

Questionnaire
Plain packaging

National Group: Peru
Date: July 10, 2013

Questions

Please answer the following questions. For each of questions 1) – 10) below, please answer in relation to your country's national laws including any constitutional law.

- 1) If the general conditions of registrability are met, does the product or service in relation to which a trade mark is used or proposed to be used have any affect on the ability to:
- (a) register the trademark; and
 - (b) use it once so registered?

No, it has no effect as long the general conditions of registrability are met.

- 2) What rights are derived from trademark registration?

The trademark registration grants the following rights:

- *Exclusive use for a period of 10 years (may be renewed for successive 10-year periods).*
- *The right to exclude third parties from the unlawful use of the registered Trademark or a similar one, for any product, service, product's package, and in general any public use as long as such use confuse or mislead the consumer.*
- *The right to transfer, license, and in general to give the Trademark any commercial use allowed.*

- 3) What rights exist in relation to a sign used as a trademark but not registered? What is the basis of any such right?

In Peru, rights over trademarks are granted by their registration. A Trademark that is not registered and is being used in commerce has no exclusive rights. This rule

does not apply to well-know trademarks, as they are protected even if they are not registered.

4) Is it possible to:

- (a) obtain; or
- (b) maintain;

registration for a trademark that is not:

- (i) used; or
- (ii) intended to be used?

Yes. It is possible to obtain and maintain registration for a Trademark that is not being used as evidence of used is not required for registrations or renewals. However, the Trademark Office cancels the registration of a Trademark at the request of any interested party when, without justification, the Trademark has not been used in at least one of the Andean Community countries (Bolivia or Colombia or Ecuador o Peru) during the three consecutive years preceding the date on which the cancellation action was initiated.

5) If yes to 4) above, are the rights derived from such trademark registration the same or different to registered trademarks that are used?

The rights derived are the same, but there's always the risk of a cancellation action.

6) Are rights in unregistered trademarks dependent on use? Whether yes or no, please explain the basis for your answer.

No rights are recognized to unregistered trademarks. See answer 3 above.

7) Is there any basis to restrict the use of:

- (a) a registered trademark; or
- (b) a sign used as a trademark?

If yes, please explain any relevant laws or precedents.

There are restrictions but they are supported on provisions other than intellectual property ones. For instance, in some specific cases there are restrictions for pharmaceutical products.

Also there are restriction in advertisement when considered to be undermining of

moral, health and public decency. For instance, tobacco advertisement is limited (not prohibited) by Law No. 28705.

Nevertheless, a new bill project has recently been presented in the preliminary commission of the Peruvian Congress; it has not been discussed or approved by the Congress yet. The project aims to forbid any kind of publicity or advertising related to tobacco products.

8) Is there any basis for the state or any state-controlled body to expropriate?

- (a) a registered trademark;
- (b) a sign used as a trademark; or
- (c) the rights deriving from either (a) or (b)?

If yes, please explain any relevant laws or precedents.

Expropriations are regulated under the "General Expropriation Law" No. 27117. In order for an expropriation to proceed, it must comply with the requirements of National Security and Public Necessity. There's been no expropriation of intangible assets in Peru so far.

9) If yes to 7) or 8) above, do public interest considerations provide any basis for such restriction or expropriation ("Restriction/Expropriation")? If yes, please explain any applicable public interest considerations, and any relevant laws or precedents.

Public interests do not provide any basis for expropriation; however trademark's use can be limited in relation to publicity/advertising when undermining moral, health and public decency.

10) If yes to 7) or 8) above, are trademarks different from other intellectual property rights in this regard?

No.

11) If yes to 7) or 8) above, are any treaty or other international obligations relied on to provide a basis for such Restriction/Expropriation (as applicable)? If yes, please explain the international obligations, and how those obligations are reflected in or received into your country's law.

No.

12) Is your country a signatory to the WHO Framework Convention on Tobacco Control ("FCTC")? If yes, has your country ratified the FCTC?

Yes. It was ratified on November 30, 2004.

- 13) If yes to 12) above, has the FCTC been implemented in your country? If yes, please explain its legal impact, if any, including by reference to the Guidelines for Implementation of Articles 11 and 13 of the FCTC.

The 6th April 2006, tobacco advertisement was regulated by Law No. 28705, basically stating the following in referral to Articles 11 and 13 of the FCTC:

- Any tobacco packs must contain a warning that occupies at least 50% of the package, plus the phrase "forbidden for under aged".
- Any tobacco advertising in magazines or other permitted media must contain warnings that occupy 15% of the ads.
- No tobacco companies can advertise on TV, radio or other similar media.
- No tobacco advertising is allowed on garments or any type of cloth.
- No tobacco ads can be spread or placed near schools, sport centers or health centers.

- 14) Is the FCTC received directly into your country's domestic law or is domestic legislation required to give it effect in your country's law?

Due to the nature of the treaty, a domestic legislation was required to give valid effect in Peru's laws.

- 15) If there is presently a legal basis in your country for permitting any Restriction/Expropriation, please answer the following questions in relation to both registered trademarks and unregistered trademarks (if your country recognizes/protects the latter).

- (a) What are the parameters for such Restriction/Expropriation? For example, the nature of any stated public interest considerations, the proportionality of the proposed measure to the Restriction/Exploration.

The parameters for restrictions are health and public decency; such regulations apply to alcohol, unhealthy food and tobaccos.

- (b) Is it relevant that such Restriction/Expropriation only applies in relation to a particular class of products, eg tobacco products, foods deemed to be unhealthy or alcohol?

Yes, restrictions apply to a certain kind of products that can be unhealthy as alcohol, unhealthy food and tobacco.

- (c) What are the financial consequences for the state and the trademark rights holder

respectively? For example, is a rights holder entitled to or eligible for any compensation in respect of the Restriction/Expropriation? If yes, what type of rights holders are so entitled or eligible? If not, why is no compensation available?

The General Expropriation Law states that compensation is mandatory in case of Expropriation.

The only limitations so far regarding trademarks are referred to advertisement as stated above. In this case there is no kind of compensation.

- (d) If compensation is available, how is it calculated?

The compensation is based on market price plus the indemnification depending on the damage.

- (e) Does a trademark rights holder affected by Restriction/Expropriation have any other claims or remedies against the state? If yes, please explain the basis and nature of any claims or remedies.

The General Expropriation Law states that in case of expropriation, it is possible to resolve the dispute through arbitration.

In case of restrictions to the use of Trademarks in advertisement, it would be possible to initiate an unconstitutionality action before the Constitutional Court of Peru.

- (f) In the event of Restriction/Expropriation, could a trademark remain registered?

As stated above there has been no trademarks expropriation but just restrictions in advertisement. In this last case, trademark remains registered as they can still be used in the commerce.

In the case of expropriation, the Trademark would be assigned to the Peruvian State.

- (g) If yes, what is the consequence of any Restriction/Expropriation on a well known trademark that was registered prior to the Restriction/Expropriation?

It would be the same consequence as the ones states in our answers above.

- 16) If there is presently no legal framework in your country permitting Restriction/Expropriation, please answer the following questions in relation to both registered trademarks and unregistered trademarks (if your country recognizes/protects

the latter).

- (a) What legislative changes would be necessary in your country to implement a plain packaging regime for a specific class or classes of products such as those previously mentioned? For example, amendments to existing domestic trademark legislation, changes to your country's constitution, multilateral or supranational treaty obligations.

In order to implement a plain packaging it would necessary to submit a bill project before the preliminary commission of the Peruvian congress. After its approval by this Commission it must be approved by the congress. Therefore a new law should be approved to be able to implement plain packaging.

- (b) Could a plain packaging regime be implemented in your country without providing compensation to affected trademark rights holders? If no, what type of rights holders would be entitled to or eligible for compensation? If yes, why would no compensation be payable?

Plain packaging regulation in Peru would be considered a restriction to the use of a trademark, therefore no compensation would be mandatory unless the Constitutional Court states otherwise.

- (c) Would a trademark rights holder affected by Restriction/Expropriation have any other claims or remedies against the state? If yes, please explain the basis and nature of any claims or remedies.

It is possible to initiate an unconstitutionality action before the Constitutional Court of Peru against any law that is considered unconstitutional or contrary to fundamental rights.