

The FTAA Chapter on Intellectual Property Rights: A North/South Struggle over Genetic Material

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The second draft of the Free Trade Agreement of the Americas (FTAA) was released in November 2002. The draft is a compendium of provisions still being negotiated by the 34 governments of the Americas. Nevertheless, when analyzing the chapter devoted to intellectual property rights (IPR), one can easily observe a polarization between provisions that would raise intellectual property norms beyond the standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and provisions that would link IPR to the *Convention on Biological Diversity* (CBD) regime.

Patentability of genetic material

One of the most controversial provisions of the TRIPS agreement is undoubtedly article 27(3), which requires World Trade Organization (WTO) member states to deliver patents on micro-organisms and to set a *sui generis* system for new plant varieties¹. Developed countries argue that patents on genetic material are essential to create incentives for R&D in biotechnology. On the other hand, developing countries see the patentability of genetic material extracted for the South's biodiversity as an unjustified appropriation of developing countries' natural resources and a threat to their access to new agricultural varieties.

A first set of provisions contained in the FTAA draft goes well beyond the TRIPs standards with regard to patents on genetic material. For instance, the draft FTAA agreement stipulates that « when the patent protects a specific genetic sequence or biological material containing that sequence, the

protection shall also cover any product that includes that sequence or material expressing that genetic information.² ». Other controversial provisions ask

FTAA member states to ratify the *International Convention for the Protection of New Varieties of Plants* and the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure*³.

The United States is undoubtedly in favour of this first set of provisions. The official US position on the FTAA is to promote the patentability of any life form⁴. The US-Chile Free Trade Agreement signed in June 2003 already prescribes the patentability of plants⁵. This trend addresses the issues raised by the *Biotechnology Industry Organization*: « Future agreements must close the loophole of Article 27(3)(b) of the TRIPS Agreement by requiring Agreement signatories to grant patents on new, useful and non-obvious transgenic plant and animal inventions⁶ ».

Canada and Mexico may not support their NAFTA partner without reservations. Indeed, the *Canadian Intellectual Property Office* and the *Instituto Mexicano de la Propiedad Industrial* still don't grant patents on plants and animals. Therefore, none of the bilateral free trade agreements concluded by Canada or Mexico prescribe patents on plants and animals. In the context of the FTAA, the Canadian government asserts that its priority « is to ensure that the current international IP rules are fully implemented, rather than to seek an extension on existing IP rights protection⁷ ».

If the United States cannot count on the support of its NAFTA partners, it could resort to its economic strength to promote the patentability of any life form. On the one hand, it may threaten to resort to commercial sanctions against countries whose legislation, policies or practises have negative consequences on US intellectual property⁸. This approach has been used, inter alia, through USTR's

2003 annual report, where Robert B. Zoellick has placed Argentina, the Bahamas and Brazil on a priority watch list of countries that do not respect IPR international standards⁹. On the other hand, the United States could offer trade advantages to Latin American countries that adopt legislation and practices that go beyond those envisaged by the TRIPS agreement. The Nicaraguan government was given such an advantage when the USA agreed to sign a bilateral agreement on investment with Nicaragua, after the latter had committed to increasing its IPR standards¹⁰. Likewise, before granting the commercial advantages foreseen in the US-Caribbean Trade Partnership Act and the Andean Trade Preference Act, the American government takes into account various factors, and notably “the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights.”¹¹

By this strategy, the United States has already succeeded in signing several bilateral intellectual property agreements with Latin American countries. In fact, since the 1994 Summit of the Americas and the launching of the FTAA negotiations, the United States reached, through bilateral agreements, at least one country from each of the four customs unions of the Americas: the Andean Community, the MERCOSUR, the CACM and the CARICOM¹². It may well be that the American strategy foresees that these poles will subsequently serve as precedents to convince the remaining countries of the Americas.

A synergy with the Convention on biological diversity

A second series of proposals contained in the FTAA draft reorients the IPR regime towards the one of the CBD. This convention, concluded at the 1992 Rio Summit, is based, *inter alia*, on the principle of access and benefit sharing arising from the use of genetic resources. Thus, the countries rich in biodiversity, mainly developing countries, have a basis to ask for royalties from industrialized countries that use their genetic material and traditional knowledge, to develop biotechnical inventions.

The FTAA draft envisages several proposals to facilitate the implementation of the principle of benefits sharing. For example, a proposal stipulates that “the granting of patents on inventions that have been developed on the basis of material obtained from genetic resources [...] shall be subject to the acquisition of that material in accordance with national law of the country of origin of such knowledge or resources”. Another suggests requiring FTAA parties to give effect to the arrangements of the Convention on Biological Diversity¹³. Moreover, a whole section of the IPR chapter is dedicated to the protection of traditional knowledge: “Each party shall grant protection to the genetic resources and traditional knowledge jointly or separately, by means of a *sui generis* system, guaranteeing a fair and equitable remuneration for the benefits derived from access to such resources or the use of such knowledge¹⁴.”

These biodiversity rights are not necessarily incompatible with IPR on genetic resources since they do not apply to the same objects. The first apply to tangible genetic material whereas the second apply to intangible genetic information. Nevertheless, the introduction of biodiversity and traditional knowledge issues in a patent law treaty would represent a significant breakthrough in international negotiations. This linkage of IPR and biodiversity reflects the position of several Latin American countries and more especially those of the Andean Community. Indeed, decision 486 of the Andean Community envisages that « Los Países Miembros asegurarán que la protección conferida a los elementos de la propiedad industrial se concederá salvaguardando y respetando su patrimonio biológico y genético, así como los conocimientos tradicionales de sus comunidades indígenas, afroamericanas o locales.¹⁵ » Article 16 of this same decision requires that applicants for patents supply proof that they have obtained all the authorizations required to access and use the genetic resources.

Just as the American government oriented IPR negotiations towards the trade regime during the eighties, the Latin American countries are today orienting the IPR negotiations towards the CBD regime. This “regime linkage claim¹⁶” offers two principal advantages to these countries. First, the

conditioning of intellectual property rights to the prior securing of access rights to genetic material and traditional knowledge would contribute to the effective application of the principle of access and benefit sharing and, therefore, to the return of technological or monetary earnings to the providers of genetic material. Second, the submissions on access to biodiversity and traditional knowledge could be part of a *quid pro quo* with the United States : “ [Developing countries] may simply wish to exploit the issue, not out of a sense of justice on behalf of their traditional peoples and communities [...] but because they are looking for concessions on TRIPS from developed countries.¹⁷ ».

Latin American countries are not deprived of means to promote their positions. Indeed, the FTAA brings together several countries that are favourable to the integration of biodiversity in an IPR chapter and that could unite in a common front¹⁸. In this sense, the FTAA forum is more advantageous to them than bilateralism, which leads some of them to additional concessions on the patentability of biological material. Also, Latin American countries can associate with non-governmental organizations (NGOs) to promote their positions in the public opinion of the Americas. At the ministerial conference of Quito in November 2002, four NGOs organized a parallel workshop on intellectual property and 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 included¹⁹». The coalition formed by developing countries and NGOs has already achieved small victories in the international regime of patents, notably with regard to access to medicine²⁰. This strategy could be used again in the debate on the disclosure of origin in patent’s applications.

Conclusion

Where is the FTAA chapter on IPR going? The richest country in biotechnology of the hemisphere calls for IPR on intangible genetic resources whereas the countries rich in biodiversity call for access rights on tangible genetic resources. A third option could be the *status quo* or, as the Canadian government advocates, the implementation and compliance of existing IPR norms.

In any event, the introduction of biodiversity protection provisions in an IPR draft agreement demonstrates that Latin American countries have thus far played a proactive role in the negotiation and are ready to pose limits to the coverage of the commercial regime where such limits would protect their capacity to develop. The international regime of patents is no longer a regime imposed by some developed countries but has become a place where biotechnology rich countries and biodiversity rich countries are engaged in full-fledged negotiations.

¹ World Trade Organisation « Reconsideration of the arrangements of article 27:3B). Summary of the questions which have been raised and of the observations which were formulated », IP/C/W/369, 8 August 2002, p. 2.

² Article 3(4), part 5, IPR chapter, FTAA draft, November 2002.

³ Article 5, part 1, IPR chapter, FTAA draft, November 2002.

⁴ www.ustr.gov/regions/whemisphere/intel.html.

⁵ Article 17(9)(2) *Free Trade Agreement between the United States and Chile*, June 2003.

⁶ <http://www.bio.org/ip/global/20030129.pdf>.

⁷ <http://www.dfait-maeci.gc.ca/tna-nac/IP-P&P-f.asp>

⁸ Section 301, *Trade Act of 1974*.

⁹ <http://www.ustr.gov/reports/2003/special301-pw1.htm#brazil>

¹⁰ Peter DRAHOS, *Bilateralism in Intellectual Property*, London, Oxfam, 2001, p. 2 et 3.

¹¹ Section 211, *US-Caribbean Trade Partnership Act of 2000*.

¹² *Agreement Concerning the Protection and Enforcement of Intellectual Property Rights Between the Government of the United States of America and the Government of Jamaica*, February 1994 ; *Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning Protection of Intellectual Property Rights*, January 1998 ; *Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Paraguay on Intellectual Property Rights*, November 1998 ; *Memorandum of Understanding Between the United States of America and the Republic of Peru*, May 1997

¹³ Article 5(3), Part 1 IPR chapter, FTAA draft, November 2002.

¹⁴ Article 1(3), Part 6 IPR chapter, FTAA draft, November 2002.

¹⁵ Article 3, Decision 486, Andean Community.

¹⁶ David LEEBRON, « The boundaries of the WTO: Linkages », *The American Journal International Law*, January 2002, 96, p. 9.

¹⁷ Graham DUTFIELD, « Trips related aspects of traditional knowledge », *Case Western Reserve Journal of International Law*, Spring 2001, no 233, p. 239.

¹⁸ It is one of the objectives of the self-proclaimed mega-diverse group which includes Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Philippines, India, Indonesia, Kenya, Malaysia, Mexico, Peru, South Africa and Venezuela.

¹⁹ David VIVAS EUGUI, « Intellectual Property in the FTAA: New Imbalances and Small Achievements », *Bridge*, vol 6, no 8, November-December 2002, p. 18.

²⁰ Several NGOs, such as Public Citizens and Médecins Sans Frontières, and developing countries such as Brazil and India, have used intense efforts to limit the rights conferred by patents. This campaign has achieved a relative success : in April 2001, the pharmaceutical enterprises have themselves withdrawn their complaint in South Africa relating to the government bill on obligatory licenses. Some weeks later, the United States withdrew their complaint to the WTO on the Brazilian law referring to pharmaceutical patents. Then, the WTO member states agreed at Doha that the TRIPS agreement should be interpreted with flexibility to facilitate access to medicines. Susan K. SELL « TRIPS and Access to Medicines: TRIPS and the Access to Medicines Campaign », *Wisconsin International Law Journal*, Summer, 2002, no 481. Ellen't HOEN, « Public health and international Law : TRIPS, Pharmaceutical Patents, and Access to Essential Medicines : a Long Way from Seattle to Doha », *Chicago Journal of International Law*, Vol. 3, Spring 2002, pp. 27-46.