

Regional and bilateral agreements and a TRIPS-plus world: *the Free Trade Area of the Americas (FTAA)*

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Supplementary table (*available separately on the web or from the publishers*):

Simple legal text comparison of the TRIPS Agreement and FTAA Draft IPRs Chapter

About these papers

In these issues papers, authors are invited to examine a subject of importance in the developing international intellectual property regime and highlight key issues they see arising. The topics have been chosen following consultations with negotiators from developing countries, and respond to their concerns. Our aim is to contribute to a greater understanding of the impact of changes in this area upon people's lives and better inform debate and negotiations.

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Summary

Higher levels of intellectual property rights (IPRs) protection in an increasingly global regime could adversely affect public interests in developing countries in agriculture, education, food security, public health, technology transfer and biodiversity management among others, according to a growing range of governments, academics, civil society actors and even a UK Government Commission. Many developing countries are still implementing their commitments deriving from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation (WTO) and various conventions adopted in the World Intellectual Property Organization (WIPO). At the same time a range of parallel negotiations at the international, regional and bilateral levels is already reshaping the existing IPRs regime.

Developing countries are concerned about so-called TRIPS-plus agreements, especially at the regional and bilateral level. These types of agreements include commitments that go beyond what is already included or consolidated in the minimum standards of the TRIPS Agreement.

This paper provides an overview, based on IPRs negotiations in the Americas, of some of the implications of regional and bilateral TRIPS-plus agreements for the current minimum standards under TRIPS.

Section 1 provides an introductory background while section 2 discusses the most important developments at the regional and bilateral level on IPRs in the Americas. At the regional level these developments include: an increasing number of Regional Trade Agreements (RTA) in which IPRs protection has become an important part; the most-favoured-nation (MFN) principle in the TRIPS Agreement and its impact in expanding IPRs commitments; and, the contents of RTAs with emphasis in TRIPS-plus commitments. At the bilateral level, various examples show how bilateral trade, intellectual property and investment agreements are promoting TRIPS-plus standards.

Section 3 examines the negotiation process of the Free Trade Area of the Americas and the recently disclosed second draft of the chapter on IPRs. The analysis points out: how IPRs protection is becoming an objective in itself rather than a means for promoting innovation, creation and technology transfer; the existence of many TRIPS-plus areas and features; and, the different national positions in the negotiating process, which range from TRIPS-like approaches to those close to the protection existing in the USA.

This second draft of the IPRs chapter poses important challenges to developing country negotiators. These challenges include, among others, the perpetual push to raise the levels of IPRs protection in trade negotiations; the limitations of com-

mercial trade-offs when looking at public policy issues; the lack of sustainable development assessments; the danger of automatic spreading effects of the MFN clause in the TRIPS; and, the impossibility of reclaiming policy spaces already given up.

Various systemic issues arise from a development perspective. The Draft Chapter could bring more restrictive legal interpretations when applying exceptions linked to the public interest; new areas of IPRs that are unknown to many countries; *a priori* acceptance by national governments of other existing and future IPRs agreements: expansion of the protected subject matter and the periods of protection; and, new and unmeasured implementation costs for developing countries.

Sectorally, the Draft Chapter could affect areas of public interest in health, food security, biodiversity, traditional knowledge, folklore, information technologies, competition policy, technology transfer and special and differential treatment for developing countries.

The final section concludes that an IPRs chapter in the FTAA would only make sense if:

- Adequate commercial and sustainability assessments are undertaken;
- Transparency and consultation processes are enhanced;
- Policy spaces to undertake measures necessary to protect public health in the IPRs system are kept and enhanced;
- The CBD and the new FAO treaty principles together with adequate legal mechanisms for assuring legal access are incorporated;
- Protection of traditional knowledge and folklore is provided for and fully developed;
- Effective ways for facilitating technology transfer are included;
- Flexibilities to address public interest concerns in national patent laws and copyright laws are kept;
- Flexibilities to choose and use the most convenient system to protect plant varieties whether through patents or a *sui generis* system, are kept;
- Regulation against abuse of rights is allowed and developed; and,
- Special and differential treatment is actually incorporated and enhanced.

Finally, developing countries are recommended not to negotiate on IPRs at the regional and bilateral level but to keep these negotiations in the multilateral level where more balanced results can be obtained.

1. Introduction

Higher levels of intellectual property protection in an increasingly global regime could adversely affect public interests in developing countries in agriculture, education, food security, public health, technology transfer and biodiversity management among others, according to a growing range of governments, academics, civil society actors and even a United Kingdom (UK) Government Commission. The IPRs regime is being shaped by a range of parallel negotiations taking place at the international, regional and bilateral levels (i.e. multilevel negotiations). Trends are moving towards widening the scope of protectable subject matter, the creation of new intellectual property rights (IPRs), progressive harmonisation, stronger enforcement measures, weakening of special and differential treatment for developing countries and weakening or removal of existing flexibilities. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), one of the key agreements in the World Trade Organisation (WTO), already imposes minimum, relatively high, standards for IPRs on all WTO members. But the TRIPS Agreement is not the end of the story. It appears to be just one step in the consolidation of the international trends of the intellectual property system, led by developed countries, to raise TRIPS' minimum standards (TRIPS-plus).

This paper provides an overview, based on activities in the Americas, of some of the implications of regional and bilateral TRIPS-plus agreements for the current minimum standards under TRIPS. First, it outlines the regional and bilateral negotiations on IPRs. Next, it introduces the context and coverage of the Free Trade Area of the Americas (FTAA) negotiations on IPRs and the FTAA Draft IPRs Chapter. It then analyses links among these multilevel negotiations and the interests of developing countries, and gives a brief assessment of systemic and sectorial problems that might arise as a consequence of a potential intellectual property chapter in the FTAA. In this analysis, the paper uses the most ambitious TRIPS-plus proposals presented by countries in the FTAA negotiations so as to provide readers with the "maximum" TRIPS-plus scenario in the current FTAA process. Even the most minimal set of proposals, however, will lead to TRIPS-plus in some areas.

In brief, negotiations take place at various levels:

Bilateral agreements between developing and developed countries increasingly include and expand IPRs commitments, both directly, through IPRs and bilateral trade agree-

ments, and indirectly, through the recognition of IPRs as an "investment" in bilateral investment treaties (BITs).

Regional Trade Agreements (RTAs) have become increasingly popular in the last 10 years among WTO members. Most regional treaties include chapters with IPRs commitments. The FTAA is one of the most important current regional trade negotiations and it aims to build one of the largest free trade areas in the world by 2005. The FTAA negotiations on IPRs started in 1998 when Ministers of the American Hemisphere established the objectives of the Negotiating Group on Intellectual Property Rights (NGIP). These objectives seek to:

"reduce distortions in trade in the American Hemisphere and promote and ensure adequate and effective protection to intellectual property rights. In this negotiating process changes in technology were considered"¹.

Multilateral negotiations are taking place at the international level (in the TRIPS Council and the World Intellectual Property Organisation (WIPO)). The TRIPS Council, to which all WTO members belong, monitors the operation of the TRIPS Agreement and undertakes any task on IPRs mandated by WTO Ministers or the WTO General Council. Current issues include:

- negotiations under paragraph 6 of the Doha Declaration on TRIPS and Public Health about finding an adequate solution for the effective use of compulsory licensing by countries with little or no manufacturing capacity²;
- negotiations on a multilateral register of geographical indications (GIs) for wines and spirits in special sessions of the TRIPS Council and the review of the GIs section of TRIPS according to Article 24;
- the mandated reviews of Article 27.3(b), which has been underway since 1999 and should have taken one year, and of Article 71.1 of the TRIPS Agreement;
- discussions on implementation issues and concerns³, notably on the scope and modalities for applying non-violation complaints⁴ and a mechanism for ensuring the monitoring and full implementation of incentives for technology transfer for least developing countries in light of Article 66.2 of the TRIPS Agreement; and,
- the relationship between TRIPS and the Convention on Biological Diversity (CBD), the protection of traditional knowledge and folklore and new developments.

Discussions elsewhere in the WTO are also relevant, in par-

¹ San Jose Ministerial Declaration of 1998 <http://www.ftaa-alca.org>

² WTO document WT/MIN(01)/DEC/2, 20 November 2001

³ Most developing countries and various experts consider this 'discussion' to be negotiations under paragraph 12 of the Doha Ministerial Declaration, the Decision on Implementation Related Issues

and Concerns and the Compilation on Outstanding Implementation Issues and Concerns
⁴Article 64.2 of the TRIPS Agreement

ticular those in the Working Group on Trade and Technology Transfer set up after the Doha ministerial meeting.

Prior to the WTO's TRIPS agreement, WIPO was the main international forum for discussion of IPRs and remains the main technical body on IPRs with a mandate to promote the protection of intellectual property throughout the world. Since 1995, WIPO has expanded the number of international treaties and recommendations (soft law⁵) adopted under its auspices as well as the number of treaty negotiations.

Treaties adopted after 1995 include:

- WIPO Copyright Treaty and WIPO Performances and Phonographs Treaty (1996), which are known as the new "internet" WIPO treaties;
- Patent Law Treaty (2000), which covers procedural patent law; and,
- Patent Cooperation Treaty (1970, last review 2001);

Recommendations adopted after 1995 include those concerning:

- the provisions on the protection of well-known trademarks (1999);
- trademarks licenses (2000); and,
- provisions on the protection of marks and other industrial property rights in signs on the Internet (2001).

Negotiation processes initiated after 1995 include those on:

- Substantive Patent Law Treaty;
- reform of the Patent Cooperation Treaty;
- a potential treaty on the protection of audiovisual performances (including an unsuccessful diplomatic conference);
- certain copyright and neighbouring rights questions (including an unsuccessful diplomatic conference); and,
- further harmonisation of the trademark laws under the Trademark Law Treaty.

Many developing countries are still implementing their commitments deriving from the TRIPS Agreement and various WIPO commitments, whether directly incorporated into the

TRIPS text (i.e. Paris or Berne Conventions) or derived from direct signature and ratification of WIPO agreements and recommendations. Developing countries, generally, are not very enthusiastic about engaging in seemingly limitless and ever deeper IPRs negotiations. Developed countries, however, are adept at using these different negotiations and shifting between different international fora to achieve their objectives⁶, which usually go beyond the minimum levels of IPRs protection in TRIPS (so called "TRIPS-plus").

In principle, *TRIPS-plus* refers to commitments that go beyond what is already included or consolidated in the TRIPS Agreement. TRIPS-plus agreements or commitments can imply:

- Inclusion of a new area of IPRs (e.g. protection of non-original databases);
- Implementation of a more extensive standard (e.g. extend the period of protection from 10 to 15 years in the case of trademarks or in copyright the calculation of protection terms based on the life of the author plus 95 years); and,
- Elimination of an option for Members under the TRIPS Agreement (e.g. an obligation to protect plant varieties "only" by the International Union for the Protection of New Varieties of Plants (UPOV) system 1978/91).

TRIPS-plus commitments do not only occur in bilateral and regional negotiations but also in international fora outside the WTO such as WIPO. The implications of these multilateral negotiations, however, are beyond the scope of this paper. Forum shopping at the multilateral level has also become a concern when looking at TRIPS-plus commitments. Negotiations at these various levels are promoting a "one size fits all" system of IPRs and increased international harmonisation based on developed countries' legislation without taking into account development objectives and, in many cases, public interest concerns. According to a report by the UK Commission on IPRs, there is a risk that regional/bilateral agreements could undermine the multilateral system by generally limiting the use by developing countries of flexibilities and exceptions allowed for in the TRIPS Agreements⁷.

⁵Soft law refers to non-binding bodies of rules that are designed to provide guidance and orientation. It has an important value as precedent in the

interpretation of law (i.e. recommendations, guidelines, etc.)

⁶Drahos, 2002

⁷Commission on Intellectual Property Rights, 2002

2. Regional and bilateral negotiations on IPRs in the Americas

The inclusion of IPRs commitments has become a common feature in regional trade agreements and in bilateral agreements for three main reasons:

1. The increased interest of developed countries in enhanced protection for their technologies and creations from “free riders”⁸.
2. The need to consolidate and expand market access for products and services with a high technological value⁹ in third countries.
3. The belief by developed countries that any regional and bilateral negotiations covering IPRs only make sense if they lead to levels of protection higher than those already agreed at the multilateral level.

2.1 Regional Trade Agreements

The scope of RTAs can vary greatly—from simple tariff preferences to full comprehensive bodies of applicable trade and economic law. RTAs can include custom unions (same set of customs duty rates on imports for non-members) and free trade areas (which usually address important tariff reduction among members and common regulation on trade related issues). According to the WTO Secretariat, regional agreements have allowed groups of countries to negotiate rules and commitments that go beyond what was possible at the time multilaterally. In turn, some of these rules—for example, in services and IPRs protection—paved the way for the Uruguay Round agreements¹⁰. By early 2003, over 250 RTAs had been

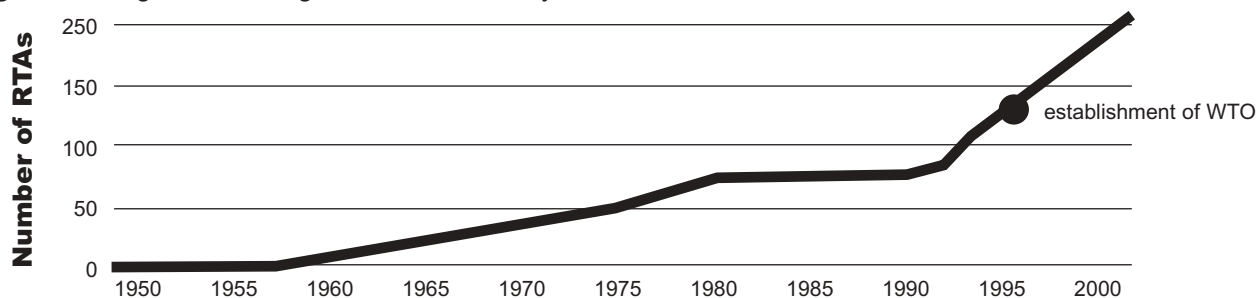
notified to the WTO¹¹ (and its predecessor GATT), with at least 150 of them notified after 1994 (Figure 1).

Before the Uruguay Round most RTAs basically dealt with tariff reductions and trade regulations for goods. Since the 1980s, RTAs have tended to include trade-related issues such as IPRs, investment, government procurement, environmental and labour rules. In the Americas, most RTAs include other issues beyond tariff preferences or trade in goods rules (see Box 1 for RTAs including IPRs)¹².

One important issue in RTAs is the most-favoured-nation (MFN) clause. In principle, under a MFN clause any advantage, favour, privilege, or immunity given to any member should be extended to other members. RTA customs unions or free trade areas can be excluded for the purposes of the MFN when certain criteria are fulfilled¹³.

The application of a MFN standard in the TRIPS Agreement is an innovation in the multilateral context, and precedent is therefore limited¹⁴. Article 4 of the TRIPS Agreement provides for the immediate and unconditional extension to nationals of all Members “any advantage, favour, privilege or immunity” granted with respect to the protection of IPRs to nationals of any country (including a non-Member of the WTO)¹⁵. The main difference between the TRIPS’ and the GATT’s 1994 MFN clause is that the TRIPS clause applies to nationals (i.e. the right holders) and not to products or Members due to the intangible¹⁶ and private nature of IPRs.

Figure 1: Regional trade agreements in force by date of notification to the GATT/WTO



Source: WTO Secretariat and Regionalism: notified regional trade agreements regionalism: facts and figures, WTO, 2000. See http://www.wto.org/english/tratop_e/region_e/regfac_e.htm

⁸ In this context it would mean producers that have not participated or made an investment in the innovation or creation processes.

⁹ Maskus and Penubarti (1998) argue that there is a strong positive relation—i.e. market expansion—between the manufacturing exports of Organisation for Economic Cooperation and Development (OECD) countries and the strength of patent rights in large and small developing countries. Smith (1999) considers that weak patent rights are a barrier to US Exports

¹⁰ WTO, 2002

¹¹ Over 170 RTAs are currently in force; an additional 70 are estimated to be operational although not yet notified. By the end of 2005, if RTAs reportedly planned or already under negotiation are concluded, the total number of RTAs in force might well approach 300. http://www.wto.org/english/tratop_e/region_e/region_e.htm

¹² That with the Caribbean Community countries (CARICOM)—Antigua and Barbuda, Bahamas,

Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago—does not include IPRs

¹³ For further information about the criteria see Article XXIV of GATT 1994

¹⁴ UNCTAD/ICTSD, 2003

¹⁵ Idem

¹⁶ In intangibles you can only protect the person behind the right (the titleholder)

Exceptions to MFN treatment in the TRIPS Agreement are limited in scope. The only exception that could under certain conditions apply to RTAs and also to bilateral agreements related to IPRs is in Article 4(d) of the TRIPS Agreement:

“(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members”.

Three RTAs in the Americas, which include IPRs commit-

ments, have been notified to the TRIPS Council under this Article: The Andean Community, the North American Free Trade Agreement (NAFTA), and the Mercado Común del Sur (MERCOSUR). Of these, only NAFTA includes both developed and developing countries, indicating that some RTAs only among developing countries also include negotiations on IPRs standards.

One limitation of Article 4(d) of the TRIPS Agreement with important consequences for the FTAA and other bilateral agreements related to IPRs is that it only applies to agreements in force before January 1, 1995. Any agreement, whether regional or bilateral, which is related to IPRs and

Box 1: Main Regional Trade Agreements in the Americas including IPRs provisions

Regional Trade Agreements	International legal instruments	IPR coverage^a
Andean Community (Bolivia, Colombia, Ecuador, Perú and Venezuela)	Decision 486 Decision 345 Decision 351 Decision 391	<ul style="list-style-type: none"> • Industrial property: patents, utility models, layout designs of Semiconductor Integrated Circuits, industrial designs, trademarks and other signs, denominations of origin and trade secrets • Breeders' rights. • Copyright and related rights. • Regulation of access to genetic resources and traditional knowledge • Enforcement measures
G-3 Free Trade Agreement ^b (Colombia, Mexico and Venezuela)	Chapter on intellectual property	<ul style="list-style-type: none"> • Copyright and related rights • Trademarks • Patents • Layout designs of semiconductor integrated circuits • Geographical indications • Trade secrets • Industrial designs • Breeders' rights • Technology transfer • Enforcement measures
NAFTA (Canada, Mexico and the USA)	Chapter XVII on intellectual property	<ul style="list-style-type: none"> • Plant varieties protection • Control of abusive or anticompetitive practices or conditions • Copyright and related rights • Program-carrying satellite signals • Trademarks • Patents • Layout designs of semiconductor integrated circuits • Trade secrets • Geographical indications • Industrial designs • Plant varieties protection (by direct incorporation of UPOV 78/91) • Enforcement measures
MERCOSUR (Argentina, Brazil, Paraguay and Uruguay)	Harmonise Protocol on Trademarks, Geographical Indications and Indications of Source ^c	<ul style="list-style-type: none"> • Trademarks • Geographical indications
SIECA (Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua)	Convenio Centroamericano para la Protección de la Propiedad Industrial ^d	<ul style="list-style-type: none"> • Trademarks and other signs
<p><i>Notes:</i> ^a The order of areas covered follows the order existing in the mentioned RTA; ^b See text at http://www.iadb.org/intal/tratados/g318.htm; ^c Adopted by Decision 08/95 of the MERCOSUR Council; ^d Agreed by Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica in 1968. http://www.goldservice.com.sv/convenio_centroamericano_para_la_proteccion_de_la_propiedad_industrial.doc</p>		

which entered into force after 1 January 1995 will not be exempted from the MFN clause. Therefore, all advantages, favours, privileges and immunities will be automatically granted to all nationals of WTO Members not originating in the region or in the countries subscribing to the particular bilateral agreement. This limits the possibility of countries negotiating intellectual property rules in a RTA to give preferential treatment to strategic trade partners.

The main RTA agreements in the Americas that include IPRs obligations are shown in Box 1. In the Andean Community, G-3 and NAFTA there is detailed coverage of IPRs. Most have standards that are very similar to those in TRIPS but in some cases they are TRIPS-plus. This is because they were subscribed to before the end of 1994. In the Decisions of the Andean Community there is a high level of harmonisation on IPRs among members. The G-3 IPRs clauses are mostly based on the NAFTA IPRs Chapter. In NAFTA, TRIPS-plus standards include the extension of coverage (i.e. protection of plant varieties based on UPOV's models or protection of program-carrying satellite signals) or limitations in flexibilities that were later agreed to at the international level in the TRIPS Agreement (i.e. causes for the revocation of patents are limited to cases where, for example, the granting of a compulsory license has not remedied the lack of exploitation of the patent). In MERCOSUR and SIECA, IPRs regulation is limited to trademarks and other signs showing a direct link with trade in goods and services and their regional marketing. Recently, the USA and Central American countries announced that they will start negotiations on a RTA that could also include IPRs commitments.

2.2 Bilateral Agreements

Bilateral agreements tend to be very focused and have a limited scope. Three types are especially relevant—investment, trade and obviously intellectual property bilateral treaties.

One of the main reasons why developing countries accepted the TRIPS Agreement during the Uruguay Round was the expectation that they would not be subject to bilateral pressures on IPRs by certain developed countries, especially the USA. Developing countries had, at that time, unpleasant experiences with the application of section 301¹⁷ of the US code (legislation allowing the use of unilateral measures under certain circumstances) and the linkages between bilateral investment agreements and bilateral IPRs agreements. Inclusion of the TRIPS Agreement in the final package of the Uruguay Round was based on some concessions in other areas (i.e. agriculture and textiles) and reduction of bilateral

pressures under an international rule-based system.

However, more than six years after the TRIPS Agreement entered into force, bilateral activity has not diminished. On the contrary, bilateral activity has increased and the level of ambition on IPRs commitments in those agreements has reached unprecedented levels. According to UNCTAD¹⁸, BITs have increased from 385 in 1989 to 1857 in 1999. Bilateral treaties on IPRs with the USA have increased from one treaty in 1986 to 42 in 1998¹⁹. Bilateral trade treaties are more difficult to track because they tend to be merged in statistics with RTAs, but as an indicator the European Union (EU) has bilateral treaties with 27 countries. It could not be established how many bilateral trade treaties the USA has signed, although some of these treaties have had a high profile, such as the US-Jordan or US-Chile treaties, and more are in the pipeline (e.g. Morocco, Singapore and South Africa).

Bilateral treaties are usually based on models prepared by developed countries that have many standardised clauses and little space for manoeuvring in negotiations. These models are reviewed regularly to include higher standards or unaddressed issues.

1. Bilateral investment agreements (BITs) do not regulate IPRs in a precise way. Nevertheless, they could have a strong impact on how international IPRs commitments may be implemented at the national level and on the regulatory capacity of host countries over foreign investments when looking at technology transfer. One important objective in many BITs is adequate and effective protection for IPRs. BITs regulate conditions for entry, treatment, protection and exit of investments between two countries. Usually, IPRs are defined as "investment" and protected under the provisions of such treaties. For example, in the definition of investment in the BIT between Bolivia and the USA (1998), it states that:

"The term 'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company. This general definition includes, but is not limited to, rights in companies, contractual rights, tangible property (real estate) and intangible property (rights such as leases, mortgages, liens and pledges); *intellectual property rights*; and rights conferred pursuant to law, such as licenses and permits²⁰ (emphasis added)".

In some BITs, IPRs are defined in a broad way. In those between Canada and Venezuela (1998) and Canada and Costa Rica (1999), for example, IPRs are defined as including:

¹⁷ Special Section 301 basically stipulates that the USA can start investigations and actions on the ground that a foreign country is denying adequate and effective protection of IPRs, even if the country concerned is fully complying with its WTO obligations in this regard. The Special Section 301 provisions deal with IPRs protection abroad and provide for a range of country listings, remedies and possible investigations, to "persuade" other

nations to yield to US demands and views. The range of country listing includes a "Priority Foreign Country list", a "Priority Watch list", a "Watch list" and a "Special-Mention" category, each triggering a particular course of investigation and possible remedies or actions. US unilateralism, multilateralism co-exist. SUNS, 1996. <http://www.sunsonline.org/trade/process/lookup/1996/11120196.htm>

¹⁸ UNCTAD, 2000

¹⁹ Calculations are based on Table I of Drahos, 2002. The author is unaware of other bilateral IPRs treaties with the USA since 1998. Most IPRs negotiations have been incorporated as part of trade negotiations

²⁰ http://www.sice.oas.org/bits/Bolus1_e.asp

“Copyright and related rights, trademark rights, patent rights, rights on layout designs of semiconductor integrated circuits, trade secret rights, plant breeders’ rights, rights in geographical indications and industrial design rights”²¹.

Some of the most important provisions of BITs that provide protection for IPRs or intangible technological assets (i.e. know how) are: fair and equitable treatment; protection against indirect expropriation; performance requirements prohibitions; and, the investor-state dispute settlement mechanisms.

The *fair and equitable treatment* standard, depending on how it is interpreted, could have implications on the expansion of intellectual property protection. There are two possible interpretations of what is to be considered fair and equitable treatment in the BITs context: the plain meaning approach; and, the international minimum standard. The “plain meaning” approach basically indicates that where an investor has an assurance of treatment under this standard, a straightforward assessment needs to be made as to whether a particular treatment meted out to that investor is both “fair and equitable”²². According to the Oxford English Dictionary, treatment is fair when it “is free from bias, fraud, injustice; equitable, legitimate ... not taking undue advantage; disposed to concede every reasonable claim” and fair treatment is that which is “characterized by equity, fairness ... fair, just, reasonable”. The “international minimum standard” approach suggests that the concept of fair and equitable is synonymous with the concept of international minimum standards applied in international law. This interpretation proceeds from the assumption that, under customary international law, foreign investors are entitled to a certain level of treatment (minimum international standards), and treatment that falls short of this level gives rise to liability on the part of the state. In some last generation BITs²³, and in the FTAA Draft Chapter on Investment²⁴, fair and equitable standards tend to include both the plain meaning approach and the minimum international standard approach.

How this latter is approached might affect the protection of IPRs. When an investment takes the form of IPRs or is accompanied by IPRs and the particular BIT or RTA includes the minimum international standard of protection then the TRIPS and WIPO treaties, and possibly a potential FTAA Chapter on IPRs, could be relevant in any possible legal interpretation of what “minimum international standard” or “international law” means. This would mean a transfer of standards of treatment in international IPRs agreements into BITs commitments. In the most recent BITs, reference is made to the “highest international standard” or “international

law” and not the minimum international standard.

Protection against expropriation regulation aims to protect foreign investors against outright seizure. Many BITs now include provisions on “indirect expropriation” and measures tantamount to expropriations. Many civil society organisations²⁵ are concerned that these provisions against indirect expropriation might deeply limit governmental regulatory powers in areas of public interest when broadly interpreted. Examples have occurred under the NAFTA arbitration procedures²⁶ that limit the use of regulation for environmental or social purposes. Limitations over regulations pursuing public policy objectives that are based on arguments linked to indirect expropriation could become particularly worrisome in the IPRs field when dealing with, for example, compulsory licensing for national emergencies or other purposes or when introducing drug price controls in both developed and developing countries.

*Performance requirements*²⁷ (Box 2) are commonly used to promote effective technology transfer under or through the use of national investment laws. They are permitted under the Agreement on Trade-Related Measures on Investment (TRIMS) and are not covered by the TRIPS Agreement. Political efforts to introduce limitations on performance requirements were among the main reasons for the failure of the Multilateral Agreement on Investment under the Organisation for Economic Cooperation and Development (OECD). In some of the last generation BITs²⁸, prohibitions on performance on technology transfer have been widely included. Prohibitions on performance requirements could limit the use of this policy mechanism to promote technology transfer as a precondition to obtain investor status in developing countries having an attractive market (regions or countries) or a particular comparative advantage.

Box 2: Illustrative list of performance requirements useful in promoting technology transfer

- Performance requirements for foreign direct investment (FDI) requiring joint-ventures in sectors of potential value-addition, differentiation and diversification
- Performance requirements for FDI requiring local research and development and the adaptation of foreign technologies to local needs
- Performance requirements/incentives for FDI to impart training skills in “best practices” and application technologies to local work force or to local providers.

Investor-state dispute settlement provisions may be one of the most powerful legal tools in the hands of investors that have been incorporated in recent BITs. Such provisions

²¹ http://www.sice.oas.org/bits/caven1_e.asp and http://www.sice.oas.org/bits/cancos_e.asp

²² UNCTAD, 1999

²³ The US BIT model envisages that the treatment, in addition to being fair and equitable, must be no less favourable than international law

²⁴ Article 6 of the Second FTAA Draft on Chapter on Investment. http://www.ftaa-alca.org/ftaadraft02/eng/ngine_1.asp

²⁵ Center for International Environmental Law (CIEL), Friends of the Earth, International Institute for Sustainable Development (IISD) and Oxfam.

²⁶ Cases under NAFTA: Metalclad Corp. vs

Mexico; 1996 and Pope & Talbot Inc. vs Canada, 1998

²⁷ Conditions set by a host country to pre-establishment as an investor

²⁸ E.g. in the BIT between Canada and Uruguay (1998)

allow a foreign investor to sue a host state for an alleged violation of certain treaty provisions²⁹. States, however, are not allowed to sue investors. This situation has generated a notable increase in disputes (e.g. under the World Bank International Center for Settlement of Investment Disputes the number of disputes under BITs increased from six during the period 1966-1997 to 43 cases pending in 2001³⁰). Some NGOs³¹ have argued that the investor-state dispute settlement in NAFTA jurisprudence is having a negative effect on regulatory authorities, especially in the environmental field³² and is limiting the capacity of national authorities to regulate in areas of public interest (so called “regulatory chill effect”). This scenario could apply to the IPRs field where regulatory authorities might be willing to implement policies to address public health, nutritional or environmental problems. We could add to the potential problems of the chill effect by introducing accumulative and alternative dispute settlement mechanisms: one in WTO; one in the FTAA; and in various arbitration mechanisms in BITs.

2. Bilateral IPRs Agreements are usually a consequence of broader trade-offs between two countries. Bilateral IPRs Agreements between developed and developing countries can be linked with back-to-back signing of BITs, science and technology cooperation agreements or even with economic or aid assistance. These agreements tend to focus on specific amendments and enforcement measures in which the particular developed country is interested (e.g. US efforts to expand protection on copyrights in the digital environment or plant varieties protection to UPOV levels; the EU emphasis on higher levels of protection for GIs plus the signing and ratification of UPOV). After 1994, Bilateral Agreements on IPRs tend to be mostly TRIPS-plus or at least tend to have TRIPS-plus provisions.

Since 1993, the various bilateral treaties and memoranda of understandings on IPRs in the Americas include those between the USA and Ecuador (1993), Jamaica (1994), Nicaragua (1998) and between Bolivia and Ecuador (2002). Two cases that illustrate how these treaties have been negotiated are given below:

(i) *Nicaragua and the USA* signed a Bilateral Intellectual Property Rights treaty in January 1998. The treaty had to be implemented by July 1999, ahead of the expiry of Nicaragua’s TRIPS deadline³³ (2000). It contains various TRIPS-plus features including an obligation to join UPOV, a deletion of the exceptions for the patentability of life, and a mandatory use of the classification system for trademarks of

the Nice Agreement on the International Classification of Goods and Services for the Purpose of Registration of Marks (agreement subscribed to under WIPO)³⁴. In this particular negotiating sequence, a BIT (which Nicaragua probably wanted) was linked to an IPRs agreement³⁵ (which Nicaragua probably did not want—certainly not its TRIPS-plus features)³⁶. During the negotiation of the bilateral, a Section 301 procedure was invoked presumably to speed up the negotiating cycle, which had been proceeding too slowly for the USA³⁷.

(ii) *Ecuador and the USA*, in October 1993, signed an IPRs treaty that mandates full protection for copyrights, trademarks, patents (including pipeline protection for pharmaceutical products), satellite signals, computer software, integrated circuits layout designs, and trade secrets³⁸. The treaty requires the establishment of criminal and border enforcement systems. However, apparently the Ecuadorian Congress has not yet ratified the treaty. Ecuador, in its accession process to the WTO, committed itself to implement the TRIPS Agreement before 1998 when the period of implementation for developing countries contained in the TRIPS was the year 2000. It did so by approving its national IPRs law in 1998³⁹. According to a report by the US Trade Representative (USTR):

“the new law [Ecuador’s] provides significantly greater protection, and notwithstanding the lack of implementing regulation, enforcement of patents and copyrights has improved. Still it can be difficult to gain protection through the legal system. In 1998, the USTR reaffirmed Ecuador’s place in the Priority Watch List under Special 301 provision of the 1998 trade act”⁴⁰.

3. Bilateral trade agreements have started to become very attractive to some developing countries. Many governments believe that they can create “privileged trade relations” with big developed countries. These agreements have as wide-ranging coverage as RTAs and many of them have IPRs chapters with TRIPS-plus standards. The free trade agreement between USA and Chile, signed in 2002, is one example of the inclusion of IPRs standards in bilateral trade agreements. In this case, the Chilean government has expressly accepted that they have not finalised the implementation of the TRIPS Agreement and that the two sets of legislation are still pending in the Parliament⁴¹. Nevertheless, the Chilean government has affirmed that once these laws are passed the level of IPR protection will be slightly in excess of that in TRIPS⁴². The coverage of this bilateral includes among oth-

²⁹ CIEL, 2002

³⁰ Idem

³¹ CIEL, IISD and WWF, the global environment network

³² IISD-WWF, 2001

³³ Drahos, 2002

³⁴ The last two TRIPS-plus features were found in the version of the bilateral deal on the web site of

the Consumer Project on Technology where the text presented is intended for general reference only and is under review for accuracy and completeness <http://www.cptech.org/ip/health/c/agreements/ecuador-ip.html>

³⁵ This also occurred in the failed negotiation process of a BIT between the USA and Venezuela

³⁶ Drahos, 2002

³⁷ Idem

³⁸ US Trade Representative (USTR) 1999

³⁹ Ley 83, Registro Oficial 320, 19-V-98. http://www.sice.oas.org/int_prop/nat_leg/Ecuador/L320ind.asp

⁴⁰ USTR, 1999

⁴¹ Tratado de Libre Comercio con Chile. De que se Trata?. Gobierno de Chile. Dirección General de Relaciones Económicas Internacionales, 2002.

⁴² USTR, 1999

ers trademarks, geographical indications, Internet domain names, program-carrying satellite signals, copyright and related rights, patents, enforcement measures, undisclosed information and adoption of various international agreements under WIPO.

The free trade agreement between the USA and Singapore⁴³ is reported to sharply restrict the use of compulsory licensing to copy patented products (e.g. drugs) and new barriers are set up to the import of patented drugs sold at lower prices in third countries⁴⁴. Together, the provisions in this agreement strengthen protection of US drug companies in ways that

were explicitly disallowed in the WTO by the Doha Declaration on the TRIPS Agreement and Public Health. Civil society organisations, like Oxfam America, have already raised concerns about this agreement, saying that new limits on compulsory licensing would impede Singapore's ability to buy cheaper drugs⁴⁵. The agreement also takes other steps toward strengthening the rights of patent holders, including provisions to extend patent terms to compensate for delays in receiving patent protection. It also requires patent protection for genetically modified plants and animals, whereas the TRIPS Agreement allows for weaker forms of protection.

3. The FTAA

The effort to integrate the economies of the western hemisphere into a single free trade agreement began in Miami in 1994 at the Summit of the Americas. Then the heads of state and government of the 34 countries in the region agreed to construct a Free Trade Area of the Americas, or FTAA, in which barriers to trade and investment could be progressively eliminated, and to complete negotiations for the agreement by 2005⁴⁶. According to the region's trade ministers, the FTAA process has been built on existing sub-regional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together⁴⁷. The FTAA process includes negotiations in various trade and trade-related fields including market access, subsidies and countervailing duties, antidumping, investment, services, agriculture, government procurement, competition policy and IPRs.

3.1 Negotiations on IPRs

In 1998, the trade ministers created nine negotiating groups, one of which—the Negotiating Group on Intellectual Property Rights (NGIP)—deals with IPRs issues. Assistance to the negotiating groups has been provided by the FTAA Tripartite Committee, which consists of the Inter-American Development Bank, the Organisation of American States, and the United Nations Economic Commission for Latin America and the Caribbean. Almost all countries negotiating the FTAA Draft IPRs Chapter are WTO members and there appears to be a tacit understanding in the NGIP that the TRIPS Agreement would be the floor for measuring any result of the negotiations.

The NGIP negotiation objective contains similar elements to those agreed upon in the 1986 Punta del Este Declaration at the beginning of the Uruguay Round, which created a direct

link between market access and IPRs protection by seeking the reduction of trade distortions (Box 3).

Box 3: Setting the objectives of trade-related IPRs negotiations

San José Ministerial Declaration, Costa Rica, 1998^a, objectives of the NGIP:

To reduce distortions in trade in the Hemisphere and promote and ensure adequate and effective protection to intellectual property rights. Changes in technology must be considered

Punta del Este Declaration, section on intellectual property^b:

D. Subjects for Negotiations

Trade-related aspects of intellectual property rights, including trade in counterfeit goods

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already underway in GATT. These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

Notes: ^a <http://www.ftaa-alca.org>, ^b GATT Punta del Este Declaration, 1986. http://www.sice.oas.org/trade/Punta_e.asp

“Trade distortions” usually refer to the effects generated by a measure that shifts the natural conditions of competition. In the IPRs field they tend to include acts of piracy, counterfeiting and weak IPRs protection. Ensuring adequate and effective protection basically means that legal protections must be accompanied by enforcement mechanisms and the availability of means for IPRs holders to enjoy their rights.

⁴³ Negotiations were completed in January, 2003

⁴⁵ Idem

⁴⁷ Idem

⁴⁴ Inside US Trade, 2003

⁴⁶ FTAA, 2001

The reference to changes in technology uses similar language to that in Article 71.1 of the TRIPS Agreement, where it states “The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement”. There are no current definitions of what constitutes a “change(s) in technology” or “new developments”.

In the TRIPS Council, new developments raised by some members include the protection of traditional knowledge and folklore, harmonisation of intellectual property law, and e-commerce and the Internet⁴⁸. In the FTAA context, “changes in technology” seems to be more restrictive than “new developments” and linked to advances in current technology or changes that could generate new technological fields. The use of “changes in technology” reflects the interest of certain lobby groups in the USA, Australia, EU, Japan and Canada that seek higher levels of IPRs protection and new technological measures to fight violations in areas where advances or new technological fields are being developed—notably in the biotechnology, movie, music and software industries.

The NGIP’s objective does not necessarily provide a development friendly mandate for developing-country interests in the hemisphere. It points towards a strengthening of IPRs standards and their enforcement in the regional setting. It does not include developmental and technology transfer objectives similar to those present in Articles 7 and 8 of the TRIPS Agreement. Furthermore, it does not call for the inclusion of effective special and differential treatment for developing countries.

The mandate of the FTAA also confuses objectives with means. The objectives of a FTAA Chapter on IPRs should be the promotion of innovation and the dissemination and transfer of technology, and not simply the protection of IPRs. IPRs protection is not in itself a goal but a means to achieve these objectives. Making the protection of IPRs an objective of the negotiations could undermine the ultimate development and public interest objectives by promoting the tacit inclusion of different objectives (i.e. consolidation or enhancement of market access) or by limiting options available to achieve the real objectives of IPRs.

So far, the negotiations in the NGIP have been relatively insubstantial when compared to the level of detail in the FTAA draft chapter on IPRs. Three main options on how to implement NGIP’s objectives have been discussed: harmonisation of IPRs rules in the region; developing the TRIPS Agreement; and, work on issues linked to trade. The NGIP has agreed, however, that the IPRs Chapter should be based on commitments adopted by FTAA countries in accordance with international agreements and not oriented towards harmonisation⁴⁹.

1. Negotiating positions. The positions of countries in the NGIP negotiations broadly match the trade-bloc schemes of the region, with the exception of the NAFTA. Generally, the bloc positioning has been the following⁵⁰:

a. NAFTA countries. These countries have not presented positions as a bloc. The USA has presented some proposals that would reflect a standard of protection similar to that found in its own national law (Box 4). They have suggested that the final outcome of the negotiations should elevate the TRIPS floor, harmonise the criteria for patentability, eliminate exceptions and exclusions, clarify the text to avoid ambiguities and reinforce enforcement mechanisms. Canada is looking for an IPRs Chapter that would look similar to the NAFTA Chapter on IPRs, while keeping existing exceptions. Canada has also expressed the need to keep the cultural exceptions in the final agreement⁵¹. Mexico is also looking for a NAFTA-like IPRs

Box 4: US trade policy on IPRs

The public law on the Trade Promotion Authority of the USA^a regarding IPRs states that:

The principal negotiating objectives of the United States regarding trade-related intellectual property are:

- to further promote adequate and effective protection of intellectual property rights, including through— (i)(I) ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)), particularly with respect to meeting enforcement obligations under that agreement; and (II) ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law; (ii) providing strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property; (iii) preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights; (iv) ensuring that standards of protection and enforcement keep pace with technological developments, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; and (v) providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms;
- to secure fair, equitable, and non-discriminatory market access opportunities for United States persons that rely upon intellectual property protection; and
- to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.

Note: ^aPublic Law 107-210 Aug 6, 2002. 116 STATU 933. http://www.tpa.gov/pl107_210.pdf

⁴⁸ In relation to e-commerce and the Internet the main political objective is to transfer the WIPO’s Copyright Treaty and the Treaty on Performances and Phonograms into TRIPS. Vivas-Eugui, 2002

⁴⁹ FTAA document FTAA.ngip/03, June 2002

⁵⁰This section is based on the perceptions of some negotiators in the FTAA

⁵¹ Canada is using the occasion of the FTAA negotiations to promote recognition of the importance of preserving cultural diversity and has proposed

a cultural exemption for the FTAA, which could affect the negotiations on services, investment and IPRs. See Cultural Diversity in the FTAA - Canada’s Position, February 2001 <http://www.dfait-maeci.gc.ca/tna-nac/C-P&P-en.asp>

Chapter but has been careful not to support proposals they consider to be “excessive” in the regional context.

b. The Andean Community has attempted to prevent the negotiations from moving too far from TRIPS-like commitments. They have emphasised issues linked to genetic resources and traditional knowledge, as well as the importance of keeping exceptions linked to *ordre public* and those based on health concerns.

c. MERCOSUR has led the opposition to the elimination of exceptions and proposals that would undermine the flexibility contained in the TRIPS Agreement.

d. SEICA has been generally sympathetic toward US proposals.

e. CARICOM has shown interest in increased protection of copyright and related rights when linked to the music industry.

f. Chile has adopted a “middle ground” position between moving towards deeper harmonisation and keeping TRIPS flexibilities.

3.2 The FTAA Draft IPRs Chapter

The FTAA Draft IPRs Chapter⁵² contains a wide variety of proposals with almost 98% of the text still in brackets at the end of 2002. In the Buenos Aires Ministerial Declaration of 2002, Ministers instructed the Negotiating Groups “to intensify efforts to resolve existing divergences and reach consensus, with a view to eliminating the brackets from draft texts, to the maximum extent possible, to work on consolidating texts.” According to some Latin American delegations the discussions in the NGIP have not been very deep on substance, and many of the issues—including crucial ones like special and differential treatment and technology transfer—have not even been discussed.

The current Draft Chapter⁵³ contains proposals ranging from those close to the TRIPS Agreement to some that are US law-plus. The following analysis is based on the highest level of protection that could be granted under the current Draft Chapter and also examines proposals that have been made to address public interest concerns when relevant. In the current FTAA draft, the origin of the proposals has not been disclosed.

The full draft text of the FTAA Agreements was consolidated and sent to Ministers in Quito at the end of 2002 for consideration. The Ministerial Declaration of Quito agreed to publish the complete second draft of the FTAA Agreement in an effort to promote transparency in the negotiating process. The participation of civil society and industry in the process usually has worked through the presentation of comments to Ministers of the Americas in side events⁵⁴. These comments were, until the Quito Ministerial in 2002, very general due to the lack of access to the official documents of negotiations

and different draft proposals by countries. This tardiness in presenting the official draft and its advanced state have given rise to many doubts about the comments that civil society actors in the Americas could actually put forward. These and other questions still need to be answered in the FTAA process.

In Quito, the Ministers instructed the Chairs of the Negotiating Groups to further refine their reports to the FTAA Trade Negotiations Committee (TNC) about the points on which there is no agreement within the negotiating groups and which might require further decision. These reports must provide the TNC with a clear description of the differences in positions, indicating alternatives where possible. The reports will be instrumental in enabling the TNC to fulfil its role as the executive body of the negotiating process, which includes, *inter alia*, guiding the work of the different FTAA bodies while striving to maintain balanced progress in all negotiating areas, in accordance with their objectives and mandates. Even though almost all of the text is still in brackets, this process puts pressure on the Chairs of the Negotiating Groups to define areas of divergence. It also establishes a more rapid process for reducing differences with the ultimate goal of obtaining a clear draft text.

1. Coverage. The coverage of the TRIPS Agreement and the Draft Chapter do not match in a number of ways (Box 5). Both texts include common areas of IPRs (e.g. patents and copyright) but there are also important differences (e.g. the protection of traditional knowledge and folklore). Not all areas included in the Draft Chapter are accepted under consensus by the NGIP and the final text of the FTAA might not include some of these. Two annexes and a supplementary table expand on the brief comparison in Box 5. The first is a bibliography and literature survey on IPRs in the FTAA and related articles (Annex I). The second summarises the content of each section of the TRIPS Agreement and Draft Chapter (Annex II). A supplementary table provides a legal text comparison identifying the main differences/similarities of language between the two texts (this is available on the internet and on request due to its length).

2. Possible outcomes. It is highly speculative to imagine what could be the possible outcome of the FTAA negotiations. The minimum scenario resulting from the negotiations would produce an agreement very similar to TRIPS with a few substantive and procedural TRIPS-plus rules oriented towards effective enforcement in the hemisphere. The maximum scenario would produce an agreement that will include most of the TRIPS-plus features identified in the text of the Draft Chapter. Other scenarios lie somewhere in between. Countries should, however, note two important negotiating facts. The first is the experience of the Uruguay Round in TRIPS negotiations, which started with a “general understanding” that the negotiations would only deal with rules for

⁵² Referred to as the Draft Chapter from now on
⁵³ document FTAA.TNC/w/133/rev/2 November,

2002. http://www.ftaa-alca.org/ftaadraft02/eng/ngipe_1.asp#IPR

⁵⁴ Examples of civil society organisations' comments are at <http://www.ceip.org/files/pdf/TED-Quito-Civil-Society-Presentation.pdf>

Box 5: Coverage of the TRIPS Agreement and the FTAA Draft IPRs Chapter^a

Intellectual property area	TRIPS Agreement	FTAA Draft IPRs
Substantive obligations		
Copyright and related rights	●	●
Codified program-carrying satellite signals	Not covered	●
Internet domain names	Not covered	●
Protection of expressions of folklore	Not covered	●
Trademarks	●	●
Geographical indications	●	●
Industrial designs	●	●
Utility models	Not covered	●
Patents	●	●
Layout Designs of Semiconductor Integrated Circuits	●	●
Traditional knowledge and access to genetic resources under the IPRs framework	Not covered	●
Plant variety protection	Indirectly covered	● ^b
Undisclosed information (trade secrets)	●	●
Unfair competition	●	●
Control of anti-competitive practices in contractual licences	●	●
Enforcement measures		
Civil and administrative procedures	●	●
Border measures	●	●
Criminal procedures	●	●
Measures against technological circumvention	Not covered	●
Other relevant provisions		
Technical cooperation	●	●
Technology transfer	●	●
Dispute prevention and settlement		
Availability of a dispute settlement procedures for violation	●	●
Notes: ^a The classification of this box does not follow that in TRIPS and the Draft Chapter. New areas have been included to facilitate an understanding of the differences in coverage. ^b Direct reference to UPOV. Substantive commitments are based on UPOV 1991		

counterfeited goods and not other issues. The second is that US negotiators have been mandated by the Trade Promotion Authority Act of 2002 to seek a level of IPRs protection similar to that existing in US Law, which is the highest standard applied in the world in general terms (Box 4).

3.3 Links between the FTAA, other treaties and negotiations

Some developed countries, the USA and the EU in particular, want developing countries to comply with international IPRs treaties or to adopt higher standards of IPRs protection⁵⁵. Other countries like Japan, Canada⁵⁶ and Australia⁵⁷ have lately become very active in seeking higher IPRs pro-

tection in multilateral negotiations. For the USA, regional and bilateral treaties together with effective use of WIPO negotiations are the main vehicles for achieving their objectives. The EU tends to prefer the use of multilateral forums, whether the TRIPS Council or WIPO, over regional or bilateral negotiations⁵⁸ for promoting higher standards of IPRs protection. Thus developing countries are being led into a highly complex multilateral/regional/bilateral web of negotiations on IPRs standards that are progressively eroding, not just their ability to set domestic standards, but also their ability to interpret their application through domestic administrative and judicial mechanisms⁵⁹. These multilevel negotiations require burdensome preparations by developing countries and may make it impossible for them to defend ade-

⁵⁵ Drahos, 2002

⁵⁶ E.g., the presentation of a proposal before the WTO Seattle Ministerial for the creation of a Working Group on Biotechnology. The only area at the multilateral level where Canada has presented formal opposition to TRIPS-plus proposals has been the discussion on scope and modalities for the application of non-violation complaints in

the TRIPS Council. WT/GC/W/359. <http://docsonline.wto.org/DDFDocuments/t/WT/GC/W/359.doc> and IP/C/W/249, <http://docsonline.wto.org/DDFDocuments/t/ip/c/w249.doc> respectively.

⁵⁷ E.g., a proposal for undertaking the review of Article 71.1 of the full text of the TRIPS Agreement. IP/C/W/210, <http://docsonline.wto.org/DDFDocuments/t/IP/C/W210.DOC>

⁵⁸ Some EU regional and bilateral agreements have promoted TRIPS-plus obligations (e.g. the interim agreement between the EU and Lebanon of 2002, Annex 2). http://europa.eu.int/comm/external_relations/lebanon/intro/ag.htm

⁵⁹ Drahos, 2002

quately the interests of their citizens. The FTAA negotiations on IPRs should be viewed in the context of the possible links between regional and bilateral treaties, negotiations at the multilateral level, and the interests of developing countries. I wish to highlight seven such links:

1. Shaping developing countries' legislation, the theory of the hammer and the anvil. The TRIPS Agreement has almost become a universal set of minimum IPRs standards at the international level. TRIPS together with the availability of a dispute settlement system that allows cross-sectoral trade retaliatory measures is becoming an anvil upon which to craft legislation on IPRs in developing countries. RTAs and bilaterals are then used as the hammer and the anvil for shaping their legislation at will. The TRIPS Agreement has, in reality, created a suitable environment for pushing deeper IPRs standards in many parallel negotiations and bilateral agreements.

2. "Trade offs" in free trade agreements. Developing countries have, as any other sovereign state, the right to agree or to "exchange" all the concessions they consider adequate for their own interests. Nevertheless, the TRIPS Agreement was accepted in the Uruguay Round without assessing the impacts on development through a clear benefit/cost analysis by developing countries. Concessions under the WTO Agreement on Agriculture have proven to be ineffective and insufficient to allow a substantive increase in developing country exports. In the WTO Agreement on Textiles and Clothing, actual benefits for some developing countries will start to be felt only after 2005⁶⁰. Yet TRIPS has fully applied to developing countries since the year 2000. This situation clearly shows that in sectors where developing countries have trade interests, benefits will usually come later or it might even take new rounds of negotiations to achieve them. However, in certain areas of interest for developed countries benefits are obtained in a faster way. This gives rise to doubts about whether some "trade offs" in the Uruguay Round were given sufficient consideration. Most RTAs and bilateral negotiations have not carried out assessment exercises and new "unmeasured" commitments have been accepted by many developing countries, raising questions about the future impact of these agreements. Developing countries in the Americas should, before entering into more commitments, compare transfer payments from technology and copyright licensing to the developed countries in the hemisphere with the value of exports of agricultural and industrial products. They will then be able to determine the actual "trade negotiating value" of the potential commitments on IPRs they might adopt.

3. Perpetual expansion of IPRs commitments. RTAs and bilaterals are generating a continuous review of commitments on IPRs even before the TRIPS Agreement is fully

implemented by all developing countries. In some RTAs and bilaterals, the type of commitments included are sometimes TRIPS-plus or even US legislation plus. For example, in the Draft Chapter one agreement on IPRs (WIPO's Patent Law Treaty) that has been signed but not yet ratified by the USA has been directly incorporated in the Draft Chapter (Article 5, Part I).⁶¹

4. Negotiating comfort of developed countries in the TRIPS Council. Owing to the proliferation of RTAs and bilaterals, developed countries, and particularly the USA, are losing interest in negotiating issues in the TRIPS Council. The USA has already demonstrated its lack of interest in negotiating issues different from the mandated negotiations in the TRIPS Council (i.e. basically a multilateral system of registration and notification of GIs on wines and spirits, although some would say that even in this case they have no interest). A similar attitude should be expected in the future by the USA until an "acceptable" harvest of RTAs and bilaterals containing TRIPS-plus IPRs commitments allows them to pursue negotiation of higher standards in the TRIPS Council.

5. MFN in the TRIPS: spreading RTA and bilateral commitments. Some of the benefits of an aggressive RTA and bilateral IPRs negotiating strategy can be obtained, even before multilateral standards are raised again, through the MFN provisions of TRIPS as discussed in Section 2.1. The limited scope of the MFN exemption under Article 4(d) of TRIPS applies only to agreements reached prior to TRIPS, allowing automatic MFN status for subsequent regional or bilateral agreements containing substantive IPRs commitments. Two examples are found in the IPRs Chapter of the G-3 Free Trade Agreement, which was signed after January 1, 1995. It contains a general obligation by which Parties have to grant protection to plant varieties. Parties are encouraged to follow the substantive provision of the UPOV system when implementing plant variety protection in their national legislation (there is no mention of the year). Parties also have to protect trademarks for a minimum period of ten years. In these two cases, obligations will be automatically multilateralised according to the MFN clause contained in Article 4 of the TRIPS.

6. Difficulties of recovering policy spaces once they have been committed. One lesson from the TRIPS and health debate in the WTO is that it is very difficult to change commitments that limit spaces for undertaking public policies once they have been agreed to. In the case of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, the TRIPS Council is at an impasse on finding solutions after more than one year of discussions. This creates a danger that, as developing countries are worn down, proposals could be accepted that include provisions more restrictive

⁶⁰ The Multifibre Agreement was dismantled as consequence of the WTO Textile Agreement. Nevertheless quotas on textiles were kept and

subject to a three steps phase out process. The last step of the phase out process will take place in 2005

⁶¹ WIPO, 2003

than those contained in the TRIPS Agreement or the Doha Declaration. With RTAs and bilateral treaties, it is even more difficult to modify commitments due to the differences in the bargaining power and the lack of political bodies following the implementation of those treaties. Many RTAs only have temporary secretariats, while bilateral agreements do not usually have administrative bodies. Any political “decision” about a bilateral treaty and the monitoring of commitments are dealt with in *ad hoc* bilateral committees, which are usually not open to the public.

7. Existence of undemocratic and non-transparent negotiation processes. In the WTO, there have been efforts since the Doha Ministerial to disclose negotiating documents to a greater extent than before. Many WTO members are authorising automatic and immediate derestriction of their documents. In the FTAA, however, the negotiating documents have not been derestricted. The first draft of a possible agreement was made available only after more than five years of negotiations, just before the Quebec Summit of the Americas in 2001, and the second draft was released after the Quito Ministerial, in November 2002. In bilateral agreements it is impossible to find proposals and in many cases even the texts of the agreements. In the case of the recently finalised bilateral trade agreement between the USA and Chile, the Chilean and the US governments only made public succinct summaries of the content of this bilateral before its signature. The text of this agreement was recently made available to the general public⁶². In these two cases, civil society groups raised serious concerns about the undemocratic nature of the negotiations and non-transparent processes due to the limited participation and the lack of publication of official and negotiating documents.

3.4 Systemic issues in the Draft Chapter

Looking more specifically at the Draft Chapter, a number of systemic issues arise. In the WTO, systemic usually refers to issues that would have consequences for the basic conception of the trade system. In the following discussion systemic refers to issues in the FTAA text that could have an impact on the basic objectives and on the balances existing in the IPRs system. The primary justification for granting IPRs protection in the past was that it brings benefits to society by promoting innovation, creation, and consumer protection⁶³. In the preamble of the Convention establishing WIPO⁶⁴, there is an indication of the desire of members to encourage creative activity and to promote the protection of IPRs throughout the world.

Although objectives might change from one agreement to another, Article 8 of the TRIPS Agreement acknowledges objectives other than the promotion of creativity and innovation, including technology transfer, mutual advantage for

producers and users and a balance of obligations. These balances are fundamental in promoting the public interest and usually include:

1. Standards for granting protection that clearly limit what is under the public domain and what is protected under IPRs law;
2. Some limited exceptions (on subject matter or on granted rights) based on public interest concerns (health, environment, education, morality, etc.);
3. Limitation on the periods of protection to give society the possibility of using the inventions or creations after such a period in finished; and,
4. In the case of patents, a description of the invention to permit replication of the invention and the use of compulsory licensing under certain conditions.

The Draft Chapter includes text that limits, and in some cases deletes, provisions necessary to achieve the objectives of IPRs protection and to keep existing balances in the TRIPS Agreement or in national IPRs legislation. Some of the main systemic issues arising from the Draft Chapter are as follows:

1. More restrictive legal interpretations. The Draft Chapter could lead to more restrictive legal interpretations of commitments on IPRs, owing to the lack of a preamble, the nature of obligations it contains, and the national treatment clause. Even though preambles do not contain operative language, they tend to include some important principles that could be relevant to the interpretation of particular articles of international agreements. For example, the TRIPS preamble includes: the recognition that IPRs are private rights; the recognition of underlying public policy objectives of national systems including developmental and technological objectives; and, the recognition of the special needs of the least developed countries in respect of maximum flexibility. These types of principles are important for enhancing the flexibilities contained in the TRIPS Agreements or in any future IPRs agreements whether international, regional or bilateral. On the scope and nature of obligations, the Draft Chapter would require a clear commitment to “provide adequate and effective” protection and enforcement of IPRs, thus limiting space for any interpretation on how obligations on implementation are or should be interpreted. In the case of national treatment, the TRIPS obligation to provide no less favourable IPRs protection would be expanded to the “enjoyment of rights and any benefits derived therefrom”, following the path of the broader coverage used in BITs⁶⁵. This would basically mean that the agreement would not only protect the rights of titleholders but also any action seeking the enjoyment of those rights and their economic interests or expectations. Enhanced protection in this context would

⁶² <http://www.ustr.gov/new/fta/Chile/text/index.htm>

⁶³ Walker, 2001 and Commission on Intellectual Property Rights, 2002

⁶⁴ Convention signed in 1967 and amended in 1979. www.wipo.int/clea/docs/en/wo/wo029en.htm

⁶⁵ Vivas-Eugui, 2002

limit the type of measures that a state could use to address public interest concerns and would expand the nature of obligations under IPRs.

2. Creation of new areas of IPRs. As shown in Box 4, the current draft includes various new areas of IPRs including plant variety protection according to the UPOV model, utility models, codified program-carrying satellite signals, internet domain names, unfair competition, well known trademarks and measures against technological circumvention. This generates over specialisation of IPRs and excessive specificity in the existing areas at the international level. Similarly, the creation of new areas of IPRs substantially reduces the area in the public domain. In some cases it could undermine the basis of innovation and creativity by limiting or making it more difficult to use “knowledge, information or creations” that were freely available before the creation of a new area of IPRs. The inclusion of new areas of IPRs protection, however, is not necessarily negative for development. Some new areas can provide tools for protecting the type of innovation or creations that developing countries do or could do. Utility models (petty patents) can help to protect “small innovations or adaptations” in industry. They are in the Draft Chapter but not the TRIPS Agreement. Utility models are usually defined as new shapes, configurations or arrangements of components of any device, tool, implement, mechanism or other object that permits, improves or allows a different operation, use or manufacture of the object incorporating it or that endows it with any utility advantage or technical effect that it did not previously have. In this case, the criteria for protection are less stringent than those of patents and easier for industries in developing countries to use. The UK IPRs Commission Report has highlighted the positive effects of utility models in promoting innovation. According to the Commission, studies of Japan’s patent system from 1960-1993 have suggested that utility models were more important than patents in stimulating productivity growth. It also found some evidence on the usefulness of utility models to protect and promote innovations in particular industrial sectors in Brazil and The Philippines, showing the value of using different types of IPRs protection that can help to address development concerns.

3. *a priori* acceptance of existing and future IPRs agreements. The Draft Chapter could result in the highest IPRs protection standards ever adopted in a regional trade agreement. As well as TRIPS, many new international treaties could be directly incorporated in the final text, including nine treaties, one set of rules, and two recommendations, adopted under the auspices of WIPO and one non-intellectual property treaty: the Convention on Biological Diversity

(CBD). More worryingly, four future IPRs treaties that are being or may be negotiated under WIPO could be included within the FTAA’s scope⁶⁶. This raises serious concerns about giving IPRs negotiators prospective and perpetual legislative-like powers—in effect a blank check with an *a priori* commitment by FTAA members to enforce future IPRs protection obligations. This raises major questions about which obligations countries are really signing onto in the FTAA process. Moreover, the texts of the Doha Declaration on the TRIPS Agreement and Public Health, the new International Treaty on Plant Genetic Resources for Food and Agriculture⁶⁷ and the Bonn Guidelines⁶⁸, which have important links with IPRs, are not included in the list of incorporated IPRs agreements and recommendations.

4. Expansion of the subject matter and rights conferred in the case of patents. The Draft Chapter expands the subject matter of patents by deleting some or all of the exceptions to patentability that are contained in Articles 27.2 and 27.3 of the TRIPS Agreement⁶⁹. These exceptions are based on particular moral, safety, health, and environmental concerns and on the nature of certain types of subject matter (i.e. plants and animals other than micro-organisms). The Draft Chapter also includes new rights for patent holders over biological patents, giving them rights over biological material derived through multiplication or propagation of the patented product⁷⁰. These two examples show a clear reduction of the flexibilities given by the TRIPS Agreement in patents and an expansion of patent holders’ rights over biotechnological inventions. See also Annex II and the supplementary table for more details.

5. Expansion of the periods of protection. Some periods of protection for IPRs are expanded in various proposals in the Draft Chapter. Any justification for the expansion of the periods should be analysed according to the needs in the particular field of technology and in light of the public interest. A simple expansion designed to satisfy the demands of industry will limit access to the subject matter of the particular IPRs for a longer period of time without new benefits for society. The periods of protection have been expanded in the Draft Chapter directly or indirectly depending on the particular case. Direct expansion would occur by extending the period of protection, in the case of copyright, by calculating the period of protection from the original authors’ life plus 50 years after the making of the work to 95 years⁷¹. Indirect expansion could occur, for example, by including a mandatory and automatic extension of the period of protection when delays occur in the granting of a patent⁷².

6. New costs for implementation and enforcement. It will cost an estimated US\$ 1.5-2 million per country to imple-

⁶⁶ Article 10, Section 2 Part II

⁶⁷ Agreed at the Food and Agriculture Organisation of the United Nations (FAO) in 2001

⁶⁸ CBD Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the

Benefits Arising out of their Utilization. CBD Conference of the Parties Decision IV/24 of 2002. <http://www.biodiv.org/decisions/default.asp?m=cop-06&d=24>

⁶⁹ Article 2, Section 5 Part II. Options presented in these Articles are proposed for deletion.

⁷⁰ Articles 3.3 and 3.4, Section 5 Part II

⁷¹ Article 10, Section 2 Part II

⁷² Article 8.2, Section 5 Part II

ment TRIPS⁷³. This cost could rise substantially in the implementation of the Draft Chapter proposals. Developing countries in the region will have to pay again for substantive reform of IPRs rules when the benefits to be realised from subsequent revisions of laws on IPRs are unclear. In the Draft Chapter, many new and costly enforcement commitments are included (e.g. obligations to protect new copyright and related rights in the digital environment, preparation of statistical information on IPRs protection and *ex officio* border measures⁷⁴). The draft text also includes a general obligation on each party not to use the distribution of resources for enforcement as an excuse for a Party not complying with the provisions of the Agreement⁷⁵. This general obligation could restrict the sovereign right of governments to prepare their budgets according to nationally chosen priorities.

The case of *ex officio* border measures is the typical example where private rights are protected at public expense. IPRs are private rights. Private rights are usually enforced through a wide range of civil actions that are initiated by the interested party in the case of any infringement. *Ex officio* actions mean that administrative authorities must monitor and undertake actions against a particular violation of IPRs, whether it has been demanded or not by the IPRs holder. These *ex officio* actions at the border are financed by the public budget and directed to protect foreign private interests. *Ex officio* actions will therefore imply an extra cost for public budgets of future FTAA parties, even in countries where no economic benefits have been obtained from further IPRs protection.

Countries that usually have budget restrictions or lack funds for these types of activities must carefully weigh these limitations in budget flexibility. If countries in the Americas decide to accept such an obligation, it should be accompanied by financial assistance for implementing such measures.

3.5 Sectoral issues

Apart from the systemic issues, the Draft Chapter could affect the public interest through its impact on several sectoral issues including:

- public health and access to medicines;
- food security, access to seeds and biotechnology;
- biodiversity and traditional knowledge;
- folklore;
- information and digital technologies;
- competition policy;
- transfer of technology; and,
- special and differential treatment.

This section examines the main proposed provisions in relation to these sectoral issues and briefly assesses some of the

problems that might arise.

1. Public health and access to medicines. Proposals in the FTAA draft could undermine the capacity of governments to take measures to protect public health. The draft text makes some links with recent WTO work although there is no express mention of the Doha Declaration on the TRIPS Agreement and Public Health. The Draft Chapter states that:

“no provision of the IPR chapter prevents, and should not prevent, any Party from adopting measures to protect public health, and it should be interpreted and implemented in a manner that takes into account each Party’s right to protect public health and, in particular, to promote access to existing medicines and to the research and development of new medicines”⁷⁶.

This general provision basically repeats a small part of the text of the Doha Declaration on the TRIPS Agreement and Public Health. It could help in facilitating some space for favourable legal interpretations on the relationship between IPRs and public health policies since this provision has been directly incorporated in the body of the Draft Chapter, and is not in a preamble or in a separate political declaration, thus raising its legal value in case of a possible regional dispute. However, this provision only refers to promotion of access to existing medicines. For new medicines the obligations only apply to research and development and not to access, which has been one of the main issues at stake in the IPRs and public health debate at the multilateral level. This differentiation should not exist and could even be considered Doha-minus in the sense that it tries to limit the scope of the Doha Declaration, paragraph 4 of which states that , the TRIPS Agreement “can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all”, without making any differentiation between medicines whether in existence or new.

The general provisions and basic principles, patent and the undisclosed information sections of the Draft Chapter contain various proposals that could limit existing flexibilities in the TRIPS Agreement and the Doha Declaration on the TRIPS Agreement and Public Health. The Draft Chapter limits the principle of international exhaustion of rights set out in TRIPS, by proposing its substitution with the principle of regional exhaustion. If a country recognises the doctrine of regional exhaustion, the right of an IPRs holder to control movement is extinguished when a good or service is first sold or marketed in any country of the region⁷⁷. If a country recognises a doctrine of “international exhaustion”, the right of an IPRs holder to control movement is extinguished when a good or service is first sold or marketed anywhere in the world. The application of regional exhaustion would permit

⁷³ UNCTAD, 1996 and World Bank, 2002.

⁷⁴ Articles 6, 5 and 1 of Part III

⁷⁵ Articles 1.9 of Part III

⁷⁶ Article 1.4 Part I

⁷⁷ Article 4 , Part I. In the Draft Chapter the regional exhaustion principle applies in general to all IPRs covered by the Chapter

the blocking of the movement of goods and services coming into the region, giving the right holder the possibility of segregating the regional market. In practice, blocking movement of goods and services from countries outside the region would limit the possibility of acquiring legitimate goods, in this particular case pharmaceuticals, at potentially lower prices.

Similarly, there are proposals to limit to the use of compulsory licensing. The TRIPS Agreement does not limit the reasons states can use to grant compulsory licenses. The most common ones in the comparative legislation include patent abuse, failure to work or insufficient working of the invention⁷⁸, national emergencies or other circumstances of extreme urgency (including for health reasons and other public interests), and public non-commercial use as a remedy against anticompetitive practices. The Draft Chapter includes a proposal to limit compulsory licenses to only public non-commercial use or in situations of a declared national emergency or other situations of extreme urgency⁷⁹. Accordingly, the authorisation to use the subject matter of a patent would only be allowed for governmental use or use by a private party acting on behalf of the government. Other limitations in the Draft are a prohibition on use of compulsory licensing until four years after the grant of the patent and obligatory judicial and administrative review. All these limitations would undermine and limit the capacities of countries in the Americas to use rights in the TRIPS Agreement and the Doha Declaration on the TRIPS Agreement and Public Health for granting compulsory licences.

A proposal to prohibit the use of information on the safety and efficacy of protected pharmaceutical or agricultural/chemical products for marketing generic products without the owner's authorisation for five years from the date of approval is also included in the Draft Chapter⁸⁰. This proposed prohibition does not mention the confidential character of the information, and it refers to data on the safety and efficacy of the product whether it is confidential or not. This would basically mean that the prohibition to access information would apply not only to confidential information⁸¹, but also include information that is available to the public today. In addition, unlike the TRIPS Agreement, it would apply to new products or mere variants on already known products. This would limit the use of important information for timely compulsory licensing⁸² and would imply the erection of artificial barriers to the entrance of competitive products, which do not appear to be required for the protection of intellectual assets.

2. Food security, access to seeds and biotechnology. The Draft Chapter contains many proposals that would allow the granting of or a substantial expansion of "exclusive rights" over living organisms, especially on plants and seeds. Two sections are particularly relevant: those on patents and on breeders' rights⁸³. Patents and breeders' rights allow for the capture of economic benefits as a stimulant to the development and dissemination of innovation. Many farmers, agricultural researchers, academics and civil society groups are concerned about the potential effects of these instruments on food security, access to seeds, farmers' rights⁸⁴, control over agricultural genetic resources, orientation of research and development in the agricultural field, structure of the market and direction of seed production, the creation of excessive incentives to monoculture and the promotion of the use of genetically modified organisms without risk assessment, and ethical issues regarding the patentability of life forms.

The patent section strengthens many patent rules when compared with the TRIPS Agreement, so as to facilitate the patentability of biotechnological inventions. It limits and in some cases deletes the exceptions to patentability of plants and animals, thus eliminating flexibilities provided by Article 27.3(b) of TRIPS. It gives new exclusive rights to holders of biological patents by covering rights over biological material derived from multiplication or propagation of the patented product⁸⁵. Furthermore, when patents protect a specific gene sequence or biological material containing that sequence, the protection will cover any product that includes that sequence or material expressing that genetic information. These proposals would provide incentives to use patents to protect plant and animal inventions (or discoveries in the case of the USA). Patents usually have stronger exclusive rights and fewer exceptions than plant variety protection systems.

Requiring the patentability of plants could undermine farmers' rights. Many national patent laws do not contain exceptions that allow farmers to save, use, exchange and sell farm-saved seed/propagating material. Plant variety protection systems such as UPOV 1991, limit farmers' rights but some practices for breeding are still allowed. If the FTAA allows patentability of plants without the inclusion of an appropriate exception to save, use and exchange farm-saved seeds, it would provide an incentive for organisations to use patents to protect plant "inventions" rather than plant variety protection systems, whether UPOV or not.

The patentability of plants, if not accompanied by mechanisms to enforce the CBD and the ITPGRFA in patent filing processes, could create even more incentives for illegal

⁷⁸ This ground for issuing compulsory licensing is specifically authorised by the Paris Convention Article 5(A)(4). Some national IPRs laws allow compulsory licensing for lack of working of the invention (e.g. Brazil). A case was brought to the WTO by the USA against Brazil on this issue but the complaint was withdrawn. There is no WTO

decision on the matter.

⁷⁹ Article 5.1, Section 5 Part II

⁸⁰ Articles 1.2 and 1.4, Section 10 Part II

⁸¹ Essential Action, 2002

⁸² Correa, 2002

⁸³ Sections 5 and 9 of Part II

⁸⁴ Including compensation for their collaboration in keeping a great variety of *in situ* germplasm and the possibility of continuing traditional exchange and reuse of seeds

⁸⁵ Article 3, Section 5 Part II

access and use of genetic resources or associated traditional knowledge by opening the possibility of obtaining exclusive rights over inventions that use or incorporate plant genetic material.

The TRIPS Agreement requires members to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Article 27.3(b) gives flexibility to all countries to choose which system they would prefer to use. Some proposals in the Draft Chapter restrict these options in several ways:

- by requiring the patentability of life forms⁸⁶ (by basically proposing the deletion of the exceptions to patentability contained in Article 27.3b of the TRIPS Agreement);
- by directly incorporating UPOV 78/91⁸⁷;
- by considering UPOV to be the only *sui generis* system⁸⁸; and,
- by adding a full section on breeders' rights, which builds on UPOV 78/91⁸⁹.

The section on breeders' rights shows differences in positions over whether breeders' rights should be modelled after UPOV 1978 or 1991. The section does not substantially change UPOV 1991 standards. Nevertheless, in some cases the existing language strengthens or adds to those standards (e.g. propagation acts of all plant varieties, and commercial use of ornamental plants or parts of those plants as propagating material are added to the list of rights conferred by a breeder's certificate).

The Draft Chapter includes the right of parties to restrict breeders' rights in order to permit farmers to use for propagation or multiplication purposes, on their own holding, the product of the harvest of the protected varieties. There are also proposals not to include this right (known as "farmers' privilege") in the breeders' rights section or to limit it by not allowing its application to fruit, ornamental and forest species. This latter type of proposal is not consistent with the new ITPGRFA regarding farmers' rights. The section on breeders' rights does not contain any recognition of the contribution that indigenous and local communities and farmers have made, and will continue to make, in the conservation and development of plant genetic resources. These contributions constitute, according to the ITPGRFA⁹⁰, the basis of food and agriculture production throughout the world.

The Draft Chapter fails to address current concerns related to food security and access to seeds. On the contrary, many proposals seem to be designed to limit or eliminate any flexibility existing in the TRIPS Agreements as well as farmers' rights recognised by the new ITPGRFA.

3. Biodiversity and the protection of traditional knowledge. One of the Draft Chapter's main achievements is the direct incorporation of the text of the CBD. It acknowledges that:

"[t]he relationship between the protection of traditional knowledge of indigenous communities and local communities and intellectual property, as well as the relationship between access to genetic resources and intellectual property shall comply with the provisions of the Convention on Biological Diversity"⁹¹.

Some defensive mechanisms to prevent illegal access to, and use of, genetic resources have been included in the Draft Chapter by incorporating an obligation for "safeguarding and respecting biological and genetic heritage" when granting IPRs⁹². Similarly, the granting of patents on inventions that have been developed on the basis of material obtained from genetic resources, or from the traditional knowledge of indigenous and local communities "shall be subject to the legal acquisition of that material in accordance to the national laws of the country of origin of such knowledge and resources"⁹³. There is no mention of requiring the disclosure of the origin of the biological/genetic resources or the traditional knowledge in patent filing procedures in the Draft Chapter, a demand that has been insistently proposed by biodiversity rich countries in the WTO and WIPO. For the first time in an IPRs text, specific obligations to establish national *sui generis* systems to protect traditional knowledge following Article 8(j) of the CBD⁹⁴ have been included. The Draft Chapter goes even further by explicitly indicating some possible elements of such national *sui generis* systems. These elements are⁹⁵:

- the right of indigenous communities to make decisions with respect to their knowledge (prior informed consent);
- the existence of fair and equitable remuneration for access to, or use of, such knowledge by third parties;
- some limited exceptions; and,
- an effective system (which basically means having enforcement measures).

In the Americas, the positions over traditional knowledge by developing country governments do not necessarily match those of the indigenous communities. While some developing country governments would like to incorporate some legal safeguards against illegal access and use of traditional knowledge in the IPRs system and to establish a *sui generis* system of protection, indigenous organisations resist the idea of considering or categorising traditional knowledge as IPRs. For some developing country experts, a *sui generis* system would imply a kind of "blend" of some principles of the

⁸⁶ Articles 2 and 3, Section 5 Part II

⁸⁷ Article 1.1, Section 9 Part II

⁸⁸ See Article 1.2, section 9 Part II

⁸⁹ Section 9 Part II

⁹⁰ Article 9 of the ITPGRFA.

⁹¹ Article 1.2, section 6 Part II

⁹² Article 1.1, section 6 Part II

⁹³ Article 1.5, section 6 Part II

⁹⁴ Article 1.2 and 1.3, section 6 Part II

⁹⁵ Article 1.2, 1.3, 1.4 and 1.5, section 6 Part II

CBD (i.e. prior informed consent and fair and equitable sharing of any benefits) and some IPRs features (e.g. automatic recognition after the creation and innovation, moral rights, exclusive rights, protection against unfair competition, database protection for compilations and registers of traditional knowledge, etc). For many indigenous organisations a *sui generis* solution for traditional knowledge seems to imply a more holistic approach where human rights, self determination, CBD principles, customary law, and rights over ancestral lands and natural resources are incorporated and enhanced⁹⁶ in a kind of “indigenous rights code or treaty” that would prevail over IPRs and certain types of governmental rights (e.g. granting mining concessions inside indigenous lands). One important indigenous organisation in the Americas has made statements showing this dichotomy between developing country governments and indigenous communities and has rejected the current FTAA negotiation process as a solution to indigenous problems⁹⁷.

Independently of the above mentioned dichotomy, some advances on biodiversity issues and on traditional knowledge protection have been achieved in the section on “traditional knowledge and access to genetic resources under the intellectual property framework” of the Draft Chapter. However, there is no guarantee that these issues will remain in the final text since they are not considered as issues accepted under consensus by the USA⁹⁸. The unwillingness of some countries to consider biodiversity and traditional knowledge as part of the issues under consensus in the FTAA shows an unfriendly position by some countries toward the recognition of the concerns of biodiversity rich countries and indigenous and local communities.

The main merit of the section on “traditional knowledge and access to genetic resources under the intellectual property framework” is to transfer many of the political positions that have been flagged by developing countries in the TRIPS Council into draft treaty language. This language is not very detailed but it could serve as a basis for discussion in the TRIPS Council regarding particular recommendations for the WTO Cancun Ministerial in 2003 when addressing paragraph 19 of the Doha Ministerial Declaration.

4. Protection of folklore. The Draft Chapter proposes that countries would have to protect effectively expressions of folklore and artistic expressions of traditional and folk culture as a general obligation⁹⁹. A “moral right”-type clause has

been integrated in the Chapter mandating that any fixation, representation, publication, communication or use in any form of literary, artistic, folk art or craft work shall identify the community or ethnic group to which it belongs¹⁰⁰. Once again, some countries do not consider the protection of folklore as an issue accepted under consensus and so this section may disappear in the final outcome.

5. Information and digital technologies. As part of the NGIP objective that “changes in technology must be considered”, the Draft Chapter contains various proposals for the protection of IPRs linked to information and digital technologies. Substantive proposals exist for granting special protection for program-carrying satellite signals and Internet domain names. Protection of program-carrying signals is mainly designed to ban decoding, or to use or make available program-carrying signals without the authorisation of the distributor of that signal¹⁰¹. The draft text also requires members to participate in the Government Advisory Committee of the Internet Corporation for Assigned Names and Numbers in order to promote adequate administration of domain names and to take part in its uniform dispute resolution to address the problems of cyber piracy of trademarks¹⁰².

Enforcement measures against technological circumvention have also been proposed which follow the provisions of the US Digital Millennium Act¹⁰³ and the new WIPO “Internet” treaties¹⁰⁴ (these treaties have been directly incorporated in the Draft Chapter¹⁰⁵). More specifically, the current text would require signatory states to provide adequate legal protection and effective remedies against the circumvention of effective technological measures that are used by titleholders of copyright and related rights in the digital environment in connection with the exercise of their rights¹⁰⁶.

Most developing countries in the Americas have not expressed reservations about protection for information and digital technologies. Since 1996, more than 14 Latin American and Caribbean countries¹⁰⁷ have ratified the WIPO “Internet” treaties. This tendency shows an increased interest of Latin American countries in copyright, especially in relation to music and some audiovisual works¹⁰⁸. Nevertheless, there is no current assessment of the possible cost of fulfilling obligations under these agreements and the potential needs for technical assistance. It seems important for these countries to measure any possible costs and needs when transferring obligations of WIPO Agreements (which do not

⁹⁶ E.g., Declaración de la Cumbre de Pueblos indígenas de las Américas, Ottawa, Canada, 2001. <http://www.dialoguebetweennations.com/dbnetwork/spanish/declaracion.pdf>, and Conhecimento tradicional indígena. Sebastiao Aji Manchineri (COICA Coordinador), 2001. <http://www.coica.org/interna.asp?s=5&r=1>

⁹⁷ COICA frente al ALCA. Sebastiao Aji Manchineri, 2003. <http://www.coica.org/interna.asp?s=5&r=20>

⁹⁸ In the FTAA process not all issues are accepted

under consensus. The USA has rejected the inclusion of a section on biodiversity and traditional knowledge related issues as has Mexico according to some government delegates interviewed in preparation of this paper. Note too that the USA has signed but not ratified the CBD.

⁹⁹ Article 1.1, Section 4 Part II

¹⁰⁰ Article 1.2, Section 4 Part II

¹⁰¹ Article 20, Section 3 Part II

¹⁰² Article 13, Section 1 Part II

¹⁰³ Adopted by the US Congress in 2000

¹⁰⁴ WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty of 1996.

¹⁰⁵ Article 5 Part I

¹⁰⁶ Article 21, section 3 Part II and Article 6 of Part III

¹⁰⁷ Argentina, Colombia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay and Peru.

¹⁰⁸ According to the recording Industry Association of America, the Latin music industry claimed a 4.9% share of the US music industry. The total US

have a dispute settlement mechanism) to regional or bilateral agreements (that might have one).

In the USA, one expert¹⁰⁹ has raised concerns about the absence in the Draft Chapter of certain exceptions that are in the Digital Millennium Act. These exceptions include non-profit libraries, law enforcement, intelligence and other government activities, reverse engineering to make software interoperable, encryption research, technology used to avoid access to minors, measures used to protect identifiable information, and security testing. Some might consider that these types of measures should fall under the general exception for copyright and related rights contained in the draft text or may be under the incorporated exceptions of the WIPO “Internet” treaties. In any event it does appear that the US delegation is negotiating inside the NGIP to include those exceptions so as to avoid inconsistency with US law.

6. Competition policy. While IPRs may occasionally serve as a tool to enhance competition and product differentiation, strengthened IPRs may have adverse impacts on competitive markets¹¹⁰. IPRs grant exclusive marketing rights (monopolistic rights) for a limited period of time¹¹¹. These rights by their nature limit competition. Abuse of IPRs may give rise to the problems of cartels, such as price fixing, restrictions on supply, market and customer divisions, and the use of licensed technology for innovation or re-engineering processes. In the international economy, this tendency is exacerbated by the practice in some countries of granting over-broad patents, the acquisition and strategic use of patent portfolios to prevent competition by similar but non-infringing products, and the continued blurring of the lines between invention and discovery. One civil society institution has even suggested that the IPRs terminology should be changed to reflect more accurately the nature and reality of these instruments¹¹². Hence, it has been suggested that the use of “intellectually-based monopoly privileges” would better reflect the social basis on which IPRs are granted, the reality of what they do and the balance that needs to be achieved in their design and application.

The TRIPS Agreement includes two general provisions on competition and IPRs. Article 40 notes that: “some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology”. Article 8.2 of TRIPS also states: “that appropriate measures may be required to address abuses of intellectual property rights”. The Draft Chapter applies directly the content of Article 40 of TRIPS. It expands the regulation

over the exercise of rights or abuses of rights if compared to TRIPS, since it indicates that:

“no party shall recognize the abusive use or abusive non use of a right. In this regard each party may apply appropriate measures...to prevent the abusive exercise of intellectual property rights by rights holders or practices that unreasonably limit trade or adversely affect the transfer of technology¹¹³. [and that:] each party shall take into consideration, for the recognition and exercise of such rights the social purposes of intellectual property, which may not be used to arbitrarily or unjustifiably discriminate against or restrict technological development or technology transfer, nor cause the abuse of dominant position on the market or the elimination of competition”¹¹⁴.

According to the UK IPRs Commission, the regulation of IPRs to control anti-competitive practices by rights holders should be given a high priority in the design of public policy and institutional frameworks. In most developing countries, mechanisms aimed at controlling restrictive business practices, or the misuse of IPRs, are weak or non-existent¹¹⁵. The recognition and inclusion of regulations on competition in the Draft Chapter will be a useful tool for addressing nationally anti-competitive practices and abuses of IPRs. It would also help in creating a legal base to develop pro-competitive attitudes, build sound regional markets and to protect the general public and consumer’s interests. The recognition and inclusion of competition in the Draft Chapter should be complemented with assistance for the development of IPRs regimes in concert with the development of appropriate competition policies and institutions as recommended by the UK IPRs Commission.

7. Technology transfer. Technology transfer clauses are commonly found in various international agreements whether commercial or not. These clauses are usually important for the fulfilment of the substantive obligations contained in the agreements, especially by developing countries. The practical success of these clauses has always been limited by the lack of real will and effective mechanisms or incentives for assuring the transfer. The Draft Chapter shows a clear tension between the need for mandatory vs. best endeavour clauses on technology transfer. For developed countries in the Americas, technology transfer clauses should be based on voluntary cooperation among IPRs authorities and the promotion of the use of IPRs. For the great majority of developing countries in the Americas, the existence of effective mechanisms and incentives is essential to achieve the core objectives of the Draft Chapter and actual technology transfer.

music market is valued in US\$9billion. See Midyear Market Report on Latin Music Shipments. Recording Industry Association of America. 1999. Note that the Latin America music industry in the USA is not a territorial concept but has a more cultural connotation. It includes Latin artists and producers in Latin America and in the USA Film productions are still sporadic ones and do

not constitute a movie industry. Currently, many countries in Latin America are producing and exporting many soap operas (telenovelas) to others countries in the region, USA, Asia, and Europe. Vivas-Eugui, 2000.

¹⁰⁹ Klosek, 2002

¹¹⁰ Stilwell and Tuerk, 2001

¹¹¹ Cottier and Meitinger, 1998

¹¹² Food Ethics Council, 2002

¹¹³ Article 10.1, Part I

¹¹⁴ Article 10.2. Part I

¹¹⁵ Correa, 1999

The Working Group on Trade and Technology Transfer in the WTO is just in its initial phase. It is not yet clear how WTO members will use the results from their examination of the relationship between trade and technology transfer. Many WTO countries could benefit from the experience and the type of debate on technology transfer happening in the NGIP as a way to focus their work and find more practical solutions in the WTO framework. To further develop work on technology transfer, developing countries should revisit the content of the Draft Code on Conduct on Transfer of Technology prepared under the auspices of UNCTAD in 1995¹¹⁶ to see which proposals might be useful in the FTAA context.

8. Special and differential treatment (S&D) provisions.

The existence of differentiated obligations between developed and developing countries has always been seen as an essential need by developing countries in the field of IPRs

due to the differences in technological development. In TRIPS, S&D provisions mostly imply longer periods for implementation. The Draft Chapter basically follows the path of TRIPS by mentioning time periods for implementation as the only S&D available. The difference is that the periods for implementation are shorter in the FTAA than in TRIPS, passing from four years to one for the general implementation of obligations. The FTAA allows an extra period of two years for countries facing structural reform of their IPRs system and special problems.

In the Draft Chapter, there is no mention of S&D for least developed countries (there is only one in the Americas: Haiti). If no direct mention of transitional periods for Haiti is included in the Draft Chapter, this country would lose the benefits of S&D contained in the TRIPS Agreement¹¹⁷ and the Doha Declaration on the TRIPS Agreement and Public Health¹¹⁸.

4. Final remarks

While strong IPRs may promote the competitive advantage of some companies and countries, they may not necessarily serve the best interests of developing countries, small producers, users of IPRs in the international community, or civil society. The push towards ever-stronger IPRs, through multilevel treaties and negotiations and forum-shifting strategies, threatens to undermine the balance achieved in many national laws and the capacity of developing countries to use flexibilities existing at the international level to achieve developmental and public policy goals.

Developing countries are becoming aware that IPRs are used as a tool for obtaining deeper market access, assuring rent transfers and consolidating market positions. The existence of real benefits from strong IPRs systems at multilateral, regional and bilateral levels must be carefully assessed before engaging in new negotiations or accepting new commitments. Assessment exercises should weigh many non-commercial considerations in the IPRs field, such as health, food security, environment, consumer interests and technology transfer, to avoid oversimplified exchanges of market access for public interest issues that could in the end have higher costs than benefits for the citizens of the Americas.

The Draft Chapter might end up being the highest level IPRs treaty ever adopted. A lack of transparency and adequate participation in this and other bilateral/regional processes is

affecting the possibility of reaching an agreement that addresses public interest concerns and is undermining the legitimacy of the process. The Draft Chapter as currently written could exacerbate imbalances already existing in the IPRs system. Examples discussed in this paper include, among others, the expansion of the subject matter of protection (patents on life, new copyrights, protection of plant varieties according to UPOV), weakening existing balances (reduction of grounds for issuing compulsory licensing, and expansion of periods of protection), and more costly enforcement mechanisms (at the border or through electronic means).

It seems unrealistic that IPRs standard setting will disappear altogether from bilateral and regional commercial diplomacy. A number of Latin American negotiators have informally expressed the fear, in relation to the FTAA process, that there will be very little real space for negotiating on the text of the Draft Chapter in the end. They feel that they will be told near the end of the negotiations that they must accept a TRIPS-plus text in the FTAA if they want to get any actual concessions on agriculture and goods from the USA. The imperative, then, is for developing countries to ensure that policy objectives for IPRs standards in regional/bilateral trade agreements are demonstrably consistent with their broader objectives for promoting international development and poverty reduction.

¹¹⁶ <http://www.law.suffolk.edu/faculty/visiting/mpaterson/intlplicensing/materials/codetechtr.html>

¹¹⁷ Article 65.1 and 5 of the TRIPS Agreement.

¹¹⁸ Paragraph 7 of the Declaration of TRIPS Agreement and Public Health, 2001.

To that end, the incorporation of a wide range of stakeholders and transparency would strengthen positions taken nationally and internationally by developing countries when dealing with policy objectives and IPRs standard setting. Experience in the TRIPS negotiations and in the management of the TRIPS Council has shown that lack of transparent procedures can lead to strong criticism and imbalanced results. The NGIP of the FTAA has been even more restrictive regarding access to official proposals and negotiating documents. This hinders participation by relevant stakeholders in the Americas and could lead them to adopting burdensome commitments without sufficient benefits for their citizens.

On sectorial issues, the potential Draft Chapter would only make sense if such issues as:

- Policy spaces to undertake necessary measures to protect public health in the IPRs system are kept and enhanced;
- The CBD and the new ITPGRFA principles, together with adequate legal mechanisms for assuring legal access, are incorporated;

- Protection of traditional knowledge and folklore is provided for and fully developed;
- Effective ways to facilitate technology transfer are included;
- Flexibilities to address public interest concerns in national patent laws and copyright laws are kept;
- Flexibilities to choose and use the most convenient system to protect plant varieties, whether through patents or a *sui generis* system, are kept;
- Regulation against abuse of rights is allowed and developed; and,
- Special and differential treatment is actually incorporated and enhanced.

Finally, countries in the Americas should also give consideration to the option that the FTAA process should not deal with IPRs issues at all; or, if their inclusion is unavoidable, should try to deal with them to the least extent possible at the regional and bilateral level. Discussions and negotiations on IPRs should be left to the multilateral level where more balanced results for developing countries and the public interest are more likely to be obtained.

Acronyms

BITs	Bilateral Investment Treaties		Property Rights (FTAA)
CARICOM	Caribbean Community	OECD	Organisation for Economic Cooperation and Development
CBD	United Nations Convention on Biological Diversity	QUNO	Quaker United Nations Office
EU	European Union	RTAs	Regional Trade Agreements
FAO	Food and Agriculture Organisation of the United Nations	SIECA	Secretaría de Integración Económica Centroamericana
FDI	Foreign Direct Investment	TNC	Trade Negotiations Committee
FTAA	Free Trade Area of the Americas	TRIPS	Trade-Related Aspects of Intellectual Property Rights
GATT	General Agreement on Tariffs and Trade	UK	United Kingdom
GIs	Geographical Indications	UNCTAD	United Nations Conference on Trade and Development
IPRs	Intellectual Property Rights	UPOV	International Union for the Protection of New Varieties of Plants
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture	USA	United States of America
MERCOSUR	Mercado Común del Sur	USTR	Office of the United States Trade Representative
MFN	Most Favoured Nation	WIPO	World Intellectual Property Organisation
NAFTA	North American Free Trade Agreement	WTO	World Trade Organisation
NGIP	Negotiating Group on Intellectual		

Annex I:

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Annex II:

Comparison of the main elements of the TRIPS Agreement and the FTAA

a full text comparison of the two agreements is given in a supplementary table available on the web or from the publishers (see page 1)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Scope

Copyright and related rights; trademarks; geographical indications; industrial designs; patents; layout designs of integrated circuits; undisclosed information; control of anti-competitive practices in contractual licences. (Article 1.2)

Like TRIPS. In addition, new areas of IPRs protection: expressions of folklore; traditional knowledge and genetic resources; utility models; protection of plant breeder's rights according to UPOV. Also, extension of traditional IPRs: trademarks cover Internet domain names; copyright obligation to protect program-carrying satellite signals and to prevent circumvention of technological measures ("encryption") used to protect copyrighted goods (especially sound carriers).

General obligations/basic principles

Relationship to other IPR Conventions

Mandatory compliance of all WTO Members with essential provisions of Paris and Berne Conventions and the Washington Treaty on Integrated Circuits. (Articles 2.1, 9.1, 35 TRIPS)

Mandatory compliance of all Parties with essential provisions of Paris and Berne Conventions. Additionally, obligation to comply with most other existing IP agreements (such as TRIPS, Rome Convention, UPOV, WIPO treaties on copyright and performances and phonograms, etc.), WIPO joint recommendations and even treaties currently under negotiation. No reference to Doha Declaration on the TRIPS Agreement and Public Health, FAO Treaty on Genetic Resources (ITPGRFA) or the CBD Bonn Guidelines on Access and Benefit Sharing. (Part I, Article 5.2)

National treatment

Requires all Members to treat nationals of other countries no less favourably than their own nationals on all matters concerning the protection of IPRs, subject to certain exceptions already provided in conventions/treaties related to IPRs. (Article 3)

National treatment with regard to the protection and enjoyment of IPRs and of any benefits derived therefrom. (Part I, Article 6).

Most-favoured-nation treatment (MFN)

Concerning the protection of IPRs, advantages, privileges granted by a Member to the nationals of any other country should be extended unconditionally to the nationals of all other Members. (Article 4)

MFN with regard to protection and enjoyment of IPRs. (Part I, Article 7)

Exhaustion of IPRs

For the purposes of dispute settlement, nothing in the Agreement shall be used to address the issue of exhaustion of IPRs, provided there is compliance with national treatment and most-favoured-nation treatment. (Article 6) Thus, Members free to adopt national, regional or international exhaustion.

One general and several category-specific provisions. a) General rule: Parties committed to adoption of at least regional exhaustion within period not exceeding 5 years. (Part I, Article 4.1) b) Trademarks: i) international exhaustion; ii) at least regional exhaustion after 5 years; iii) regional exhaustion after 2 years. (Part II, Section 1, Article 4.1) c) Copyright: i) at least regional exhaustion after 5 years; ii) national exhaustion. (Section 3, Article 5.3 and 5.4) d) Patents: i) international exhaustion; ii) at least regional exhaustion after 5 years; (Section 5, Article 6.1) e) Industrial Designs: i) international exhaustion; ii) at least regional exhaustion after 5 years. (Section 8, Article 5.1) f) Breeder's Rights: no specification as to location of the first sale. (Section 9, Article 6.1)

Basic objectives and principles

The protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology. They should also contribute to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations. The Agreement allows Members to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development. At the same time, appropriate measures can be taken in order to prevent the abuse of IPRs or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. (Articles 7 & 8)

Like TRIPS. In addition: Parties may take measures to prevent abusive practices that unjustifiably limit trade or prejudice local industry or employment. (Part I, Article 3.2)

Standards

Copyright and related rights

Relation to other copyright treaties

All members are required to comply with the substantive provisions of the Berne Convention except for the obligation on moral rights. Eligible works must be protected on the basis of their expression as a literary work, not on the basis of ideas, procedures, methods of operation or mathematical concepts as such. (Article 9)

Like TRIPS. Discussion on mandatory vs voluntary protection of moral rights (Part II, Section 3, Article 9). In addition, Parties shall comply with the essential provisions of the

- 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;
- 1971 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms;
- 1974 Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite;
- 1996 WIPO Performances and Phonograms Treaty;
- 1996 WIPO Copyright Treaty;
- Instrument for the Protection of Audio-Visual Performers' Rights (currently under negotiation);
- Treaty for the Protection of Non-Copyrightable Elements of Databases (currently under negotiation);
- Instrument for the Protection of Broadcasting Organisations' Rights (currently under negotiation). (Part I, Article 5)

Protection of computer programs and compilation of data

Computer programs are protected (for the normal period of literary works, if the term is calculated on the basis of the life of the author). Compilations of data are also protected under the Agreement. (Article 10)

Like TRIPS. In addition, obligation for government agencies to use only computer programs authorised for intended use. (Part II, Section 3, Article 24)

Rental rights

Concerning computer programs, Members shall provide to authors the rights to authorise or to prohibit the commercial rental of their works to the public. As for cinematographic works, this obligation exists only if commercial rental has led to widespread copying which is materially impairing the reproduction rights. (Article 11)

Such rental right not only with respect to computer programs and cinematographic works, but with respect to all literary and artistic works in general. (Part II, Section 3, Article 6)

Protection of performers, producers of phonograms and broadcasting organisations

Specific provisions are introduced for the protection of performers, producers and broadcasting organisations and the term of protection is extended (no less than 50 years for performers and producers; 20 years for broadcasts organisations) (as compared to the Rome Convention). (Article 14)

Similar to TRIPS. But term of protection granted to broadcasting organisations is extended to 50 years. (Part II, Article 18)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Protection of program-carrying satellite signals

Not covered

Mandatory protection against:

- the decoding of encrypted program-carrying satellite signals without the authorisation of the lawful distributor of the signal,
- and the reception or further distribution of decoded signals without the authorisation of the lawful distributor of the signal.

Both actions are to be treated as criminal and civil offenses. (Part II, Section 3, Article 20.1)

Obligations concerning technological measures

Not covered

Parties obliged to provide adequate legal protection and effective legal remedies against circumvention of effective technological measures used by title holders of copyright and related rights to prevent unauthorised use of their protected works (encryption) (Part II, Section 3, Article 21.1)

Collecting societies

Not covered

Obligation of each Party to facilitate and encourage collective administration of copyrights and related rights. Obligation to recognise legitimacy of such societies, and to let them exercise such rights under the terms of their own statutes. These statutes shall be the only legal title for the purpose of rights enforcement in administrative or judicial proceedings (Part II, Section 3, Article 23).

Protection of expressions of folklore

Not covered

Each Party obliged to ensure effective protection of all expressions of folklore and artistic expressions of the traditional and folk culture. Any use of such folklore shall identify the community or ethnic group of origin (moral type clause). (Part II, Section 4, Articles 1.1, 1.2)

Trademarks

Protectable subject matter

Members may require, as a condition of registration, that signs be visually perceptible. (Article 15.1, 3rd sentence)

No Party may require that signs be visually perceptible to be eligible for registration. (Part II, Section 1, Article 1.2). This will basically allow the registration of new types of trademarks identifiable by their smell or texture.

Protection of service marks and of dissimilar goods and services

Provides equal treatment to trade and service marks. (Article 15.1) Under certain circumstances also provides protection against use of dissimilar goods and services. (Article 16.3)

Like TRIPS.

Requirement of use

Registrability may not be made dependent on actual use of the trademark before the expiry of a period of three years from the date of application for registration. (Article 15.3)

No express provision.

Maintenance of a registration may be made dependent on use of the trademark. But cancellation only in case of an uninterrupted period of three years of non-use.

Like TRIPS. But registration may only be cancelled after five years of non-use or uninterrupted suspension of use. (Part II, Section 1, Article 9.1)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Elimination of restrictions on use of trademarks (Article 20)

Use of trademarks is not to be encumbered by special requirements, such as use with another trademark.

Like TRIPS.

Term of protection

Minimum period of seven years. (Article 18)

Minimum period of ten years. (Part II, Section 1, Article 8.1)

Protection of Internet domain names

Not covered.

Each Party required to participate in the Government Advisory Committee of the Internet Corporation for Assigned Names and Numbers (ICANN), to promote adequate administration of domain names, and to participate in the ICANN Uniform Dispute Resolution Procedure to address the problem of cyber-piracy of trademarks.

Geographical indications

Definition and scope

Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. (Article 22) This definition applies only to goods.

Like TRIPS (Part II, Section 2, Article 1.1). GIs or denominations of origin can identify goods and services (Article 1.2).

Additional protection

With regard to wines and spirits, protection must be provided even where there is no threat of the public being misled as to the true origin of the good. A multilateral system of notification and registration will be established for wines eligible for protection. (Articles 23 & 24)

Like TRIPS (general reference to the entire Section 3 of Part II of TRIPS, see Part II, Section 2, Article 2.1).

Actions available

Obliges Members to provide means to prevent use of geographical direct or indirect indications from misleading the public as to the true origin of the good, or indications which constitute an act of unfair competition. (Article 22) As to wines and spirits, such means have to be available even where public is not misled and there is no act of unfair competition. (Article 23)

Parties may protect GIs with *ex officio* actions (Article 1.2).

Industrial designs

Term of protection; textile designs

For industrial designs, a protection of at least 10 years is required. Special provisions on textile designs which leave each Member to decide whether to provide protection through copyright law or industrial design law. (Articles 25 & 26)

In addition to the ten-year term of protection, each Party shall endeavor to provide for in their laws at least a five-year renewal. (Part II, Section 8, Article 3.2) As to textile designs: no option to protect through copyright law. (Article 1.1)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Utility Models

Not covered.

Obligation to protect utility models through patents or utility model certificates for a period of at least ten years. Exceptions authorised for procedures; chemical and other substances; and matters excluded from patent protection. (Part II, Section 7, Articles 1.2, 2.1, 3.1) A utility model is any new shape, configuration or arrangement of components of any device, tool, implement, mechanism or other object, or any part thereof, that permits improved or different operation, use, or manufacture of the object incorporating it, or that endows it with any utility, advantage, or technical effect that it did not previously have. (Article 1.1)

Patents

Scope of protection

Protection should be available for any inventions, whether products or processes, in all fields of technology (Article 27). As to patented processes: patent extends at least to the product directly obtained by the process. As to patented products: patent covers only that product. (Article 28.1 TRIPS). Inventions that threaten *ordre public* or morality need not be patented, provided the commercialisation of such inventions is also prohibited. Micro-organisms must also be protected, but plants and animals and essentially biological processes for the production of plants and animals (excluding non-biological and micro-biological processes) may be exempted from patent protection.

As to patented processes: comparable to TRIPS. As to patented products: patent extends to any biological material derived through multiplication or propagation of the patented product. Where patent protects specific genetic sequence or biological material containing that sequence, protection extends to any product including that sequence or to material expressing that genetic information (important potential for cloning purposes). (Part II, Section 5, Article 3.3 and 3.4)

As to inventions contrary to *ordre public* or morality: like TRIPS.

As to living organisms: deletion of the exception available under TRIPS. Thus, patenting becomes mandatory. (Article 2.1)

There is a list of what shall not be considered as inventions. (Article 1.5.) The list includes discoveries.

Patentability of pharmaceutical products

Pharmaceutical products in some Members only patentable as of 1.1.2005 (except LDCs). But in the meantime, mailbox applications and exclusive marketing rights (EMRs). (Articles 27.1, 65.4, 70.8, 70.9)

Authorisation to delay application of IPRs disciplines to areas or sectors not so protectable under domestic law on the general date of application of the FTAA. This is practically useless: probable date of application is 1 January 2006. By then, all WTO Members (except LDCs) will have to protect product patents under their domestic laws (due to TRIPS, see left). (Part V, Article 1.3)

Non-discrimination in the field of technology

The Agreement requires non-discrimination in the granting of patents and the enjoyment of rights in relation to the field of technology, the place of invention and whether patented products are imported or locally produced. (Article 27.1)

Like TRIPS (Part II, Section 5, Article 1.3).

Exceptions to rights conferred

Authorisation of limited exceptions which do not unreasonably conflict with normal exploitation of a patent and do not unreasonably prejudice a patent owner's legitimate interests, taking account of legitimate interests of third parties. No express reference to cases where third parties need to use invention for marketing approval purposes prior to patent expiry (e.g. production of generic pharmaceuticals to be marketed right after patent expiry). Clarification through WTO panel: exception clause permits production to extent necessary, but no stockpiling ("Bolar" exception). (Article 30)

Express and exhaustive list of cases in which patent rights may be disregarded. No reference to public health problems. Consequently, such problems may not be addressed under this provision. Express reference to cases of third-party use of patented inventions for marketing approval purposes: limited to the extent necessary to demonstrate that the generic product is scientifically equivalent to the previously approved patented product. In addition, if patent granted before marketing approval, Party obliged to extend patent term by a period sufficient to confer reasonable term of exclusivity. Any generic product made for marketing approval purposes may not be commercially exploited domestically or by exportation, except as reasonably performed for obtaining marketing approval. Patent owner is to be informed about identity of any entity using above authority to seek marketing approval prior to expiration of the patent (arguably to facilitate efficient defence of patent holder's exclusive rights). (Section 5, Article 4.2 and 4.4)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Other uses without authorisation of the patent holder (compulsory licences)

No substantive restrictions are placed on granting compulsory licensing and government use of patents. Members free to determine grounds for compulsory licensing. However, these practices must respect a number of procedural conditions to prevent patent-holders' rights being undermined. Authorisation of such use should be considered on its individual merits. The detailed conditions for granting these authorisations are listed in the Agreement. (Article 31)

Substantive restrictions on the issuing of compulsory licences. Compulsory licensing can only be used for public non-commercial purposes or in declared national emergencies or other extreme urgency; products not to be sold to private parties; products exclusively for domestic use; public health problems to be dealt with under this provision. (Article 5.1)

Term of protection

The duration of protection must not be less than 20 years from the date of filing application. (Article 33)

20 years from the filing date. To be extended at the request of the patent holder in case of unreasonable delays in the patent grant (i.e. issuance of the patent at least four years after filing or two years after the request to examine the application has been made, whichever period is later). The same extension is to be accorded to patents granted to the same invention in other countries on the basis of the delayed examination in the first country. (Part II, Section 5, Article 8.2)

Process patents (burden of proof)

Reversal of the burden of proof in civil proceedings relating to infringements of process patent is to be established in certain cases. (Article 34)

Like TRIPS. (Part II, Section 5, Article 9)

Plant varieties

Plant varieties, including seeds, must be protected through patent or alternative *sui generis* means, or a combination thereof. (Article 27.3.b)

The FTAA (IPRs Chapter) contains an independent Section on the rights of breeders of plant varieties. See below.

Layout designs of integrated circuits

Substantive provisions of the Washington Treaty must be respected with a number of additional obligations: scope of protection includes not only the protected chip, but also articles incorporating it. Term of protection must be 10 years. An 'innocent infringer' must be free from liability, but once he has received notice of infringement, he is liable to pay a reasonable royalty. (Articles 35-37)

Like TRIPS (no express provisions. But general reference to, inter alia, the TRIPS disciplines on layout designs, Part I, Article 5.2 e)).

Traditional knowledge (TK) and access to genetic resources under the IPRs framework

Not covered.

Each Party shall grant protection to genetic resources and TK by means of a *sui generis* system, ensuring fair and equitable remuneration for the benefits derived from the access to such resources or the use of TK. (Part II, Section 6, Article 1.3).

Protection of IPRs shall respect genetic resources and TK. (Article 1.1)

The relationship between TK and access to genetic resources on the one hand and IPRs is subjected to the CBD. (Article 1.2)

The granting of patents developed on the basis of material derived from genetic heritage or TK is subject to the acquisition of that material in accordance with international, regional, sub-regional and national law. (Article 1.5)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Plant variety protection

Indirectly covered in the Section on patents: plant varieties, including seeds, must be protected through patent or alternative *sui generis* means, or a combination thereof. Members are free to choose a *sui generis* system appropriate to their social and economic development. (Article 27.3(b))

Directly covered in an independent Section: obligation to provide protection according to UPOV 1978 or 1991. (Part II, Section 9, Article 1.1 and 1.2) Express list of rights conferred to breeders (Article 4) provides more extensive rights than Article 5 of UPOV 1978. With respect to Article 14 UPOV 1991: list of rights is partly more, partly less extensive. Less extensive: Parties are free to extend protection to essentially derived varieties (Article 4, last para: "may"; whereas mandatory under UPOV 1991). More extensive: FTAA list covers propagation in general, not only conditioning for the purposes of propagation. Also, addition of the right to use ornamental plants commercially, or parts of plants, as multiplication material for the purpose of producing ornamental and fruit plants or parts of plants, or cut flowers. Excepted from the breeders' right are those varieties that farmers obtain from their own production and use for propagating and multiplication purposes on their own holdings. But commercial use only of the raw material, not of the material obtained from multiplication, reproduction or propagation. (Article 5.3)

Undisclosed information and test data

Protection of undisclosed information

Undisclosed information (or trade secrets) must be protected against acquisition, use or disclosure in a manner contrary to honest commercial practices. To benefit from such protection, information must be secret, have commercial value owing to such secrecy, and have been subject to reasonable steps to keep them secret. (Article 39.2)

Like TRIPS (Part II, Section 10, Article 1.1 a)).

Protection of test data

Test data provided by a company in order to gain marketing approval for pharmaceutical and agricultural chemical products must be protected against unfair commercial use; this arguably allows third parties from relying on test data earlier presented by others for marketing approval.

Test data must also be protected against disclosure, except unless steps are taken to ensure that the data are protected against unfair commercial use or where necessary to protect the public. (Article 39.3 TRIPS) The latter arguably applies to cases in which public health is threatened: undisclosed information/technical know-how related to a patented invention may then be disclosed to a compulsory licensee if such information is required for the use and marketing of pharmaceutical products necessary to protect the public.

Reference to Article 39.3 TRIPS. (Part II, Section 10, Article 1.1b)) Additional rules: For at least five years from the first marketing approval of pharmaceuticals, third parties seeking marketing approval for the same or similar product are precluded from relying on information submitted by another party for first marketing approval. (Article 1.2) Likewise where the first approval was made in another Party. (Article 1.4) If the product is patented, the above term of protection is not to be shortened if the patent expires prior to that term. (Article 1.5b)) In case the product is subject to patents in two Parties, the second Party shall extend the term to expire no earlier than the patent in the first Party. (Article 1.5c)) If the patented product is subject to a compulsory license, Parties not obligated to require patent holder to transfer undisclosed information or technical know-how to licensee. (Section 5, Article 5.1d)

Anti-competitive practices in contractual licences

Licensing practices

The Agreement recognises that countries may specify in their domestic legislation the commercial licensing practices that constitute an abuse of intellectual property protection, and take steps to address these through appropriate measures. (Article 40)

Like TRIPS. (Part II, Section 12, Article 1)

Consultations among Members

Members must cooperate with each other, including through the provision of information, in investigations of alleged abuse of IPRs that have international dimensions.

Like TRIPS. (Part II, Section 12, Article 1)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Unfair competition

No express provisions. Reference in Article 2.1 to Article 10bis of the Paris Convention applies only "in respect of Parts II, III and IV" of the TRIPS Agreement. Thus, no general applicability of rules on unfair competition, but only as far as protection of geographical indications and undisclosed information is concerned (Articles 22.2(b); 39.1 and 2).

Independent Section 11 on unfair competition in general. Modelled after Article 10bis of the Paris Convention. Obligation of Parties to assure protection against unfair competition. Acts of unfair competition are, *inter alia*: acts creating confusion with establishment, goods or activities of a competitor; false allegations possibly discrediting a competitor; certain acts misleading the public as to nature and other characteristics of goods. In addition to the exemplary list under Article 10bis Paris, the following acts are to be considered contrary to honest commercial practices: deliberate breach of contract, fraud, breach of confidence, and inducement to infringe.

Enforcement

General obligations

Members must provide effective means of action for any right holder, foreign or domestic, to secure the enforcement of his rights, while at the same time preventing abuse of the procedures. (Article 41)

Like TRIPS. (Part III, Article 1)

Civil and administrative procedures

The Agreement specifies procedures available to right holders for civil and judicial action, including means to produce relevant evidence. Civil remedies that must be available include injunctions, damages and destruction of infringing goods or disposal of these outside the channels of commerce. Provisional measures must be available to prevent infringing activity and to preserve relevant evidence. Judicial authorities must have the authority to adopt provisional measures *inaudita altera parte* (without listening to the other party). (Articles 43-50)

Like TRIPS. (Article 1) But procedures not only for right holders, but also for their exclusive licensees in their respective territory. (Article 2.9)

Customs cooperation

Right holders must have the means to obtain the cooperation of the customs authorities in preventing imports of pirated copyright and counterfeit trademark goods. (Article 51)

Like TRIPS. (Article 5)

Criminal procedures

Criminal procedures and penalties must be available in case of wilful trademark-counterfeiting or copyright piracy on a commercial scale. No definition of "commercial scale". Where appropriate (i.e. according to the courts' discretion), available remedies shall include seizure, forfeiture and destruction of, *inter alia*, the infringing goods. (Article 61)

Like TRIPS. In addition, Parties are obligated to recognise the commercial scale of a wilful infringement in case this infringement is significant, even if there is no direct or indirect motivation of financial gain on the part of the infringer. (Article 4.1) Also, Parties shall oblige their judicial authorities through domestic legislation to order the forfeiture and destruction of, *inter alia*, all infringing goods (i.e. no discretion for the courts as in the case of Article 61 of the TRIPS Agreement). (Article 4.3)

Indemnification of the defendant

Compensation for the abuse of enforcement measures is specified, including payment of defendant expenses, which include appropriate attorney's fees. (Article 48)

Like TRIPS. (Article 2.3 f))

Technological Measures

Not covered.

Parties obligated to provide adequate legal protection and effective legal remedies against acts undertaken for economic gain that circumvent encryption technologies or that take advantage of such acts of circumvention. (Article 6)

Acquisition and maintenance of IPRs

Procedures or formalities for obtaining intellectual property rights should be fair, reasonably expeditious, not unnecessarily complicated or costly, and generally sufficient to avoid impairment of the value of other commitments. (Article 62)

Unlike TRIPS, there is not a separate section. Covered in a general provision on transparency of procedures governing the filing, prosecuting, and cancellation/opposition/invalidation of applications for the protection of IPRs. (Article 11.2)

TRIPS Agreement

FTAA Draft IPRs Chapter

Reference is made only to TRIPS-plus proposals

Dispute settlement

WTO Dispute Settlement Understanding (DSU) applies to the TRIPS Agreement.
(Article 64)

FTAA Chapter on Dispute Settlement: similar to DSU, with binding (*inter partes*) panel and Appellate Body decisions; similar remedies, but in addition to DSU there could be provision on payment of damages (no proposed text as yet).

Non violation complaints

The TRIPS Council is examining the scope and modalities for the application of non-violation complaints. (Article 64). There is a potential availability of these actions.

There is availability of non-violation complaints in the FTAA Draft Chapter on Dispute Settlement (Article 2).

Transitional arrangements

One-year transitional period for all countries to apply the Agreement.
(Article 65)

Part V, Article 1.1 equally provides a one-year transitional period for developing country Parties. Proposal to include developed country Parties. There are no special transitional periods for least developed countries.

Developing countries

Developing countries can delay application of the Agreement for another four years, except for national treatment and MFN obligations. These countries are entitled to an additional five-year period for introducing product patents in areas of technology (pharmaceuticals and agricultural chemicals) that are not protected at the date of application of the Agreement. This 10-year delay in the implementation of these provisions should be seen in conjunction with Article 70.8 of the Agreement which provides, in respect of pharmaceutical and agricultural chemical products, the following arrangements: any Member who does not make available, as of 1 January 1995, patent protection for the pharmaceutical and agricultural chemical inventions must accept the filing of applications for patents for such inventions (establishment of a 'mailbox' for patent applications claiming such product patents), and must do so from 1 January 1995, even if it is a country which may delay the application of the Agreement, as indicated above. Once the Agreement becomes applicable in that country, it must take a decision in respect of the application (either reject it or grant a patent) but, in doing so, it must apply (retroactively) the criteria of patentability as laid down in the Agreement. If its decision is to grant a patent, that patent will be available for the remainder of the term (Article 70, para. 8). However, an 'exclusive marketing right' (for a period of five years) must be granted concerning the invention which is the subject matter of the application if, after 1 January 1995, in another country a patent application has been filed and a patent granted for that product and marketing approval obtained in such other Member (Article 70, para. 9).

Possibility to further delay for two years the application of the FTAA's IPRs Chapter in case a developing country is undertaking structural reforms of its IPRs system and facing special problems in the preparation or implementation of IPRs laws and regulations. Proposal to extend this exemption to developed country Parties. (Article 1.2)

Authorisation of any Party to delay for additional period of five years the application of IPRs disciplines to areas or sectors not so protectable under domestic law on the general date of application of the FTAA (i.e. 1 January 2006, see Article 28.1 of the Draft Text on General and Institutional Issues). In practice, this extension will not apply to areas or sectors already covered by TRIPS: developing countries have had to respect TRIPS since 2000 (and for product patents at the latest by 2005). This is arguably the reason why the draft does not include any obligations to provide for a "mailbox" for patent applications nor any obligation to establish exclusive marketing rights.

Least developed countries

Least developed countries are entitled to delay application of the Agreement, except for national treatment and MFN until 1 January 2006. However, they are also covered by the requirement to protect all pharmaceutical inventions made after the entry into force of WTO.

According to paragraph 7 of the Declaration on the TRIPS Agreement and Public Health, least developed countries do not need to protect pharmaceutical products until 2016.

Not covered. No provision on least developed countries.

Technical cooperation

The Agreement calls upon developed Members to provide technical and financial assistance in favour of developing Members on mutually agreed terms and conditions. (Article 67)

Comparable provision. (Part IV, Article 1)

Quaker United Nations Office, Geneva

QUNO publications on trade, development and intellectual property

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Report on workshop held at Utstein Kloster, Norway, July 2002
Norwegian Ministry of Foreign Affairs / QUNO
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Legal Options for Implementing Paragraph 6 Of the Ministerial Declaration on the TRIPS Agreement and Public Health

Presentation made at workshop at Utstein Kloster, Norway, July 2002
Prof. Frederick Abbott

Legal Options for Implementing Paragraph 6 Of the Ministerial Declaration on the TRIPS Agreement and Public Health.

Presentation made at workshop at Utstein Kloster, Norway, July 2002.
Marco Bronckers

Promoting participation for negotiating food and biodiversity in the post-Doha TRIPS work programme

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