana de Acción frente al libre comercio y el ALCA

SENASA – Servicio Nacional de Sanidad Agraria (Peru)

SNI – Sociedad Nacional de Industrias (National industry Peru)

TABLE OF CONTENT

Chapter 1: Introduction	7
Chapter 2: Theoretical framework	9
2.1 International Politics and Economics	9
2.2 Intellectual Property Rights and Multilateral Developments	13
2.3 Actors, Power and Ideas in Policy-making	19
2.4 Conclusions Theoretical Framework	25
Chapter 3: Background information	26
3.1 The EU	26
3.2 The CAN	27
3.3 The negotiation process EU-CAN	32
Chapter 4: Research Methodology	35
4.1 Research Questions and Hypotheses	35
4.2 Operationalisation	36
4.3 Methodological reflections	38
4.4 The data	40
Chapter 5: Data-analysis of two case studies	44
5.1 The case of Peru	45
5.1.1 Historical Perspectives	45
5.1.2 The EU negotiations & the government	51
5.1.3 The EU negotiations & Non-state actors	54
5.2 The case of Ecuador	64
5.1.1 Historical Perspectives	64
5.1.2 The EU negotiations & the government	68
5.1.3 The EU negotiations & Non-state actors	74
5.3 Comparative analysis	84
Chapter 6: Conclusions	97

Bibliography	102
Appendices	108
1. List of respondents	
2. Questionnaire Semi-Structured Interviews	
Tables and figures	
Figure 1: Conceptual scheme position-forming	37
Figure 2: Units of Analysis	38
Figure 3: Position forming Peru	63
Figure 4: Position forming Ecuador	83
Figure 5: Final conceptual scheme	100
Table 1: Stakeholders and positions Peru	62
Table 2: Stakeholders and positions Ecuador	82
Table 3: Summary comparative analysis	95

Chapter 1: Introduction

Trade negotiations the European Union is undertaking do not make the news in Europe. As we can see from the news headlines and pictures on the first page of this thesis, this is different for their counterparts, in this case the Andean countries. Negotiation partners often include developing countries where trade processes are highly important and contentious. The debate taking place there is not only one between those who believe in ‘free trade’ and those who do not. Frequently it is related to divergent ideas on specific, sensitive, and non-trade, issues. One such contentious non-trade issue is the strengthening of Intellectual Property Rights (IPR), the focus of this research in context of the trade negotiations between the EU and the Andean countries that started in 2007.

The thesis will look at how developing country governments deal with trade negotiations and the inclusion of IPR, and what processes lead to their final positioning on the topic. The processes of two case studies, Peru and Ecuador, will be tracked in order to understand the internal – but by no means domestically isolated – politics, as well as the relevance of non-state actors. The difference in political orientation and earlier experiences in bilateral trade negotiations form the basis of an interesting comparison that increases our understanding of developing countries politics of trade and IPR. Manifold are factors that make this topic highly interesting and relevant to the field of Development Studies.

IPR, such as patents, seem to favour industrialised nations and their (pharmaceutical) industries with potentially dramatic consequences for developing countries, such as public health. In the period between starting and finishing this thesis IPR has become the issue of contestation between the negotiating counterparts, between state and non-state actors, within the Andean region, and even within certain governments.

The controversiality of IPR can be extended to broader debates on commercial versus social interests, as well as the dangers of asymmetrical agreements and hegemonic behaviour of Western nations when imposing Western standards upon the ‘South’.

After a period in which trade negotiations were multilaterally based, it is now bilateral and bioregional settings that form the arena of debate. This shift comes with a different distribution of power between and within states, including changes in possibilities of non-state actor influence. Whereas we are aware of the relative strength of Western nations and business actors in influencing such processes, very little is known about internal politics of bilateral and biregional trade negotiations (or specific issues therein) and the relevance of non-state actors.

As is the case in the EU-Andean negotiation process, we often find rhetoric of ‘association agreement’ or ‘partnership’ with a region assigned to increase local integration and development. We see here that

this original aim of the EU was soon replaced however by a purely commercial agreement with only the more willing countries of Peru, Colombia, and to some extent Ecuador. The break with the regional setting was largely based on an internal Andean disagreement on IPR, Indeed IPR strengthening is an issue the EU – within a knowledge-based paradigm - is strongly promoting, resulting in severe criticism from civil society in both regions. Developing country governments seem to respond differently to such demands, ranging from very critical to more pragmatic, like the use of IPR as a bargaining chip within the negotiations. Whereas such trade agreements are hardly to be reversed, and caution seems necessary, some countries seem to be in a huge rush to get it done.

Whereas there is a lot of information on trade and IPR in EU politics, little empirical work has been done on developing countries and nearly none on the Andean region. Yet, considering the uncertain but strong potential consequences of this new, sensitive and highly understudied topic, as well as the relevance to broader debates, it is necessary to increase our understanding of developing countries ideas and politics on this issue. It is interesting to see whether the IPR debate itself is relevant to these governments or instead IPR is used as a bargaining chip.

This thesis will start with a theoretical framework in chapter 2, followed by background information on the research topic in chapter 3. These two chapters help us to contextualise the process and politics later discussed, and form the basis for research questions and a guideline in the analysis. Chapter 4 goes into these research questions, and the methodological foundations of the fieldwork. After this we will finally get to the results of the fieldwork in the data analysis of the two case studies, as well as the comparative analysis, in chapter 5. This will lead to the conclusions drawn in the final chapter, accompanied by suggestions for policy and further research.

Chapter 2: Theoretical Framework

In order to be able to contextualise and form questions and hypotheses on the topic, it is useful to have an overview of relevant theoretical background. I will discuss main theories in international relations and political economy trends in global governance that could allow us to understand the position and behaviour of states in trade issues. Knowledge and ideas are considered to play a key role in this positioning, but also other themes discussed here, such as new-constitutionalism, multilateral and regional trade developments, the belief in the knowledge-based economy and finally non-state actors. Lastly we will discuss the concepts of power and influence as these are fundamental to any discussion on politics and even more considering the broader North-South debate and potential role of civil society.

2.1 International politics and economics

This theoretical framework will start off with discussing some broader theories on international relations and political economy that are relevant to any trade as well as internal politics. Global governance forms the contextual base of such politics nowadays as well as trends related to this, such as new constitutionalism and new regionalism, that will be explained after.

Theories of International Relations and Political Economy

There are different approaches one can take when looking at world politics and state behaviour therein. This reflects different ideas on the role of the state and the relevance they ascribe to different actors, including those outside the state. They also represent diverging views on cooperation between states and regimes, the last defined here as “*principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area*” (Krasner 1982:1). According to its believers these regimes, such as trade agreements, can change the context in which states act and facilitate cooperation between states.

Mainstream approaches are considered to be (neo-)realism and neo-liberalism. *Realists* emphasise the importance of power distribution in state interests and dismiss the significance of institutions or actors outside the state (Haus 1991). *Neo-liberals* on the other hand believe in cooperation and international regimes for mutual benefits between countries in an interdependent world. Their view is less state-centric and leaves some space for influence by civil society, especially business (Arts 2003). An alternative view is that of *Political economy* with a focus on structural power and including all relevant actors, such as social movements, but considers regimes to be ineffective. Critical of any such approach are constructivists or *knowledge-based cognitivists* who believe reality is more complex and involves a large role of ideas (Hasenclever et al. 1996). This last approach is directly relevant to this research, as well as a focus on the role of both agency and structure. This is emphasised by Arts

(2000) who looks at agent behaviour as embedded in structures, resembling the *structuration* theory of Giddens.

When looking at trade policies that states choose, it is useful to understand what model of development they envisage. Coming from the realist idea described above, *Mercantilism* emphasises maximising state wealth relative to that of other states by increasing its power and security. To mercantilists trade is a zero sum game and there is a need for protectionism (Haus 1991).

The current dominant view is that of *neo-liberalism* however, which believes free trade, that can be established through regimes, is mutually beneficial to all parties due to comparative advantage.

Neo-liberal ideas were embodied in the early nineties in the ‘Washington Consensus’, which stated that the state should hand over its functions to the market. This liberalisation would lead to increased efficiency and, together with strict stabilisation measures, to the development of countries suffering from the debt crisis such as in Latin America in the 1980s (Williamson 1993). Countries that implemented this however, such as Peru, often showed disappointing results with increased inequality and unemployment, leading to a strong growth of the informal sector (Kurtz 2004). Later, in the Post-Washington Consensus period, it was acknowledged that the state should play a role, but mainly in providing institutions so that the market could work (Williamson 1993).

Neoliberalism is often criticised from different sides for being market fundamentalist -overlooking other aspects - and having failed to provide improvement for many people (Kurtz 2004; Tickel&Peck 2003; Peet 1999). The anti-imperialist camp, a term Wolfe (1997) uses to group together (neo)marxists, dependencia scholars, postcolonialists and postdevelopmentalists, claim neoliberalism, or capitalism in general, to provide the rich countries with a new and often cheaper way of dominating the poorer countries. Trade, or trade regimes, are seen as a means of exploitation with a power dimension, in which the poor, or periphery, transfer wealth to the rich, or core, countries (Mazzucato 2008). The people or social movements that oppose North-South trade negotiations often cite such anti-imperialist arguments. This also goes for some Latin American presidents that are part of the ‘turn to the left’ as a result of strong disappointments with the neo-liberal projects of the 80s and 90s (Weisbrot&Sandoval, 2006¹). An illustrating quote, which points out the importance of power that will be discussed later, is from pre-neo-liberal times by Sideri (1970:6), who stated that

“in the international system the relations among those elements are bound to be pervaded by power both as ends and as means. Mercantilism and free trade are not basically different, but both are a manifestation of and the instrument by which power is exercised. It is the mercantilism of the strongest power, and it leads to imperialism almost as surely as a thought-out commercial policy”.

¹ Weisbrot&Sandoval (2006) mention six presidents are chosen on the grounds of their anti-neoliberal programmes, including the Ecuadorian Correa. In the meanwhile a seventh could be added with the election of a new left wing president in Paraguay.

Global governance & new constitutionalism

Some of the more state-centric approaches mentioned above seem less relevant in the current globalising era, in which many argue that the role of the state has diminished or at least strongly changed and other actors can be highly relevant. These globalisation processes² take place in different directions and arenas, such as the economic, political, social and cultural, and are therefore sometimes called globalisations instead of globalisation (Santos, 2000). There is a strong economic focus however as represented in the neo-liberal paradigm discussed above and the increase in trade and foreign direct investment. The term *global governance* is used to describe this situation in which not just state governments determine world politics but many actors at all levels from supranational to local, also called multi-level governance. A broad definition of governance is “*any mode of public co-ordination*” (Arts 2003:8). This contextualisation is relevant here because trade agreements are instrumental to such global governance in a non-neutral way. Global governance is also said to define the aim and scope of increased activity of Non-State Actors (NSAs), who usually target specific issue-areas of global governance. NSAs can be defined as “*all those actors that are not (representatives of) states, yet that operate at the international level and that are potentially relevant to international relations*” (Arts 2003:3) and will be discussed more broadly later. They can link up in transnational policy networks that are characterised not only by the different state and non-state actors, but also by a complex cross-discipline, cross-border and cross-policy level interaction. Usually these networks evolve around a specific issue or policy making process, that is temporal, limitedly formalised, dynamic and in the case of the negotiation process EU-CAN also very contentious and with a strong relevance of power dynamics (Peels 2009).

Gill (1998) sees the current discourse in governance as a *new constitutionalism* of disciplinary neo-liberalism, in which the structural power of capital is locked in by the rule of law. This shows from the fact that governments mainly care about sustaining credibility for investors and privileging corporate capital in general. According to Gill this is restraining the democratic process by insulating economic and property rights from both democratic rule and popular accountability. One strategy is not suppressing but co-opting and channelling potential protesters or Polanyi’s ‘double movement’. Two major examples of new constitutionalism, the World Bank and the EU, indeed show a recent strong but contested discourse on participation of civil society. Gill’s argument also points at a crisis of democracy, as well as mobilisation, which is affirmed by Kurtz’s (2004) analysis of Latin America.

As opposed to old constitutionalism in the 19th century, this civil society focus, as well as the growth of the power of multi-national corporations and an extension of legal protections for property rights in emergent countries, is new. The agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) will be discussed later as an example of institutionalising neo-liberal reforms by “*reinforcing*

² For more on globalisation(s) read Held (2004). It is not considered here as something entirely new, but as one definition commonly used it is seen as the “*widening, deepening and speeding up of global interconnections*” (Held et al. 1999:4).

legal guarantees for property holders and other sanctions in support of a deepening of economic liberalisation” (Gill 1998:31). Bilateral economic and political pressure, including bilateral trade negotiations, is used by actors such as the US and EU to ensure this project and compliance by developing countries. The economic and monetary EU shows a strong focus on international agreements and stronger regulation, both inside and outside the union.

The structural power of capital discussed above can be linked to the increasing presence of *corporate governance*, a situation in which business dominates the decision-making realms. This shows from the strength of industry and business (NGOs) both in general and in IPR in particular. After the US this phenomenon is also increasingly seen to be present within the EU (Rhodes&Van Apeldoorn 1998).

New (inter-)regionalism

Within the context of global governance multilateralism has strongly increased, as will show from the next paragraph. At the same time however countries have been engaging in cooperation on a regional level, within and between regions, often geographically based. Such *regionalism* and *inter-regionalism* are seen to be both complementary, as a stepping stone, and inhibiting, as a stumbling block, to multilateralism (Lamy 2002). Regionalism is defined as “*processes by which actors, public or private, engage in activities across state boundaries and develop conscious policies of integration with other states*” (Grugel 2004:604) as well as an attempt to establish regional governance with regions defined as “*supranational subsystems of the international system*” (Hettne 2005:544). The process of *regionalisation* is generally dynamic and complex (Hettne 2005).

Whereas the old regionalism that developed after WW2 had normative principles and focussed on peace, the new regionalism from after the Cold War can be said to be morally neutral and constitute an open regionalism that is mainly market-driven. This attempt to establish regional governance is can be a strategy of minimising state risk as a response to the globalising world and the weakening of states (Santander 2005). It is important that the project does not only involve state actors, but also civil society. New regionalism has strongly increased worldwide in the past 15 years and can take very different forms and degrees. Different dimensions can be the creation of a trade bloc or development perspectives, the latter being a driving force for CAN. Internal markets and movement can be liberalised and legislation, including IPR, can be harmonised. The European Union is an example of far reaching new regionalism, taking up a global role and negotiating various interregional partnerships or trade agreements, including stimulating regionalism in other parts of the world. This new regionalism and inter-regionalism, agreements between two distinct but similar regions, is partly a reaction to US competition for markets and investment. The US has made many attempts for a hemispheric integration with Latin America, such as with the creation of a Free Trade Agreement of the Americas (FTAA), that was strongly opposed to by civil society from both continents and finally failed. In Latin America new regionalism became a popular strategy within an overall (liberal) policy convergence with the North and many regional pacts were created (Grugel 2004). In a later section I

will go into the European as well as the Latin American case of the Andean Community of Nations (CAN) more extensively.

2.2 Intellectual Property Rights and multilateral developments

After discussing the issue at stake here, Intellectual Property Rights, and debates and developments that evolve around it, we will look at multilateral developments in relation to IPR with the result of TRIPs. The process of establishing this agreement will be discussed due to its relevance for our analysis on politics of IPR. We will see that after multilateral attempts to strengthen and expand IPR regimes, bilateral approaches are becoming more popular.

Knowledge-based economies and Intellectual Property Rights

In the last decade the idea of having to create and improve knowledge-based economies has gained great power with substantial influence in trade negotiations, including those with developing countries, of which the topic of intellectual property rights (IPR) is a prime example. It believes knowledge to constitute a production factor and considered as intellectual property should have commercial value and restricted access. Knowledge economies can be defined as “*economies which are directly based on the production, distribution and use of knowledge and information*” (as quoted from the OECD by Godin 2003:11). Some say this reflects the needs of the OECD and other countries whose comparative advantage is based in knowledge and technology (Robertson et al. 2006). According to Cammack (2006) this can be related to the politics of global competitiveness in which these actors, including the EU, not only strongly emphasise improving their own competitiveness but also want to promote the competitiveness of other (emerging) economies. He claims this is motivated from the goal of creating a well-functioning global capitalist knowledge-based economy in order to maintain their hegemony. The learning emphasised in this idea focuses very much on the market-based economy with a belief in free trade combined with strong legal protection of knowledge, as embodied in the focus on IPR and the establishment of TRIPs or TRIPs-plus bilateral agreements that we will discuss later.

IPRs are said to be “*the formal mechanisms by which property is established in intellectual assets*” and “*define the extent to which their owners may exclude others from activities that infringe or damage the property*” (Maskus 1997:1/2).

Traditionally there are two types of IP, industrial and intellectual property. Protective rights of these are divided into patent, copyright, trademark, (relating to) geographical indication and design. We will focus mainly on patents and geographical indications, as these are the most relevant in our case studies and more contentious in most developing contexts.

Patent rights³ are temporary monopolies of generally 20 years on industrial property that are meant to benefit business environments. This monopoly can be extended by data protection in the process up to the patent granting. (Gielen 2007) Industrial property includes medicine and fertilisers that are particularly important to developing countries. A patent on a medicine excludes the possibility of generic, thus patent-free and cheap, production of the medicine. In some cases, such as national health emergencies, generic production can be allowed under ‘compulsory licensing’. More recently also other forms of patent rights have been awarded, such as to therapies. This could potentially include the use of biodiversity, such as plants or animals, and traditional or indigenous knowledge (Florez 2004). Indeed bio resources are important raw materials for many (Western) companies, be it in making medicine or better cash crops, and they often need the help of locals in finding and understanding these. This acquired knowledge and product can be used to develop a patentable product, although for the communities themselves different kinds of protection mechanisms are being sought (Sahai, 1996). Geographical indications are a special kind of trademark that allows the use of geographical origin – the place where the product was made - in the name of the product. Europe is particularly dominant in this topic and has many indications registered, such as Champagne and Gouda. (Maskus 1997; Gielen 2007)

The rationale behind IP protection is that it could otherwise suffer from overuse, which would decrease its value and limit incentives to create it. In a world where knowledge creation and innovation are prime goals, this is considered undesirable. There is a belief that IP will stimulate innovative production – as the monopoly will allow investments to be gained back-, create competition and ultimately lead to increased consumer welfare. However, many disagree with this argument, as IPR creates monopolies and therefore decreases competition, raising prices. In the context of trade, non-protection or only protection of the national IPR is feared to form barriers to international trade and investments. IPRs are supposed to balance private rewards with public rights of access, but it turns out interpretations of this differ strongly. Proponents do acknowledge a limitation to these rights is needed and often propose disclosure within 20 years. Critics feel the balance to be too much in favour of knowledge owners and their social value is overemphasised, whereas the social bargain or costs for society as a whole should be factored as well. (May 2004; Stiglitz 2006)

The IPR debate

There is a lot of debate on the benefits and dangers of IPR, relating to often contradicting economic, political and social analyses.

We have already discussed the argument behind the need for IP for innovative production and consumer welfare. Increased investment in learning and research could also be beneficial for

³ “A patent is the right granted to an inventor by a State, or by a regional office acting for several States, which allows the inventor to exclude anyone else from commercially exploiting his invention for a limited period, generally 20 years” (as quoted from WIPO by 't Hoen 2009).

developing countries, especially if they want to 'join in' the global knowledge economy. Besides increased incentive for local companies to create new knowledge, having a strong IPR regime also could also take away barriers to trade and attract more foreign investment as it creates a more secure investment climate for IPR holders. This would not only bring economic benefits, but also the import of foreign technologies and knowledge which would increase learning.⁴

A lot of worries exist within and about developing countries that are likely to face high implementation costs and will thus lose in the short term at least. Long term economic and social effects are generally uncertain. Katz (2001) does show that increased IPR protection in Latin America in the 80s and 90s has negatively affected its knowledge production and innovation as it impeded them from using their earlier step-by-step informal upgrading strategies. Chang (2001) and Stiglitz (2006) both discuss the arguments in favour of IPR and counter most of them with empirical and historical facts. The relation with attraction of foreign investment is not proven by empirical data, and even if it were it shows that such investments have uncertain effects for the economy as well as for the knowledge system. In Latin America foreign companies brought their own knowledge and technology but did not share this, nor did they stimulate local knowledge production (Katz 2001). The argument of increased incentives for conducting and publicly presenting research and development is also contested on several grounds and from a historical and empirical perspective by Chang (2001). The current developed countries show a history of copying and imitating with no IPR protection from which they have clearly benefited.

Besides uncertain gains there are particular risks to strong IPR. Developing regions face financial and institutional trouble implementing these regimes with high (human resource) costs (Chang 2001). Also royalties increase since almost 95% of the patents are to be found in the 'developed' world, namely North America, Japan and Europe (Verger 2008). It is therefore said a transfer of wealth from poor to rich is the result (May 2004).

A main worry however is the effect of more and longer patent and test data protection on medicine. Despite rationales earlier mentioned, monopolies here have lead to higher prices and less access to medicine. It is said that 30 % of the world population does not have access to the medicine they need and this is mainly due to the high prices. Generic, patent-free medicine, have historically been able to provide access for larger parts of developing countries' population. Restrictions on these leave only the option of foreign, patented medicines that are often too expensive. (Hoen 2009) Although some

⁴ Some economists find a positive relationship between IPRs and innovation and a U-shaped relationship with economic development in developing countries (Chen&Puttitanun 2004). Others find that both regions can gain if the South harmonizes its IPR standards with those of the North and if the North liberalizes its traditional goods market or other relevant sector/bargaining tool in return. This compensation is needed because although several analyses show that total welfare can go up with increasing ipr protection, it usually shows higher potential gains in the North, especially for producers, and lower gains or losses in the South, especially for consumers who pay higher prices (Lai&Qiu 2002; Maskus 1997).

deny the relation between patents and medicine prices, MSF specialists show the strength of this relationship for AIDS antivirals (Fairlie 2007).

Restrictive behaviour such as monopoly pricing is not only common strategies for pharmaceuticals, but also for agro-chemical businesses (Chang 2001). Also other (sensitive) products that require some patent-protected element are thus likely to increase in price. It has been proven that precisely in these sectors innovation has been very limited ('t Hoen 2009).

Many of the developing countries are mega diverse countries with high levels of biodiversity and of indigenous knowledge (on this biodiversity). Most people feel that bio piracy, the unauthorised use of biodiversity and related local knowledge, should be prevented. According to the Convention of Biological Diversity this requires both prior consent with the original knowledge (or biodiversity) 'holders', such as indigenous communities, and as long as they receive their equal share of the benefits. In practice this usually does not happen. It is usually Western businesses that are more capable of re-packaging such products, which results in them monopolising or privatising products derived from this biodiversity or knowledge. It is not clear what protection mechanism should be used here as Intellectual Property Rights, and in particular patents, are not very appropriate for their individual character. It is often forgotten that the Western ideas on IP do not always fit into other cultural societies, such as these indigenous communities. (Ruiz 2002; Florez 2004; Chang 2001; Sahai 1996)

By legal tradition these rights or rules have been territorial, so that each country or region establishes its own terms. This also shows from the generally lower standards in the South compared to the North. The territorial approach to IPR did not correspond with the 'need' for international exploitation of this asset. As will be discussed next this resulted in pressures, especially from software, media and pharmaceutical companies. Accordingly, required minimum standards have expanded rapidly, although developing countries have been given a longer period to make adjustments (Maskus 1997). There is still a lot of pressure to increase these standards even further, and shorten adjustment periods for developing countries. There has also been attempts and pressure from the EU and US in multilateral, bilateral and interregional negotiations, of which the latter two have been most successful in raising IPR standards (Maskus 1997b).

May (2004:834) relates this privileging of the rights of knowledge owners, such as information and pharmaceutical industries while "*denuding the 'democratic public realm of substantial knowledge and information resources'*" directly to the new constitutionalism of Gill. It has also shown however that local industries sometimes speak out as they fear stronger IPR protection will increase their own product prices.

Few claim that a return to a situation without any IPR is desirable, but the speed and depth of the current developments, as discussed in the next paragraph, worry many and makes it an important topic to study further, especially as it is a good reflection of the wider debate on globalisation (Berry 2004).

Multilateral trade developments

IPR developments take place in a context where not only approaches to but also activities within trade have been changing. Where there was a big push for *multilateralism* after WW2 with the set up of the UN and Bretton Woods institutions, it took until the nineties -or the neo-liberal era- before a truly global trade organisation pushing for worldwide liberalisation was established. This World Trade Organisation (WTO) was to go further than its predecessor, the General Agreement on Trade and Tariffs (GATT, established 1947). It was to involve developing countries more, and be truly rule-based and democratic, instead of power based (Srinivasan 1998). This would mean a victory for the neo-liberals, although sceptics claim a neo-mercantilist agenda with substantial protectionism (especially of developed countries) and asymmetrical power relations are still present (Krugman 1997). With the ambitious Uruguay round and the establishment of the WTO in 1994 countries came together based on the perception that this increasingly globalising world had made them more interdependent and more dependent on trade. Developing countries, especially in Latin America where policy convergence to the North seemed to take place after a long inward period under Import Substitution Strategies, were indeed more involved. Developing countries gave in on issues such as services and Intellectual Property Rights - new issues that were mainly of interest to US and later EU - but were disappointed later by unkept promises of the developed countries in market access and technical assistance (Cohn 2002).

TRIPs

A prime example of a legal regime in the multilateral setting is the agreement on Trade Related Aspects of Intellectual Property (TRIPs)⁵ of 1995. This was to complement the World Intellectual Property Organisation (WIPO) that had no enforcement power and was seen to be dominated by less developed countries (Sell and Prakash 2004). TRIPs was the embodiment of the will of the US, and later the EU and Japan, to increase regulation on intellectual property, such as patents and copyright. It is said to be an example of the increasing power of multinational corporations (MNCs) within the current neo-liberal global paradigm. It stemmed from the already discussed (neo-liberal) belief that this regulation would promote investment and trade and thus economic growth.

“(It) codifies a trade-based conception of intellectual property (IP) protection that binds signatory states, requires them to enact implementing domestic legislation, and adopt enforcement measures. The agreement provides IP owners with a twenty-year monopoly right, and subjects signatory states to the threat of trade sanctions if they fail to comply with the TRIPs provisions” (Sell 1999:168/169).

All member states had to incorporate these standards into their legislation; developed countries within one year, developing countries within five years, and the least-developed countries within eleven

⁵ Requirements of TRIPs cover, besides the general obligations of the WTO, copyrights, trademarks, patents and other arrangements (Maskus 1997). For an overview of the whole TRIPS agreement see his article or the WTO website http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last visited 22 May 2009). Article 4 of part one refers to the Most Favourite Nation Principle.

years. Enforcement measures were strengthened, such as with a dispute settlement mechanism, and IPRs were thus directly linked to the international trade regime. This also included the application of the Most Favoured Nation principle that obliges countries to minimally give any (bilateral) negotiation partner what they have given to earlier ones.⁵

The strength of TRIPS and the areas it covers, make it a highly important agreement with far reaching implications, especially for developing countries. We have already discussed how, according to some, it helps developed countries to lock-in the neo-liberal paradigm. The help, or capacity-building, that developing countries receive for installing an intellectual property rights regime can of course be beneficial but is also said to be a political project. As it reproduces the TRIPS mindset and “*structures of commodification on which the globalisation of contemporary capitalism depends*” (May 2004: 823) it is considered part of the ‘epistemic lock-in’ mentioned before. In some cases it has led to more stringent writing of the laws than actually required by TRIPs.

The TRIPs process

The initial opposition of developing countries against this issue had dropped by the nineties, which some ascribe to the fact that they had no other choice because ‘the powerful’ had unilaterally changed the status quo. Since there was no shared-interest for IPR it was a matter of trade-offs or a bargaining chip with issues such as an agricultural opening in exchange, which turned out to be disappointing to many developing countries. Sell (2006) describes the process of US firms lobbying for international protection of their intellectual property through industry associations and an IPR committee that were very powerful, out of fear of losing their comparative advantage due to technology getting cheaper. Finally the US government recognised this and successfully promoted this position within the WTO. Sell (2006) relates this to the concept of structured agency. The role of agency is particularly clear in the ‘new issues’ such as IPR that strongly effect state policies. The new actors that played a role in this, such as US firms, were empowered by (their embeddedness in) structural changes, such as technological development and its increased importance. They are even said to have written a large part of the US proposal, which led to an agreement that privileges their interests (May 2004). The result was the most authoritative agreement within the WTO, made possible by the mobilisation of MNCs, OECD consensus and the lack of sustained opposition (Sell 2006).

In a few areas agency can be seen of non-business NSAs as well, such as the role of NGOs and the South in general, in addressing public health issues in relation to TRIPs as a major area of concern and achieving changes in the regime (Sell and Prakash 2004). As a principle, TRIPs does allow for flexibilities, such as the compulsory licensing of medicine in case of national health emergency, which were emphasised in the Doha Ministerial Declaration. It took a lot of negotiation and a long campaign, largely based on AIDS emergencies and the lack of adequate medicine world wide to get this recognition. Despite this small success, such licensing is still often problematic in practice, and developing countries are pressurised to be more stringent than necessary in their application of TRIPs

(May 2004). Protection of biodiversity in relation to IPR was also discussed at Doha, as TRIPs limits adherence to the Convention on Biological Diversity that was signed in 1992 at the Rio Earth Summit (Florez 2004).

Whereas different views exist on the merits and dangers of IP protection, the strengthening acquired with TRIPS is seen by many to be of benefit to the industrialised nations, as almost all patents are registered there. Industrialised nations however say that it will also benefit the South (Sell 2006).

Although the 'South' is highly divided within, overall they have become more reluctant towards far reaching agreements that are often proposed by the developed nations. Despite many rounds and agreements within the WTO in the past 15 years and attempts to include more development agendas, as in the DOHA round, there was also notable stagnation in the multilateral field. This pushed countries or regions such as the EU to simultaneously choose bilateral, regional and multilevel routes to free trade or agreements that often go much further than in the WTO in liberalisation and regulation, such as a TRIPS-plus on IPR. This strategy is often criticised both by neo-liberals that prefer a multilateral approach and by anti-imperialists that see these negotiations as more asymmetrical (Cohn 2002). Some say that developing countries do better in multilateral negotiations and that these gains are quickly undone at the bilateral or regional level (Sell 2006). Others show that these bilateral or regional negotiations can be more effective for establishing strong legal regimes (Maskus 1997).

2.3 Actors, power and ideas in policy-making

As this thesis stems from an interest in policy-making processes in developing countries in relation to trade and IPR, it is necessary to discuss conceptual ideas in relation to these. Both agency and structures will be included in this theoretical background on non-state actors, their resources, strategies, political opportunity structures and finally influence, followed by a discussion of state bureaucracies and government decision-making in relation to ideas and power.

Non-State Actors

We have already mentioned the rise of *Non-State Actors* (NSAs), which can be divided into multinational corporations, epistemic communities, non-governmental organisations (or NGOs), intergovernmental organisations and a remainder category (for example liberation or guerrilla movements) (Arts 2003). This rise of activity and impact of NSAs in the past decade demands a new approach and more research. Here, we will focus on both the business organisations (BO) and social organisations (SO), as well as reflect on epistemic communities.

Burstein (1999) groups BOs and SOs together under the heading of Social Movement Organisations (SMOs). These are thus not just the 'traditional' social movements that strive for idealist change, but also include business lobbies and other non-governmental interest groups that try to influence

government policies. There is little consensus on definitions in this field but most scholars agree that these organisations act at the margins of the political process as a challenging group. Burstein (1999) believes the differences between them are not so much organisational, but rather legal, in the extent to which they have access to the political process. Partly due to this difference in this research there will be differentiated between BOs and SOs. Further, within the SOs there are strong differences between more institutionalised organisations or NGOs and more grassroot organisations.

It is said that non-state organisations are created as part of the democratic process to provide governments with the information they need – namely about what the public wants – and to make them more responsive (Burstein 1999). This providing of ‘new’ information is also what Arts (2003) considers a main resource. He finds that multinational corporations and business organisations are more powerful than other NSAs in terms of size, resources and structural dependence of the government on the NSA. Governments depend both on technical expertise and (electoral) support. Resources of NSAs include not only technical expertise but also “*broad membership (...), credibility, status, money, mobilisation capacity, creation of employment, tax contributions and access to the media or information*” (Peels 2009:6).

These resources can be used in *strategic gaming*, which involves the interactions between different actors given their dependencies, resources and rules of the game. Others speak of *strategic framing* of the topic in order to diminish discrepancy with society or government views. NSAs can also address those arenas, such as specific state entities, where they find more congruence with their preferences (Beyers 2008; Peels 2009). This arguing reflects the role of ideas and is a different communicative strategy than bargaining which is about exchanging resources. The nature of the policy issue at stake structures the context for interest group strategies. A very specific and technical issue leads to a narrow group and limited interest, broader policy shifts are actually few and difficult. Social scholars refer to the conflictual, non-institutionalised nature of policy issues and the importance of political cleavages.

According to the theory of democratic representation governments will generally do what they believe the majority wants, which means that NSAs can not influence the process directly if they oppose the view of the majority. This is different when the public shows little interest in an issue which creates more space for the NSA to lobby. The way to influence the process then is to change the legislators perception of the preferences of the public (inform them), change the preferences of the public themselves or change the importance of the issue to the public (Burstein 1999). If certain SOs turn out to have little impact on the process it could be because certain elites (with opposite viewpoints) are more powerful than the theory of democratic representation makes us believe, or because the public actually wants something else.

Epistemic communities are particular groups that share causal beliefs and principles and can draw on different ideas at the same time (Vergier 2007). They are mostly an external influence consulted by the government in complex and uncertain circumstances. Members of the community can include both

those with direct interests in alternative policies, such as governmental or (international) organisations, and those with a more intellectual interest, such as academics (Haas 2004). Epistemic communities were particularly relevant for newly emerging ideas on benefits of trade-liberalisation led to a radical change in government discourses. Information provided by the epistemic community and their framing of the issues and (delimiting) options strongly influenced the policymakers in these uncertain times. The extent to which the members have access to top policymakers – both formal and informal - also plays a role, at least up to the moment of final negotiation. The more their statements appear scientifically objective and serving the whole community, the more authority they gain. (Drake&Nicolaidis 1992)

Political Opportunity Structures for NSAs

Political opportunity structures (POS) involve system alliances, oppositions and the structure of the state (Giugni 1998) or are “*conditions under which social movements [here: all NSAs] influence policy making*” (Sell and Prakash 2004:146). As governments are often still dominant in decision making due to the belief in their legitimacy through election, they decide on POS, or their political openness such as in the institutional framework, for NSAs. This often results in more open POS, and thus a voice for those groups that share similar agenda’s and preferences as the state (Peels 2009). Crises are seen as a great opportunity that increases NSA possibilities. Tarrow (1994) distinguishes useful dimensions of both stable and changing political opportunity structures where a situation of institutional access, shifting alignments such as electoral instability, rifts within elites, available influential allies and less state capacity for repression or more for facilitation can provide challengers with opportunities to advance their claims. These opportunities or constraints can also be an effect of NSA activities and their communication of information. They are thus not only multiple, but also dynamic. We have seen how new constitutionalism includes both an emphasis on including civil society and attempts to co-opt these groups or insulate decision-making.

Influence of NSAs

It has already been discussed how NSAs can try to influence public policy, but to assess the outcome of this is very difficult. Indicators of the relevancy of an organisation identified in international relations are its size, constituency (whether it is substantial and covers several countries for example), formal recognition (access granted by governments and intergovernmental organisations) and political impact (whether it is consequential to political arenas). The political impact is especially hard to define and measure as causality can not be proven without excluding third party intervention, but according to Giugni (1998) this can be solved theoretically. Not only should we focus on organisational characteristics and other direct impact measurements but outcomes should be placed in context. Success, failure, intended as well as unintended or unconscious effects, should be considered.

Some unintended effects can be negative of course, such as repressive measures by the state. Considering the context, public attention and opinion are important external factors.

In the realm of power that will be discussed hereafter the three faces that Arts (2003) distinguishes are useful and will be used in the analysis on NSAs. He divides power into (non) decision-making power, that strives to modify decisions and influence politics directly, discursive power, that can frame political discourse by argumentative or cognitive turn and thus indirectly influence politics, and regulatory power that can (re)make rules as sometimes happens in private rulemaking these days. These faces each know different strategies that can be effective in different phases of the decision-making and have their advantages and disadvantages related to the type of decision to be taken. The *decisional face* is exercised by lobby, advocacy, monitoring, protest and participation and can be aided by expertise, access, legitimacy of demands, nature of the political issue, policy phase and the extent of cooperation with other NSAs. As this also involves agenda setting, the decisional face can also reflect the power of non-decision making. Besides resources such as knowledge a certain level of political access, either formal or informal, is necessary. In the *discursive face* ideas play a major role in framing the discourse and giving meaning to political phenomena in all policy phases. Strategies are naming, framing and campaigning to which moral authority, access to mass media and the illegitimacy of the dominant discourse that is being challenged can be beneficial. Finally for the *regulatory face* of power a gap in governance and market regulations is needed, to which private actors respond by setting up regulative rules –as defined earlier under regime theory- such as technical standards or codes of conduct or the IPR.⁶ The context and earlier mentioned political opportunities structures play a role in all these faces.

Theories of power

As earlier paragraphs showed, power is an important concept in any politics, as well as for this thesis with a focus both on multi-dimensional power dynamics of and within states as well as of NSAs in a contentious, polarised context and process.

Power has always been a controversial concept among scholars, especially in its definitions, with dimensions and faces of power, and measurements. Where analysis used to consider power as something to be possessed, a resource, it developed into a relational power approach with power as a type of causation (Baldwin 2005). The classical definition showing this relation is “*getting others to do what they would not do otherwise*” (Meunier&Nicolaidis 2005:11).

Lukes (2005) dismisses ‘simple’ definitions of power that only look at outcome produced as observable with one or two dimensions. Instead he suggests a three-dimensional view that includes the non-observable power, such as the power to exclude issues from the political agenda (non-decision

⁶ Other typologies are comparable such as the influence on ‘decisionmaking, agenda setting and definition of preferences’ (Lukes 2005), ‘control over agenda’s, thoughts and desires’ (Baldwin 2005) or substantive and normative influence or outcomes (Sell and Prakash 2004).

making power) or shaping the preferences or perception of needs of the other party so that no alternative seems available. He shows with an example how the promotion of one agenda can drive another one away and the promoter of the first thus has the power to prevent one agenda from becoming political. Lukes claims that power is also a capacity that doesn't have to be exercised, whereas others such as Arts (2003) use Giddens' definition of power as having resources and achieving outcomes or the 'capacity to achieve outcomes'.

The power of a country in trade is said to be mainly a function of its economic strength as based on its market size and overall economic performance. This means the EU is a more powerful trading region than CAN, and according to Meunier&Nicolaidis (2005) they are even able to gain power through trade and trade negotiations. In such asymmetrical negotiations it is said to be possible to use soft (intangible) or persuasive power and get the other party to not only do, but also want, what is in your interest. Another factor that can be beneficial in trade negotiations is less need for the agreement than the other party and thus more patience (Jonsson 2005; Grossman 1995). Internal conflict over demands, especially when concerning 'new issues', when this means more flexibility for the negotiators (Meunier&Nicolaidis 2005) can also be beneficial. Trade and power are not always positively correlated, and in some cases the 'weaker' party can actually gain more as context plays a large role, which was often ignored in classical theories on negotiations that based themselves on game theory (Jonsson 2005). As a principle, Sell (2006) states that countries can sign out of shared interest, reciprocal exchange, coercion or the lack of alternatives.

Government decision-making

Traditional models represent government policymaking as a struggle for power of competing interests. Constructivists have their own set of assumptions about the functioning of the state in relation to uncertainty threats, asymmetrically distributed knowledge, formal institutional properties and of course power (Haas 2004). They use interactive theories, looking at institutional and knowledge-based influences in multi-level governance and try to explain different roles of ideas and beliefs. This paragraph will go into both decision-making processes of governments or states and the role of ideas.

First of all, a state or even a government is not simply one unified actor. It can be considered as a black box consisting of different ministries and individuals with different roles and interests (Hall 1993). Ministries responsible for trade negotiation processes do not necessarily coordinate this in a neutral manner (Verger 2009). State factions can have specific (trade) interests and pursue these more easily from their powerful position that includes their internationalisation – as they are the direct participant in the international or bilateral setting - and control over information. If their interests do not match those of other state factions that are thus subordinated, this leads to a lack of coordination that Cox (1981) refers to as '*Internationalisation of the State*'. This domestic situation can also have an impact on international politics, such as in the case of trade negotiations. Ministries of finance and

prime ministers offices can play a similar role (in international economic policies). We have seen how these state agencies can also link up with international networks or epistemic communities including international organisations and big business (elites) (Cox 1981; Drake&Nicolaidis 1992). Internationalisation of the state does not only happen in the North, but also in developing countries such as Peru, as during the exchange for debt renewal in the beginning of the eighties (Cox 1981).

For general decision-making we have mentioned the relevance of the perception of the public's preferences as defined by the hypothesis of representative democracy. Others do point at concern with the living standards of the general electorate but also the campaign contributions of special-interest groups. There is disagreement about the extent to which states respond to national interest or instead decisions are an outcome of bureaucratic politics or policy legacies. Instead Hall (1993) suggests a model of policymaking as social learning, both within the state, based on their structure and earlier experiences, and outside the state, such as pressure and ideas from politics and society (through media and interest groups). Policy making is a knowledge-intensive process, including both power and uncertainty. The more technical and coherent the policy paradigm that the state presents is, the more it allows them to deal with it autonomously. *“Such paradigms are most likely to be found in fields where policymaking involves some highly technical issues and a body of specialised knowledge pertaining to them”* (Hall 1993: 291). Weber (1968) already stated that the power of bureaucracies, such as the government, was largely based on its technical superiority over other forms of organisations, but also its resources and knowledge, that only private economic interest groups in business can sometimes exceed.

The role of knowledge and ideas in politics

Sets of ideas, often more loose than in a fully elaborated policy paradigm, strongly affect decision making, although this is difficult to model. Hall (1993) speaks of the role of ideas in defining and prioritising the issues, reducing uncertainty by introducing simplified models and identify solutions, or as we saw earlier, limiting those policy options. Ideas alone are never enough for a policy change, and when they do have an impact this is said to be greatest in case of policy failure and when there is little opposition from voters and interest groups, as well as a concentration of the decision making authority (institutional environment). In the case of opposition from within the state or from outside, secret decision-making or altering of the institutional environment, such as decreasing power or budgets for opposing bureaucracies, can be used as strategies by senior proponents. Explanatory research in the role and conditions of the influence of ideas is lacking still. (Walsh 2000)

Another term used to describe the successful ‘product’ of epistemic communities is *usable knowledge* that fulfils conditions of accuracy, traceability, credibility, legitimacy, saliency and, importantly, be of use to politics and represent consensus. As science based advice is often highly politicised, legitimacy is greater when the knowledge is fully developed behind politically insulated walls. It can then lead to

comprehensive and fast policy changes. Despite the lack of technical resources within states, effective transfer of knowledge and ideas or social learning from epistemic communities to governments or regimes remains limited. This is related to the fact that politicians often care more about justifying or preventing others from undermining existing programmes than that they care about truth (Haas 2004). Verger (2007) also shows how ideational factors are key elements in transforming and explaining choices, functioning as roadmaps in decision-making or trade negotiations more specifically. Final positions can be based on these beliefs and can be divided into five models with ‘principled beliefs’ based on ethical or moral reasons, ‘causal beliefs’ or caution based on text ambiguities and uncertainties, ‘defensive interests’ with uncertainty about the effects, ‘instrumental logic’ when extrinsic factors or bargaining chips play a role and finally the ‘believers’ of, for example, neo-liberalism or the need for stricter regulation of IPR.

2.4 Conclusions theoretical framework

After discussing theories of international relations and political economy we have an idea what views can underlie decisions on trade policies and agreements or regimes –of which neo-liberalism or free trade is the dominant one- as well as the importance that is given to the role of the state and other actors. The literature on the current state of global governance emphasises the role of agency, taken here as embedded in these (global) structures. This means different actors inside and outside the state can play a role in decision-making and negotiations. This can happen in different ways, in different contexts and with different faces of power, an important but contested concept in this thesis and the polarised North-South, trade and IPR, as well as structure-agency debate. The fact that influencing policymaking might not be easy is demonstrated by the concept of new-constitutionalism, which emphasises the strategy of co-opting resisting forces. Political opportunity structures defined by the government can be more closed or open to specific interest groups.

For contextual understanding, we have described the multilateral approach of the WTO and the example of the authoritative TRIPs agreement which is increasingly combined or replaced with new regionalism and inter-regionalism or bilateral negotiations. The focus on intellectual property rights that stems from business interests and might have strong implications (especially for developing countries) fits within the knowledge economy discourse. Whereas it seems that the European Union represents almost all trends described, for any conclusions on CAN or Andean countries more research is needed. This theoretical framework, combined with the background information provided hereafter, will help to contextualise and understand the negotiations and country position and processes, as well as forming the research questions and hypotheses.

Chapter 3: Background Information on the EU, the CAN and the trade negotiations

In the theoretical framework new regionalisms of Europe and the Americas were already mentioned. In this background information the case of the EU and the CAN will be discussed further, as well the case study countries Peru and Ecuador and the ongoing negotiation process between these actors. This context setting is important in order to understand and put in perspective the data-analysis of the case studies that follows after. Even though the EU is not a direct object of analysis here, the following discussion is useful as an example of existing information trade and IPR politics as well as their role as a negotiation partner with consequent influence on their counterparts' positions.

3.1 The European Union

The EU is the main example of new regionalism with far going integration involving 27 countries that have delegated a large part of their power to the European Commission. The European Parliament can give the commission mandates but does not have any decisional or negotiating power. It is considered here as a complex intergovernmental as well as supranational organisation with often contradicting agendas and views within. Storey (2004) sees neo-mercantilism, social democracy and neo-liberalism as an example of this, in which the last one reflects the increased corporate agenda or governance is seen to be predominantly visible, with strong results. As mentioned before some claim neo-mercantilist features such as protectionism are actually the strongest (Raza 2007). Since the EU was converted into a single market in 1992, aiming at strong regional integration, it has increasingly looked outward in its strategies (Robertson 2007). The Lisbon agenda and the latest document 'Global Europe: competing in the world' (EC 2006) strongly aim at a promotion of European competitiveness and emphasise the necessity of international negotiations and programmes. Global and 'third markets' are to be opened for free trade and European investments. There is also a focus on knowledge and innovation within the mentioned knowledge paradigm. This shows well from the quote "*The European Union must become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*" (European Council at the Lisbon meeting 2000 as quoted by Robertson 2007:4). Opening foreign markets is pursued by a multilevel strategy, bilaterally, regionally and multilaterally (Lamy 2002). The EU uses different types of trade instruments, namely the free trade areas, non-reciprocal agreements with the least developed countries and partnerships including a (free) trade agreement, political dialogue and development cooperation. In the case of the partnership on a regional scale, they often try to promote a 'copying' of the EU integration model for the partner region as part of the new inter-regionalism and as a marker of the more humane governance model that should distinguish them from the US (Grugel 2004; Santander 2006). In the context of investment, this opening should be accompanied by strong regulation on IPR to ensure a proper legal environment for (their) companies (EC 2006). For this the EU considers TRIPs as the minimum standards, but does claim to be

supportive of public health and technology transfer as well as providing technical support where necessary⁷. The EU claims that by ensuring such *deep integration* the developing country partner can better benefit from the liberalisation by building markets instead of just opening (Lamy 2002) whereas this is contested by others that point at instability caused after earlier agreements. Some say such EU standards are even a prerequisite for access to their markets. US competition, which is particularly strong in Latin America, is seen as a driving force for the EU (Meunier 2005).

Analyses of the trade behaviour of the EU show a tendency to use a strong version of soft trade power and the use of bargaining chips such as market access to the EU for developing countries (Meunier 2005). This soft power is valued differently by different parties, some claiming that the EU is a more considerate party that respects the other more than the US would as reflected in the term partnership, whereas others claim this is just dress up and such elements are mere rhetoric. The same is sometimes said for the inclusion of civil society in interregional negotiations that the EU emphasises, but that is often lacking in practice or just ceremonial. Case studies on Mercosur and Mexico are critical not only on outcomes but also on transparency and possibilities for participation that are said to be biggest for the European business council (Grugel 2004; Aguirre&Perez 2007). The EU strategy paper mentioned is often criticised by SOs for being extreme in that nothing should stand in the way of Europe's competitiveness, a goal that together with deregulation is given higher priority than social and environmental goals (TNI 2008).

Indeed we will see that in the case of the EU-CAN negotiations the regional and developmental aspects were subordinate to the EU. Partly as a result of the EU-CAN negotiation process, the prior importance to the EU of IPR, and in particular (pharmaceutical) patents, geographical information and surveillance, in trade negotiations has become even more clear. Based on this analysis it is likely that the EU uses its different power strategies on the countries involved in order to achieve its goals.

3.2 The Andean Community of Nations (CAN)

Also in the Americas new regionalism has spread, and many different regional arrangements now exist, such as *Mercosur* and our case of the *Comunidad Andina de Naciones* or CAN. Despite it being the oldest regional bloc of South America, there is very little information on the CAN, especially as compared to the EU or even other South-American regional initiatives. A few local scholars pay constant and particular attention to the issue⁸, but outside the region there is little to be found.

The CAN started out as the Andean Pact in 1973 including Peru, Ecuador, Colombia, Bolivia, Venezuela and Chile and with the idea that cooperation could increase development, Chile left already in 1976 and Venezuela left when Peru and Colombia signed a free trade agreement with the US in

⁷ European Commission External Trade Issues: For better recognition of Intellectual Property Rights. http://ec.europa.eu/trade/issues/sectoral/intell_property/index_en.htm (last visited 30/6/2008).

⁸ Such as Alan Fairlie in Peru, Marco Romero in Ecuador and the ALOP/CAAAP institute in both.

2006⁹. These bilateral agreements followed the failure of an extension of the Free Trade Area of the North America (NAFTA) to the whole Americas (ALCA) that encountered much opposition. A study on the possible implications of increased IPR in the context of these negotiations advised against such regulation for developing countries such as their own as costs would be high and future benefits uncertain (Pacon 2005). Mobilisation against the agreement took place in all countries, but only Ecuador and Bolivia decided to abstain from further negotiating or signing it.

There have been attempts for a communal foreign politics and open internal market but this has proven to be very difficult (Defis Sud 2008:5). The process of integration, that was already slow, is currently said to be in crisis or even 'dead'. Besides current border tariff conflicts and the ongoing battle between Colombia and Ecuador - that broke diplomatic ties after Colombia's attack on FARC on Ecuadorian grounds -, trade negotiations are a major source of conflict. This shows from the EU negotiations, as well as the different bilateral agreements Peru and Colombia are signing, in which IPR in particular – and especially biodiversity - has shown to be very sensitive and a source of conflict between the countries. Peru and Colombia have a vision of development that is favourable of commerce and open regionalism and are considered neo-liberal, whereas Ecuador and especially Bolivia are considered more left wing oriented and are sceptical of these processes (Defis Sud 2008; Gutierrez, 2006). This reflects the division within the region, although Ecuador is currently joining Peru and Colombia in these bilateral negotiations.

The final agreement between Peru, Colombia and the USA did include IPR regulation¹⁰ and led to the change of the Andean norm on Industrial Property, decision 486. Together with decision 351 on Copyright, 345 on Protection of Plants and 391 on Access to Genetic Resources, 486 forms the normative IPR framework of the region. Positions on geographical indications have historically been similar to those of the EU. The Andean norms on IPR are said to be relatively complete and modern. (Fairlie 2006)

Harmonisation on the topic has decreased however with the change of 486 that allowed for flexibilities in applications and consequent adjustment of Peruvian and Colombian national laws. Respondents in this research believed this adjustment to the US agreement increased the minimum IPR restrictions of any regional negotiation because the WTO Most Favourite Nation clause prescribes equal treatment to any next negotiating partner. Bolivia in particular objected to the change of the norm, especially as they felt biodiversity, of in this case the Amazon, is a cross-border issue. They tried to destitute the (Ecuadorian) Secretary General of the CAN as a consequence of this first non-consensus decision, representative of another rupture to the region.

⁹ Sanchez, A. 'Mercosur, CAN and the EU: How will Venezuela manage foreign trade?' on October 24, 2007. <http://www.spectrezine.org/LatinAmerica/Sanchez2.htm> (last visited 30/6/2008).

¹⁰ See for the final agreement between US and Peru http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (last visited 20/6/2009)

The countries of CAN have thus not been able to present a communal proposal on the topic of IPR, which respondents mainly relate to the difficult position of Bolivia on biodiversity and to a certain extent the cautiousness of Ecuador. Others however point at the far going proposals of Peru and Colombia on the topic, as also showed from their initial requests for 486. The negotiations that were specifically aiming at increasing integration have turned out to worsen it instead, although some officials believe there will be no effect.¹¹

The CAN has a Secretary General in Lima that can only assist the countries in coordinating their positions and find a common ground. There is no mandate to negotiate or speak on their behalf, as is the case with the European Commission. In earlier rounds each country led one of the pillars and one country, Ecuador at the moment, is presiding the regional pact. On the topic of IPR there are specialists within the Secretary General that check proposals on technicalities and coherence in a neutral matter, although the understanding shown for Peruvian and Colombian positions was clearly greater than for Bolivian or even Ecuadorian stances (CAN_1). There is also an Andean Parliament, whose role seems limited however. As a final mechanism of coordination, presidential meetings are held, such as the ‘emergency’ meeting in October 2009 on the CAN crisis and EU negotiations, The CAN countries thus can and do speak much less with one voice than the EU does, affecting their chances to strongly negotiate as a bloc and, in the case of the EU, leading to another bilateral negotiation instead.

The EU has always tried to promote integration in the Andean Region with different forms of cooperation, such as the current SOCICAN project that is supposed to include civil society into the integration process, as so far both interest and possibilities have been limited (Romero 2007).¹² On the issue of the negotiations, countries were obliged to direct this money towards increased participation, but free to fill in how to do this. Both the Andean meeting in April 2008 and the meetings that Peru and Ecuador individually held were limited in their content. Despite governmental appraisal, only a few NSA respondents spoke of SOCICAN when discussing participation and gave it minor importance (Pe_1,8,13, Ec_14).

On the regional level there are three official councils for participation, namely the business, labour and the newly installed indigenous council. As a rule these councils are informed on decision-making and can send proposals, but they have no vote or right to be consulted at all times (CAN_1).

As the indigenous council has only just been established - according to a Peruvian trade representative because their own indigenous groups were obstructing the process (Pe_16) – its role is not clear yet. Some indigenous groups have been participating in regional platforms on how to protect biodiversity

¹¹ ‘Uribe and Garcia break negotiations between the EU and the CAN’ 16/9/2008 and ‘Por el fortalecimiento de la CAN: No a las negociaciones bilaterales’, 27/11/2008, www.bilaterals.org (last visited 20/6/2009).

¹² ‘La CAN abre las puertas a la sociedad civil’, Lima, July 2008, www.comunidadandina.org (last visited 20/6/2009). It also showed from most interviews, including EU_1.

and traditional knowledge, a project that the region is trying to promote internationally as well.¹³ Of the other two it is said that the labour council is much more active and has a permanent presence. The business council is not at every CAN meeting but did have their own meeting in Guayaquil in relation to the CAN crisis and the EU negotiations. It is said that in general business is in favour of free trade negotiations, labour takes a middle position but is also a platform to the - mainly Bolivian - indigenous groups that are more radically against these processes (Ec_7). These last positions are also reflected in declarations of the Andean wide umbrella organisation CAOI, that condemn the process and Peruvian and Colombian negotiators in particular.¹⁴

The Andean group, as most Latin American countries, has a colonial past with the Spanish and a large indigenous population, consisting of many different groups, that still often feels underrepresented. This shows from declarations and mobilisations in both countries in the past few years and the organisation of critical forums such as *Enlazando Alternativas*¹⁵.

Besides these institutionalised participation forms there are different regional alliances between social organisations, including ties with their European counterparts and the European Parliament. Most SOs are in favour of CAN integration, but have little faith in the process, pointing at difficulties due to different levels of development, political orientation or 'ideology'.

Economically CAN is less strong than the EU. The neo-liberal measures of the Structural Adjustment Programmes, such as trade liberalisation, but also increased IPR protection, did not have the expected positive effects. Instead the countries, like the most of Latin America, experienced an increased focus on natural resources, de-industrialisation processes and less innovation (Katz 2001). In the last few years CAN has shown economic growth, although the importance of raw materials make its economies sensitive. The US are CAN's biggest trade partner, followed by the EU. It also tries to facilitate trade and other relations with associated countries Chile, Argentina, Brazil, Paraguay and Uruguay and observatory countries México and Panamá¹⁶.

Peru

Peru is the biggest country of the CAN but is less populated than Colombia with around 29 million inhabitants. It is a republic that considers itself to be social democratic and is currently headed by the president Alan Garcia Perez¹⁷. Garcia has already been president in the years 1985-1990, a term which promised social changes but turned out disappointing to many. Still he was re-elected in 2006 with

¹³ 'CAN y OTCA realizan Taller Regional Amazonico sobre conocimientos tradicionales, recursos geneticos y propiedad intelectual', Lima, 10/07/2008, www.comunidadandina.org (last visited 20/6/2009); and 'Expertos indigenas analizan propuesta de regimen andino para la proteccion de conocimientos tradicionales', AGENCIA EFE, Lima, 13/4/2009.

¹⁴ Also 'Andean Indigenous reject FTA with Europe', 24/11/2008, www.bilaterals.org (last visited 20/6/2009).

¹⁵ See statement of the forum for indigenous people within Enlazando Alternativas <http://www.enlazandoalternativas.org/spip.php?article265> (last visited 30/6/2008)

¹⁶ See www.comunidadandina.org (last visited 20/6/2009).

¹⁷ See <http://www.comunidadandina.org/quienes/peru.htm> (last visited 20/6/2009)

new promises for social improvements but also fiscal responsibility¹⁸. The neo-liberal programme is regularly criticised by social movements who also claim that the current government employs repressive methods. In the past years there have been riots and strikes out of disagreement with the privatisation of cultural heritage as well as Amazonian land.. The recent dramatic clash between police and Amazonian indigenous in relation to the US trade agreement was a climax and for many have condemned the force used by the government here.¹⁹ The support for Garcia has been very low, with approval rates between 20 and 40 percent in the past year. He is unlikely to be re-elected, whereas other right wing candidates are popular in Lima and the socialist nationalist party of Humala is favourite in large parts of the rest of the country, showing the differences within the country.²⁰

Economically Peru has suffered in the 1980s and 1990s but has been growing strongly in recent years, although social and regional inequality, as well as unemployment and poverty, are still high. Despite attempts for diversion its trade is still highly dependent on minerals, but also agriculture and textile are exporting goods. The US is its biggest trade partner, followed by the Latin American countries for imports and China for exports¹³. Peru has negotiated bilateral trade agreements with many countries, besides US also China, Canada and Chile for example. Compared to other CAN countries, Peru amounts for the biggest share of trade and investment with the EU (Defis Sud 2008:5). Relations with Ecuador and Colombia are good, but tensions exist with Bolivia, who's developments are critically followed.

Ecuador

Ecuador is Peru's smaller neighbour with almost 14 million inhabitants. It is a republic that has seen political instability and many different constitutions throughout time, with a new draft started in 2007 after the election of new president Rafael Correa in 2005¹³. The new constitution was accepted in October 2008. Correa was elected based on a social programme and the promise not to sign a FTA with the US. He is said to form part of the 'turn to the left' in South America but seems more moderate than Bolivia or Venezuela in rhetoric and even ambiguous in practice, questioned by some that believe neo-liberal policies continue. Besides joining in on the bilateral negotiations, Correa has removed the law of prior consent with indigenous groups on mining activities and has been said to repress mobilisation against. At the same time however, he has been renegotiating and partly cancelled debts with big institutions, expelled the local World Bank representative for more independence and expressed strong moral critiques at the EU migration policies. Correa still has a lot

¹⁸ See country description on CIA factbook <https://www.cia.gov/library/publications/the-world-factbook> (last visited 10/6/2009).

¹⁹ See article of Van 't Land (february 2008) and others on www.noticias.nl/globalisering (last visited 20/5/2009) Also various indigenous declarations strongly criticize this government, see www.minkandina.org (last visited 20/5/2009) and www.bilaterals.org (last visited 20/6/2009); and 'Jornadas por la democracia', August 2008, Programa Democracia y Transformacion Global, Lima,

²⁰ This shows from analysis by the Peruvian Institute of Public Opinion in Lima (IOP) <http://www.pucp.edu.pe/iop> (presidential approval and coming elections; last visited 20/5/2009).

of support and has just been re-elected after two years of continuous electoral processes. He also receives criticism however from very different groups, varying from business that believes him to be too ideological to indigenous, press and environmental groups that accuse his government of racism and repressive, as well as co-optive, strategies.²¹

Economically, Ecuador has suffered a last major crisis around 2000 and is currently steadily growing, but less strongly than Peru and more affected by the recent crisis. It is substantially dependent on its petroleum resources, followed by bananas and other agricultural goods for export, of which almost half goes to the US. The EU share is moderate, but it is still considered an important partner however, in particular for bananas.²²

3.3 The EU-CAN Negotiations

The relations between the EU and CAN were already established in the seventies with cooperation on the creation of the regional bloc and the preferential trading agreement that the EU granted CAN together with other developing countries (Santander 2006). Trade flows between the EU and CAN have increased with the EU as the leading investor in CAN and second largest trading partner after US. For the EU, the CAN is a relatively small trading partner. To renew the relationship a Framework Cooperation Agreement was signed in 1993, followed by the Declaration of Rome on political dialogue in 1996 which contemplated that official meetings would regularly follow. This framework was replaced by the new Political Dialogue and Cooperation Agreement of 2003 and a process for a future Association Agreement, including the three pillars common to the EU, namely political dialogue, development cooperation and (free) trade, was to be speeded up from 2006 with negotiations starting in 2007.²³ The political dialogue included efforts to increase integration within CAN as based on the EU model. There was a focus on democracy and inclusion of civil society, although critics consider this rhetoric again, pointing at earlier negotiations of the EU and the current situation in both continents. The dominance of the trade pillar shows not only from the current process in which only this pillar is left, but was already visible in the earlier drafts of all three pillars.²⁴ Within the trade pillar there was always a tendency to maximum liberalisation and market access, of which the EU consequently contradicted herself on whether this is a free trade agreement or not.²⁵

²¹ 'Ecuador: Correa comes in for criticism from the left', Inter Press Service, 5/12/2008 and 'Ecuador dejaria de apoyar negociacion con UE si no cambian ley migratoria', El Comercio y Andina del Peru, 8/8/08. Different declarations CONAIE between January 2008 and now (for example 9/1/2008 and 16/5/2008). This also showed from the interviews.

²² See footnote 13 and Powerpoint Presentation by R. Aspiazu 'Negociaciones CAN-UE: Estado y Perspectivas' (no date).

²³ See http://www.sice.oas.org/TPD/AND_EU/AND_EU_e.ASP (last visited 25/6/2009).

²⁴ See www.noticias.nl 'Mei 2008: Verzet in Lima'. And 'Lima Declaration' V Latin America and Caribbean-European Union Summit. Lima, May 16, 2008 and www.noticias.nl 'Verklaring van Lima: een lege huls', May 18, 2008.

²⁵ In some cases the EU emphasized that it did not concern a free trade agreement but instead a partnership (such as official conclusions first round, Bogota 21st of September 2007) whereas other, also official, documents and

When leaving for the field in August 2009, three official negotiation rounds had taken place, complemented with some smaller meetings on each of the 14 negotiation topics or tables, one of them being IPR. Especially during the last meeting in Lima in May 2008 criticisms to the negotiations were ousted very openly in a simultaneous contra-conference of many social movements, both Latin American and European, as united in *Enlazando Alternativas*. These movements also claimed that all decisions are being taken behind closed walls.¹⁴

There was a strong emphasis on taking into account asymmetries, both within CAN and between CAN and EU. In Lima it was decided that a flexible framework agreement would be more effective as there was the strong disagreement within the CAN.²⁶ This was mainly related to IPR on biodiversity or even the use of biological instead of genetic (resources), which Bolivia, and to a certain extent Ecuador, disapproved of.²⁷ Other difficulties were (public) services and sustainable development and trade. Bolivia is often blamed for blocking the process, but – as we will also see later - within Ecuador people also point at their own government with an opposing minister that sent a critical letter to the EU. Critics however feel it is actually Peru and Colombia's strong positions and impatience that causes the problems, as well as the free trade focus and demands of the EU. The 4th round that was to take place in July 2008 in Brussels was postponed by the EU as a result of the disagreement within CAN with reference also to the issue of intellectual property rights. (Gutierrez 2008)

Meetings, especially on IPR, have been going on afterwards as well and in the meanwhile there was also the change of 486, bringing out the internal differences even stronger. Even though it is said biodiversity was not part of this change and it was related to the US and not the EU, many believe certain parallels can be drawn. We have seen in the CAN description how this process, combined with other internal issues, increased the regional crisis.

In September Peru and Colombia sent a letter to the EU requesting bilateral negotiations as they wanted to move forward faster.²⁸ Social movements say both countries already solicited bilateral agreements during the 2nd round, but since the EU had a mandate for the whole region they initially refused. In October the presidents came together in Ecuador in order to discuss the issues facing the region and EU trade agreement in particular. It was decided that they would still aim for negotiation as a bloc, with exceptions for Bolivia and Ecuador in sensitive issues. Several meetings between the two regions to discuss the continuation of the negotiations were cancelled by both sides. In November it turned out however that the proposal of Peru and Colombia to negotiate bilaterally had already been

several scholars show that this is indeed their goal (such as the leaked directive for the negotiations and on their website) and current rounds also prove this.

²⁶ 'CAN y UE llegan a acuerdo marco flexible para asociación, anuncia Presidente García', Agencia Andina, Lima, 17/05/2008.

²⁷ 'Una palabra traba la negociación entre la CAN y la Unión Europea: 'Biológico' o 'genético'', La Razón de La Paz, 2/10/2008, and confidential document, subgrupo 11: Propiedad Intelectual, pp. 8/9.

²⁸ "Uribe and García break negotiations between the EU and the CAN", RECALCA, Bogotá 16/09/2009; on www.bilaterals.org (last visited 20/6/2009).

accepted by European Union. Promises made by Peru and Colombia at the last CAN summit in October were thus broken. Bolivia and Ecuador were said to be allowed to step-in any time as the negotiations would not be exclusive. This is not considered to be very democratic however as it would most likely be on the other's terms, going against the wishes of Ecuador and Bolivia to achieve an alternative kind of agreement. (Gutierrez 2008)

Many were surprised however to find that Ecuador was joining in on the negotiations as well, and despite refuting this position again afterwards, they are currently negotiating together with Peru and Colombia. After the EC got approval for this new setting in December 2009, rounds are taking place at a much higher speed now with three new rounds up to May and an aim to finish before September 2009. Whereas the EU had not put forward concrete IPR proposals in earlier rounds, the new start brought a strong EU position on the topic, going not only beyond TRIPs, but also beyond the US FTA and even European legislation. Especially the increased patents and data protection are strongly criticised for its negative effects on access to medicine by civil society from both regions, as well as the European Parliament.²⁹ Partly due to these 'sudden' EU demands, interest for the negotiations and especially the issue of IPR grew strongly. Following several impact studies, meetings³⁰ have been organised by transnational alliances of social organisations, often in cooperation with critical members of the European Parliament that see their recommendations to the commission ignored. This is not only the case for the topic of IPR, that they have emphasised the EU's responsibilities on, but also the disintegration of the CAN by these strong positions and decision to negotiate bilaterally.

²⁹ See 'EU, Andean Nations Struggle Forward to Trade Talks', Bridges Weekly Trade News Digest, 13 (6), 18/2/2009. Criticisms from civil society already shows from a letter from European social organisations to the European Commission 25th of June 2008, a declaration of European (TNI), Andean (ASC) and other groups, 26th of November.

³⁰ The alliance CAN-UE, with SOs from both continents, undertook several impact studies specifically on IPR, such as by Seuba Hernandez and G. Holguin (both 2009). A large meeting that was organized by Health Action International and Evert Vermeer Stichting including these different SOs, European Parliament Members and Members of DG Trade and Development of the European Commission that I personally also attended on the 17th of February 2009.

Chapter 4: Research Methodology

This research will be structured around two main questions, which will be discussed here first, followed by an operationalisation and explanation of methodology, methods and data used in order to answer these questions.

4.1 Research Questions & Hypotheses

The theoretical framework has informed us on the issue of, and debate on, IPR and the process and politics of multilateral agreements on this topic. Less is known however about the bilateral processes that are currently so popular and often involve developing countries, whose positions and politics are yet to be academically assessed. In order to do this we have looked at more general theories on decision-making, power and the role that ideas and NSAs can play if facing the right political opportunity structures.

The background information has helped to form an idea of the current negotiation process and the different contexts of Peru and Ecuador, whose comparison is to lead to additional information on politics of trade and IPR in developing countries.

The research questions, and sub-questions, are therefore the following:

How are the positions of the Ecuadorian and Peruvian government defined on the topic of Intellectual Property Rights within the trade negotiation process between the EU and CAN?

- What are the positions of the Peruvian and Ecuadorian government on IPR?
- Who are stakeholders (state and non-state), what do they want, what strategies do they maintain and to what extent can they exert influence on the position of the countries?
 - What political opportunity structures help or impede them?
- Is the IPR debate important for the position?

What differences exist between the position forming on IPR of Ecuador and Peru and why?

Hypotheses

Before gathering the data different hypotheses in relation to the position forming were made based on the theoretical framework and background information that will be reproduced here.

-First of all it is clear that local politics and ideas matter and that Peru and Ecuador show very different stances towards free trade negotiations in general. News articles show Peru is already more favourable to the current negotiations than Ecuador and has signed a trade promotion agreement, including IPR, with the US before. It seems likely that Ecuador with a generally more ethically focussed rhetoric might be more sceptical than Peru, both of the agreement and inclusion of IPR.

-Theoretically, both state and non-state actors are considered potentially influential and IPR is likely to affect many people. Main stakeholders are expected within the different ministries of both governments such as those of trade and technology, likely to be in favour, and health and environment, likely to be more concerned of the inclusion of IPR. Of NSAs only the Andean Business Association and Labour Association are officially represented at the time, but also others, business and social, are expected to have an interest. The last one will include a critical voice such as expressed at *Enlazando Alternativas*.

-There is disagreement on whether BOs are more influential than SOs, but the countries political opportunities structures differ in that Peru seems more repressive and Ecuador facilitative towards SOs and the other way around for business. In general I do not expect a substantive decisional impact, but even the discursive influence of SOs will likely be limited.

-Inside CAN the co-members and their NSAs might pressure each government too. We know Bolivia is extremely sceptical and has expressed concern about IPR whereas Colombia's position will be closer to Peru.

-Lastly other actors and in particular the EU are expected to play a substantial role considering the claims on its (soft) power, new-constitutionalism and preferences. We know that the EU is in favour of strong IPR regulation in a knowledge paradigm and will be pushing for this. This is not a focus of this research however.

-Since the IPR issue has been a bargaining tool in TRIPs, it is possible that the countries maintain this view upon the issue, also because I expect little public interest. This would mean that the whole IPR debate (and actors that maintain a position in this) is not directly relevant to their position. On the other hand the countries will be aware of the debate and the relation to developing countries as they have been participating in the WTO and Doha, as well as negotiated this topic bilaterally in the case of Peru.

4.2 Operationalisation

In order to answer the research questions in a validate way, it is necessary to operationalise and formulate clear definitions on what the research will entail. The following conceptual scheme and operationalisation of relevant concepts as well as the units of analysis at stake are to serve this.

Conceptual scheme

The following scheme shows the potential influence of the ideas different stakeholders, such as ministries and institutions of the public sector (government self) and various types of NSAs, have and that might influence the government ideas and finally position, our dependent variable. These are embedded in structures of political opportunity, the current trade regime, IPR debate and the culture of the negotiations. This is not exhaustive as we have also mentioned other developments in the theoretical framework and the general presence of globalisation and global governance. As reflected

in the question due to scope of the research I will focus on the influence of ideas in particular and see if political opportunity structures and the IPR debate are relevant indeed.

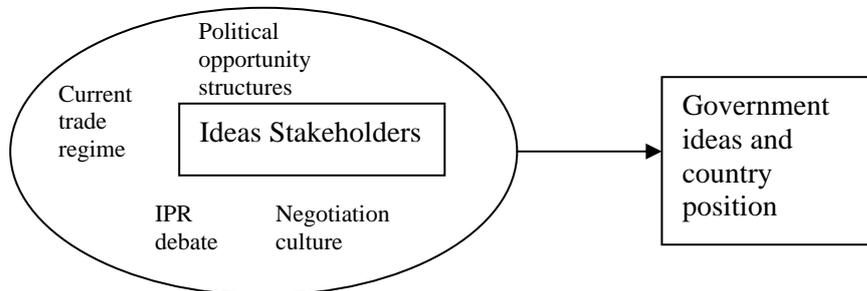


Figure 1: Conceptual scheme (B. van Paassen)

Operationalisation of major concepts

Positions are considered here to be based for a large part on ideational factors and potentially influenced by different actors. Through process tracing and critical discourse analysis I will try to go beyond official statements. The exploration of the position involves a better understanding of the rationales or as we will call beliefs behind a pro, cautious or negative stance towards the FTA in general and IPR inclusion in particular.

Stakeholders are defined here as any individual or group that *has “something to gain or lose through the outcomes of a planning process or project”³¹*, in this case the inclusion of (certain) IPR restrictions in the trade negotiations. As mentioned these stakeholders can be within the country government, other governments, outside institutions or NSAs and differ by context. I do not claim to identify and investigate all stakeholders within this research and will focus on the key ones within each country from government, business and civil society.

Influence will be defined here as the activated power or more simply outcome as defined by Lukes (2005). There are many ways to look at influence and it is a problematic concept in any research, but for the purpose of this research I will stick to the typology of Arts (2003) as discussed in the theoretical framework with three faces of influence, namely discursive, decisional and regulatory. As the process has not ended and influence is often not observable, such as is the case for non-decision making power, influence of groups will be assessed based on earlier experiences as well as respondents’ perception of who is important and will be in this process.

Political opportunity structures are defined here as *“conditions under which [NSAs] influence policy making”* (Sell&Prakash 2004:146). Despite its name, these conditions that can be both stable and changing can either help or constrain the freedom of action of NSAs and differently for BOs and SOs (Tarrow 1994). In this definition it includes access (official inclusion, consultation, lobby),

³¹ Definition by ODI at http://www.odi.org.uk/RAPID/Tools/Toolkits/Communication/Stakeholder_analysis.html (last visited 20/6/09).

alignments (stability government), influential allies, coherence of elites, repression/facilitation and strength of the state. I will also look at other contextual factors however such as public interest and opinion.

Units of Analysis

Cox (1972) speaks of subsystems of states and subsystems within those states that can be both representative, such as the government, or participatory, such as the NSAs we have been discussing. Both the Ecuadorian and Peruvian state as well as their representative and participatory subsystems as will be identified as (key) stakeholders on the topic will be the units of analysis here, as is graphically displayed below.

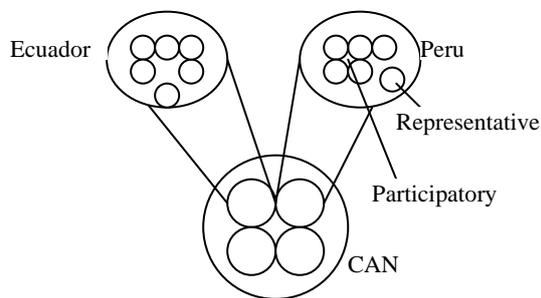


Figure 2: A graphical representation of the subsystems that form the units of analysis (B. van Paassen)

4.3 Methodological reflections

As already referred to in the theoretical background, this thesis comes from a *constructivist* stance or epistemology with a belief in the complexity of political processes, including the importance of both structure and agency, power and ideas. The focus on agency will be reflected in the research on different actors, also non-state, involved in the policymaking with a reference to context as they are embedded in structures that can be both enabling or constraining. It is said that constructivism shares a special relationship with international relations and questions of power and is particularly useful in the studying of new issues influenced by ideational factors (Verger 2007) as will be done in this research.

This approach relates to the *critical inquiry* or *theory* as the main theoretical perspective, which sees ideas as mediated by power relations in society. It also comes from a belief that science should aim at transformation, but with the scope of this research this might be more difficult (Crotty 1998).

As will be done in this research, constructivism often employs a *qualitative* approach. Qualitative approaches are sometimes criticised for being less ‘scientific’ than quantitative research that can present figures and is said to be more neutral and generalisable. On the other hand, qualitative research is more open and useful when exploring and creating a deeper understanding of new areas and positions and perceptions involved as in this research. Claims by positivist pro-quantitative critics

can largely be offset by maintaining post-positivist criteria for the research³² that will be strived for here too (O’Leary 2004). Concerning generalisations some say these can instead be analytical based on theory (Tellis 1997) which will be attempted here to a limited extent, as knowledge can still be generated without generalisations as well.

A *case study* is often used in constructivist research as it is useful when contemporary events require a holistic, in-depth investigation bringing out viewpoints of different participants. It can be exploratory, explanatory or descriptive (Tellis 1997). Since this research involves both what and why or how questions, it can be considered a exploratory-explanatory case study.

Case studies can be singular or multiple. This research will focus on two cases, namely those of Peru and Ecuador, and study the process of positioning towards IPR in the EU trade negotiations within both countries individually as well as compare the results and thus retrieve more information through comparison. Selection of cases should aim at maximising learning in the available time (Tellis 1997), whilst keeping strong boundaries (Buroway 1998). The choice of two countries with many similarities but still a different stance in the process is useful in this *comparative case study*.

An additional aim of this comparative case study is to extent it to broader power structures and its context as discussed in the theoretical framework and background. It does not claim to fully be an *extended case study* as Buroway (1998) describes however, since the set time for this research would not allow such an extensive project and self-involvement.

The focus on power structures relates to the *Critical Discourse Analysis*, which will also be employed only partially. The discourse as a text, a discursive and a social practice of different parties, mainly governments, will be studied critically as part of the analysis. This is based on critical theory and the belief that meanings are constructed, to be understood and challenged (Blommaert&Bulcaen 2000).

Different *methods* are useful for these different methodologies, but also different sources of data can and should be used within the single methodology of a case study, such as documentation, archival records, interviews and direct or participatory observation (Tellis 1997). The main data source here is *semi-structured interviews* with relevant stakeholders (representative and participatory) as will be described into more detail below. Semi-structured interviews are considered the best tool in this type of research (Tellis 1997) and allowed me to keep a list of questions and items at hand as well as a considerable amount of flexibility as depending on the person, the interview and the time. I aimed at 15 respondents in each context with an equal share of different types of stakeholders in order to create a relatively broad picture of the process within the scope of research. As we will see the selection was based on perception of relevant stakeholders and snow-balling. Interviews were held and transcribed in Spanish with the necessary care in translation to English observations and quotes.

³² Namely neutrality or subjectivity with transparency, dependability, authenticity, transferability and auditability (O’Leary 2004).

I have also engaged in *direct or participatory observation* as several relevant meetings or workshops took place during my stay. This allowed me to retrieve information in a less direct and more informal manner.

Secondary data complement the above, such as through (content) analysis of policy documents and statements by NSAs, as well as newspaper articles on the topic.

Data are largely gathered through analysis here when process tracing, which will also be discussed in the next paragraph.

Triangulation is a main principle in any research from the ethical need to conform the validity of the processes (Tellis 1997) and is even more necessary in a polarised one like this. Triangulation has been established by cross-checking data from different interviews with each other as well as with the document analysis.

4.4 The Data

The data used for this research will be discussed next, starting of with the main source of data, interviews; how respondents were found and what the final sample looked like. After this, other data sources as well as the data analysis that can be considered part of data gathering are explained, followed by a reflection upon limits and constraints of methodology.

The process of sampling and interviewing

While it was hard to identify stakeholders and contact ministries and institutions before leaving for the field, after arrival in Peru I quickly had access to a large range of respondents. This was largely possible with the help of contacts I already had from a governmental background and the use of ‘snowballing’. Where meetings were not directly arranged for me, it was very useful, if not essential, to have a reference helping me to ‘get in’. The danger is that people are selected for me, potentially leaving out critical or underrepresented voices. Interestingly however, often their choice of respondent was indeed among the relevant stakeholders I identified myself. Concerning critical voices the problem seems limited, especially as most officials were happy to give me contact details of their ‘opponents’ as well and were generally quite open about these things. It is possible that underrepresented voices (both within and outside the government) maintain this role in my research. But as my aim was identifying the main stakeholders, both in interest and influence, this is not necessarily a problem either. It would be interesting to see of course how the underrepresented within the government perceive the process and why they are underrepresented, but this is beyond the scope of the research. For NSAs I mainly interviewed the more institutionalised or visible (such as in news articles and internet) ones and still quite a few of these felt underrepresented. This was particularly the case for more radical or indigenous organisations, which were actually most reluctant to meet and are therefore unfortunately underrepresented in my research. Considering the scope and time limits of the

research it was never an aim to cover the whole spectrum however and the final sample was both very broad and relevant.

For the Ecuadorian context it was initially harder to get to the right people, but the Peruvian –and later also Ecuadorian through snowballing- contacts were helpful in this again. This led to a relatively similar sample in number and position, increasing comparability between the two cases.

Although a few respondents were hesitant in sharing information or did not let me record, most were quite open and took their time. Since opinions were generally quite strong or even polarised I had to be careful during the interviews not to take position, although in some cases it helped to be either a bit provocative or very understanding. It turned out the semi-structured format worked well in acquiring as much information as possible.

*The sample*³³

Whilst I was in Peru I held twenty-one interviews, seventeen full and two short interviews particular for the Peruvian context, plus one EU delegate and one with two members of the CAN Secretary General. Of the 17 full Peruvian interviews, seven were with government institutions or negotiators and one with an ex-negotiator. Six interviews were with social organisations, two with business, two with academics and one with a person who was both academic and business representative. The shorter interviews were more introductory at the beginning with a government expert on the IPR topic and negotiations and another one with a more social movement expert from a social movement, who organised a workshop I attended as well. These were useful for some background information and contacts and are sometimes used in the analysis.

Most of the respondents were directly involved in the EU process, but some less or not at all. In that case they were either academics with knowledge of the process or had been directly involved in the US negotiations, which will show to be highly relevant for my research. These people were usually quite well informed on this process however, proving very useful in the study of both negotiations processes.

In Ecuador I held seventeen full interviews and four shorter and more informal ones. Of these twenty-one interviews in total, there were four with government officials or negotiators (Ministry of foreign affairs, health and the national IPR institute IEPI) and six ex-government or negotiators. The ex-negotiators were still relevant as they often just quit, having been involved in the US and EU process, and as they maintained ties with those currently involved at the governmental level. They were also still participating, but now from a civil society role in business, SM organisations or at universities (academic). The other eleven interviews were with NSAs, mostly SOs, although often engaged in several roles at the same time.

³³ A full list of the sample is given in appendix 1.

It is interesting to see what positions respondents maintain in the negotiations and on the IPR topic as this can influence their view or perception on government positions and the other items of the research, as well as give a direct idea of the different stakeholders positions and differences between the two countries.³⁴

In Peru a large majority was highly in favour of the agreement and also an inclusion of IPR, although some considered this a bargaining tool/extrinsic factor. Four people were mainly cautious because of topics such as IPR and a two were principally against both the inclusion of IPR (2) and one on the agreement in general..Most of the 'believers' in benefits of FTAs or IPR have a governmental background, but also business and some academics maintained this position. Except for one representative, all SOs, together with one academic, were either against the agreement or very cautious and often critical on IPR in particular.

In Ecuador the positions of the respondents were very different with only six 'believers' in the general agreement and four in IPR in particular, and then more as a bargaining tool, coming from government and business (academia). As many respondents were (morally) against, as well as cautious and worried on what the outcomes could be. These positions were found in the SO, academic, ex-negotiator and local pharmaceutical business respondents.

Other data

Besides the interviews, I participated in an SO workshop both in Peru and in Ecuador, of which the last one on the EU-CAN process in particular meaning that the content of the presentation was directly relevant. In both cases discussions were particularly interesting to see the relation between and viewpoint of different organisations, either on the topic at stake in particular or on participation possibilities in their respective countries.

Most of the respondents gave me some article, declaration or other written document, which was used in the data analysis. In the case of some NGOs and ministries, also website information was taken into account, including some that have not been interviewed (such as certain indigenous groups). Together this represents an enormous amount of information that has been selectively, carefully yet thoroughly analysed in order to reach strong conclusions on the topic.

Analysis

In order to get an overview of all different answers on different items I have made a table in SPSS based on summary of the interviews, which forms the frame of my argument, especially where statements keep recurring. The full interviews as well as their summaries were continuously studied in order to fill up the gaps, add the relevant quotes or anecdotes and check which actors are referred to more than others in order to identify the stakeholders and institutions. After this I crosschecked and

³⁴ A general overview of different positions of stakeholders, represented by the different groups interviewed in this research, will be given in table 1 and 2 as well.

complemented this information with a critical discourse analysis of the most relevant (press) articles, (negotiation) documents and declarations. I did not only take the information as such, but tried to read ‘between the lines’ and find positions or assumptions lying underneath, as well as patterns between the different data.

The above helped me to thoroughly trace the process as part of the data analysis as well, identifying key events and steps in decision-making and exploring these into depth in order to gain a better understanding of the politics involved.

Limits and constraints

Reference has already been made to the role of personal perception, both in gathering data and interpreting them. Especially as different parties have very polarised ideas on the topic it was important for me to appear neutral in my own view on the topic, but remain transparent as to my intents. As complete neutrality is not possible, I have aimed for transparency also in the writing up my report, as constructivism prescribes.

The polarisation of the debate, as well as the fact that negotiations were still ongoing, led to initial hesitation in sharing (official) information with me of different respondents. Due to the informal setting and length of the interview I could still retrieve the information I needed, be it less specific and concrete than might have been possible otherwise.

The impasse of the negotiations at the time of fieldwork and the changes taking place afterwards show the relevance of timing of the research that is to be taken into consideration. Would the fieldwork have taken place now, different findings on positions and influence might have been found as well as additional information and understanding of the process.

I have already discussed issues around the selection of respondents, which was in no way at random and includes under representation of less visible, but also indigenous actors. Within the limited scope of the research, it did however provide me with key actors from all different groups identified, allowing me to draw a broad picture.

Chapter 5: Data-analysis of two case studies

In order to reflect on developing countries position taking in trade negotiations, and IPR in particular, we will look at two national cases, those of Peru and Ecuador.

Because a common position on the IPR topic was never reached within CAN, and countries are currently negotiating bilaterally, they have more relevant and distinguishable positions than within the EU for example. In some cases it is difficult to differentiate the two cases however, such as with social and indigenous movements that often cross borders in their joined declarations or higher CAN level participation.

By presenting a thick description of the (key events of the) negotiation process, the positions and participation of various actors (relevant for government position) in each country and a comparison between the two, I will explain nuances in these themes and try to uncover the complex 'black boxes' of these states. This can increase our understanding of the politics of a 'new' topic such as IPR in negotiations between regions with a different level of development, focussing on the less developed. The focus is often broader than IPR however, as it is interesting to see the interrelation to other topics and interest groups that can take precedence over IPR issues.

This analysis will be based on 42 interviews with different kind of actors in different positions, the documents that I retrieved from these respondents, other literature on the topic and the many news and internet articles that have been published on the case. I will also use the data in a cross-country manner, confirming Peruvian data with what Ecuadorians said about that context and the other way around.

In the following chapter we will thus take a close look at the case of Peru and Ecuador respectively. The process tracing will start further back with the establishment of TRIPs or IPR regimes in the countries, followed by the highly relevant negotiations with the US, as well as its outcomes and implications, such as for CAN. This history sets the context for the current negotiations that we will discuss right after. Here a more thematically focus will cover the different relevant items such as the government position and decision making, as well as the transparency and mechanisms they offer to civil society, followed by the interest, positions and role of (key) stakeholders. In the final comparison I will draw upon the concept of Political Opportunity Structures and look at the inclusion of the IPR debate in particular. This in order to identify, as well as explain, similarities and differences between the two cases and their consequences.

5.1 The case of Peru - An era of FTAs

5.1.1 Historical perspectives

IPR in Peru

Peru is, after Colombia, often seen as a country with a relatively strict regulation of, and strong institutions in IPR, despite the amount of ‘piracy’ found in the streets. In 1992 the National Institute of Defence of Competitiveness and the Protection of Intellectual Property (INDECOPI) was created, bringing together these two areas in one public institution. INDECOPI has initiated projects on the protection of traditional knowledge and biodiversity, and as a country Peru has always promoted these topics on multilateral agendas, such as the Convention on Biological Diversity. Another project focuses on the protection of Geographical Indications, especially after a bad experience with a French company patenting their local product Maca (Ec_3), but also stimulating this nationally (Pe_3,9). In 1995 Peru became a member of the WTO and signed TRIPs, adjusting its laws and norms to these standards and introducing patents for the first time. Together with the DOHA declaration and the Andean norms these agreements are used as the main reference in any negotiation on IPR. (INDECOPI 2005) Their assertiveness on the above mentioned topics is still emphasised by government officials, as well as their coherence with European positions in these forums (Pe_9,16,17).

US negotiations

Whereas all four Andean countries were originally participating in the FTA negotiations with the United States, only Peru has a ratified final agreement that just took effect on the 1st February 2009.³⁵ The negotiation process with the US of 2005-2006 is very relevant for our analysis, as it was the first time Peru was engaged in negotiating a bilateral agreement, and one including IPR as a prime topic (Pe_8,17; Garcia 2008). It was thus the first time they had to take position on this in such a setting, and it is said that the government position on the topic has changed little since (Pe_3,8,15,17). Lastly the process was often used by respondents as a reference for participation and other items in negotiations in general, especially as the EU negotiations had been limited up to the moment of fieldwork.

According to the government officials their main - and according to some only truly offensive - aim in IPR was to defend a fair protection mechanism for biodiversity and indigenous knowledge. The Peruvian view on this does not always correspond with other mega diverse countries, such as Bolivia, nor the view of some of their own indigenous groups, which shows from the recent conflicts over this topic that will be discussed later. The biggest achievement on this topic was a reference to the

³⁵ A partir de hoy entra en vigencia el TLC con EE.UU’, Correa del Peru, 1/2/2009

importance of the issue in a side letter of the final treaty³⁶. Geographical Indications were mentioned as another key issue to the country, although the negotiators accepted a different system from the US, which may cause inconveniences with the EU system (Ec_3).

Besides the few offensive interests mentioned it seems that the Peruvian negotiators were to make sure the topic would cause as ‘little harm as possible’ (Pe_8,10,15,20) or as one civil society member quoted the negotiator “*we are to make sure that we prevent this elephant (the FTA) in a crystal house to cause major damage as much as possible*” (Pe_11).

The most harm was feared within the realm of access to medicine. US demands, such as the extension of patents and test data for medicine, went in many ways beyond the TRIPs agreement and limited flexibilities achieved in the Doha round. Whereas the public and many SOs strongly manifested this fear, besides the head negotiator and Ministry of Health (Pe_15) no government official mentioned this as a worry. Instead, the Ministry of Trade (Pe_16) discredits the study of the Health Ministry that showed their concern over potential dangerous consequences of extending patents and test data terms as the US demanded³⁷. The conflict between the Ministry of Trade and that of Health is said to have been settled with compensation for the damage the health sector would face, followed by close cooperation between the two (Pe_2, 11). This was disappointing to some (health) organisations (Pe_1,11).

Another impact study of a public institution, INDECOPI that was even the official negotiating institution on the topic at the time, was highly discredited by its own government. These studies discussed the various dangers that Peru was exposing itself to by signing an agreement that included such strong IPR protection (Roca 2007)³⁸. According to a current INDECOPI official the institute switched from supporting the FTA to a highly critical position that believed it was better not to have an FTA than to have one that includes IPR as a topic, a position considered too political for a technical institution. Although many respondents believed the studies were technical and coherent (Pe_5,9), the Ministry of Trade and the head negotiator did not accept them and still considers it a political declaration that ruined the image of a state institution. As a consequence it was decided that from now on INDECOPI was only to maintain a role of technical support, while the Ministry of Trade would handle all IPR negotiations. People were replaced and the head of INDECOPI, Luis Alonso Garcia, had to resign. He was promptly hired by the Ministry of Trade to lead the IPR negotiations from there.

³⁶ For an overview of the full agreement – with chapter 16 on IPR including two sideletters - see http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (last visited 27/6/2009)

³⁷ Valladares Alcalde, G, Cruzado Ubillús, R, Seclén Palacín, J, Pichihua Serna, Z.J. (2005) *Evaluación de los potenciales efectos sobre acceso a medicamentos del tratado de libre comercio que se negocia con los Estados Unidos de America*. Ministerio de Salud.

³⁸ This study includes various papers of important scholars and politicians that were finally joined in a book of INDECOPI president S. Roca that needed a lot of pressure of the publishing university ESAN and the congress in order for INDECOPI to allow it (preface book).

Finally the Pacifico University was asked to do another impact study, which presented more positive figures and is currently still used as a legitimization tool by various officials. (Pe_1,6,9,16³⁹)

According to the main IPR negotiator at the time, there was a lot of public participation and all different entities had a say on their own area of expertise (Garcia 2008). However, a civil society representative states *“How is it possible that those two public institutions, responsible for these themes and saying that it will cause us problems do not have the capacity to influence or define the process with the final decision concentrated at the level of the ministry of commerce?”* (Pe_1).

As this was the first time Peru was negotiating in a bilateral setting, there was both a lack of knowledge, and a lot of interest and debate in the media, public and NSAs. The government organised a campaign to inform the people themselves, explaining *“the benefits it can have for them (...) Which helped us, the country now understood what it was”* (Pe_16). There was also a website on the negotiations, where information was posted after each round. There was also a considerable amount of protest, including national strikes and campaigns, and an attempt to force a popular referendum⁴⁰.

Even though IPR was only one of the topics for most of civil society, some organisations focussed on it more specifically. Medicine and health issues were the main concern and also a topic that seemed to ‘reach the people’ (Pe_10). Negotiators at the time mention the (transnational) health campaign of Alianza CAN-UE, including ForoSalud with Health Action International (HAI; or AIS) and a *“silent alliance with local pharmaceuticals”* (Pe_11) such as ADIFAN. They consider this to have been influential, although mainly due to the intervention of and cooperation with US democrats and civil society. The head negotiator at the time refers to them as key actors, but *“their proposals were generally regarded as reflecting a political agenda and [particular] interest, which reduced their relevance and influence in the overall debate”* (Garcia 2008: 5).

The main national campaign ‘FTA, not like this’ carried this strategic slogan as a way to open the debate without being considered fully anti-systemic as often happens in the pro-FTA context of Lima (Pe_1). Although not a prime issue in this campaign, there was clearly a concern for the IPR topic, again mainly related to health issues. The same was found for campaigns of OXFAM and MSF.

Small indigenous farmers, usually without such representation, expressed strong concerns, in particular on the IPR commitments on genetic resources and traditional knowledge, including the possibility of patenting plants⁴¹. Indigenous organisations such as the Amazonian AIDSESEP and Andean umbrella COAI focussed, and still do, more strongly on biodiversity issues. Also the environmental NGO SPDA worked on this topic, but was more cooperative with the government providing technical analysis, as they felt it would be beneficial to include this topic into the agreement. (Pe_8)

³⁹ ‘El personaje: Luis Alonso Garcia’ in Bajo La Lupa, pp. 15, no. 5, February 2008.

⁴⁰ (No name) Prensa Latina, Lima, 10th of March 2006.

⁴¹ Montenegro de Wit, I. FTA means deeper poverty in Peru, 28th of September 2006, Third World Network. <http://www.twinside.org.sg/title2/FTAs/info.service/fta.info.service033.htm> (last visited 27/6/2009).

Achievements of health and environment campaigns are said to be reflected in the side letter of the agreement stating respect for health, the need for access to medicine and protection and equal benefits of biodiversity and indigenous knowledge (Pe_3)³. Some government officials and most of the SOs claim this means very little however and are not happy about the results in these fields.

There is mention of an academic apathy, although a few scholars have always followed the process. (Pe_7,8)

Business is also said to have participated actively, usually in a manner supportive of FTAs (Pe_14). During these negotiations a mechanism for participation of both local and transnational business associations called CENI (*Consejo Empresarial de Negociaciones Internacionales*) was installed. This included a working group on IPR headed by Dr Carmen Arana, who believes CENI has have been successful as a forum for business with a significant influence (Pe_3). Not all CENI members or business associations in general carried the same view however. Not only small farmers but also other national producers, and in particular the association of national/local pharmaceuticals, ADIFAN, have strongly fought against it. There was a continuous battle with the transnational ALAFARPE, establishing a large presence and the clearest example of pressure and lobby (Pe_1,9,16).

Besides CENI (members), also other civil society actors - after being accredited - could participate in the side room that was present before and after most negotiation rounds. In general, the information given in the side rooms was considered shallow or limited, just as the possibility to ask questions, give feedback or possibilities to use the information was limited (Pe_1,8,11,13). The few NGOs that were present here found they did not have the same access to documents as their business counterparts that arrived at meetings with the relevant and up-to-date papers already in their hands, whereas they could sometimes only see older versions of texts on a 'blind computer', but not take anything away (Pe_1).

Just before the finalisation of the Peru-US negotiations in 2006, a change of government occurred and Alan Garcia replaced Alejandro Toledo as president. Toledo (2001-2006) was being criticised for wanting to sign the FTA at all costs - 'si o si' - just before the end of his term, despite the amount of protest against them. Garcia, who had been president before in the 'lost decade' of the eighties, campaigned with the promise not to sign the FTA unless strong changes were made. In the end however Garcia did sign the FTA as it was and, considering himself the protagonist of FTAs, continues signing FTAs one after another (Pe_1,10,13;⁴²). - This behaviour of signing at all cost is criticised by most SOs, but all government officials instead emphasise the popularity of Garcia after signing.

Many – especially within civil society- feel that there was little space for Peru to really negotiate with the strong US and potential gains are therefore low. In IPR this is even more clear as the topic was scheduled for the last moment when Peru had little choice left 'in this package deal' (Pe_6,8). Most

⁴² Crabtree, J. 'Alan Garcia's Second Coming', 28th of July 2006, University of British Columbia Weblogs.

government officials disagree, pointing to the side letter obtained in IPR and the technological opportunities it could bring. The focus is on the general picture, with the current economic growth of Peru as a first indicator of the general benefits the agreement has brought. In this argument the officials mainly refer to the market access and investment opportunities they created, as well as how this differentiated them from other countries, with Ecuadorian business coming to Peru as a consequence. (Pe_9, 16)



Protesters in the streets of Lima (Source: Bajo la Lupa No. 5 2008)

Source: Translated from Diario La Republica, Lima, 27/9/2006

Implementation FTA US: 486

Not only is the negotiation process with the US decisive for the current EU negotiations, but also the 'highly complex and problematic' (Pe_16) implementation process of this agreement has a lot of the difficulties which are related to IPR.

This derives from the request of Peru to change the Andean norm 486 on Industrial Property in order to be allowed to make the national changes that the US FTA required. Peru claims to have flexibly incorporated any comments and worries from the other CAN countries as their aim was to reach consensus within CAN (Pe_16,17).

According to the Ministry of Trade, which made the proposal, all relevant public institutions were consulted, mainly on technical aspects. However, representatives from the Ministry of Health (and DIGEMID) claim their suggestions were not taken on board and they were even told it was not going to happen until 'suddenly' the decision had been made and the proposal was accepted. The same was experienced by a few SOs that had been wanting to influence the process and provided technical analysis (Pe_1,11).

Different civil society groups were worried about the effects the change of this norm would have on access to medicine and biodiversity, and on CAN integration, as the consensus rule was broken.

Several declarations⁴³ were sent out, but besides a few individuals from CENI, in the end only the indigenous groups were informed. One trade ministry official (Pe_16) explained that they had a meeting with indigenous groups, headed by the indigenous umbrella organisation COAI, after they had requested a meeting via the CAN labour council. The meeting was requested because they strongly disagreed on the process and demanded consultation. This official complains about Bolivian influence on Peruvian movements and stated that their demands for permanent consultation and participation are unrealistic, as Peru is a representative and not a participatory democracy like Bolivia. She claimed the indigenous groups had not tried to get official accreditation by the Ministry of Trade, which is normal procedure for participation. The indigenous groups' anger was partly based on the idea that biodiversity would be affected, as Bolivia believed, but this is strongly denied by most respondents as there are no direct references to this topic in the proposal (CAN_1,Pe_1,4). The Ministry of Trade tried to explain the changes that in their view were not in any way to affect these groups. *"We told them: If it is a political issue and you are against the FTA, then tough luck, as we already have it"* (Pe_16).

The decision of 486 brought out the differences or even conflict between the Andean countries on IPR, therefore being of even more relevance to the EU process that was on hold for the same reason (Pe_1, 16). The relationship between Peru and Bolivia worsened as a consequence, which also shows from the negative view and misunderstanding of Bolivian positions on the Peruvian (governmental) side. A social organisation representative (Pe_13) says: *"We hear that we shouldn't take the bad example of Bolivia that resists free trade (...). There is a very strong anti Bolivia campaign here."* Peru has a good relationship with Ecuador, which Peru is said to have used to convince them to vote in favour of 486. Others speak of pressure and even blackmailing – something 'especially MINCETUR is very good at' - threatening to put certain import restrictions on Ecuadorian goods (Ec_5,6)¹¹. The threat of Peru leaving CAN if this modification was not made is also relevant here. Peruvian SOs criticise their government for this and their general lack of effort to save the CAN integration (Pe_1,11).

The rest of the (long) implementation process took place with the non-governmental participation mainly of CENI (Pe_3), whilst NGOs that aimed to influence the process - as to prevent stricter implementation than necessary - were finding it extremely difficult (Pe_11). When the US-Peru agreement took effect on the 1st February 2009 it was followed by criticism of civil society on risks for biodiversity with the possibility of 'patenting' plants and on the negative affects for local pharmaceutical industry according to ADIFAN.⁴⁴

⁴³ Such as CAOI's -on behalf of many indigenous organisations, mainly Peruvian- open letter to different governments involved condemning the agreement and 486. 'Carta al Presidente Rafael Correa' of the 14th of August for example, as well as declarations such as 'No a 'la flexibilización' de la decisión 486 de la CAN' (2/6/2008).

⁴⁴ Newsletter Red-Ge 19/2/2009

5.1.2 The EU negotiation process & the government

Government positions and ideas

Since the beginning of the negotiations process with the EU, Peru has always expressed its great interest in having such an agreement as soon as possible. Throughout the process they kept emphasising that they would like to go faster and have (therefore) requested bilateral continuation several times (Pe_1,2,13,14).⁴⁵ Now that they are in a bilateral setting and the process is expected to be finished within the year, before the other countries. Despite this,, officials still believe it is going too slow.⁴⁶ This need to advance, together with a lack of faith in the CAN(as we also saw with 486) was reflected in almost all interviews with government and business representatives.

It is related to the fact that they already had an agreement with the United States and thus had ‘little to lose’, as well as being ‘more advanced’, but also to the problems they are having with the Bolivian - and to lesser extent at some points the Ecuadorian- discourse (Pe_2). The strong belief in free trade (agreements) that is echoed by most governmental or business respondents, attests to this as well, although their reasonings vary. Civil society identifies a “*fear things will get worse if we don’t*” (Pe_6) and a need to differentiate from countries without an agreement. Government officials mainly express an optimistic view in which the open market strategy is responsible for the current economic growth and a decrease of poverty which they – but no SOs – observe. Overall there is clearly an idea of a strong ‘need’ for the agreement or, more specifically, market access and attracting investments, that defines the general government position and is relevant to specific issues such as IPR that ‘come with the package’ (Pe_6,8). This idea is widely spread within society, by government and business (Pe_1,6). According to a representative of the Ministry of Foreign Affairs (Pe_12): “*We need free trade. (...) Like in every negotiation there will be winners and losers (...) so the state, and we are doing that well in Peru, will just have to make sure that those affected are helped so that the impact won’t be as tough*”. The term free trade is commonly used by all respondents and clearly does not have the bad connotation it does in some other countries.

Overall the position of the Peruvian government both on such agreements in general, and on IPR specifically, has remained very similar to earlier positions during US negotiations and multilateral forums. “*Positions that are not from now, not from the FTAs, we’ve had them since the 90s and the WTO (...), we are adjusting that to FTA texts*” (representative Ministry of Trade).

In IPR offensive interests are still mainly found within the issue of biodiversity and indigenous knowledge. They claim themselves to be very assertive on obtaining at least the side letter recognitions, as they got with the US, but preferably they want more, such as to be included in the document itself (Pe_3). This is a chance for Peru to prevent bio-piracy and create more equal benefits

⁴⁵ These feelings were also expressed regularly in the daily newsletters Comunidad Andina july-september 2008.

⁴⁶ See ‘EU, Andean Nations struggle forward in trade talks’, Bridges Weekly Trade News Digest, 13(6), 2009.

for indigenous groups of these resources. According to some there is also a major possibility of exploitation, investment and research (Pe_16). Geographical indications, in which they have always maintained a similar position to the EU, remain important too. Other benefits of a stronger IPR are believed to be found in transfer of technology, attracting investments and increasing the own competitiveness (Pe_10,16).

Health is not often mentioned as a worry. Whereas the Ministry of Trade feels risks are minor and instead IPR can be seen as a chance, the Ministry of Health claims dangers are generally acknowledged within the government, also by that same Ministry. They believe “*FTAs can be beneficial in many aspects, but unfortunately in the issue of medicine, it will affect us most. (...) We are the weak point of the FTA, those who will come out most affected, in issues of medication*” (Pe_16).

After the strong reaction of civil society to the most recent EU proposals, a negotiator did claim these IPR demands would not be accepted and there was no need to worry.⁴⁷

It seems that the government feels that other benefits are big enough to compensate this sector, although no concrete promises were made yet (Pe_1).

Overall there is again – as with US - an idea of achieving an IPR chapter with the least harm or damage, as most civil society members perceive it and as some government officials have acknowledged. Positions in IPR are often referred to as more reactive or defensive, showing the lack of importance of the issue to the government (Pe_8). In the case of the EU there is less worry than before, as they already have a deal with the US and they are not planning to go (much) beyond that (Pe_3).⁴⁸

Even though most government officials emphasised the major importance of IPR to Peru, it would never be a deal breaker as it has not been with the US either (Pe_12,20). As mentioned above, market access, other benefits or the general bigger picture are usually considered more important. “*IPR is not only useful in facilitating an adequate investment climate, it was also essential for the subscription of the agreement: two themes that we expect to really take us out of poverty*” (INDECOPI official; Pe_8) summarises this position well.

Peruvian decision making procedures

It has already become clear that since the US negotiations, the Ministry of Trade became fully responsible for all chapters, including IPR. The institute formerly responsible for this, INDECOPI, currently has a purely technically advisory role, mainly on patents and copyright. Other public institutions involved are the Ministry of Foreign Affairs, the Ministry of Health and DIGEMID,

⁴⁷ ‘Peru no aceptará exigencia de UE sobre medicamentos’ in newsletter Comunidad Andina 11/2/2009, reflects the official position on medicine after a strong civil society reaction. ‘Indecopi: Peru buscará que capítulo de biodiversidad en TLC con UE superé al TLC con EEUU’ (22/4/09) shows their emphasis on biodiversity.

SENASA, INRENA, CONCYTEC, INIA⁴⁸ and the Ministries of Environment (new), Agriculture and Justice. Besides the first two these are only mentioned sporadically.

It is clear that the Ministry of Trade is not only the coordinator of (positions on) the IPR negotiations, but is a very powerful actor within the IPR negotiations. This also shows from the fear within the public health institutions (Pe_16) to not contradict them or speak out against them. This Ministry, head IPR negotiator Teresa Mera. and Minister Mercedes Araoz, are - unlike other actors - constantly mentioned. The Ministry claims to coordinate the negotiations in a purely technical manner, taking all state and non-state actors into account. They are satisfied when all parties are half content, meaning that no interest was taken over the other (Pe_17). *I don't have to do what one tells me or another, I have to do what's best for the country*" (Pe_16). Also a business respondent claims the Ministry of Trade does not allow lobby (Pe_2). This is criticised by some SOs who feel this Ministry is instead ideologically *"crazy for money"* (Pe_11), not basing themselves on technical analysis and preferring the big business interest over others. The IPR negotiators claimed at the time they had not been able to make impact studies yet because there were no concrete proposals from the EU thus far.

The Ministry of Foreign Affairs has a representative at every table of the negotiations, including IPR, with a less technical role but more looking at potential political implications (Pe_12). Within IPR their focus is mainly on (the promotion of) geographical indications and traditional knowledge, leading to a slightly different view in some cases. Their power seems limited. *"You can see how little they can do in the process, how much it is being led by commerce"* (Pe_1).

The Ministry of Health and DIGEMID maintain the same position they had with US and that reflects the discredited study at the time, worrying about access to health care and medicine with longer patents and test data protection. A more cooperative stance did increase their incidence at the time. As we have seen with the decision of 486 and the fear described above, the public health institutions actually seem to have a relatively small ability to influence decision making. This is even harder as they do not have the funds to travel to all negotiation rounds, as was the case with the last round held in Brussels (Pe_15).

Interestingly enough, the president is rarely mentioned as a relevant actor in decision making and only a few times in ideational processes within the government.

A large section of the people who are currently involved in the negotiations, were also there during the US process, which some relate to the unchanged positions and experience in (not) dealing with civil society. Many emphasise the good internal coordination between the different ministries, that all carry the same optimistic view of such an agreement and work well together to make it happen. As we have seen this is not the case for all ministries, and besides the Ministry of Health, the Ministry of

⁴⁸ SENASA is the national institute of services of agrarian sanitary, INRENA is the national institute of natural resources and INIA is the national institute of agrarian investigation, all related to the Ministry of Agriculture. CONSYTEC is the national institute of science, innovation and technology. Garcia also mentions SUNAT, the customs authority, and CONAM, the environmental authority, in his article. (Garcia 2008)

Foreign Affairs does not always agree with the Ministry of Trade (Pe_1,12). In general Peru shows an agreement of elites – as civil society also puts it - if only in appearance. As a negotiator of Foreign Affairs states *“There is constant coordination. We try to make sure our position is coherent. (...) There have been tough sessions, as in any negotiation where everyone wants more for his own pitch. We look at the political side, they look at the technical side, you have to balance it.”*

Some SOs refer to the lack of a true mandate, as the people negotiating are the same as those taking decisions, as well as a lack of rules for the negotiations or measures to fight corruption (Pe_1). Besides the dominance of commercial interest and the Ministry of Trade, SOs are critical of the negotiators. *“They are young, inexperienced - although now more - people who don’t know poverty and only use the expensive medicines themselves. I wonder if they have any idea how damaging these matters can be”* (Pe_11). Some feel the government do not care about public welfare (Pe_13) or simply lack the knowledge or capability. In most cases they feel much closer to the Ministry of Foreign Affairs – as opposed to that of Trade –because they consider it more open to social issues and debate.

5.1.3 The EU negotiations & Non-State Actors

Transparency & Mechanisms for Participation

Up to the fieldwork period the negotiations with the EU had not only received less attention, but were also less transparent than those with the US, according to - mainly SO - respondents. *“With the US the whole world knew. Now they are signing agreements in a dangerous manner”* (Pe_10). This also shows from the fact that there is no separate website, as there was with the US, and a lot of documents –even when supposedly public- cannot be found⁴⁹. The government has neither initiated a campaign nor anything similar to that during US.

This lack of transparency can not be, as it was previously, related to an impasse of the negotiations or the fact that they are held on a regional level. The reason is possibly more related to the fact so many negotiations are taking place at the same time, downsizing the relevance of this particular one. It is also considered less necessary as the government is little worried about public opinion. They feel the public is aware of what an FTA is and is generally in favour, especially since the EU is much more accepted as a partner (Pe_16).

⁴⁹ It was difficult to retrieve information on who was present at different meetings, what information was given to civil society, etc. Different officials told me this information was to be found on the internet, which turned out impossible, as well as receiving it through e-mail from them. Recently they did add a section on Peru-EU but there is only two pages of information on there at the moment (www.mincetur.gob.pe; last visited 25/3/2009).

Also mechanisms for participation have diminished, such as the disappearance of CENI, which most people regret, as it was a good way to coordinate business interests and exert influence (Pe_3,14,17). As it never included other civil society sectors little has changed for them.

According to government officials anyone accredited has access to the side rooms where facilities, activities, information and other materials are given as mentioned before. There is the option of asking questions and presenting proposals and in next meetings being told what negotiators took on board and what they did not. (Pe_9,16). There have also been some other information meetings, both at the Andean and the Peruvian national level. According to a representative of the Trade Ministry, they stayed until late at night giving information, table by table, informing them on the chapter and answering questions and collecting proposals. NGO participants of both the side room and these meetings are critical as information was lacking and they are not allowed to diffuse much of the information or use it in another way. The limited information meetings mainly caused frustration and led to a lower participation (Pe_1,13). Civil society has been requesting another information meeting on the first new round in February 2009⁵⁰, as well as the re-introduction of the earlier mentioned 'blind computers' to see provisional texts in order to increase transparency (Pe_1). Whereas the government claims to take feedback, proposals and interests of all parties equally, SOs feel this is more the case for economic groups. They claim their space here is limited to listening what the negotiators have to say (Pe_1,13).

Another possibility for participation is sending letters to the ministries and requesting private meetings, as they are sometimes adhered to. This direct contact with, or information from, the negotiators themselves is indeed a clear demand of SOs.

In some cases organisations are directly consulted by the government on specific topics. For example the environmental organisation SPDA has occasionally been invited in the past, and certain business associations are still regularly consulted (Pe_6,14). Whereas business respondents believe the Ministry of Trade is open to everyone, whatever institution (Pe_2,14), some SOs claim "*They only consult with business*" (Pe_13).

Where the government did refer to SOCICAN for example, none of the SO respondents thought this was relevant.

The lack of transparency, information, impact studies and participation mechanisms was not only expressed in the interviews, but also stated in almost all letters and declarations of civil society (coalitions)⁵¹ and posts of Peruvian citizens on the CAN forum.⁵² We have seen the government related this partly to the early stage of the negotiations, although SOs believe it is also important

⁵⁰ ADIFAN in Red-Ge newsletter 19/2/2009.

⁵¹ Such as the letter to the government on 14/9/2007 by Red-Ge and 5/12/2007 by 20 Peruvian organisations

⁵² 'Foro Virtual: Why is it important to negotiate the Association Agreement CAN-EU together?' on the EU-CAN section of www.comunidadandina.org with a few posts up to June 2008. Section removed by 1/2/2009.

earlier on in the process and more recent news and personal correspondence points at a similar situation still.⁵³

Interest, Positions & Participation

Besides a lack of transparency, the fieldwork also showed a lack of interest in and participation by civil society, as well as a lack public debate or interest on the negotiations and even less on IPR in particular.

Foro Salud is an example of an organisation that played a large role in the process with the US, but was said not to have been participating yet (Pe_7). Also pharmaceuticals ADIFAN and ALAFARPE were not yet mentioned as active players, although we will see they later appeared in some news articles. Some respondents of both SOs and BOs that were highly active in the US process, admitted they had not been to any round so far with the EU. Often they were not sure why this was the case, but mentioned the impasse or slowness of the process as a reason not to invest time and money yet (Pe_2,9,14). It is also due to the fact that many things were already set as “*the great battle has been with the US*” (Pe_2). Not much new or dangerous was expected, especially because the EU was perceived as a better negotiation partner or even ‘ally’.

Mentioned business associations are the umbrella of CONFIEP, the export groups of ADEX and COMEX, the Chamber of Commerce of Lima, the more critical national producers of SNI⁵⁴ and mentioned pharmaceuticals ADIFAN and ALAFARPE. For business the lack of interest perceived (Pe_14) can be related to the fact that the EU is a much smaller business partner than the US and many other negotiations, including with China, were and are taking place at the same time. The websites of the mentioned associations often have a section on the agreement with US or other negotiations, but not on the EU. One business respondent states “*we have never been active in IPR as we have been in other topics as there has never been any inconvenience*” (Pe_14). Government officials believe ‘business always has an interest’ and is often willing to help as they believe in the benefits. They are considered most capable of technical analysis, partly due to a higher level of resources (Pe_3,10).

These officials also feel that SOs are more interested in the political and cooperation pillars now with the EU, whereas these organisations do clearly express concern for the commercial pillar in particular (Pe_4,9,16). There is a concerned group of SOs including the highly active RedGe and AIS, as well as Alianza Continental Capitulo Peru. Indigenous organisations often work under the umbrella of CAOI which represents mainly Peruvian organisations but also works on the Andean level. AIDSESEP,

⁵³ Personal correspondence Red-Ge.

⁵⁴ ‘Critican exigencias de UE en materia de propiedad intelectual en TLCs’ in which national producers SNI and ADIFAN critically assess the IPR inclusion in the agreement, Newsletter Red-Ge, 24/2/2009.

CONACAMI, CONAP and APRODEH have more specific and individual interests, often related to other topics.⁵⁵

Despite the fact that IPR is often mentioned as a main worry by civil society, this was hardly ever explored or discussed in more depth at the time of fieldwork, as it was during the US negotiations in relation to the access to medicine issue (Pe_1,5,10⁵⁶). Still the main fear and interest of most organisations are centred on this, especially with the longer patents and test data protection that the EU demanded more recently. This triggered a strong reaction, especially from organisations such as Red-Ge, AIS and ADIFAN, and a sudden boost of information and opinion articles specifically on IPR.⁵⁷ Again indigenous and environmental groups are more worried about biodiversity and traditional knowledge, such as on seeds, often disagreeing with the regimes the government proposes and tries to negotiate.

Even though most social organisations are critical or worried about the inclusion of IPR in the agreement, these organisations do not all carry the same views, something they are often criticised for when they are not able to come up with a common proposal for example. Government officials and business respondents often claim that the topic is too complex or technical for these groups that lack the knowledge to make technical analysis and make more political or even ideological statements (Pe_3,4,9). This is a returning rhetoric that is criticised by many on the general front, but less strongly on the IPR topic. Whereas some organisations have very specific IPR knowledge, a few indeed feel they lack capacity on the topic, especially on issues other than the well studied issue of medicine. Despite admitting a more general argumentation, they strongly deny the political and ideological approach they are being accused of. Instead we have seen that they believe this is what the government is often doing, as the belief in FTAs is strong and no impact studies are undertaken.

Some believe that as a general pattern there is more interest of those that are likely to lose, such as the national laboratories and health sectors that strongly protested during the US process (Pe_2). The fact that there seems to be less at stake could then lead to less participation of this group with a normally strong presence.

As was the case with the US, positions are also not generally as black and white as most government officials and business respondents claim, with some businesses (such as local pharmaceuticals and small farmers), but not all social organisations, being against FTAs and IPR inclusion.

Critics have a difficult time in general because of the strong consensus in Lima on the benefits of FTAs. Criticism is often not accepted and the danger of being considered 'anti-systemic' leads to a fear of speaking out (Pe_1,5,9). It is difficult for them to express their opinion in the media or certain

⁵⁵ See www.bilaterals.org (last visited 25/6/2009) and their respective websites.

⁵⁶ Also shows from various articles in *Bajo la Lupa*, no. 5, february 2008, Lima (such as pp 15,18,19).

⁵⁷ This shows from many newsletters of *Comunidad Andina* and *Red-Ge* from February 2009 on.

sectors of society “*because there exists drunkenness for money and economic growth in Peru*” (Pe_11). We have seen the government indeed feels public opinion is generally positive (Pe_4,16). Others speak of a fear created and even repression (Pe_6,11) as was already mentioned in the context chapter.

Only a few academics - such as Roca, Fairlie, Rojas and Arana⁵⁸ continuously follow such negotiations and write on these and IPR inclusion, and often in a critical manner. A few institutions – Cepes, Cordes, Ceas and University Catolica – have shown an interest at different points in time. This lack of scholarly participation is considered a pity by many since they are generally taken more seriously than social organisations.

Newspapers were said to write, at least up to the point of fieldwork, little on these negotiations compared to those with the US. Articles usually remain general and do not go into the topic of IPR more deeply. They are also criticised by some SOs and academics for being very uncritical of these topics. They feel that the government or the economic groups that they depend on are backed up in these media (Pe_6,11). SOs find more space in media such as radio to present (more critical) positions (Pe_13).

Some say there is little political opposition within Peru and most other parties agree on current processes, but the Nationalist Party of Humala that almost won the last election does clearly disagree with the manner FTAs are being negotiated and also claims IPR charters should never be accepted.⁵⁹

Resources & Strategies

Due to a lack of transparency and mechanisms for participation of civil society on this theme (Pe_5,6,8), organisations either choose to do everything they can to be included into the limited institutional process, or completely stay out of it.

The former implies following the rules of the institutions, getting accredited for participation in meetings and future invitations, requesting individual meetings or consultations with the ministries or sending proposals and providing the government officials with (their) information or studies. All this whilst trying not to be too confrontational, such as with ‘*tlc asi no*’ instead of ‘*no tlc*’ explains a representative of Red-Ge (Pe_1), that is often mentioned as the only one always present in the side room. Health organisations such as AIS have sent letters to the Ministry of Health presenting their interests and willingness to participate, but this Ministry could not do much for them (Pe_11). This strategy is also maintained by some business associations that actually seem to have some extra

⁵⁸ References to Roca and Fairlie can be found in the bibliography. Rojas was said to be active by a few and Arana, C. (2008) is a scholar directly involved in the negotiations and wrote a thesis on IPR within the Peru-US agreement from her own experience.

⁵⁹ As can be seen from different anti-FTA articles, as well as their government plan on FTAs that can be found on www.partidonacionalistaperuano.com (last visited 20/9/2008).

advantages in this. They all work differently but often assign a coordinator/spokesman (from outside) to follow the negotiations and speak on their behalf (Pe_3,14).

The second group has lost faith in participation this way and tries to find other ways to influence the process, such as organising forums and spreading information in order to open the debate, make statements or declarations in the press, and if necessary, mobilise or protest in a more confrontational manner (Pe_13). The indigenous groups are often mentioned as a group that does not follow the institutional routes, but instead sends out radical declarations and mobilises in order to make their point (Pe_3,17,19). Others point to the fact that these groups are never invited to participate in a 'normal' way and therefore have the least presence of all (Pe_8). CAOI sent a letter to the ministry of Foreign Affairs on behalf of Andean indigenous groups, rejecting the bilateral FTA of their countries, as well as the actions of the Peruvian state against Bolivian social movements present in protest demonstrations. They assert their right to participate in the discussion, which they deem impossible with a lack of timely information to civil society.⁶⁰ Indigenous groups also speak more of the current repression and criminalisation of the protest that complicate matters.⁶¹

In both cases stakeholders undertake studies, write articles to provide the government, the people or other civil society members with information. They all strongly criticise the fact that the government is not undertaking any impact study at the moment.

The internet is widely used for spreading news and declarations through mailing lists, by the alliance Red EU-CAN or RedGe alone, or to keep contact through skype, but websites and blogs are often lacking or not up to date.

The use of lobbying is hard to identify as respondents do not usually openly admit this strategy, but SOs believe this is common in business spheres and particularly clear for pharmaceuticals as we saw also in the US era (Pe_1).

Whereas the government speaks of a strong division within civil society, they often create national or international alliances in order to create more diffusion and fill up the gaps in capacity, resources or knowledge that often exist. Some refer to this in particular in relation to the topic of IPR (Pe_1,13). It also helps organisations that would otherwise not have access to official documents to retrieve these through Andean – often Bolivian - or EU counterparts. Since European organisations are also concerned about the process, these alliances cross oceans such as the strongly established Red EU-CAN. Another more health-oriented one is the Alianza CAN-UE, including AIS. This organisation recently organised an expert meeting on IPR in the European parliament, which was attended by many commission and parliament members, as well as many European and South American NGOs. Such alliances also organise regular summits, often in parallel to a negotiation round, such as *Enlazando Alternativas* during the EU-Latin America meeting last year in Lima and recently during the first new

⁶⁰ 'Andean Indigenous Reject FTA with Europe', Prensa Latina, Lima, 23/11/2008.

⁶¹ This was clearly stated in the workshop I attended of Global Democracia (20/9/2008) as well as in declarations of ASC, CAOI and AIDSESEP. See www.bilaterals.org (last visited 22 May 2009).

negotiation round in Bogota⁶², usually ending the meeting with a final declaration that is announced publicly.

Influence

It is too early to say much on the level of influence that stakeholders have had so far or are having in the negotiations with the EU. The role of key players in the US negotiations has not become clear in this context yet. People often refer to this experience, when both CENI and (health) NGOs were influential, but find it hard to build expectations on this.

There is a clear general picture of the more influential stakeholders in Peruvian trade politics. Whereas most government officials and business associations would not directly admit it, there seems to be a strong dominance of business or economic interests in most decisions. *“It depends on the definition a country has of civil society. In Peru this is mainly reflecting the private sector”* (CAN_1). Not only Peruvian civil society, EU and CAN respondents, and also almost all Ecuadorian respondents, speak of the major difference in closeness of business and negotiators, and SOs and negotiators respectively, and often refer to Peru as the most pro-business Andean country. Even those same government officials always bring up the business associations when asked about civil society, whereas it takes some more digging to hear, about any non-business participation, ideas or influence, if at all, because often they do not know. As mentioned, they also believe that business is not only more helpful but often has better and more technical arguments. At the same time it seems like there are more personal contacts between business and government, as both regularly referred me to the other during my research. The contrast between an SM that feels left outside and a business representative that believes they do *“not just influence the process but create and complement ideas”* (Pe_14) seems strong. Without any direct participation the same ideational power is ascribed to economic groups such as the Peruvian Economic Institute (IPE) that acts as an important (civil society) think tank.⁶³ *“The government does whatever IPE publishes that day”* (Pe_13). These different pro-FTA groups can be considered a powerful epistemic community. Most believe transnational business, that often has more resources, is not necessarily more influential than local industries. This is reflected in the battle between the local ADIFAN and international ALAFARPE over pharmaceutical industry related IPR themes. Both are said to be influential and similarly taken into consideration. *“If we have both ADIFAN and ALAFARPE annoyed, then we know we did well in reaching a balance. (...)”* (Ministry of Trade; Pe_17).

The situation is different for other NSA groups. The more institutionalised SOs, such as Red-Ge, AIS, ForoSalud, Oxfam and SPDA, are also mentioned by the officials for their presence, ideas or even influence (Pe_4,7,9,17). Some of these partly agree on this being the case (Pe_1,8), whereas others

⁶² The first organized by CAOI, the second by Recalca in cooperation with other organisations. Information on activities within this round and a final declaration in newsletter Alianza Social Continental, February 2009.

⁶³ On their website www.ipe.org.pe (last visited 27/6/2009) they also state that they are considered one of the most influential think tanks. They are financed by associated companies, that are not specified however.

still feel they lack any incidence (Pe_11). RedGe and AIS are particularly often quoted as ‘experts’ in the media recently.⁶⁴ Other organisations, such as the more indigenous or ‘radical’ ones, do not always seem to be taken seriously. This corresponds with the way they feel they are being seen, namely, always being against and not providing technical arguments, a view they strongly disagree with (Pe_11,13). One SO representative also speaks of continuing racism in the country and quotes a congress member “*They want us to consult with the lama’s on free trade agreements?*”(Pe_11). The problems that indigenous groups face in participating have already been discussed, but at the same time ‘their interest’ is mentioned a lot by the various government institutions. Unfortunately the two views on what the indigenous groups’ interest is do not always correspond. This shows from the various conflicts such as on 486, in which they were actually the only group participating in the end (Pe_16). Many say academics could be influential if they really wanted to and had a continuous participation.

Overall it seems that it is difficult for non-business civil society to influence the Peruvian decision (or position) making in a direct manner, as it lacks institutional design or opportunities in general for this. This could be part of the reason those groups which seem to have more personal connections, resources, and what is considered better analysis, such as business, find they have more access, and have been more influential in earlier negotiations. These groups did actually have more access to the mechanisms with the existence of CENI, as well as more access to information at the time. For the current negotiations this difference is not so clear yet. Other groups definitely feel that missing such mechanisms is partly responsible for their lack of influence, as well as the fact that being on the more critical side it is harder because of the strong consensus on FTA benefits and the perceived repression.

The Peruvian research centre CEPES confirms claims that small farmers and civil society in general have a hard time influencing their government, or the president in particular, however both are clearly at the disposal of the bigger business interest.⁶⁵ Whereas business can be ascribed decisional power, or non-decisional as many prefer other items than IPR on the agenda, through direct consultation in decision-making, as well as discursive influence, this is very different for SOs. During the fieldwork not even discursive influence was found, although this seems to have increased somewhat in recent rounds.

To summarise

Below a list is given of different stakeholders in Peru and their positions, as well as a graphical display of interrelations and influence within decision-making. Both are not exhaustive but include the main ones as well as those stakeholders focussed on and interviewed within the context of this research. In

⁶⁴ Such as in ICTSD’s ‘EU, Andean Nations Struggle Forward in Trade Talks’ in: Bridges Weedly Trade News Digest, Vol. 13, No. 6, 18th of February 2009. Also ‘Critican exigencias de UE en materia de propiedad intelectual en TLCs’ in Correo Lima 23rd of February 2009 and many others that week.

⁶⁵ Eguren, F (2008) ‘Peru: Business o Negocio’, Defis Sud, Edicion especial, May 2008.

figure two, level of influence can be seen from the distance to decision-maker (Ministry of Trade) as well as the thickness of the line style and is meant in a relative rather than quantified manner. More unconstant participation is displayed with dashed lines. Actors are displayed in boxes, and linked where relevant, other factors outside. Both figures are simplified versions of reality of course and are mainly to serve the understanding of the reader.

Table 1: Stakeholders & positions in Peru

Stakeholder	Position	Role and strategies
Ministry of Trade	-Pro FTA (market access) -IPR important, minor risks, some gains and bargaining chip	-Negotiator -Veto role decision-making
Ministry of Foreign Affairs	-Pro FTA -Less commercial focus and somewhat more sceptical IPR	-Direct participant -Coordinator other pillars and better relation SOs
Ministry of Health & DIGEMID	-Critical of inclusion medicine- related IPR matters -Compensation accepted	-Inconsistent direct participation -Fear to speak out/little influence
National Institute of Intellectual Property Rights (INDECOPI)	-Pro FTA and inclusion IPR	-Only technical role
Other Ministries and Government Institutions	-Not clear; diverging?	-Inconsistent direct participation
President	Pro FTA; no clear position IPR	Not directly relevant to Trade/IPR politics
(Transnational) Business associations (e.g. CONFIEP, ADEX, CamCom)	-Pro FTA -Little interest nor fear IPR – bargaining chip	-Direct contact and consultation Ministry of Trade (and INDECOPI) -Discursive and Decision- making influence
Transnational Pharmaceuticals (e.g. Pfizer, ALAFARPE)	-Pro FTA and inclusion/strengthening medicine related IPR	Idem
National Business Associations (e.g. SNI)	-Critical of FTA and IPR (agrochemicals and medicine)	Idem
Local Pharmaceuticals	-Against inclusion medicine related IPR -Consequently critical FTA	Idem
More institutionalised SOs (e.g. RedGe, AIS)	-Critical of FTA, but more of specific elements such as IPR (mainly for health reasons)	-Use (limited) institutional routes and request direct consultation -Limit confrontation -Some influence
Grassroot SOs/indigenous organisations (e.g. ASC, CAOI); often with Small Farmers	-Anti FTA -Also IPR in particular for health, biodiversity&knowledge, seeds and agrochemicals	-Outside institutionalised routes and more confrontational -Difficult influence

Academics	-Various, but mostly critical of both FTAs and IPR inclusion	-Unconstant participation -potential discursive influence
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(B. van Paassen)

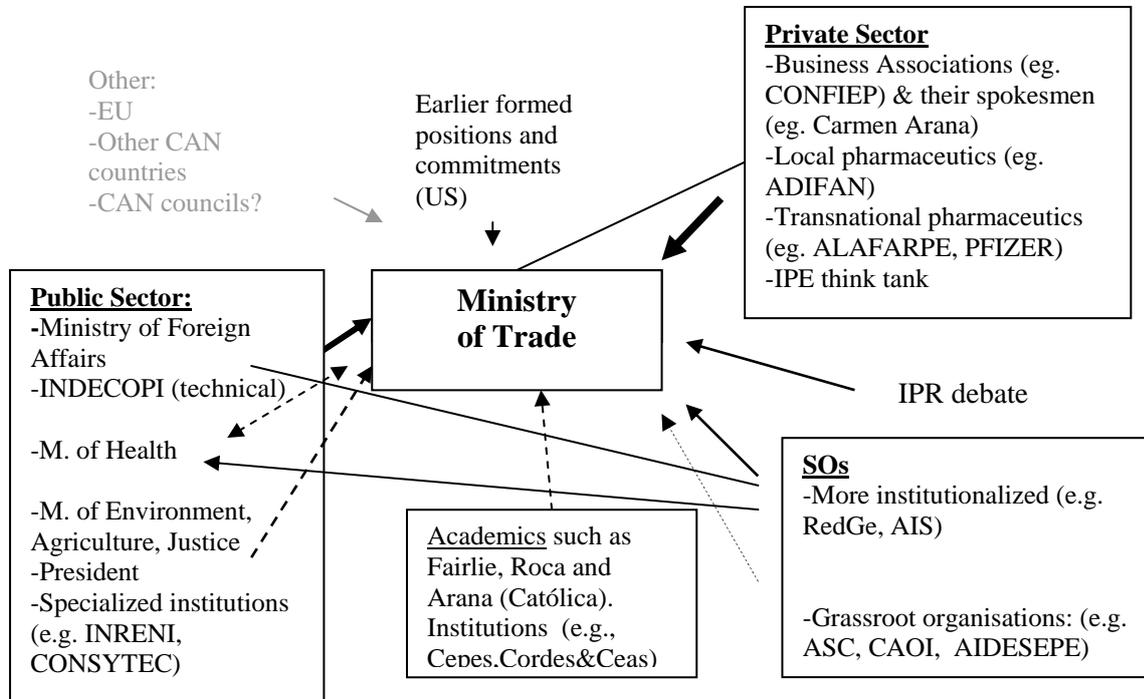


Figure 3: Graphic display of interrelations in Peruvian decision-making on IPR in EU negotiations (B. van Paassen)

5.2 The case of Ecuador

5.2.1 Historical perspectives

Institutionalisation of IPR

In Ecuador IPR laws are based on the Andean norms, the TRIPs agreement – officially since 1996 – and the national law on intellectual property of 1998. They are also signatories of the Convention on Biological Diversity and the Doha declaration. (Acosta&Falconi 2005: 231-233)

The Ecuadorian Institute of Intellectual Property (IEPI) was created in 1998 in order to control the application of IPR laws. The president, Alfredo Corral, and the different committees are assigned for a period of six years⁶⁶. IEPI has recently started a project on the protection – and according to them not patenting - of indigenous knowledge and biodiversity, or genetic resources, in the whole Andean region. This project is led by an indigenous lawyer and in cooperation with indigenous groups that do not always carry the same view on how to do this (Ec_9,3,20). A IEPI representative states that they have always had a strong position in this topic and defended this in all forums, often with the EU (Ec_3).

The new constitution that was accepted by referendum in October 2008 also has specific consequences on the direction or mandate of IPR negotiations as “*it forms the base of any IPR negotiation*” (Ec_13). It states for example that international agreements “*should never diminish, directly or indirectly, the right to health, access to medicine (...) nor advances in technological innovation*”.⁶⁷ This article is applauded by most SOs that also helped in the process of creating the constitution, often in cooperation with the constitutional assembly that is said to be responsible for this article on medicine in particular with the government having to follow it, “*whether they want to or not*” (Ec_12). Whereas generally the constitution and the president are seen to be progressive on the environment, critics do point out an issue on the topic of indigenous knowledge where the prior consent of communities formerly needed, and considered essential, has been removed (Ec_9,12).

US negotiations

Ecuador participated in the negotiations with the US under the lead of president Gutiérrez, (2003-2005) who had said to want the FTA so badly he would sign no matter what (Ec_12). IEPI and its president Corral were responsible for the IPR negotiations. They were said to be highly in favour of the agreement, unlike some other negotiators, including a health expert that saw risks in the possibility of patenting biodiversity and especially for medicine. “*The costs of the IPR charter were going to be too high and in favour of transnational companies and the US (...). It was of no interest to us at all.*”

⁶⁶ See www.iepi.gov.ec (last visited 10/3/2009).

⁶⁷ Constitución 2008, Asamblea constituyente, Ecuador. Article 421, pp 184.

Health and life are not negotiable.” He felt there was no sense in ‘exchanging’ these matters of life and death for other commercial themes and opposed to signing (Ec_8).

Transparency and civil society participation under Gutierrez was very limited (Ec_5). One respondent claims “*the negotiators had appropriated the issue of signing*”, not allowing any exchange of positions (Ec_16). Although it is said that the head negotiator at the time, Manuel Chiriboga, was more participatory than most other negotiators, the full-capacity negotiators made them very powerful (Ec_2,3).

Only the national business association, CEE, is said to have had permanent access. They were strongly in favour of the agreement, according to some as a result of dominance of bigger companies within the group or the personal (political) benefits of its leaders. Smaller companies and their representatives, especially as they were becoming increasingly critical of the agreement with the realisation that no real negotiation was possible, were said to be manipulatively removed from their positions. Some NGO’s were participating, also in the side room that was present, but it was generally hard to influence as the agenda was clear. (Ec_16)

Partly due to this lack of options for civil society that was critical of the agreement, this process was confronted with a high level of mobilisation. The umbrella organisation *Ecuador Decide* (ED) was started with the help of Juanita Ramos, president of the South American Organisation of Local Pharmaceutical Producers ALAFAR. She saw a common interest of social movements and her industry, especially in IPR health but also in other matters (Ec_12). It was the first and possibly only time such a coalition was made openly. They first demanded impact studies, checked those of Peru and Colombia, and then did their own that in a technical manner showed different and more negative results on IPR than those of the government. They informed the people and initiated a strong campaign in order to prevent the signing of an agreement that would increase IPR protection in prolonging patents and test data protection of medicine, but also reflected on other disadvantages. They also condemned the lack of space for participation or power of the public in the process. Their mobilisation was therefore not just against the FTA, but also to directly demand a referendum by gathering enough signatures. In this they regularly cooperated with indigenous, as well as environmental groups that were equally critical. (Ec_10,12)

Academics were not so involved, besides Alberto Acosta – later also president of the National Assembly - who wrote a critical book, including a chapter on IPR by Salvador Crespo, the lawyer of ALAFAR.³⁵ Acosta, as well as current president Correa formed part of the *Foro Alternativo Ecuatoriano*, an academic forum for change that assisted Ecuador Decide in their campaign (Ec_10).

It never got to a referendum however, as the president was dismissed which many ascribe to the negotiations with the US and the campaign of Ecuador Decide and the pharmaceutical sector (with an important role for Juana Ramos) which had a strong effect on public opinion (Ec_2,12,14,15,16). The head negotiator at the time says, “*In a way it was the social movements conditioning from outside*

much of the negotiation. They were an important factor for Ecuador not to finish the negotiation.” (Ec_2).

His temporary replacement Palacio (2005-2007) assured the people he would not sign anything on IPR and agriculture. Being from a medical background, Palacio was particularly concerned about the health effects of IPR restrictions. These safeguards were not acceptable to the US, and negotiations were stopped, especially after Palacios announced partial nationalisation of the oil companies in 2006 (Ec_12,16). It could be said that *“in the end health was the reason not to sign the FTA”* (Ec_16).

Some negotiators at the time, possibly also those still in position, as well as business respondents still regret this as they currently feel behind (Ec_1,4).

In 2007 Rafael Correa was elected with the help of Ecuador Decide, indigenous and other ‘critics’ described above, based on a campaign that strongly condemned FTAs and certain IPR topics. Ever since Correa came to power, many institutional changes have taken place within the government, as well as the new constitution and other electoral processes.

These have diverted attention away from other processes such as the negotiations with the EU, both of the government as *“the public agenda has been limited”* (Ec_12) and of NSAs and the media.

Decision 486 & CAN

After outing some worries and criticisms to the Peruvian proposal, Ecuador took the somewhat surprising decision to support the change of the Andean Decision 486.

Some officials, both Ecuadorian and Peruvian, claim this decision was based on a thorough technical analysis (of IEPI) that proved Ecuador would not find any effect of this as they were not going to make use of the freedom to change national legislation (Pe_3, Ec_4,7). Most respondents, however, including the Ministry of Health, believe it was really a political decision, or even an improvised one. As president *pro tempore* of CAN it was important for Correa to do what was best for the integration, like keeping Peru (Ec_1,7). Another potential factor that we have already mentioned is the strong direct pressure or even blackmailing strategies of Peru towards Ecuador (Ec_5,6). Respondents also relate it to the good relationship between the two countries that Ecuador decided to maintain after a phone call from Peruvian president Garcia to Correa (Ec_6).

The final decision in this was clearly made by the president in cooperation with the Ministry of Foreign Affairs, or negotiators, according to some because it was such a politicised, sensitive topic (Ec_3,14). A negotiator at the time (Ec_5) says, *“It was eminently a political issue. They supported it against instructions of the Minister of Economy not to (...). It was taken by the president with two members of Foreign Affairs”*. Indeed it is said that especially the mentioned Minister Paez strongly opposed as part of a larger internal struggle that we will get back to later (Ec_6,17). Other public participation was limited, especially at the point of decision making. The Ministry of Health claims

their suggestions on adding Doha flexibilities to the norm were not taken aboard, of IEPI only certain elements were used (Ec_3,21).

Unlike Foreign Affairs claim, it seems clear there was hardly any involvement of civil society in this matter besides a few experts with more personal contacts and prestige. Their critical proposals, either made within the academic group especially formed or individually, were partly taken into account (Ec_8,12). Juana Ramos, who claims there was agreement between her and the different ministries, is said to have opposed strongly and was therefore partly kept out of the process. Some say she was therefore unsuccessful (Ec_2) but she did implement some items (Ec_12). Ecuador Decide happened to be in Lima, but was not allowed entrance to the Secretary General of the CAN at that moment (Ec_10). Also indigenous groups reacted critically to this decision and demanded in letters to the president a change of the negotiating team responsible (Ec_21).⁶⁸ Others, partly anonymous but also under the heading of *Accion Ecologica*, have written critical analyses of the impact on this.⁶⁹ However, even those somehow involved were surprised when the decision was suddenly taken “*in the middle of the night, when no one was expecting it*” (Ec_12).

There is a strong division between people, mainly in government and business, who feel this was a good decision of Ecuador for the above political reasons, as they would not be affected anyway and should therefore not stand in the way of others. Others feel that this might not be true since allowing Peru to implement the US agreement lifts the ‘floor’ of any future CAN negotiation in IPR because of the Most Favourite Nation clause that obliges a country to give anyone what they have given another (Ec_8,12,17). This means that in a CAN context Ecuador and Bolivia will also be affected by compromises Peru has made or as one respondent puts it “*now we all have an FTA*” (Ec_8). The argument of saving integration is nullified by many as it meant the end of consensus decision making and a step back in harmonisation of IPR norms (Ec_12,14). One ex-negotiator says, “*We totally opposed as it was negotiating IPR, of which no one can oversee the consequences, (...) not evaluated, for a commercial issue*” (Ec_5).

This ‘non-consensus’ decision-making brought out some important aspects for the EU negotiations. One is the existing internal disagreement or “*clear difference in view between negotiators and Ecuadorian government*” (Ec_4). Another is “*The decision of Ecuador helping Peru with 486 generates doubts on what the position of Ecuador really is. It is not clear where our red lines are*”

⁶⁸ ECUARUNARI ‘Los Kichwas de Ecuador se mantendran vigilantes frente a las negociaciones CAN-UE’, Quito, 17/11/2008. www.bilaterals.org

⁶⁹ Such as the ‘Análisis técnico de la propuesta Peruana reformativa de la decision 486, régimen comun para la protección de la Propiedad Industrial’, revised by an anonymous group of experts; and ‘Mis observaciones de la propuesta de Peru para reformar la decision 486’ of a representative of Accion Ecologica.

(Ec_15). The decision of the president is criticised in contradicting his own anti FTA rhetoric. His ambiguity was reflected in a move from (and whilst ignoring) the FTA-critic and Minister of C.E.P. Pedro Paez towards the more ‘pragmatic’ and ‘liberal’ direction of Foreign Affairs (Ec_14,17). Several respondents believe Decision 486 shows the lack of importance given to IPR (in relation to commercial or political issues).

5.2.2 The EU negotiations & the government

(Ambiguous) positions

Unlike for Peru, the trade agreement with the EU would be Ecuador’s first and only, as no other negotiations are currently in sight. Showing from the position at the end of the US negotiations and the electoral campaigns, it is also clear that the Ecuadorian government has a cautious view on these matters. We have seen in the context description that Ecuador has ousted strong reserves at several points at time, such as in relation to the EU migration laws. There is still strong ‘no FTA’ rhetoric in both government and civil society, which results in the consequent emphasis on the Agreement of Association with the ‘more friendly and social’ EU that is not and should never be a mere Free Trade Agreement. Ecuador has always demanded exemptions of or a special treatment in certain topics - including IPR as based on the new Constitution - and initially refused to negotiate bilaterally with the EU. They would still prefer to negotiate as a bloc and express a belief in CAN integration, as well as it being a way to prevent this from being a plain FTA.⁷⁰

Many feel –including all Peruvian and CAN officials - that since the start of the negotiations the position of Ecuador, and mainly of its president, has been ambiguous or not even present at all. Generally Ecuador is seen to take a middle position between Bolivia on the one hand and Peru and Colombia on the other hand in these topics (Can_1, Ec_5). Some believe it was approaching Bolivia’s position in the third round (Ec_1,8). We have already seen however how the decision of 486, but also the recent decision to rejoin the negotiations, make Ecuador seem closer to its Peruvian and Colombian counterparts than before (Ec_8).

Officially the Ecuadorian position, at least at the time of research, remains anti-FTA, including a rhetoric that does not go beyond TRIPs besides geographical indications. As that is so important to the EU Ecuador could make concessions on this, or even gain from as well (Ec_7). This position the Ministry of Foreign Affairs claims is well known and accepted by the EU. An IEPI official defines the position of Ecuador as allowing for IPR changes as long as health, culture and biodiversity are not affected (Ec_3). Official government information including directives given by the ministry council

⁷⁰ See Redaccion Negocios y AP, El presidente puntualizo que el Ecuador no busca un tratado bilateral de libre comercio con la UE, 16/11/2008; and Moya, A. ‘Ecuador busca un trato preferente – La delegación ecuatoriana negocia con la UE bajo el marco de la nueva Constitución’, www.expreso.ec, February 2009, Bogota

COMEXI confirms this largely.⁷¹ As we have seen before the worries for health and access to medicine were also strongly emphasised, and protected, in the new constitution. The issue of culture, traditional knowledge and biodiversity in particular is said to be “*a personal worry of the president*” (Ec_20) that they maintain a cautious approach to (Ec_7). Whereas IEPI (Ec_3) claims the Ecuadorian position “*is founded in this*”, a discrepancy seems to exist with the president that has expressed himself against a protection system in the way Peru and Colombia propose or inclusion of biodiversity in general (Ec_17). The new constitution even problematises this option by eliminating consultation and prior consent with indigenous in such matters (Ec_12). The current IEPI projects on the topic are more in the style of Peru however, including consultation with indigenous to aim for sharing of benefits (Ec_3,9,17). It also shows from various documents that they agreed with Peru and Colombia within the Andean proposal on biodiversity or preventing bio-piracy, although most documents state exclusion from application in their own country.⁷² A negotiator believes the issue is complicated by ideological discourses that overlook what it is really about (Ec_17).

Very few current government officials or negotiators, nor the official documents, spoke of potential advantages of a stricter IPR regime. IEPI, as well as an ex-negotiator, saw possibilities in GI also for Ecuador (Ec_2,3). The Health representative mentioned transfer of technology and information on diseases that was lacking there as benefits without which including IPR would not be a good deal. Another respondent believed a stricter regime could bring more medicine to Ecuador, as well as investment in general (Ec_4).

Only one negotiator (Ec_17) referred to the floor that was set by Peru and Colombia’s agreement with the US mentioned before as problematic for it implicated obligations also to them. Others seemed to have faith in the EU’s flexibility or goodwill – as “*they promised it*” (Ec_7) - towards Ecuador.

It was clear then that there was not too much worry on the topic amongst negotiators, as well as a belief in the potential benefits of the agreement, such as for the agrarian sector (Ec_17). There was coherence in this for the ministries of Foreign Affairs, IEPI and to a certain extent also for the Ministry of Health, that all house many of the same people that were involved in the US negotiations. This is the case for head negotiator Villagomez and many of his Ministry, that together with IEPI, or at least its president Alfredo Corral, are said to have ‘affinity with FTAs’ (Ec_8) and not to have changed their pro (US) FTA position much. IEPI claims continuity in their protective stance towards

⁷¹ The powerpoint of the information meeting held by the Ministry of Foreign Affairs in May 2008 states ‘*not go further than our Andean legislation or TRIPs in patent and test data protection*’. Another (confidential) paper reads no to go further ‘*in those areas that can affect public health, food security (‘seguridad alimentaria’) or can cause negative effects in certain sensitive sectors such as access to information or culture*’. No reference is made here to biodiversity and traditional knowledge here. (own translation)

⁷² For example the document of IEPI ‘Patentes de Invención’ (no date) and ‘Propuesta Andina en la mesa de negociación sobre derechos de propiedad intelectual – artículo 2: Protección a la Biodiversidad y los Conocimientos Tradicionales’ (no date). Two CAN reserved document ‘subgrupo 11’ (no date or name) and CAN-UE/GCM/dt/027, 17/7/2008.

natural resources and indigenous knowledge protection. One IEPI representative claimed there was no position taken yet, but they were definitely cautious (Ec_20).

The ministry of Health (representative) clearly states that health matters, such as the inclusion of medicaments in IPR, are too sensitive and essential and should not be part of a trade agreement. However, even though ‘no official positions were taken yet’, partly because most of their attention had been going to the constitution up to then, they feel that there shouldn’t be a problem in defining this cautiously together and gaining from the agreement (Ec_15). One respondent speaks of strong ties between this ministry and the multinational pharmaceutical industry (Ec_16).

This positive view was not found with the Minister of Coordination of Political Economy and head of COMEXI at the time, Pedro Paez. He has always been very critical of the agreement, including IPR as we also saw with the decision of 486. In an official document of IEPI it is stated that his Ministry misunderstood the proposal of Ecuador thinking it was to patent biological and genetic resources as well as traditional knowledge *as such* (instead of the elaboration of these).⁷³ He announced this publicly from the 2nd round on, starting a debate and according to some partly causing the final break-up (Ec_4,6).⁷⁴ He was soon replaced however, according to some mainly for the issue of IPR (Ec_17).

This difference of opinion between the Ministry of Foreign Affairs and that of Economic Policy Coordination recurred in every interview. It was clearly related to the ambiguity of the Ecuadorian government’s position, especially as the president seemed to move between the two. Another speaks of a president that “*easily changes positions*”, partly because he is “*a good populist politician*” (Ec_16). Yet another respondent says “*With two years of elections there is a game of interests going on, not taking any concrete positions in order to prevent conflict*” (Ec_12). People were also confused on his actual position. He has always been anti-FTA and cautious on IPR and was backing up his minister Paez for a period but then replaced him and chose to support 486 with the Ministry of Foreign Affairs. Whereas president Correa still claims to embrace the socialist ideas, mainly social organisations consider him, or at least his government and their policies, as neo-liberal as any of his predecessors (Ec_11,12,13).⁷⁵

There have been clear moments where the position of not only Paez, but also the president did not seem to correspond to that of the negotiators and several respondents felt they were not following his mandate (Ec_5,10,CAN_1). The strongest example is that when representatives of the Ministry of Foreign Affairs publicly announced Ecuador’s interest in the negotiations, and if necessary a bilateral

⁷³ IEPI, ‘Patentes de Invención’, no date.

⁷⁴ Also Jaramillo, G. ‘Tantas veces Pedro’, www.elcomercio.com, 26/4/2008; strongly criticizes his declaration based on his own misunderstanding, which is also what a confidential paper of the IPR table (Quito, Ecuador, 22/4/2008) speaks of.

⁷⁵ Also Lucas (2008) ‘Ecuador: Correa comes in for criticism from the Left.’ Inter Press Service, 5/12/2008 speaks of Correa combining left-wing rhetoric’s with right-wing policies.

FTA, Correa strongly condemned this afterwards.⁷⁶ This 'confusion' with Foreign Affairs (as it was called) resulted in the replacement of the Minister with new clear presidential mandates that they were to follow at all times.⁷⁷ Correa also stated that “ (...) *it is clear that Ecuador is not interested in a bilateral FTA agreement with the European Union*”.⁷⁸ We have seen that in the end the president did decide to move ahead however, but always under the above rhetoric. The need for the agreement to be pro-development and in line with the Constitution, including on IPR, is now expressed by different officials in the press.⁷⁹

Whereas the government officials each feel they have the clear position mentioned first, few of Ecuador's civil society, but also Peruvian officials for example, are able to really describe this. They either do not really know what the government position is or have not heard of the 'official and public' TRIPS roof for example. They believe there is nothing concrete besides the constitution or think it is ambiguous, also because the constitution strongly contradicts with many of the topics currently being discussed (Ec_8,10,12). Sometimes they relate this to a lack of capacity or even ignorance within (segments of) the current government (Ec_4,12) or the lack of importance of IPR to them (Ec_12). They almost always refer to the internal disagreement. Finally they demand the taking of a clearer and less disorganized position and mandate, which should then be announced officially and publicly.⁸⁰

Decision-making procedures

As mentioned before, quite some changes took place in the Ecuadorian bureaucracy ever since Correa came to power. First of all the Ministry of Industry and International Trade that used to lead negotiations before, changed names into 'Industry and competitiveness'. The Ministry of Foreign Affairs took over the role of coordinating negotiations and now carries the name 'Ministry of Foreign Affairs, Commerce and Integration'. They are also responsible for the creating civil society participation mechanisms. (Ec_4)

⁷⁶ Ecuamex, 'Presidente de la Republica cuestiona a funcionarios de Cancilleria', 17/11/2009 and see elcomercio.com, 18 and 19/11/2008 for business responses. Mainly business organisations did not understand why the president suddenly contradicted COMEXI and the Ministry again.

⁷⁷ 'Correa quiere una cancilleria politica', elcomercio.com, 19/12/2009.

The new Minister was the third in two years and also the co-author of the critical book on the US FTA.

⁷⁸ Redaccion Negocios y AP, 'El presidente puntualizó que el Ecuador no busca un tratado bilateral de libre comercio con la UE', 16/11/2009.

⁷⁹ Moya, A. 'Ecuador busca un trato preferente – La delegación Ecuatoriana negocia con la UE bajo el marco de la nueva Constitución', www.expreso.ec, February 2009, Bogota.

⁸⁰ This shows not only from almost all interviews, but is also stated in public declarations of Ecuador Decide 'Contenidos fundamentales de los comunicados publicos al presidente y posicion mantenida como ED' (no date) and CONAIE 'Los Kichwas del Ecuador se mantendran vigilantes frente a las negociaciones CAN-UE' (17/11/2008).

The Ministry of Economics was created in order to give direction to these processes. Its minister Pedro Paez also became the head of COMEXI, a forum that used to join business and the public sector together in defining international commerce discourse, but was from now on constitutionally only opened to the public ministries (Ec_1)⁸¹. The Minister did invite civil society a few times in order to listen to COMEXI decisions (Ec_5). Also here Pedro Paez has been replaced however, in this case by the Minister of Industry. An ex-negotiator feels COMEXI has always remained under control of that last Ministry, but has also weakened strongly. The opposite goes for CORPEI that is a private non-profit institution promoting national exports and investments and with more resources is considered a strong actor (Ec_5).

Certain elements of current government decision making strongly came up in every interview. The first is the dominance of the current president Correa and the centralistic, strong government he has installed. He was mentioned as the ideational and decisional actor in almost every topic, but especially when it considers a sensitive or more politicised issue. One respondent even believes *“there is no government; there is a president of the Republic, and it is him that decides”* (Ec_16). This goes for decision 486, the agreement with the EU and the topic of intellectual property rights or biodiversity and medicine in particular, that he showed such empathy with and formed part of his campaign. *“Correa was one of the most clear, expressing that there was not going to be an FTA. (...) There is a clear anti neo-liberal and FTA position within this government.”* (Ec_10). As we have seen, others believe neo-liberalism rather consolidated with Correa or have at least have some opinion on him or his ideas, including the press that also quotes him often. Respondents also claimed that power of different ministries or individuals depended on how well the president perceives them or even his ‘mood’ at each particular moment (Ec_5).

In relation to another main finding, the disagreement described above between the Ministry of Foreign Affairs and that of Economics, changing power levels of these Ministries actually influenced the ‘official’ government position at the time.

Foreign affairs is supposed to follow the presidential and COMEXI mandate in coordinating the negotiations, but as we have already seen this seemed to be lacking at times (Ec_5,10). *“The Ministry of Foreign Affairs is not representing the national interest or following the president’s ideas”* (Ec_10). Negotiators often do not directly come from the Ministry of Foreign Affairs or other public entities, but are instead contracted ‘from outside’. This can be academics or members of business NGOs, such as the Observatory for International Trade (OCE) (Ec_5,8,17). We have already mentioned that many of the current negotiators have been in their positions since the US negotiations

⁸¹ Ministry of Industry, Finance, International Relations, Agriculture, Tourism and the president. Headed by Minister of Production. http://www.comexi.gov.ec/sobre_comexi.shtml#AUTORIDADES (last visited 25/5/2009). See also ‘Ecuador define sus acciones frente al acuerdo CAN-UE’, *elcomercio.com*, 26/9/2008.

or longer which some believe have consequences for the way the negotiations are being managed (Ec_5,14). They are said however to have less full capacity to negotiate than was the case during the US negotiations, which is related to the increased leadership of the president (Ec_2,18). A former head negotiator believes,

“Before the large share of the discussion was there, in the negotiating team, that’s where it concentrated. The president was just another actor, usually quite weak. Now it seems to have changed (...). There is a much stronger presidency and that is related to a weaker negotiating team (...) that is more dependent on the line of the presidency” (Ec_2).

Despite the mentioned ‘ceiling’ there is a lack of strategy and red lines for negotiations identified, partly related to the internal disagreement or lack of coordination (Ec_6). People also speak of a ‘blind negotiation’ as no official impact studies had been done up to the point of fieldwork and only the Ministry of Health referred to earlier ones. It did not seem to be considered very necessary therefore. An IEPI representative believes that *“As long as we negotiate well it is ok”* (Ec_20).

Another relevant actor in decision making is of course the national intellectual property rights institute, IEPI, and mainly its president Alfredo Corral. He was mentioned by almost all respondents, including some in Peru and the CAN Secretary General, as a key figure and one of few specialists in the country. He is the coordinator of the IPR table in the negotiations with the EU, as he was with the US. This is supposed to be a technical role without the power of final decision making. *“The Ministry of Foreign affairs tells us what to do and provide the theme, usually the legal outlines. So far they told us not beyond TRIPs”* (Ec_20). Many however still refer to IEPI, and Corral, as the authority on the topic due to their specialism and responsibility for operationalisation (Ec_2). Although having improved institutionally, their coordination with other (investigating) institutions is limited (Ec_2,5).

A new player mentioned is the personal advisor –someone of confidence- of the president, Ramon Torres, who is specialised in biodiversity issues. His role was not clear yet as he had just assumed this function during the fieldwork but people expected him to be essential in what was going to happen (Ec_1,16). This also shows from the earlier quote (Ec_1) and the references to his statements in current news.⁸² IEPI claims there is a lot of incidence between them and Ramon Torres (Ec_3).

The Ministry of Health was mentioned a few times, such as the fact they were invited to IPR meetings such as with COMEXI (where they otherwise would not be) for the issue of access to medicine. The representative of the Ministry (Ec_15) felt they are in an equal position to others, or even have an

⁸² Such as “Ecuador insiste en negociar acuerdo de comercio para el desarrollo” in El Comercio, 8/4/2009.

advantage as they are part of the social sectors that Correa is supposed to support more. She spoke of good coordination and similar positions with the other ministries, although their position earlier mentioned does not seem to correspond to some others. The Ministry of Environment is usually present, but was often forgotten as a relevant actor by respondents and is said to lack capacity to study the topic thoroughly (Ec_9). Also the Ministries of Agriculture, of Culture and of Industry are mentioned as 'assisting ministries' (Ec_3,20).

Especially since the more centralistic government that the more dominant president established, (more than ever) it seems that decision making takes place only at the public level and the presidential level specifically. The New Constitution has become an important guideline for the negotiations.

5.2.3 The EU negotiations & Non-state Actors

Transparency & mechanisms

Ecuador started off saying this would be a more transparent and participatory process than ever before and most government officials, including a critical ex-negotiator, feel that this is the case. Also the new constitution refers to decision making in such cases, such as the power of the assembly, a civil society committee for participation and the option of a referendum. Respondents consider this a positive move, if the government actually sticks to it. (Ec_8,16)

Transparency seemed limited however. The supposedly public position of the Ecuadorian government, not to go beyond TRIPs besides geographical indications was unknown to most civil society participants, including those with considerable connections. It was known however to the president of the national business committee CEE, also showing from the PowerPoint presentations he gave to his sector.⁸³ Also OCE members claimed it was very hard to find information though (Ec_6). Instead groups such as Ecuador Decide felt there was no information given at all and have been demanding an official position taking of the Ministry of Foreign Affairs (Ec_10,12). We have seen that the government did make public statements on their position in the new round of negotiations and this is also taken aboard by civil society.

There had been two general public information meetings up to the point of research and a forum for agrarians in cooperation with the business NGO *Observatorio de Comercio Exterior* (OCE) (Ec_17). A website was also installed by the Ministry in cooperation with OCE in order to inform civil society, but this was very limited and out of date.⁸⁴ A negotiator believes Foreign Affairs has created a

⁸³ Aspiazu, R. Ing, Executive Director CEE 'Negociaciones CAN-UE, Estado y Perspectiva' (no date).

⁸⁴ See <http://200.6.8.25/mmrree/index.php> (last visited 25/5/2009). It only contained an information sheet on round 1 and 2, meaning it had not been updated for over half a year at that point, something that actually surprised the representative of Foreign Affairs

negative image concerning their handling of the negotiations and the fact they are very closed (Ec_17).

Some believe the government does not only try to cover up the topic but in general does not listen and thinks it knows it all, not allowing for participation, dismissing, marginalising or demobilising dissident voices (Ec_13,16). Already in the context as well as later we see that various indigenous declarations speak of repression.

Concerning participation, the responsible Ministry of Foreign affairs is particularly proud to present their CS committee on the negotiations, *el comite mixto* – or *consultativo* as no one seemed sure on the name. Initiated at the beginning of the negotiations with money of the EU and reconfirmed in the new constitution, this committee is to act as a forum for civil society organisations to unite, increase participation, transparency and to check on public institutions.⁸⁵ Unfortunately most CS respondents did not feel that this was a well working mechanism as not only did it imply a cooptation of CS by institutionalising their participation in such a way and inviting only certain groups⁸⁶, but also was there not enough of the transparency and influence that was promised to them (Ec_10,12,16).

“It is a cooptation of civil society, incorporating mechanisms of action (...) of civil society into the state apparatus. Now there is no free civil society anymore that expresses what she wants, but instead expressing what the government wants. And then they can say we’ve got legitimacy because this is what civil society says. And all the rest of the organisations that is not co-opted by the government are marginalised, criticised, disqualified.” (Ec_16).

Others believe it could be good to give an impulse to participation but this way it is very paternalistic and indeed runs the risk of working as no more than a legitimating tool, being able to say civil society has been consulted (Ec_6). One negotiator confirms this disappointing outcome of the committee, with both the Ministry of Foreign Affairs and its own participants being criticised for it (Ec_17).

Most respondents, including the whole of ED, therefore felt they better try to achieve their goals outside this mechanism and left the committee soon after its installation. According to an ED representative, also those still in the committee are starting to see its deficiencies (Ec_10). This is not expressed by themselves however at a workshop held by Ecuador Decide⁸⁷ where it also became clear

⁸⁵ Constitución 2008, Asamblea Constituyente, Ecuador: article 204-210 on ‘Consejo de Participacion Ciudadana y Control Social’.

⁸⁶ This also shows from other Ecuadorian civil society members on the forum of the CAN website that claim they have never been invited, although one committee member expresses himself positively on the creation. ‘Foro Virtual: Why is it important to negotiate the Association Agreement CAN-EU together?’ on the EU-CAN section of www.comunidadandina.org with posts up to June 2008. It has to be said there were only a few posts on here and it was not clear what was done with the statements put up. Section removed by 1/2/2009.

⁸⁷ Workshop Ecuador Decide on the CAN-EU agreement including presentation of impact study of the current process (P. Ruiz) and Mexican outcomes, followed by a broad discussion of both Ecuador Decide members, the committee and interested individuals, 30/10/2008, Quito.

that the committee members – often more of an entrepreneurial or academic background – have a very different, much more positive, view on the agreement than other civil society members (present).

The committee was set-up to complement the side room that was originally for business (Ec_7) and resembles that of Peru. People mainly spoke of the limitations, such as the lack of real information and options for participation. According to an ex-negotiator this qualified the side room the “*biggest deceit on civil society as a whole*” (Ec_5). Finally, the ministry of Foreign affairs is also said to believe pre-consultation (before any decision making on IPR) is not necessary, which is strongly criticised again by civil society (Ec_5). Instead Minister Pedro Paez and his Ministry were seen as taking more effort to include civil society, inviting them and increasing transparency (Ec_5,8).

Most people felt some things might have changed or even improved, but in the end the possibilities are similar to those under earlier governments and “*qualitatively participation has not really changed*” (Ec_13).

One negotiator claims there is no institutional articulation from the government towards civil society, but that this also works vice versa and also civil society themselves can be partly held responsible. He furthermore believes that this lack of institutionalism in participation leads to an arbitrary situation where options for civil society depend on who is in charge of their table (Ec_17).

Interest & Participation

As was the case in Peru, also in Ecuador the process so far has been less visible than the one with the US. The electoral processes of the past two years, with the highlight of the new constitution in October 2008, have decreased interest for other topics such as the negotiations with the EU. Many social organisations, including Ecuador Decide, have been largely involved in the making of the constitution and feel that only after this it was possible to really start the debate on the EU. That would explain why the first major workshop took place end of October 2008 informing the different organisations of the process so far and giving room for discussion. They also informed them on what activities ED had already undertaken as especially the secretariat had been working on the topic. Besides this select group not many members or other organisations had been involved however. (Ec_10,12) Of course there is the set-up committee that has attended government meetings and have an interest, but did not seem to be very well informed yet. Other organisations, such as Health Action International, were just initiating their activities (Ec_18).

Besides the electoral processes diverting attention away from the negotiations, respondents point to the fact that there is still a large support – or even ‘love’ - for the president. As long as he says it is not an FTA and there is no need to worry, the general public stays calm (Ec_2,10,19). The more positive perception of the EU as ‘less bad or hegemonic’ than the US, resulted in the theme being less confrontational this time (Ec_1). Some say in general Ecuadorians have little interest in CAN processes in general, let alone now that it’s all in an impasse and even considered ‘dead’ by some

(Ec_14). The topic of IPR is said to receive even less attention, let alone to mobilise the people. Health issues have always been the biggest concern and receive some more attention, followed by biodiversity and other more indigenous related issues, as well as agrochemicals (Ec_12,15,16,19). Some believe it is too difficult a topic for the people, although the US negotiations have definitely increased consciousness (Ec_3,12).

The involvement of indigenous groups was not very clear at the moment of fieldwork. Most respondents believed it to be much less than with the US and even spoke of “*a crisis of the indigenous movement*” (Ec_6). CONAIE co-organised the Ecuador Decide workshop but in the end could not be present. One member of that organisation does believe that the indigenous groups – not only CONAIE, but also ECUARUNARI and some small farmers foundations- are generally active, also sending proposals (Ec_21). Although they showed themselves critical of decision 486 and signed the CAOI declarations then, there were not many declarations going around on the topic, let alone IPR, at the time of research. On the negotiations themselves they condemn the procedures and neo-liberal views of the negotiators, which we have seen should be replaced according to them, as well as the recent bilateral course and the disappointment with Correa for accepting this⁸⁸. They have been paying more attention to other issues however, generally condemning the current government that would be breaking human rights with consistent racism and repression of indigenous.⁸⁹

Even though quite a few of the respondents of this research were academics somehow involved or interested in the process, overall Ecuadorian academics are said not to be so involved, with no impact studies and even less on IPR (Ec_14) From University Simon Bolivar and the research institutes FLACSO and ALOP there are a few people following the process, often oriented on CAN integration however.⁹⁰ At the time of fieldwork one impact study had been done on this agreement.⁹¹

Business has so far showed relatively little interest in the process with the EU, that is considered a less interesting commercial partner than the US (Ec_1,15⁹²). The national business association CEE does not see much danger in IPR matters that their businesses have also not defined any particular interest on yet. They just state that they would like to advance an agreement, especially since they are already lagging ‘behind’ Peru that does have multiple agreements (Ec_1). Different chambers are often quoted in the press, before critical of the slow process but recently happy that Ecuador is finally really

⁸⁸ CAOI, ‘No al tratado de libre comercio con la union europea’, 13/11/2008 and see footnote 38;

⁸⁹ CONAIE news bulletin 9th of January 2009, Quito “*El gobierno de la revolucion ciudadana continua con su abuso de poder*”

⁹⁰ The role of educational institutes and scholars such as Alberto Acosta, who was very active during the US negotiations and published the book mentioned, was not clear.

⁹¹ This was the critical paper of P. Ruiz, including a chapter on IPR.

⁹² Rhon, F. ‘La paz Andina’ in: Defis Sud, special edition, May 2008.

negotiating.⁹³ We have already seen that local pharmaceuticals, mainly united in ALAFAR, participate actively. Multinational producers, such as the chamber on pharmaceutical industries of investigation (IFI), are not so visible, but said to exert their influence also in other ways (Ec_2,12).

Ecuador Decide claims that in their critical campaign they also represent smaller business or farmers however that are very worried, for example on the consequences for agrochemicals that can increase in price with prolonged patents (Ec_10,15,16). They are not against trade, or even free trade, agreements however, but believe that this bilateral setting is dangerous for their country's interests. Developed countries are often imposing non-trade issues such as IPR that should not be included according to them. They also believe in a more 'rational' IPR regime in general, not only creating monopolies but instead actually promoting innovation and access to medicine, is needed (Ec_12).

The committee has a much more optimistic view on what the agreement could bring and stated this solitarily at the workshop organised by Ecuador Decide. They also believed that strict IPR regulation would improve the safety of medicine, which was strongly denied by others present, such as IPR expert Ramos.⁹⁴

Overall respondents (from different sides) regret the lack of NSAs activity on the topic, as well as public interest, at the time of research. This seems to have increased with the recent new rounds.⁹⁵

Civil society respondents, unlike the officials, do expect public opinion to be or become critical like they were, including on IP.⁹⁶ Media however often cite business and other pro-agreement sources and are considered neo-liberal institutions (Ec_11,13⁹⁷). *"The public opinion in the streets is very different from the public opinion in the media. There's no consensus, a meeting-point between the two."* (Ec_13) Others speak of a control of the media by the state (Ec_16), although recent news speaks of media being the only opposition to the current government.⁹⁸

Resources & Strategies

As said the lack of information and direct participation mechanisms is a main criticism of organisations such as Ecuador Decide that have strongly demanded this from the government in several letters as a first important strategy. They also request direct meetings, which are sometimes

⁹³ See for example: Carrion Mena, 'Por fin: Ecuador y la UE', *elcomercio.com* 31/1/2009; and Agencia EFE, 'La CE abierta a negociación comercial separada con Colombia y Peru', Quito 8/10/2008.

⁹⁴ See footnote 88. It was interesting to see the contradicting views between both civil society groups.

⁹⁵ As compared to Peru there are less mailing lists or other media usage making this increase less clear. Other national topics such as mining are also still very relevant, if not more.

⁹⁶ This also shows from the meeting that was held on the negotiations at the University Simon Bolivar. All social organisations present here pronounced themselves against the agreement (Ec_14).

⁹⁷ See also CONAIE, 'Exitosas Jornadas por los Derechos Indigenas y de Todos los Ecuatorianos', Comunicacion Conaie (no date) on propaganda.

⁹⁸ Cees Zoon, 'Couppleger gaat voor presidentschap Ecuador' in *Volkskrant Achtergrond*, 26/4/2009.

adhered to. Most respondents believe that (impact) studies and diffusion, such as in the earlier mentioned workshop or declarations, are important strategies. The web is often used for this, although not all organisations have websites, partly due to capacity gaps (Ec_10). We have seen media are considered difficult to access for various reasons, resulting in mainly a use of radio if any (Ec_11,16).

There is still the important alliance between ALAFAR and Ecuador Decide that left the committee and mainly tries to retrieve their information through other sources now, including transnational alliances such as Alianza Continental Social. Within Ecuador Decide many different kinds of organisations participate and also small business and indigenous groups cooperate at times, increasing possibilities to put pressure. People working with Ecuador Decide also have more personal contacts within government, and thus access, than most other organisations. They consider this a main resource that they will always try to use (Ec_12,16).

Individual experts or concerned often team up in ad hoc (academic) groups, as they did with decision 486 (Ec_8). We have already seen examples of this happening on a regional or international level also, including workshops and the joined strategy-making.

Mobilisation (in the streets) is mentioned as the ultimate strategy that has always worked and will be applied if necessary, but is preferably a last resort. One respondent says *“I know it will happen. I’m sure the theme will get a reaction because we do not get an adequate response from the government”* (Ec_12).

Business seems to be maintaining an ‘on hold’ position due to a critical relationship with the current government, or mainly president (Ec_5), as well as the lack of worry. The CEE does plan to maintain contacts with IEPI and the Ministry of Foreign Affairs however. They mention only consultation and side room participation and do generally not form alliances outside CEE or other chambers (Ec_1).

The business NGO OCE mentioned before as cooperating with the Ministry of Foreign Affairs on the information website and some events, aims at diffusion and good ties with the Ministry (Ec_2,18). They mainly focus on the agrarian sector and market access, meaning IPR is not really on their agenda, despite the effect it can have on agrochemicals.

Influence

Despite governments’ intents and belief of increased participation of all and the creation of a special committee, real options to influence the process from outside seem limited. We have seen that the committee is perceived to be limited a form of cooptation and other mechanisms, as well as transparency have remained inadequate according to both NSAs and several negotiators. As decisions are taken only at the public or even just presidential level this decreases space for civil society even more (Ec_13,17). We have also seen how a negotiator points out that due to lack of institutionalism, possibilities to influence depend on who is in charge of the table, which can differ a lot (Ec_17).

Some (mainly business) respondents feel that the president is still backing the wishes of the social movements that helped him during the elections and that the indigenous groups are the protagonists of today (Ec_1,5). This is strongly denied by those social organisations however that feel abandoned by their former ally and find it hard (again) to gain influence, even referring to continuing neo-liberal paradigms. Their letters to the president mentioned before are usually forwarded to the Ministry of Foreign Affairs, who does not always respond (Ec_12). We have seen that indigenous groups have written critical declarations on the current government and decision-making, with a particular lack of trust in the current negotiators taking their point. Environmental organisations are considered (to have been) influential by some (Ec_2) but the more institutionalised is not working on the topic anymore and the other is often considered too radical (Ec_9,5). Social movements such as ED do feel however that in the end they could influence the process, if only by mobilising as they have done before and as has always been the only way to really make a difference in Ecuadorian politics (Ec_10,12). They feel this historical fact helps them being taken seriously as well, as the government knows what can happen otherwise (Ec_16). Also others believe these organisations could influence if they really want to and organise themselves well (Ec_5,6). Those that do have more of a direct influence usually have this on a personal level, through networks or personal contacts within the government (Ec_8,12,16). This is clearly the case for ALAFAR and Ecuador Decide, whose main members, such as Juanita Ramos, are known influential figures with such connections. The lawyer of ALAFAR - who is actually the brother of the Minister of Foreign Affairs at the time and a friend of the head negotiator - d⁹⁹. “*Whoever doesn't have this access, has no way to [make their point at higher level].*” (Ec_16).

Some ascribe the lack of influence of social organisations to their incoherence, lack of organisation and cooperation, articulation and again analytical base or technical arguments (instead of political). These people also often feel critical voices believe ‘trade is bad’ or have similar simplistic ideological views (Ec_2,5,6).

Besides strong limitations, social organisations still feel they can do much more than their Peruvian counterparts that find themselves in a purely business context and civil society participation in general is seen as an “*inconsistent thread*” (Ec_5). At least the option of mobilisation has always given the Ecuadorians power. Whereas any (direct) decisional influence is denied, also discursive influence had yet to be shown.

Whereas business used to play a prominent role in decision making on these issues, with their participation in COMEXI and the strong presence of the main national business committee CE, this seems to have come to an end with the current government, at least officially. Business respondents feel there is an anti-commercial attitude within society and the – ideological - government (Ec_1).

⁹⁹ They are often mentioned in press and declarations, such as the reference to the presence of Munoz at the parallel meeting in Bogota, 10th of February 2009 by Recalca.

“Recently (...) we stay at the margin, outside. It is another signal of the [difficulties] that have characterised the relationship of the government with the private sector” (Ec_1). These business groups have lost some official direct participation in mechanisms but also because negotiation power is not only concentrated in the negotiating teams anymore, but is partly transferred to the president. Since they maintain strong good ties with the first but have a more difficult relationship with the last this makes it more difficult for them (Ec_2,5). SOs however feel this continuing close relationship with the Ministry of Foreign Affairs still allows business to exert more influence than social organisations do, nothing much having changed therefore (Ec_12). They point at public pictures taken of the head negotiator with the head of the CEE (Ec_10). Also a Peruvian respondent speaks of Foreign Affairs being a business platform (Pe_1). Another claims their power now works through CORPEI with the help of the Vice Minister of Foreign Affairs, who is also a member there (Ec_12). Local pharmaceuticals are said to have been particularly strong, although not necessarily more than multinationals (Ec_2). The OCE is another business example that does not only maintain good contacts and works together with the Ministry of Foreign Affairs, but also provides negotiators, increasing their role. They also believe in their own influence, that is more based on the fact that they offer more technical arguments and support than others might do (Ec_5,6,17). Since they do not focus on IPR their power can be considered non-decisional as it might actually make it more difficult for those that do. The same can be said for most other BOs, besides pharmaceuticals. Small business seems to have a hard time defending their interest, but are strengthened by ED.

Academia could influence the process discursively and have in the case of Acosta during the US negotiations. Partly due to a lack of involvement their role at the moment of fieldwork was minor, besides a few moments in which they teamed up as they did for decision 486.

To Summarise

The table below will give an overview of relevant identified Ecuadorian stakeholders with correspondent (simplified) positions and roles or strategies.

After that in figure 3 it shows the complex web of interrelations in Ecuadorian decision-making, with the Ministry of Foreign Affairs as the negotiator but strongly influenced by the veto-power of the president, who is related again to his advisor but also addressed by SOs. Public institutions are emphasised by thick lining due the strong centralisation of decision-making into public offices. Besides (limited) influence from different ‘outside’ actors we see the set regime, and mainly the constitution, as well as the IPR debate to be relevant to the decision-making. Again proximity to decision-maker or negotiator as well as thickness of the line represent influence, whereas a dashed line relates to the discontinuity of ones participation.

Table 2: Stakeholders & positions Ecuador

Stakeholder	Position	Role and Strategies
President	-Ambiguous: critical of FTAs and inclusion of IPR (health/biodiversity) but so far no concrete measures	-Strong ideational power and veto-role -decides on power each ministry
Ministry of Foreign Affairs	-Pro FTA -cautious in IPR (but has shown ambiguous in this too)	-Negotiator -after autonomous decisions now back under president's mandate -facilitates SOs in institutional participation and Bos (CEE)
National Institute of Intellectual Property Rights (IEPI)	-Pro FTA -claims caution in IPR but pro inclusion biodiversity/indigenous knowledge	-Officially technical role, but president (Corral) head coordinator IPR table
Ministry of Economics (Former composition)	-Very critical FTAs and inclusion IPR	-Lost influence and got dismissed -Was more facilitative towards SOs
Ministry of Health	-Positive on FTA due to belief in social emphasis government -Critical inclusion medicine related IPR (if not compensated)	-Consulted, some direct participation.
Personal Advisor President (Torres)	-Not clear: said to be similar to IEPI indigenous/biodiversity themes	-Important to position president.
Other Ministries or Government Institutions (eg. Environment, Culture, Industry and Agriculture)	-Not clear	-Said to be present but little input found
(Transnational) Business Associations (mainly CEE)	-Pro FTA ('behind on Peru') -No interest or fear IPR – bargaining chip	-Lost some mechanisms but still contact with negotiators
Transnational Pharmaceuticals	-Not identified	-Not identified
'Comite Mixto'	-Overall positive FTA and inclusion IPR	-Organised within Foreign Affairs -limited access and influence
Ecuador Decide (as representing many SOs), Local pharmaceuticals (ALAFAR) and small farmers	-Very critical of FTA, mainly for IPR (health, biodiversity/knowledge and seeds/agrochemicals)	-Less influence than expected -some through personal networks -strategies of diffusion and demanding consultation -mobilisation?
Indigenous Organisations (eg. CONAIE, ECUARUNARI)	-Critical FTA & IPR -Generally critical inclusion biodiversity/knowledge (more occupied other issues)	-Letters and declarations of discontent
Academics	-Various: some cautiously in favour, others very critical FTA and IPR	-Limited real participation

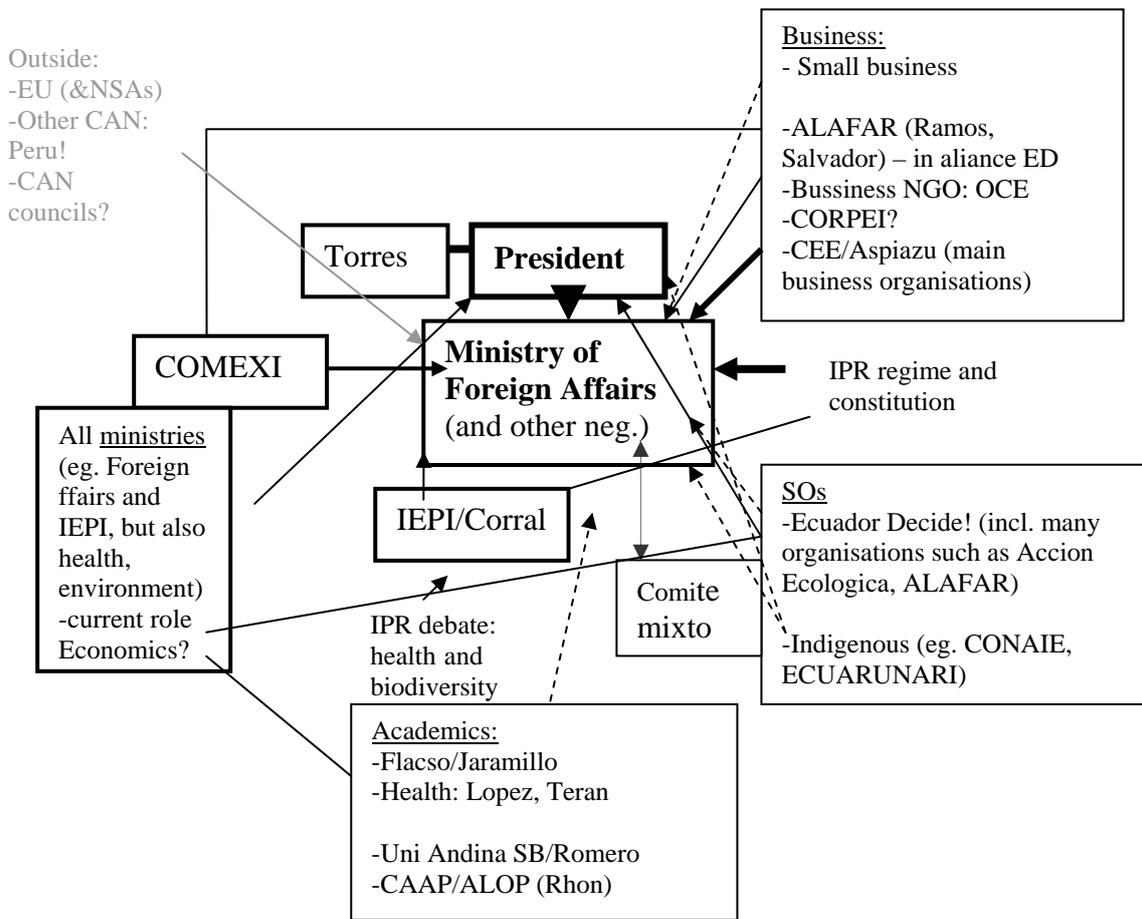


Figure 4: Position-forming scheme of Ecuador on IPR in EU negotiations (B. van Paassen)

5.3 Comparative analysis

After thoroughly exploring the processes of both countries, many similarities and differences can be identified to help us understand these politics in developing countries. The comparisons will be divided into different themes reflecting the different subquestions. It starts with differences in context (such as earlier commitments and political orientation), then positions and decision-making procedures of the governments, on to the ideas and participation of NSAs as reflecting their agency, as well as the POS for relevant structural settings (including here the institutional framework provided for participation), followed by an analysis of the inclusion of the IPR debate. These last two will be discussed here more at length as they have not been separately considered in the earlier analysis.

Contextual factors

The first important contextual difference is in current IPR regimes. Whereas both countries are signatories of TRIPs, CBD and CAN legislation, only Peru has made bilateral commitments that - due to the Most Favourable Nation principle – will have to be extended to any following negotiation partner. The fact that Peru has already signed an agreement including restrictive IPR measures with the US and others means a lock-in situation, as we have seen with new constitutionalism, as well as the fact that Peru has already formed such positions before. Ecuador, on the other hand, has not signed any bilateral agreements but forms part of CAN legislation. This difference in the set regime leads to a much more careful approach of Ecuador, as well as more experience and a more clear position of Peru. Many of the negotiators of both countries at the time of the US negotiations are still present, bringing along not only their experience in negotiating IPR and dealing with civil society, but also their former positions.

Political orientation is shown to be different in both countries and is related to the different positions in both countries, although clearer for Peru than for Ecuador. Peru strongly believes in free trade (*'si o si'*) and is willing to accept stronger IPR restrictions in exchange. The experience of Peru leads to a contrary situation in which they have wider but clearer red lines in IPR matters such as patents, as well as a more offensive position in biodiversity.

In contrast, Ecuador shows a left wing and anti-FTA rhetoric, claims not to go beyond TRIPs, but seems ambiguous and more evolving in their positions, as we saw for example on biodiversity. Many believe a strategy is lacking here, which can not be said for Peru.

Another relevant difference is that Ecuador has been in a continuous electoral process for the past two years. This does not only divert attention away from negotiations, but also directly affects positions and decision making of the Ecuadorian government, mainly the president. We have seen how the Ecuadorian constitution that was part of the electoral process set out some - although not very concrete - red lines for negotiation, especially on health. This sets out very different standards when compared to Peru.

The context of the region and IPR harmonisation is also relevant. Within CAN, IPR is a continuous source of including in current negotiations and Decision 486. The disagreement over how to best protect biodiversity was one of the main reasons to stop the negotiations and continue bilaterally. Commitments of one country can affect others when negotiating in a regional setting. It is said that Peru has more expertise on the topic than Ecuador and is more advanced on projects such as the protection of indigenous knowledge and biodiversity. This increases their power on the topic, although some believe Colombia is even stronger. We have seen also how Peru has pressured Ecuador to allow changes in 486.

Positions

Both governments claim to give high importance to IPR and to have a clear position on the matter. The Peruvian government particularly emphasises offensive interest in biodiversity and traditional knowledge protection, and its model is praised by the national property right institute IEPI yet does not correspond with views of most Ecuadorian officials. The Ecuadorian President and former Minister of Economics have been critical on IP protection of these matters, and the new constitution prohibited some essential elements. Despite a mentioned offensive interest of Ecuador, they have also claimed not to go beyond TRIPs on this topic, creating confusion on their position. For Peru geographical indications are an offensive interest too, in Ecuador it is considered a non-damaging and potentially useful element.

On other IPR matters positions of both countries are seen to be defensive or reactive. Whereas most Peruvian government officials – but not their Health Department - do not see much danger in IPR on medicine, the Ecuadorian government is very cautious and claims not to go beyond TRIPs and the new constitution. Again this is partly because Peru has ‘less to lose’ after the US.

Despite the importance given, Peru shows, as it did with the US, a will to use IPR as a bargaining tool in exchange for the highly-emphasised market access and admits it is unlikely to be a deal breaker. Ecuador, despite internal disagreements, ambiguous statements and behaviour such as with the political decision of 486, is more cautious and strict on the topic. In relation to US experience, where negotiations were largely stopped due to IPR problems, and the new constitution that sets out red lines, Ecuador is more likely to break off negotiations for this topic.

Ideas are relevant as this view on IPR relates to the paradigm of strong beliefs in FTAs in Peru and the negative connotation this has for most Ecuadorians. These differences became very clear in their rhetoric in negotiations, Ecuador consequently referring to agreements of association and Peru unproblematically referring to FTAs. Although at the time of fieldwork different ideas or even paradigms existed within the Ecuadorian government, and one corresponded more to the Peruvian view, the current rhetoric clearly emphasises the developmental nature of the agreement. Peru frames this FTA as an urgent need for more market access and keeps pointing out the economic benefits they are having of these ‘open’ strategies, as well as differentiating themselves from their neighbour

countries by attracting more foreign investment. Some Ecuadorian negotiators and business respondents felt behind, not having signed with the US.

Decision-making processes

Both countries have changed their decision-making process after their experience with the US. In both cases the national property rights institutes lost responsibility for the IPR negotiations in order to maintain a purely technical, non-political, role. In Peru this is directly related to the critical studies coming from this institute, and it is now the Ministry of Trade that fully handles IPR negotiations with the help of other ministries and institutions. In Ecuador the Ministry of Foreign Affairs is officially in charge, although the president of the national property rights institute was still the coordinator of the IPR table at the time of fieldwork. These institutions turn out to be very powerful, which can be related to their international role as compared to other public entities. The theory on internationalisation of the state points at the possibility of differences of opinion following from this, something that became particularly clear in the Ecuadorian context. Here, the negotiators from the Ministry of Foreign Affairs (and those hired from outside) and IEPI did not only maintain a different position – more favourable – towards the negotiations and inclusion of IPR, but also expressed this publicly. The Ecuadorian president, who plays the most decisive, but often ambiguous, role, strongly condemned this action. The Minister of Economics who expressed strong disagreement with negotiations and inclusion of IPR was blamed for blocking the negotiations, was withheld information, and finally removed from his position.

Specialised ministries such as health and environment are often present at negotiation rounds but limited in their influence. In Peru the dominance of the trade ministry over the health ministry was particularly clear as their earlier impact study was discredited and they were afraid to speak out criticism of the risks taken within IPR and medicine.

It is interesting to see that in both countries institutional changes as well as an insulation of the decision-making process have taken place where disagreement existed at the time of US or in the case of Ecuador currently. As discussed in the theoretical review of the role of ideas, it seems there are strategies involved in reaction to opposing state entities, although more research is needed to be sure of these internal processes. The framing of the process as highly technical also helps in insulating decision-making among a small group of ‘experts’.

The fact that no impact studies have been made in such a knowledge-intensive process points to a lack of state interest in ‘the truth’ and in the case of Peru during the US negotiations search for justification by dismissing critical studies and their own ‘evidence-based research’.

Decision-making on the Andean norm 486 was interesting and illustrative especially in the case of Ecuador where it ended up being a political decision - including direct pressure from Peru - not in their interest and not taking into account much of the IPR debate (or its general importance). The

decision in Peru was mainly taken by the Ministry of Trade, whereas in Ecuador it was clearly the president in cooperation with several officials of the Ministry of Foreign Affairs.

Whereas the Ministry of Trade and its negotiators seem to be the accepted policy maker in Peru, in Ecuador the veto role could be ascribed to the president. He has not only established a strongly centralised politics that evolve around him and a few public entities, but also still maintains a large public support in comparison to his Peruvian counterpart. The ideational and decisional role he plays was very clear and mentioned by all respondents. In Ecuador there is no significant political opposition to both the president and the process (rather more quickly), in Peru only the oppositional Nationalist party expresses itself strongly against these issues. As we have seen, partly related to the presidents' preference, other public institutions play different roles at different times. As they have maintained different views, this has affected the official positions on the topic.

NSA activity

A relative lack of attention was found in almost all different parties in both contexts, be it for different reasons. Even though in Peru public interest and participation was limited, in Ecuador even those with a high interest in the process were very busy with electoral processes. Trust in the president is another reason for low public interest. In Peru reasons were related to the experience with the US which has led to less fear on IPR matters (as there was not much left to lose) and the consensus on FTA benefits as a result of economic growth. An important reason for lack of interest in both countries was the relatively positive perception of the EU, especially when compared to the US.

However, in both contexts there was increasing interest from particular NSA groups, showing the dynamic nature of their activity. Differences in interest and activity between the different kinds of NSAs were similar in both countries.

Business groups were generally in favour of negotiations and with little interest nor concern in IPR as a bargaining chip more than anything. This was different for pharmaceutical businesses that have a direct interest or, in the case of local laboratories, concern. Small businesses are generally more critical of the agreement and small farmers who use agrochemicals of the inclusion of increased patent protection in particular.

Most social organisations are critical of both the agreement and IPR with more interest in specific IPR issues among health and environmental organisations, although the more 'general' organisations are currently picking up this topic as they done have with the US. Ecuador Decide is an example of a big movement that has always had a particular focus on IPR matters. They are unique in their open alliance between a local pharmaceutical union and many different social organisations, as well as the effects they have achieved through mobilisation during the US negotiations. In Peru AIS and Red-Ge pay special attention to IPR, but overall in both countries at the time of fieldwork not many NSAs, nor the media, discussed the topic into much depth.

Besides similar positions of BOs on the one hand and SOs on the other, resources and strategies are also quite comparable between the two countries. Most SOs use diffusion through declarations and studies, often spread on the internet as a main strategy, as well as directly confronting the government with critical letters or consultation requests. One difference is that in Peru a clear division exists between SOs that follow institutional paths and strategically frame the issue less confrontational in relation to the large pro-FTA consensus in Lima, and those that do not believe in institutional options and are more confrontational. Framing the issue as something ‘closer by the people’ is another strategy used by organisations such as Ecuador Decide and local pharmaceuticals as a focus on IPR and access to medicine. Another difference is the dominance of one umbrella organisation in Ecuador that sets out lines for many and has much experience with and believe in the strategy of mobilisation. Also they decided to abstain from institutionalised participation, in this case a formalised civil society committee within the Ministry. Instead critics in Ecuador chose to address the president and critical Minister of Economics as a choice of arena that they were hoping to gain from. In Peru health organisations did similar for the Ministry of Health. In general organisations preferred dealing with Foreign Affairs over the Ministry of Trade, even though there is less to gain there. Access to media is important to their strategies but was limited, although more recently Peruvian NGOs have been very visible in the newspapers. In both contexts SOs formed (transnational) alliances in order to increase their limited resources, such as knowledge and size or membership.

Alliances were less necessary for BOs that are already perceived to have the knowledge (without necessarily owning it), have the contacts and in Peru are ascribed an important role to the country economics, possibly for their tax revenues or employment creation as discussed in theoretical framework. In Ecuador instead business felt ‘blamed for all the bad’, but in practice still had access through contacts in the Ministry of Foreign Affairs. The resources, consultation and side room as well as hiring an IPR expert as representative are mainly used to serve BO interest.

Academics in both countries are said to be taken more seriously, but are not always participating actively, and publish more in Peru than Ecuador.

Political Opportunity Structures for NSAs

Despite attempts, we saw there was hardly any participation possible on the ‘sudden’ decision of 486, an important indicator of IPR-related decision making. After decisions were taken, Peru had an ad-hoc information meeting with angry indigenous groups on the topic. Besides a few experts in both countries no NSAs had a presence during the process. In both contexts SOs were very critical and tried to influence decisions somehow, but found this impossible. The lack of possibilities in the case of 486 can be extended to other processes and be related to the POS that will be discussed now.

In this analysis I will use a broad definition of POS, not only including the strength, stability and coherence of the president and the government, repressive or facilitating structures and access of different civil society groups and their allies (including official mechanisms), but also other factors

that contribute to the POS in the respective contexts. This includes the strength of the policy paradigm, framing and public opinion and attention. We have seen in the theoretical framework that these POS can affect opportunities for civil society to influence the process with (political) crises increasing them and repression or a strong policy paradigm of the government diminishing them for example. Many of the POS of both countries can be related to earlier discussed items, such as the US experience.

Starting with the policy paradigms and the political elites, there are several very strong differences between Ecuador and Peru. On the one hand there is Peru with a strong policy paradigm that believes in free trade and seems to have an overall agreement of elites on the topic, and even with the Ministry of Health in appearance at least. This strongly limits space for critics. On the other hand we have Ecuador that has openly showed an internal disagreement between different ministries, institutions and the president at different points in time. Such disagreement or the absence of one strong paradigm (or the existence of two) is said to create opportunities for civil society. According to one respondent (Ec_15) *“Positions are not given, meaning that they will be the result of a game of pressure by different sectors according to their interests. So the business sector favourable of the agreement have been betting on the Ministry of Foreign Affairs, whereas those sectors that are looking for a different type of agreement have been represented by Pedro Paez”*. This corresponds to the strategies of different civil society sectors in choosing their arena, as far as they had the access to these institutes. At the time of research no real decision-making was taking place and now that this is happening people have changed functions and the disagreement is less obvious (at least to the public). It is hard therefore to speak of any concrete results or impact of this disagreement for NSAs.

The agreement of elites in Peru can also be related to the fact that many of the people involved have been there for a long time and also worked together during the US negotiations. The fact that Ecuador has these people mainly in Foreign Affairs and IEPI would explain then that these maintain a different, more pro-FTA discourse from new ministers and to a certain extent the ‘new’ president. Whereas both countries were dismissing – often critical – officials during the US negotiations, this is currently only the case for Ecuador.

The fact that both countries have a clear veto player could diminish the importance of any disagreement (or force agreement) as well as possibilities for NSAs in general and in the case of Ecuador specifically. The support that the Ecuadorian president Correa, as opposed to his Peruvian counterpart Garcia, has among the public decreases possibilities for those groups that go against his views and the other way around.

A more centralised system in Ecuador also means decision making is a more public domain than ever before. Also in Peru direct participation in decision making is very limited, especially since institutionalised business coordination through CENI ended. In Ecuador a similar thing happened with

the exclusion of business from COMEXI, however this is directly related to the problematic relationship between the president and business. In both cases personal contacts with negotiators still allow for a slightly more direct role, such as through consultation, which seems to be the case only for the main business associations and pharmaceuticals. All others can use ‘mechanisms’ such as general information meetings, the sideroom during negotiations, and request consultation. All these options are considered very limited by social organisations in both countries, especially as little transparency makes it more difficult for them to use the options they do have. The lack of institutionalisation of participation is held responsible by some for the arbitrary situation in which not only personal contacts are important but as in Ecuador participation also depends on who is in charge of the table. The latter has established a special civil society committee which is supposed to increase the non-business participation, but is actually strongly criticised both for the limits and the attempt of co-optation it is seen to represent.

Even though mechanisms seem similar and possibilities to influence are considered limited in both contexts, a clear contrast does seem to exist when considering access and influence of different groups.

On the one hand there is a rhetoric for more inclusion of SOs and a tense relationship between the president and business in Ecuador. Critics theoretically have more space as a cautious rhetoric on both FTAs, and IPR was the accepted norm also for public opinion, which creates option for mobilising them as well. We have also seen more radical criticism was still not acceptable either, especially after the ending of ‘their arena’ at the Ministry of Economics. Space for those in favour was limited as well. On the other hand in Peru a more negative view on SOs – to a lesser extent for more institutionalised NGOs - seems present and the interests of big business are generally represented by the Ministry of Trade. Business groups in Peru are more automatically mentioned as participants of the sideroom or other consultation meetings. They are seen to have more expertise, but are also better informed by the government itself. It is clear that business faces more open POS here that increase their relevance.

It has to be said that in Ecuador SOs still feel excluded, which they largely relate to how Foreign Affairs handles their obligation for transparency and stimulating participation. It is very different from the large discrepancy between business and social organisations in Peru that is expressed by almost all SOs in both countries.

They relate this to the neo-liberal approach and the large consensus or policy paradigm on the strong ‘need of FTAs, *si o si*’ that diminished the space to ouster criticisms. Also in public opinion in Lima it was almost unacceptable to be against FTAs. Going against majority opinion, or at least the perception thereof that is important to the government, critics thus face more closed POS. As public interest was limited still, the weight of this factor might have been as well. However, mobilising people in such a context is more difficult.

Peruvian business interests seem to be almost equalised to country interests. In fact government and business show similar agendas and preferences, which could explain their more open POS and influence. A few respondents also link this difference to historical factors such as the crisis of the left in Peru after the 1980s and the history of strong and successful mobilisation in Ecuador, showing the result of one own's agency to POS. However, also in Ecuador some believe neo-liberalism is ongoing and nothing much has changed.

In both contexts (indigenous) declarations speak of repression, with Peru being the strongest including a criminalisation of protest and social movements, whilst Ecuador is criticised for demobilising through co-optation of (potential) critics as well.

Both governments feel they are trying to include everyone as far as the process allows it. They do point out it is a difficult topic with only few specialists, a statement that can easily exclude anyone not considered as such. Indeed we have seen that a perception exists of SOs with political and ideological instead of technical arguments. Social organisations in both countries do sometimes admit a lack of technical capacity, often related to a lack of resources, but generally believe they bring strong technical and non-political arguments. We have seen business, but also academics are taken more seriously. This technicality of the topic can thus decrease POS even further, also as it generally allows the government to work more autonomously and authoritatively.

Influence of NSAs

Lack of POS decreases chances of influencing the process, although agency plays a large role too. Formed alliances and campaigns in both countries against the US agreement and the issue of IPR and health in particular were mentioned by officials as influential to both the agreement and public perception. This was strongest in the case of Ecuador and the campaign of Ecuador Decide, that showed a discursive and decisional or agenda-setting influence then that is not yet clear now. In Peru the discursive influence of government and business seems to be stronger at this time in which consensus exists on the benefits of FTAs. This diminishes the importance given to IPR issues, although this has recently somewhat increased again showing from the attention by the press to arguments of critics as well. For NSAs it is relevant that perception of public opinion is mentioned by government officials in relation to their decision-making, such as the consensus among their citizens on the benefits of FTAs in Peru and the worry on biodiversity in Ecuador. It also shows from government reaction to more broadly carried criticisms, such as the denial of Ecuador's continuation of the negotiations and Peru's recent promise no to go beyond US on patent protection.

It is possible that SOs in both countries have shown their discursive influence recently through critically assessing the process in the media, thus forcing the mentioned public statements made by their governments. In both countries the belief of social organisations in their own actual influence is very small, besides the option of mobilisation in Ecuador, a threat that increases power of these groups

by state learning as they have seen what can happen. The fact Ecuador Decide represents a large group and has personal contacts increases their influence, although it was limited up to the time of fieldwork and nothing like expected after the election of Correa. Indigenous groups in both countries face strong difficulties in part due to their more confrontational approach, or perception of this and lack of capacity, as well as repression. In theory a confrontational approach in such a setting can lead to less access and effect, which indeed seems the case in Peru.

The more institutionalised organisation in Peru are believed to have a discursive influence, but decisional power is very limited for any SO. Business, especially in Peru, are more optimistic about their role and are often directly related to ideas (discursive) and decision-making or non-decision making on IPR specifically, such as the Peruvian economic think-tank IPE. Most respondents from both countries confirm these views also when comparing themselves to the other context.

The IPR debate

IPR was considered a highly important topic in any negotiation, especially as parties such as the EU or US would not negotiate without inclusion of this topic and in both negotiations the topic has created much conflict. Ecuador was much more convinced of the possibility of making minimum concessions in this case than Peru, that seemed more realistic in that it will be harder for them to influence the EU in a topic that the other party is so particularly strong and strict in. An important difference is that Peru has the ‘floor’ of the US and Ecuador does not, although in a regional setting also Ecuador could be obliged to accept this.

As we have seen internally it has been a topic of heated debate within both countries during the US negotiations. In Peru civil society and the health ministry became very concerned with the consequences for access to medicine during the US negotiations and the indigenous about their biodiversity and knowledge resources. This position remains, but the health ministry agreed on compensation measures earlier, and the debate on the topic seems to have diminished. In Ecuador the mobilisation and concern for medicine in particular even brought an end to the process and installed a new anti FTA president.

It is seen as a new, sensitive and difficult topic that is both important and potentially risky to the country on some aspects, although the extent to which risks are perceived differ largely. The level of piracy, mainly within Peru, and the large amount of biodiversity and traditional knowledge both countries have, as well as the interest they have in geographical indications, are mentioned as reasons for the importance of a good IPR regime.

In both countries there were respondents that believed a strong IPR regime will stimulate import or trade in general, foreign investments as well as knowledge transfer (including on medicine). These ‘believers’ see the potential financial benefits of traditional knowledge and biodiversity as a chance

for the indigenous and the country. In Peru there were many more ‘believers’ than in Ecuador and especially in the latter the minor interest of this topic to the country was emphasised.

Critics however fear the effect on medicine (prices and access) by increased lengths of patents, test data protection and restrictions on compulsory licensing. Both health departments acknowledged this risk, but whereas the Ecuadorian felt confident the negotiators would take this into account or at least make sure other benefits were gained in exchange, the Peruvian health department was not even able to speak out on the topic. In both cases people spoke of compensation – as also happened with Peru during the US – or gaining other benefits in exchange, again pointing at the use of IPR as a bargaining tool. Longer patents can also increase prices of the agrochemicals that many small farmers need for production.

Most SOs have a negative view on the inclusion of biodiversity and knowledge in IPR negotiations. Some even feel their government is ‘selling off’ their recourses, not caring about plants and animals’ (Pe_13, Ec_13) or at least choosing the wrong way of protection (Ec_19). We have seen that also the Ecuadorian president opposes himself to this inclusion however, although IPR negotiators in both countries are strongly in favour.

The argument of the country ending up being a net payer on royalties with such an IPR agreement was only mentioned by one economist in Peru (Pe_6), although many reflected on the minor amount of patents both countries currently had registered. No one mentioned the implementation costs. An international relations scholar believes IPR to be the topic in which asymmetries between negotiating groups – developed versus less developed – are strongest. Despite allegations by those in favour of ideological reasoning of critics, few referred directly to historical and moral reasons for the need of an asymmetrical system or defending against imposition of Western standards.

Criticisms were ousted by more Ecuadorian public servants than in Peru, but in both cases by most SOs.

Despite the recognition of its importance, there has been still relatively little interest in IPR specifically of both business and social organisations, nor was there any public debate at the time of fieldwork. Before recent negotiation rounds the topic was always mentioned as one of the problems, but not many declarations or articles actually went into the topic more deeply. A few organisations, such as Ecuador Decide in Ecuador and AIS in Peru have been working on this topic in depth since the US negotiations, and actually achieved a lot doing so. Recently also Red-G in Peru is focusing a lot on IPR and sends around much information. These groups mainly work on health issues, on which most knowledge exists. There are also some environmental groups active however and also indigenous sometimes focus on these issues, but they tend to disagree on what approach to take. Ecuador Decide does express clear ideas on what a more ‘rational’ IPR regime should look like and why it is much better to negotiate it in a multilateral setting. Most of these organisations think either IPR should not be included in the process or sensitive issues in relation to this, such as health, should

be left out. Many of these organisations are not against (free) trade agreements, but believe this bilateral setting unable to serve their countries' interests. Often, however, they are generally against FTAs, making IPR only one of their criticisms. We have seen SOs are often blamed for not bringing technical arguments or not having expertise, which in the case of IPR is perceived to be concentrated in the national property rights institute and in the case of Peru in the Ministry of Trade. Especially the Peruvian institutes are seen to be very competent, also by Ecuadorians, resulting in a strong(er) position at the table. In Ecuador it is mainly the president of the IPR institute. In reality, expertise can be found also outside these institutions, including in the different SOs. In academia there are only a few scholars continuously working on the topic, but also those with a broader interest usually have a (critical) opinion on IPR.

However, many important organisations, including almost all business groups, do not focus on IPR at all as they have no interest nor fear from it. This creates diverging interests of NSAs and potentially makes it more difficult for other groups to influence IPR matters.

The government officials interviewed were usually specialists, working on the topic, meaning their appreciation of its importance might not be representative for the government or even trade ministry as a whole. Whereas a Peruvian negotiator says IPR is as important as market access, this does not show from the process and many respondents feel IPR is not a priority to their government. It is rather seen as a necessity not in their interest, with the exception of some more offensive items such as geographical indications and indigenous knowledge, mainly in Peru that promotes this strongly in multilateral settings. Especially in Peru IPR is generally not considered a deal breaker, but instead a bargaining tool used to gain other benefits such as market access. This way of viewing IPR also means that arguments in the IPR debate are often not directly relevant to the government's position. Of course they do strive for certain offensive objectives and try to minimise harm in other fields (reactive), but in the end would accept 'the package' anyway.

This is different for Ecuador, where IPR in a way has been a deal breaker and even government officials, following the president, express themselves much more carefully on the topic and strongly on what will not be excepted in IPR. The negotiators were less clear on this however and the same is said for the final red lines at the negotiating table. Also social organisations do not fully believe the importance of IPR to their government and refer to the political decision of 486 with 'unforeseen' consequences in IPR (negotiations). The emphasis on other or general benefits of the agreement as well as aiming for a 'least bad impact in exchange possible' that we find in Peru is less strong in Ecuador.

In general worries on the topic were limited for different reasons at the time of fieldwork in both cases. Of course for the few that believe in a higher protection of IPR anyway with its benefits for investment and knowledge transfer it could be said that they indeed take the IPR debate into account, but do not believe there to be much risk. All speak of 'the right balance' in IPR, but definitions of

what this balance is strongly differ and are hardly made very concrete. Some speak of being realistic, others more of fairness, but conceptualisations on what this implies are hardly ever given. In general it seems that in Ecuador the balance implies less protection of IPR (in sensitive fields) than in Peru, and for social organisations even lower or excluding those areas.

In Summary

The following table will give an overview of the different events and items discussed in the data analysis chapters, comparing the findings of Peru with those of Ecuador.

Table 3: Summary of comparative analysis

Topic	Peru	Ecuador
IPR commitments	-TRIPs, CBD & CAN -Bilateral agreements like US	-TRIPs, CBD & CAN
US experience	-Mobilisation against (including health/IPR arguments) but ratified -Current economic growth linked to this as legitimation more FTAs	-Strong mobilisation against, mainly on health and IPR -President denounced and negotiations stopped -Correa elected
Decision 486	-Pushed for freedom within CAN harmonisation, including pressure on Ecuador -Decision by Ministry of Trade with no participation (only informing indigenous)	-Initially critical but accepted for political reasons -Decision of President with Foreign Affairs; some consultation but no real participation
Position	-Pro FTA (belief market access) -Well developed IPR position including offensive interest; little fear health (compensation; recently more) and more importance bigger picture; bargaining tool	-Anti FTA rhetoric ('Agreement of Association') but still on board -Against IPR inclusion of sensitive issues such as health and biodiversity (as stated in constitution)
Decision-making procedures	-Ministry of Trade (negotiators and veto) -In coordination Foreign Affairs, INDECOPI, some health	-President veto (and personal advisor) -Foreign Affairs and Negotiators (incl. IEPI) -Other ministries less clear
Transparency & mechanisms for NSA participation	-Lack of transparency and mechanisms; sideroom limited	-Lack of transparency and mechanisms; sideroom limited -Committee seen as co-optation
NSA interest, positions & participation	-Limited for long time, since strong EU requests more interest IPR SOs and media (health) -Business limited interest IPR	-Limited for long time due to love president and electoral processes -Some more interest, mainly ED
NSA resources & strategy	-Lack of access to information, some lack technical capacity IPR -Personal contacts business	-Some lack resources -Popular mobilisation as main resource; also personal contacts

	-Transnational alliances -Institutional vs. Confrontational	-SOs diffusion and demand consultation
Political Opportunity Structures	-Strong policy paradigm (pro FTA) and coherence elites -Weak president but strong negotiating team (veto) with expertise -Facilitation business, repression indigenous -Less interest public, mainly in favour	-Unclear policy paradigm; disagreement elites -Strong president and centralised politics -Little facilitation NSAs, committee considered co-optation -Public Opinion critical FTAs but faith president
NSA influence	-Business much discursive and (non-) decisional -Institutionalised SOs some discursive -Confrontational/indigenous very little	-Difficult for all NSAs (decision-making concentrated in public sphere) -Business some through networks -Ecuador Decide some through networks and history of mobilisation
IPR debate	-Expertise present but limitedly used for debate and position due to bargaining role IPR; -SOs active on health issues	-Health and biodiversity included in rhetoric and constitution -486 shows other interests above IPR -ED well developed IPR arguments; non-pharmaceutical business no interest

(By B. van Paassen)

Conclusions

Throughout the thesis we have seen the current relevance of trade negotiations and in particular the topic of IPR in developing countries. This is clearly a very contentious topic, yet little is known on politics within these fields and countries. This thesis implemented empirical evidence in order to understand these politics better.

In the outline of this thesis I posed questions on the forming of position on IPR by the Ecuadorian and Peruvian government in context of negotiations with the EU. As displayed in the conceptual scheme at the beginning of the thesis, I expected government ideas and final positions to be the result of different interactions, of which I have mainly shown interest here in contextual factors, internal decision-making processes, the relevance (influence) of NSAs in relation to their activity and the structures they encounter, as well as the extent to which the IPR debate is actually included in actors' discourses. I have emphasised the importance of comparing the two cases and reflecting on their differences in order to retrieve more information on such politics. Unlike the ideas formulated on the contrary positions and NSA facilitation in Ecuador and Peru in the hypotheses at the beginning of this thesis, reality proves to be less straightforward, especially in the case of Ecuador.

As both questions have largely been addressed in the comparative analysis before, final conclusions – mainly in relation to the comparison - will be drawn in short only.

We have found different positions of both governments. In Peru the position on IPR is more elaborated including offensive interests on biodiversity, indigenous knowledge and geographical indications, but at the same time more flexible as IPR could be used as a bargaining chip. Ecuador on the other hand showed diverging internal positions at different points throughout the process, including a more pragmatic and inclusive view on IPR, but overall emphasised red lines in health and – contradicting their own projects – biodiversity and indigenous knowledge. These red lines and the importance given to IPR were not clear to NSAs and seemed contradictive with Ecuador's decision to support 486. The policy paradigm of neoliberalism and belief in FTAs was particularly strong in Peru, where the bigger picture of commerce and market access would always take precedence over IPR. It is partly a result of the FTA with the US that is said to have led to economic growth but also created a lock-in situation of the Peruvian IPR regime. In Ecuador no FTA is present and more caution is necessary. Different ideas exist and still evolve; there is a less strong paradigm, although recently the emphasis on and framing of an agreement for development has been present and the new constitution has become an important guideline.

To see where differences in ideas and position between both governments can stem from I have traced their policy processes, internal and external, as much as possible.

Distribution of power within the governments appeared relevant to dominant government ideas or even policy paradigm. Decision-making processes included different state entities, but had been

modified in both countries after disagreement during the US negotiations, concentrating the power in the Ministry of Trade (negotiators) in Peru and into the hands of the President, and partly negotiators and Foreign Affairs, in Ecuador. Negotiating ministries in both countries show a strong preference for commercial interests and were favourable to negotiations. This expressed a presence of the internationalisation of the state problem in Ecuador as other state entities, including the president, did not all agree with this view. As this veto player has shown different discourses, possibly due to electoral needs, the Ecuadorian position – despite strong anti-FTA rhetoric that he has expressed since his election - remains relatively unclear. In both contexts insulation from opposing state entities and secret decision taking seem to be present, such as shown on 486.

NSA activity was limited at the time of fieldwork for several reasons discussed, but more so in Ecuador than Peru. Dynamics are visible, as they have been very active on IPR during the US process and with recent rounds media presence of NSAs has much increased. Possibilities, such as mechanisms and POS, to influence the process were limited for most NSAs. This can not be said for business in Peru that has played an important role in the US negotiations and is still considered directly relevant to official positions. This can be related to resources (or perception thereof) such as technical capacity and the congruence between their preferences or ideas, and that of the government or Ministry of Trade that opens more POS. The expected privileges of SOs in Ecuador under the current government were not found, which can be partly ascribed to the centralisation of the politics and the individuals of Foreign Affairs responsible for NSA participation. Repression is mentioned by indigenous groups from both countries, but mostly in Peru, as a factor preventing true participation.

Despite strong emphasis on the technicality of the topic and the lack of capacity NSAs face, both countries did not undertake any impact studies yet and especially in Peru – as showing from the US process - the search for justification of IPR inclusion was larger than the importance of truth.

Public opinion is mentioned by both governments as a relevant factor, and NSAs that go against this face a harder time influencing the process. We have seen that broad mobilisation during US negotiations, including on IPR, was effective in achieving a sideletter in Peru and even an end to the negotiations in Ecuador. State learning helps these organisations and potential mobilisation to be taken somewhat more seriously or instead attempt to coopt these groups as seems the case in Ecuador. Decisional influence of NSAs is particularly difficult as officially there is a lack of transparency and no direct participation possible. Discursive influence can be seen in the epistemic pro-FTA community of Lima, as well as some critical voices in recent media such as Red-Ge.

The regional setting of the process was mainly referred to as a reason for lack of participation mechanisms or interest and possibilities for regional participation mechanisms and cooperation were hardly mentioned. Also, in country coordination it increased difficulties rather than created possibilities for the CAN countries. There are hints to the importance of country differences in strength or pressure, such as Peru putting on Ecuador for decision 486, that could be relevant in this negotiation process. The EU has often been mentioned as a very strict and well-prepared negotiation

partner that will definitely influence these government positions. These power dynamics will have to be studied in further research however.

Throughout the research and even more towards the end of analysing the data, theoretical knowledge acquired in the framework has proven to be extremely useful in developing ideas and structuring findings. I have found theories on global governance, new constitutionalism, decision-making, the role of ideas (in IPR) and NSA activity very relevant to the cases studied here, adding to the empirical base of these theories as well as to the 'generalisability' of my research findings.

We have looked at two specific cases with different contexts, and although more empirical base is needed for hard conclusions the cases give important insight into trade and IPR politics developing countries.

It becomes clear that most of the process takes place within the government and often within insulated (negotiation) teams or even at the presidential level. This is possible partly because of the technical nature of the issue, and in one of our cases due to the strong policy paradigm present.

We find that NSAs are dynamic in their interest and activity but lack official mechanisms to participate, leading to a stronger position for those with informal contacts or other resources. The congruence between NSA ideas and that of decision makers or public opinion are particularly important as well. Indeed critical SOs face a difficult situation whereas business, especially in a neoliberal context, has easier access and more influence. Despite growing acknowledged importance of IPR and offensive interests for mega diverse countries, it seems to remain largely a bargaining chip to developing countries, especially where FTAs and market access are considered 'the highest goods'. It shows that earlier commitments indeed lock-in country positions.

Based on the case studies I would like to elaborate further the conceptual model presented at the beginning of the thesis as the process is more complex than presented. Most decision-making and forming of ideas takes place inside the state, showing from the insulated circle, in which certain groups are insulated again or instead have less influence. Both cases showed a veto decision maker, in the case of Ecuador the president, but more generally negotiators in these countries form positions as well (unlike in the EU where this is separated). Epistemic communities or policy networks in general can increase outside influence, but more research is needed to identify these links. The NSAs studied had a limited effect, especially where their ideas did not correspond with those of the decision-makers or public opinion, and often lacked - or were perceived to lack - resources.

Distance to decision-maker is representative of (lack of) influence; often arrows go both ways, for example when framing strategies were used by different actors.

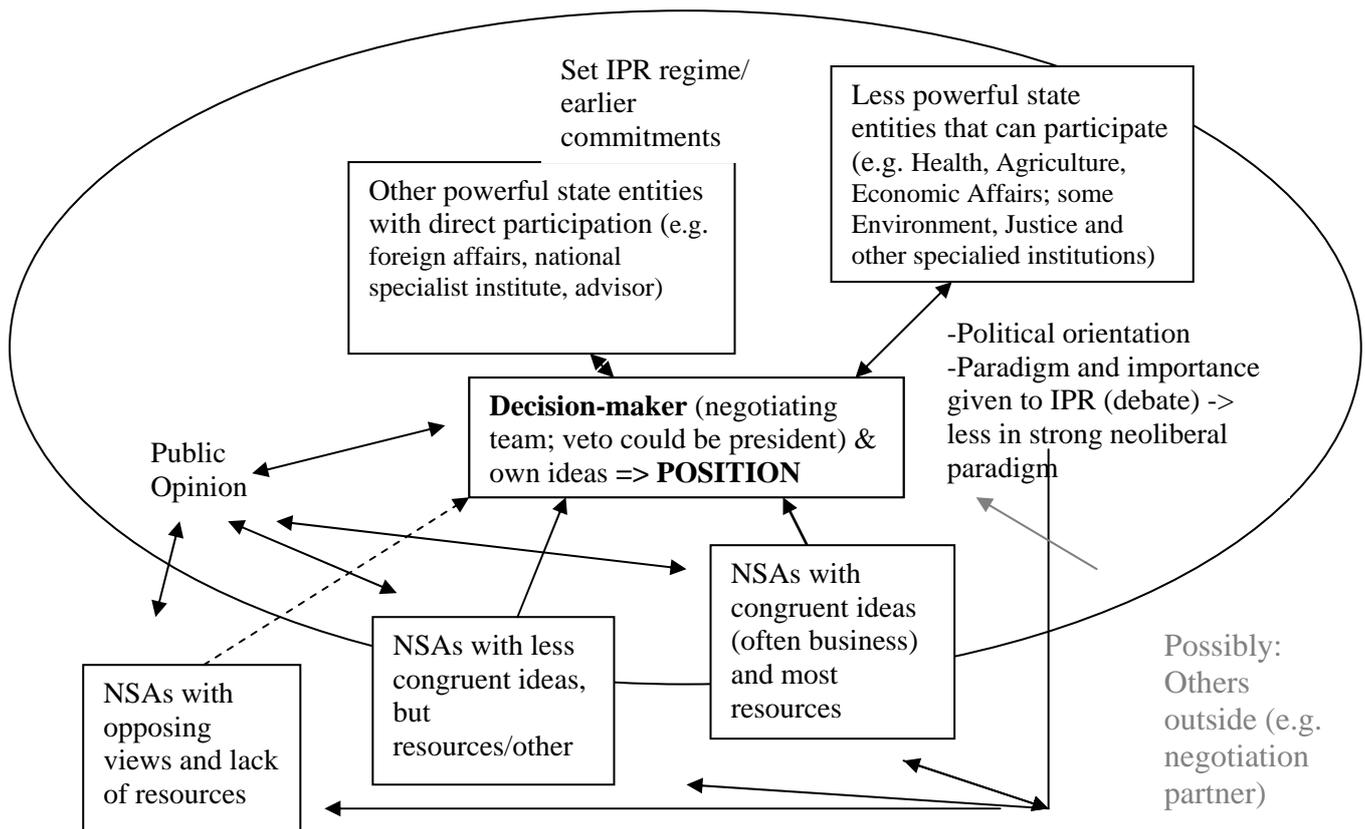


Figure 5: Final conceptual model
(B. van Paassen)

Methodological reflections and future research

These two case studies based on many interviews and other sources have, due to difference in context, the comparisons made and correspondence to theory, given important insight into internal politics of developing countries on a new issue such as IPR. More case studies with a systematic approach, which is both difficult and important in such polarised issues with room for perception, are needed to add to the empirical base and draw more general conclusions on such politics.

As this research concerned new highly understudied issues and was kept relatively broad for exploratory reasons, there are many topics that could be picked up and elaborated on further. These include a further deepening of the understanding of the black box of developing country politics on ‘new issues’, such as IPR but also other contentious issues such as trade in services. More inside information is needed to create a complete picture of internal power dynamics, strategies such as policy insulation and alliances that are created within and outside the state in (transnational) policy networks. I have mentioned the potential relevance of power dynamics between countries and the role of EU (soft) pressure, which would have to be studied more in order to draw conclusions. As expected it was difficult to operationalise (non-observable) power and influence, including lobbying, and for stronger conclusions more systematic research is necessary. The organisations involved could be

studied more in-depth as to their role and importance of public opinion both directly to decision making and NSA work.

As negotiations were in an impasse at the time of fieldwork, and Ecuador was going through a lot of changes including the transformation from a regional into a bilateral setting, it would be interesting to look at the process now and after negotiations end to see what final positions and possibilities for influence look like. Will Ecuador break off the negotiations again and will this be related to IPR? And will Peru stick to the US agreement or go beyond as most expect?

Policy recommendations

This research showed once again how difficult it is to align not only positions of different stakeholders, but also their perception of others position and activities. Governments were convinced of the fairness of their positions and options they offered for participation, whereas most SOs completely disagreed. As this is not – and probably should not be – solvable, increased communication and understanding of the other's position could already diminish discontent from both sides. Furthermore, stronger institutional frameworks that do not imply cooptation are needed for all NSAs to decrease arbitrary, 'unfair' advantages for only a few. The original regional setting should not be an excuse to difficult participation even more, but could instead be used to strengthen this process and the existing alliances of NSAs. More transparency is a prerequisite.

As this research was about IPR, a topic I personally consider highly relevant for developing countries, less viewing of this as a bargaining tool and more inclusion of the actual debate is highly recommended. It is important then that actual information and knowledge, also that produced by (more critical) SOs is taken seriously by governments in a search for truth rather than legitimacy.

Lastly, there is a large role for the EU to play in sticking to promises made on negotiation schemes, inclusion of (Andean) civil society and development goals that are currently being undermined, and putting the Andean countries in a difficult position where IPR is more likely to become a bargaining tool.

Bibliography

- Acosta, A. and Falconi, F. (2005) TLC mas que un tratado de libre comercio, ILDIS/Fredrich Ebert Stiftung/FLACSO, Quito. Including: Salvador Crespo, I. Acceso a los medicamentos y propiedad intelectual en el TLC, pp 231-244.
- Adler, E. (2005) Constructivism. In: Carlsnaes, Simmons, B.A. and Risse, T. "*Handbook of International Relations*" Sage.
- Aguirre Reveles, R. & Perez Rocha, M. (2007) *The EU-Mexico Free Trade Agreement Seven Years on: A Warning to the Global South*. TNI, June 2007.
- Arana, C. (2008) *Temas de Propiedad Industrial en el tratado de libre comercio Peru-EEUU*. Thesis, Universidad Católica, Lima Peru.
- Arts, B. (2000) Regimes, Non-State Actors and the State System: A 'Structurational' Regime Model. *European Journal of International Relations* 6, pp 513-542.
- Arts, B. (2003) *Non-State Actors in Global Governance: a power analysis*. Paper presented at ECPR 2003.
- Bajo la Lupa (2008) *El Peru en la Globalizacion*, No. 5, Lima.
- Baldwin, D.A. (2005) Power and International Relations. In: Carlsnaes, Simmons, B.A. and Risse, T. "*Handbook of International Relations*" Sage.
- Berry, R. (2008) Frontiers of Freedom: Intellectual Property and the Developing World. Part IV.
- Beyers, J. (2008) Policy Issues, Organisational Format and the Political Strategies of Interest Organisations, *Western European Politics*, 31(6), pp 1188-1211.
- Blommaert, J. and Bulcaen, Ch. (2000) Critical Discourse Analysis, *Annual Review of Anthropology* 29, pp 447-466.
- Buroway, M. (1998) The Extended Case Method in: *Sociological Theory* 16(1), pp 4-33.
- Burstein, P. (1999) Social Movements and Public Policy in: Giugni, M., McAdam, D. & Tilly, C. (1999) *How Social Movements Matter*. University of Minnesota Press, Minneapolis, London.
- Chang, H.J. (2001) Intellectual Property Rights and Economic Development: historical lessons and emerging issues, *Journal of Human Development*, 2(2), pp 287-309.
- Chen, Y. & Puttitanun, T. (2004) Intellectual property rights and innovation in developing countries. *Journal of Development Economics* 78 (2005): pp 474-493.
- Cohn, T.H. (2002) *Governing Global Trade: International institutions in conflict and convergence*. Ashgate.
- Cox R.W. & Jacobson H.K (1973) *The anatomy of influence: decision making in international organisation*. New Haven: Yale University Press
- Cox, R.W. (1981) Social Forces, States and World Orders: Beyond International Relations Theory, *Journal of International Studies* 10, pp 126-155.
- Cox, R.W. (2006) Problems of Power and Knowledge in a Changing World Order. In: Stubbs,

- R. & Underhill, G.R.D. “*Political Economy and the Changing Global Order*”. Oxford University Press.
- Crotty, M. (1998) *The foundation of social research: Meaning and Perspectives in the Research Process*. Sage London.
- Danermark, B, Ekstrom, M, Jakobsen, L. and Karlsson, J.Ch. (1997) *Explaining Society: Critical realism in the social sciences*, Routledge London.
- Defis Sud (2008) *Paises Andinos – Europa: superar las divergencias* Special edition May 2008, SOS faim, Brussels.
- Drake, W.T. and Nicolaidis, K. (1992) “Trade in Services” and the Uruguay Round, *International Organisation* 46(1), pp 37-100.
- European Commission (2006) *Global Europe: competing in the world, a contribution to the EU’s jobs and growth strategy*.
- Fairlie (2004) *TLC en Debate*, Friedrich Ebert Stiftung/ Red Latinoamericano de Politica Comercial, Lima. Chapter 5: Propiedad Intelectual en las Negociaciones del TLC, pp 105-138.
- Florez, M. (2004) Impactos de los acuerdos de libre comercio sobre el medio ambiente: Diversidad Biologica y Derechos de Propiedad Intelectual. In: Herreño, L, Cerda, A. Alvarez, D. and Daneri, J. *ALCAtemas: de mal en peor*. Diakonia, Ediciones Antropos, Bogota, pp 84-91.
- Garcia, L.A. (2008) Intellectual Property in the US-Peru Trade Promotion Agreement. *Intellectual Property, Bilateral Agreements and Sustainable Development Series: 3*, CIEL and SPDA.
- Gielen, Prof. Mr. Ch. (ed.), Alkema, Mr. A.C.M, Geerts, Mr. P.G.F.A, Groenenboom, Mr. M.M, Hermans, Mr. R, Klos Mr. S.A. and Van Oerle, Mr. R.C.K. (2007) *Kort begrip van het intellectuele eigendomsrecht*, pp 77, 13-16 and 90. Kluwer, Deventer.
- Gill, S. (1998) New Constitutionalism, Democratisation and Global Political Economy. *Global Change, Peace & Security*, 10(1), pp 23–38.
- Giugni, M.G. (1998) Was it worth the effort? The outcomes and consequences of social movements. *Annual Review Sociology* 1998, 98, pp 371-93
- Giugni, M.G.(1999) Introduction in: Giugni, M., McAdam, D. & Tilly, C. *How Social Movements Matter*. University of Minnesota Press, Minneapolis, London.
- Godin, B (2006) The Knowledge-Based Economy: Conceptual Framework or Buzzword? *Journal of Technology Transfer*, 31, pp 17–30.
- Grossman, G.M. and Helpman, E. (1995) Trade Wars and Trade Talks. *The Journal of Political economy*, 103(4), pp 675-708.
- Grugel, J.B. (2004) New Regionalism and Modes of Governance – Comparing US and EU Strategies in Latin America. *European Journal of International Relations* 10, pp 603-626.
- Gutierrez, J.A. (2008) The Andean Community and the European Union: Crisis on the Free Trade Agreement negotiations? *Anarkismo.net*, 24th of October 2008.
- Haas, P.M. (2004) When does Power listen to Truth? A Constructivist approach to the policy process.

- Journal of European Public Policy*, 11(4), pp 569-592.
- Hall, P.A. (1993) Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain. *Comparative Politics*, 25(3), pp 275-296.
- Hasenclever, A., Mayer, P., Rittberger, V. (1996) Interests, Power, Knowledge: the Study of International Regimes. *Mershon International Studies Review*, 40(2), pp 177-228.
- Haus, L. (1991) The East European Countries and GATT: The Role of Realism, Mercantilism and Regime Theory in Explaining East-West Trade Negotiations. *International Organisation*, 45(2), pp 163-182.
- Hay, C. (2002) *Political analysis: A critical Introduction*. Palgrave Houndmills, Basingstoke, Hampshire.
- Held, D. (2004) *A globalizing world? Culture, economics, politics*. Routledge, London.
- Held, D., McGrew A.G., Goldblatt, D. and Perraton, J. (1999) *Global transformation: Economics, politics and culture*. Stanford University Press Stanford, California.
- Hettne, B. (2005) Beyond the 'new' regionalism. *New Political Economy*, 10(4), pp 543-571.
- Hoen, E. 't (2009) *The Global Politics of Pharmaceutical Monopoly Power*. AMB Diemen.
- Jonsson, C. (2005) Diplomacy, Bargaining and Negotiation. In: Carlsnaes, Simmons, B.A. and Risse, T. (2005) *Handbook of International Relations*. Sage.
- INDECOPI (2005) *Peru-Los intereses nacionales en la PI y los TLCs*, INDECOPI, Lima.
- Katz, J. (2001) Structural reforms and technological behaviour: The sources and nature of technological change in Latin America in the 1990s , *Research Policy* 30(1), pp 1-19.
- Krasner, S. (1983) *International regimes*. Cornell University Press, Ithaca and London.
- Kurtz, M.J. (2004) The dilemmas of democracy in the open economy: Lessons from Latin America. *World Politics* 56, pp 262-302.
- Krugman, P. (1997) What should trade negotiators negotiate about? *Journal of Economic literature* (35)1, pp 113-120
- Lai&Qui (2003) The North's intellectual property rights standard for the South? *Journal of International Economics* 59, pp 183-209.
- Lamy, P. (2002) *Stepping Stones or stumbling blocks? The EU's approach towards the problem of multilateralism vs. regionalism in trade policy*. Blackwell.
- Lukes, S. (2005) *Power: A radical View*. Palgrave
- Maskus, K.E. (1997a) Implications of regional and multilateral agreements for intellectual property rights. *World Economy* 20(5), pp 681 – 694.
- Maskus, K.E. (1997b) *The international regulation of intellectual property*. Prepared for the IESG Conference "Regulation of International Trade and Investment", Nottingham September 1997.
- May, C. (2004) Capacity building and the (re)production of intellectual property rights. *Third World Quarterly*, 25(5), pp 821-837.
- Meunier, S. And Nicolaidis, K. (2005) The European Union as a conflicted trade power. *Journal of*

- European Public Policy* 13(6), pp 906-925.
- O’Leary, Z. (2004) Indicators of Good Research in: O’Leary, Z. *The Essential Guide to Doing Research*, pp 56-65. Sage Londen.
- Pacon, A.M. (2005) *Impacto de negociaciones hemisfericas: implicaciones in propiedad intelectual*. Comunidad Andina, June 2005.
- Peels, R. (2009) *The present negotiation process between the European Union and the Andean countries: A field of Contention*.
- Peet, R. (1999) *Theories of development*. New York: Guilford.
- Raza, W. (2007) European Union Trade Politics: Pursuit of neo-mercantilism in different fora? In: Blaas, W. & Becker, J. (2007) “*Strategic Arena Switching in International Trade Negotiations*”. Ashgate publications.
- Roca, S. (2007) *Propiedad Intelectual y Comercio en el Peru*. ESAN, Lima.
- Romero Cevallos, M. (2007) *Los desafios de una nueva integracion andina (agenda juvenes)*. Universidad Simon Bolivar, Quito.
- Russel, B. (2002) Unstructured and Semi-Structured Interviewing in Research Methods. In *Anthropology: Qualitative and Quantitative Methods*, pp 208-236. Walnut Creek: Altamira Press.
- Rhodes, M. and Apeldoorn, B. Van (1998) Capital unbound? The transformation of European corporate governance. *Journal of European Public Policy* 5(3), pp 406-427.
- Robertson, S (2007) *Stirring the Lions: Strategy and Tactics in Global Higher Education*, a paper presented to the European Union Studies Association Conference, Montreal, Canada, 17-19th May.
- Ruiz, M. (2002) *Proteccion Sui Generis de Conocimientos Indigenas en la Amazonia*, SPDA/CAF, Parlamento Amazonica, Lima, pp 35-45 and 71-73.
- Sahai, S. (1996) Importance of Indigenous knowledge in IPR System, *Political and Economic Weekly*, 16(47), pp 3043-3045.
- Santander, S. (2005) The European Partnership with Mercosur: a Relationship Based on Strategic and Neo-liberal Principles. *Journal of European Integration*, 27(3) pp 285-306.
- Santos, B.S (2002) *The Process of Globalisation*. Eurozine.
- Sell, S.K. (1999) Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights. In: Cutler, C., Haufler, V. And Porter, T. : *Private Authority and International Affairs*. State University of New York Press.
- Sell, S.K. (2006) Big business, the WTO and Development. In: Stubbs, R. & Underhill, G.R.D. “*Political Economy and the Changing Global Order*”. Oxford University Press.
- Sell, S. and Prakash, A. (2004) Using ideas strategically: The contest between business and NGO networks in IPR. *International Studies Quarterly* 48(1), pp 143-175.
- Sideri, S. (1970) *Trade and power: informal colonialism in Anglo-Portuguese relations*. Rotterdam

University Press.

- Soederberg, S. (2006) *Global Governance in Question: Empire, Class and the New Common Sense in Managing North-South Relations*. Pluto Press, London.
- Srinivasan, T.N. (1998) *Developing countries and the multilateral trading system*. Westview Press Colorado, US.
- Stiglitz, J.E. (2006) *Making Globalization Work*. Norton, New York.
- Storey, A. (2004) *The European Project: Dismantling Social Democracy, Globalising Neoliberalism*. Paper for the conference 'Is Ireland a Democracy?', Sociology Department, National University of Ireland Maynooth, April 2004.
- Tarrow, S.G. (1994) *Power in movement*. Chapter: Political Opportunity Structures. Cambridge University Press Cambridge
- Tellis (1997) Application of a Case Study Methodology. *The Qualitative Report* 3(3) (no pp)
- Tickell, A & Peck, J (2003) Making Global Rules: Globalisation or Neoliberalisation? In: J Peck and H Yeung (eds) (2003) *Remaking the Global Economy: Economic-Geographical Perspectives*. London: Sage, pp 163-181.
- Transnational Institute (2008) *No to corporate Europe: Yes to Global Justice!* 25 January 2008.
- Verger, A. (2007) The Constitution of a New Global Regime: Higher Education in the GATS/WTO Framework. In *World Yearbook of Education 2008: Geographies of Knowledge, Geometries of Power: Framing the Future of Higher Education*. London: Routledge.
- Verger, A. (2009) *Global Governance and its tensions in the World Bank and the WTO. from the education sectors*. Paper prepared for WB workshop, Washington, April 2009.
- Weber, M. (1968) *Economy and Society*. Edited Guenther Roth and Claus Wittich. Bedminister Press, New York (Conceptual Exposition), pp 956-1005, "Bureaucracy".
- Weisbrot, M. And Sandoval, L. (2006) Bolivia's Challenges. Washington: *CEPR*, March 2006.
- Wolfe, P. (1997). History and Imperialism, A century of Theory, From Marx to Postcolonialism, *The American Historical Review*, 102(2), pp 388-420.
- Williamson, J. (1993) 'Democracy and the 'Washington Consensus'', *World Development* 21, pp 1329-1336.

Lectures

- Mazzucato, V. (2008) *International Trade*. Course 'Political economy of development and its critiques', International Development Studies, Universiteit van Amsterdam.
- Verger, T. (2008) *GATS, TRIPS and the Commodification of Knowledge*. Course 'Knowledge, Globalisation and Development', International Development Studies, Universiteit van Amsterdam.

Frequently used websites

Bilaterals <http://www.bilaterals.org/> (last visited 28/6/2009)

CAOI <http://www.minkandina.org/>

CIA factbook <https://www.cia.gov/library/publications/the-world-factbook> (last visited 31/7/2008)

El Comercio http://www.elcomercio.com/noticiaEC.asp?id_noticia=200778&id_seccion=3 (last visited 28/6/2009)

Comunidad Andina (CAN) <http://www.comunidadandina.org> (last visited 25/6/2009)

Enlazando Alternativas <http://www.enlazandoalternativas.org> (last visited 1/8/2008)

IEPI <http://www.iepi.gov.ec> (last visited 28/6/2009)

INDECOPI <http://www.indecopi.gob.pe> (last visited 28/6/2009)

Ministry of Trade Peru <http://www.mincetur.gob.pe> (last visited 20/6/2009)

Ministry of Foreign Affairs Ecuador <http://www.mmree.gov.ec> (last visited 28/6/2009)

Noticias <http://www.noticias.nl/> (last visited 4/6/2009)

Red-Ge <http://www.redge.org.pe/> (last visited 28/6/2009)

US government http://www.ustr.gov/Trade_Agreements.html (last visited 20/6/2009)

Appendix 1: List of respondents*Peruvian Respondents*

Respondent	Role in process	Place and date
Pe_1	Representative Red-Ge (NGO)	Lima, 19/9/2008
Pe_2	Representative PFIZER (multinational pharmaceutical company)	Lima, 22/9/2008
Pe_3	Academic (IPR) & Business representative (Former head IPR CENI)	Lima, 25/9/2008
Pe_4	Representative Ministry of Foreign Affairs	Lima, 15/9/2008
Pe_5	Academic (law)	Lima, 9/9/2008
Pe_6	Academic (economics)	Lima, 23/9/2008
Pe_7	Ex head IPR negotiator	Lima, 8/9/2008
Pe_8	Representative SPDA (NGO on Environment)	Lima, 16/9/2008
Pe_9	INDECOPI head copyright	Lima, 26/8/2008
Pe_10	Representative Creative Commons (NGO on copyright)	Lima, 13/9/2008
Pe_11	Representative Health Action International – South America	Lima, 8/9/2008
Pe_12	Ministry of Foreign Affairs IPR negotiator	Lima, 11/9/2008
Pe_13	Representative Alianza Social Continental – Capitulo Peru (SO)	Lima, 26/9/2008
Pe_14	Representative Chamber of Commerce	Lima, 25/9/2008
Pe_15	Ministry of Health and Digemid Four representatives	Lima, 23/9/2008
Pe_16	Ministry of Trade First advisor	Lima, 16/9/2008
Pe_17	Ministry of Trade Head IPR negotiator	Lima, 12/9/2008
Pe_18	Global Democracia (SO) Representative	Lima, 17/9/2008
Pe_19	Government IPR expert (informal)	Lima, 22/8/2008

Other respondents

CAN_1	IPR&EU experts at Secretary General (2)	Lima, 19/9/2008
EU_1	EU-CAN relations expert	Lima, 18/9/2008

Respondents Ecuador

Respondent	Role in process	Place and date
Ec_1	Director CEE (Business Association)	Quito, 19/10/2008
Ec_2	Ex-negotiator (head) Member OCE (business NGO) & Academic (economics)	Quito, 29/10/2008
Ec_3	(head) IEPI	Quito, 5/11/2008
Ec_4	Ex-Negotiator/Ministry of Commerce	Quito, 29/10/2008
Ec_5	Ex-negotiator & Academic (economics)	Quito, 31/10/2008
Ec_6	Academic (International Relations) & Member OCE (business NGO)	Quito, 28/10/2008
Ec_7	Ministry of Foreign Affairs Head representative CAN affairs	Quito, 20/10/2008
Ec_8	Ex-negotiator & Academic (medicine)	Quito, 27&31/10/2008
Ec_9	Representative IUCN (environmental NGO)	Quito, 5/11/2008
Ec_10	Representative Ecuador Decide (SO)	Quito, 30/10/2008
Ec_11	Representative Campesinos Agrarios (SO)	Quito, 30/10/2008
Ec_12	Representative ALAFAR (local pharmaceutical) & Ecuador Decide (SO)	Quito, 21/10/2008
Ec_13	Academic & NGO/SM (CAAP/ALOP)	Quito, 27/10/2008
Ec_14	Academic (international relations) & SOCICAN representative	Quito, 15/10/2008
Ec_15	Ministry of Health IPR expert	Quito, 28/10/2008
Ec_16	Lawyer ALAFAR (local pharmaceutical)	Quito, 22/10/2008
Ec_17	Negotiator (agriculture) & Member OCE	Quito, 4/11/2008
Ec_18	Academic&Representative Health Action International – Ecuador - <i>shorter</i>	Quito, 24/10/2008
Ec_19	Accion Ecologica (environment SO) <i>shorter</i>	Quito, 30/10/2008
Ec_20	IEPI representative <i>shorter</i>	Quito, 21/10/2008
Ec_21	IEPI representative indigenous affairs <i>shorter</i>	Quito, 5/11/2008

Appendix 2: Questionnaire Semi-structured Interviews

Preguntas Entrevista: Propiedad Intelectual, CAN y acuerdo con la UE

- Sobre la persona y/o organización, experiencia y/o parte en las negociaciones/ CAN
 - ¿Qué quieren; algún interés particular en Propiedad Intelectual?
 - ¿Cómo intentan alcanzar sus objetivos?
 - ¿Lo alogran? ¿Cuales son problemas y oportunidades en eso?
 - ¿Sienten que tienen algún influencia y con qué resultados (agenda, ideas, decisiones, regulativo)/ quienes sí ó más?

- ¿En qué estado se encuentran las negociaciones en este momento? ¿Cómo piensa que van a evolucionar en el futuro? ¿Cuáles son los temas más sensibles? En especial, como están las negociaciones respecto al tema de la inclusion de Propiedad Intelectual.

- ¿Y en el marco de la CAN (implementacion EEUU)?

- ¿Qué peso / importancia tiene la PI en las negociaciones?

- ¿Qué importancia tiene el tema para el país? ¿Qué consecuencias puede tener, positivo/negativo? ¿Y en términos del desarrollo del país?

- Hay una opinión pública sobre el tema / qué piensa la gente?

- ¿Cómo ve a la sociedad civil –ambos gremios y ongs- en Perú/Ecuador sobre estos temas? ¿Es activa? y en la CAN, es diferente? / ¿Qué organizaciones son consultadas o participan en las decisiones?
- ¿Hay mecanismos de transparencia y participacion? ¿Cuales o cómo son?

- ¿Qué posición tiene el gobierno sobre la PI en estas negociaciones?
- ¿Cómo (piensa que) se forma esta opinión?

- Esta posición, ¿responde a una política de estado o más bien a una política de gobierno? ¿Cree que la oposición actual adoptaría una política muy diferente?

- ¿Los otros países de la CAN piensan parecido a Perú/Ecuador sobre estos temas? ¿Cuáles son los motivos de discrepancia? ¿Cómo ha gestionado Perú/Ecuador estas discrepancias? ¿Ha modificado su opinión inicial?

- ¿Y los de la UE? (Y fuerza UE?)

- ¿Qué piensa sobre el proceso? ¿Qué consecuencias puede tener, para quien, positivo/negativo? ¿Y en términos del desarrollo del país?

- ¿Qué documentos han producido o conoce a los que pueda acceder?