Intellectual Property in the FTAA: New Imbalances and Small Achievements

By David Vivas Eugui

In November, ministers negotiating the Free Trade Area of the Americas received preliminary drafts from the FTAA's nine sectoral negotiating groups, including a chapter on intellectual property rights. This draft chapter contains proposed language, which, if adopted, would constitute the most ambitious and diverse intellectual property agreement ever written and an important potential precedent for all multilateral negotiations.

It would revise some general intellectual property provisions, incorporate new treaties, and expand the coverage and scope of existing intellectual property rights (IPRs). Proposed new provisions include some achievements for developing countries regarding public health measures, the relationship with the Convention on Biological Diversity (CBD), the protection of traditional knowledge and folklore, and technology transfer. However, following the draft chapter's publication,[1] civil society groups are starting to voice concern about its potential to limit the pursuit of public policy objectives and the small gains for sustainable development.

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The new draft chapter is a compilation of a number of undisclosed country proposals over the last six years. Currently almost the entire text is in brackets – meaning not agreed – and some of the issues under discussion might never be part of the final outcome.

Aiming for TRIPs Plus

The minimum negotiating floor that FTAA negotiators set for the Americas was the TRIPs Agreement. Many of the draft's proposed general provisions are based on, or copied from, TRIPs Articles, including objectives and principles.

Some relevant changes, however, can be found in relation to the nature and scope of obligations and to national treatment. On the scope and nature of obligations, the chapter would require a clear commitment to provide adequate and effective protection and enforcement of IPRs, thus limiting space for any interpretation of the rest of the chapter. As for national treatment, the TRIPs obligation to provide no less favourable intellectual property protection would be expanded to the enjoyment of rights and any benefits derived therefrom, following the path of the broader coverage commonly found in bilateral investment agreements.

Turning Negotiators to Legislators?

Some provisions in the draft chapter would result in the highest intellectual property protection standards ever adopted. In addition to the TRIPs Agreement, many new international treaties could be directly incorporated in the FTAA's intellectual property chapter, including nine treaties, one set of rules, and two recommendations adopted under the auspices of World Intellectual Property Organisation (WIPO), as well as one non-intellectual property treaty: the Convention on Biological Diversity.

More worryingly, four IPR treaties that are being or *could be* negotiated under WIPO might be included within the FTAA's scope. This raises serious concerns about potentially giving intellectual property negotiators a 'blank check' to actually write – during possible future WIPO negotiations – the IPR protection obligations that FTAA members would have *a priori* committed to enforce.

Expanding Coverage

The substantive coverage of the draft chapter calls the attention of the reader. The scope of many IPRs could be expanded by the reduction or elimination of some exceptions like the ones contained in article 27.3(b) of the TRIPs Agreement or by limiting the grounds on which compulsory licensing could be exercised. The periods of protection could also be expanded directly or indirectly. For example, the period of trademark protection could pass from seven to ten years. Indirect expansion would follow from the prohibition to use information on the safety and efficacy of protected pharmaceutical or agricultural/chemical products for the purposes of marketing generic products without the right owner's authorisation for five years from the date of approval. Among new rights not currently covered by the TRIPs Agreement, the draft chapter includes proposed provisions related to Internet domain names, measures against technological circumvention, satellite signs, specific regulations on biotechnology, relationship with genetic recourses, traditional knowledge, folklore, technology transfer, utility models and plant variety protection in accordance to Union for the Protection of Plant Varieties (UPOV).

Advances towards a Sustainable Development

Among the new issues that might be incorporated in the chapter, five are linked to sustainable development. Those are flexibility for public health measures, the relation between intellectual property and genetic resources, the protection of traditional knowledge and folklore, and technology transfer. The main merit of the draft chapter on these issues is not only their inclusion in a potential regional agreement but to textually reflect the proposals of developing countries on these matters.

In the general provisions section of the draft chapter an article has been proposed calling for flexibility to protect public health. This article links the FTAA work with the latest WTO results in the IPR field, although there is no express mention of the Doha Declaration on TRIPs and Public Health. The article 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. This article could facilitate favourable legal interpretations on the relationship between IPRs and public health policies if accompanied and operationalised through flexible provisions regarding compulsory licensing and the extent of the rights of the patent holder.

One of the draft chapter's main achievements could be the acknowledgement that '[t]he relationship between the protection of traditional knowledge of indigenous communities and local communities and intellectual property, as well as the relationship

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At the domestic level, it was suggested that changes in long-run global prices can have significant allocative effects in developing countries. For example, increases in food prices can shift resources away from some agricultural sectors and into others.

Does Doha have a 'Development' Agenda?

The call for a 'development' round stems from the fact that developing countries participate in global trade policy amidst high incidences of poverty, severe discrepancies in income and stagnant growth levels. Despite frequent criticism of the post-Doha negotiations, many delegates acknowledged this round's potential to further development objectives. First, more consideration has been given to the bias that developing countries experience with regard to the world trading system, especially regarding market access issues. Second, developed countries increasingly recognise the link between WTO implementation commitments and supply-side capacity in poor countries.

Successful export growth is integral to the growth prospects of a small open economy. From this perspective, trade is very important – but certainly not the panacea to major development problems. For example, further trade reform or slow reform is not a solution to eradicating poverty and unemployment. Rather, in addressing some of the most pressing problems in developing countries, we need to use the right policy instruments to target specific distortions.

There was overall agreement that there is great scope for a large exchange of concessions in favour of developing countries during the Doha Development Round. Critical ingredients for success include a combination of better market access, improved capacity to participate effectively in WTO processes (such as dispute resolution) and domestic reform in developing countries.

If developing counties do not participate aggressively in the Doha Round, they will forego benefits from participating in the WTO. Kym Anderson argued that even Sub-Saharan African countries had several reasons to take part in the round. First, they would otherwise forego economic efficiency gains from reforming their own policies while still suffering the terms of trade losses from others' reforms. Second, they would forego the opportunity to gain better market access. Finally, these negotiations hold the promise that participating poor economies losing from taking part in multilateral liberalisation could secure much more compensation than in previous rounds in the form of technical assistance and funds for trade policy capacity-building.

Key Challenges

Delegates identified a number of key challenges for the future. For example, how best can developing countries reconcile their national priorities with WTO disciplines? According to Hoekman, a major exercise would include looking at how to improve the prospects for export growth by identifying what matters most in foreign market access terms and for our own reform agenda.

It was recommended that developing countries should use the negotiations as a means to pursue reforms that are difficult to implement unilaterally. Lastly, we need to recognise that the WTO revolves around 'policy bindings', which can be a useful (pre-) commitment device.

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between access to genetic resources and intellectual property shall comply with the provisions of the Convention on Biological Diversity […].' Some defensive mechanisms to prevent illegal access to/use of genetic resources are included in the draft chapter, which establishes an obligation 'safeguarding and respecting biological and genetic heritage' when granting intellectual property rights. In this line of ideas, the granting of patents on inventions that have been developed on the basis of material obtained from genetic resources, or from traditional knowledge of indigenous and local communities 'shall be subject of the legal acquisition of that material in accordance to the national laws of the country of origin of such knowledge and resources'.

The draft chapter includes provisions on traditional knowledge, defensive mechanisms in the intellectual property filing process, similar to those applied to genetic resources. For the first time in a IPR text, specific obligations to establish national *sui generis* systems to protect traditional knowledge and recognition of the right of indigenous and local communities of decide over their knowledge are proposed for inclusion. Parties would also have to protect effectively expressions of folklore and artistic expressions of traditional and folk culture as a general obligation. 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, art-folk or craft work shall identify the community or ethnic group to which it belongs.

Technology transfer clauses are common in international agreements whether commercial or not. They are important to the fulfilment of the substantive obligations contained in the agreements, especially for developing countries, but lack of political will and effective mechanisms/incentives for assuring the transfer have limited the practical success of technology transfer provisions. The FTAA chapter on IPRs shows a clear tension between the need for mandatory vs best endeavour clauses in this field. While some FTAA countries advocate basing technology transfer on voluntary co-operation among IPR authorities and the promotion of the use of intellectual property, for most the existence of effective mechanisms/incentives will be essential for achieving the core objectives of the IPR chapter and actual technology transfer.

Civil Society Concerns over the FTAA IPR Chapter

Civil society organisations are starting to express concern over the content of the draft FTAA chapter on intellectual property rights. During the November Ministerial Meeting in Quito, participants in a workshop on intellectual property and biodiversity – jointly organised by the CEDA, CIEL, SPDA and ICTSD – concluded that any chapter on intellectual property rights in the final FTAA agreement would only make sense if such issues as genetic resources, traditional knowledge, technology transfer, flexibility in plant variety protection, and competition regulations against abuse of rights were included and fully developed. Some even considered that the FTAA should not deal with IPR issues at all, but that they should be left to discussions and negotiations at the multilateral level where more balanced results for developing countries and the public interest might be obtained.

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[1] See FTAA.TNC/w/133/Rev.2. The entire Second Draft FTAA Agreement is posted at: www.ftaa-alca.org