Bilateral Investment Agreements:

Agents of new global standards for the protection of intellectual property rights?

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Executive summary

Developing countries have entered into a large number of bilateral investment treaties (BITs) as well as free trade agreements (FTAs) that include explicit obligations for the protection of intellectual property rights as "investments". These agreements fall outside the arena of multilateral standard-setting on intellectual property rights, and are being strategically pushed by developed countries to advance their industries' economic interests.

This study examines whether and how bilateral and regional investment instruments increase the scope and availability of IPR protection beyond current standards, reduce flexibilities available to developing countries under international treaties and can be used to expand the application in their territories of IPRs over biodiversity.

The study finds that:

- Bilateral investment treaties and investment chapters of free trade agreements go beyond international norms since they extend to intellectual property rights not covered by the World Trade Organisation (WTO) TRIPS Agreement and incorporate the "national treatment" principle without the exceptions provided for under international treaties.
- It is unclear the extent to which rights granted by investment agreements may be used to substantiate IPR claims through investment-related disputes. Areas of particular concern are the granting of compulsory licenses, since investors would be able to claim an economic loss, and the enforcement of disclosure of origin principles to prevent biopiracy, which may be challenged by investors as incompatible with international law.
- Biological materials collected under an access permit may be considered the "property" of the collector who, under a broad definition of investment, may claim protection as an investor with regard to the materials.
- There is no "international standard" relating to the protection of IPRs as an investment that could be invoked in the context of bilateral obligations to comply with "the highest international standards" imposed in some investment agreements.
- Because of the grey areas that investment agreements generate, they provide room for investment-related disputes to induce changes in national IPR legislation of developing countries, even if that legislation is TRIPS-compliant.
- The "most favoured nation" clauses in BITs and FTAs contribute to a global elevation of IPR protection standards. If negotiations on investment were initiated in the framework of the WTO, for instance, pressure to replicate the highest levels of investment protection for IPRs, as currently found in the bilateral treaties, can be expected.

Introduction

Developing countries have entered into a large number of bilateral investment treaties (BITs), free trade agreements (FTAs) or regional trade agreements (RTAs) that, among other matters, include provisions for the protection of foreign investors[1] on the basis of most-favoured-nation and national treatment principles. Under these agreements, host countries assume broad obligations for the protection of foreign investments, particularly against expropriation and strife.

Policies welcoming foreign investments have become a common feature in developing countries in the last fifteen years, after the failure of attempts to impose some forms of control over the activities of transnational corporations and the flows of foreign direct investment (FDI) and technology.[2] Investment agreements have been regarded by some developing countries as an instrument to attract foreign investors. The number of BITs quintupled during the last decade, rising from 385 at the end of the 1980s to 1,857 at the end of the 1990s, while the number of countries involved in bilateral investment treaties reached 173. By 2002, 2,181 BITs had been established (UNCTAD, 2000 and 2003). There are more than 172 RTAs in force; a small, albeit growing, minority of them also deal with investment issues (OECD, 2003, p. 65).

Despite expectations about the impact of BITs on FDI, there is no evidence indicating that the adoption of BITs has actually encouraged FDI flows to signing developing countries. While half of OECD (Organisation for Economic Co-operation and Development) FDI into developing countries was covered by a BIT by 2000, the increase in FDI flows to those countries over the previous two decades were accounted for by additional country pairs entering into agreements rather than signatory hosts gaining significant additional foreign direct investment (Hallward-Driemeier, 2003).[3] BITs, FTAs and RTAs, however, permit developed countries partners to influence the domestic political economy of developing countries and advance the interests of their corporations in the latter markets. The establishment of BITs and investment rules in FTAs has strategic value for developed countries, especially the major capital exporters. Though not all investment agreements ensure market access (to the extent that pre-establishment rights are not recognised),[4] they provide broad post-establishment rights, including in some cases the possibility of directly bringing complaints against host States and obtaining compensation.[5] The

[1] RTAs containing rules on investment usually include provisions on the right to establish a presence in other countries covered by the RTA, and protection principles found in BITs (OECD, 2003).

[2] Negotiations on a UN Code of Conduct on Transnational Corporations and on an International Code on Transfer of Technology were launched during the late 1970s, but collapsed due to the resistance of developed countries. See Correa and Kumar, 2003, Chapter 3.

[3] Even comparing flows in the three years after a BIT was signed to the three years prior, there was no significant increase in FDI (World Bank, *Global Economic Prospects*, 2003).

[4] See, however, the draft US model BIT (2004), which applies the national treatment principle to the pre-establishment phase (article 3.2), available at http://www.state.gov/e/eb/rls/prsrl/28923.htm. The US-Singapore FTA, for instance, defines "investor of a Party" as "a Party or a national or an enterprise of a Party that is *seeking to make, is making*, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality" (Article 15.1.17 US-Singapore FTA) (emphasis added).

[5] The scope and content of BITs have been standardised over the years. The wording of individual provisions still varies in some cases, while differences are most significant between BITs signed some

USA started to include provisions on intellectual property in its bilateral investment treaty program during the 1980s, at the same time it was pushing for the negotiation of what became the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS) and forcing advanced developing countries, like South Korea and Brazil, to bilaterally negotiate higher standards of IPR protection (Drahos, 2003).

OECD countries attempted to develop a Multilateral Agreement on Investment (MAI) in the 1990s, but after significant divergences among OECD countries and opposition from civil society, the initiative collapsed. An attempt is currently underway to incorporate, as one of the "Singapore issues", investment rules in the already burdened agenda of the World Trade Organisation. The outcome of the WTO Ministerial Conference in Cancun, however, shows a strong resistance by developing countries to accept new disciplines on investment as a component of the WTO system.

While negotiations on intellectual property rights in WTO are virtually paralysed, and the launching of negotiations on investment finds strong opposition, developed countries, notably the USA, have turned to bilateral dealings to advance their industries' economic interests and obtain "WTO-plus" concessions from developing countries. The USA has concluded BITs[6] with a large number of countries (see Table 1) and several FTAs[7] including rules on investment, as well as IPRs, with Australia, Jordan, Singapore, Chile, Morocco and the Central American countries. There are ongoing negotiations with Bahrain, the Southern African Customs Union, Thailand, Panama and four Andean countries (Bolivia, Ecuador, Peru and Colombia).[8] Powerful and well articulated business interests[9] actively push for standards that erode the flexibilities left by the TRIPS Agreement, and carefully monitor[10] how much the US government achieves in imposing TRIPS-plus standards on weaker countries.

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decades ago and those signed more recently. The main provisions deal with: the scope and definition of foreign investment; admission and establishment; national treatment in the post-establishment phase; MFN treatment; fair and equitable treatment; guarantees and compensation in the event of expropriation; guarantees of free transfers of funds and repatriations of capital and profits; and dispute settlement provisions, both State-State and investor-State (UNCTAD, 2003a, p. 89)

[6] In February 2004, the US State Department released a draft text of its revised BIT template (available at http://www.state.gov/e/eb/rls/prsrl/28923.htm). The new draft model BIT includes extensive transparency commitments on the part of host governments, incorporates a range of changes to the investor-state dispute settlement process, adds new language to clarify the meaning of certain substantive provisions, including those on expropriation and the minimum standard of treatment (in line with earlier US FTAs), includes provisions on labour and the environment, and contemplates the creation of a future appellate body or mechanism which would provide a means for review of arbitral awards. See *INVEST-SD: Investment Law and Policy Weekly News Bulletin*, February 23, 2004 (available at http://www.iisd.org/investment).

[7] The Bush Administration also revised the investment template used in US FTAs as per a series of requirements set down by the US Congress.

[8] The draft Free Trade Area of the Americas (FTAA), still under negotiation, also includes a chapter on investment.

[9] As illustrated by the role of the US-ASEAN Business Council and of the American Chambers of Commerce in the negotiation of FTAs.

[10] See, e.g., the various reports on the recent US FTAs by the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) advising USTR (available at http://www.ustr.org).

Table 1: **United States bilateral investment treaties**

Country	Date of Signature	Date Entered into Force
Albania	January 11, 1995	January 4, 1998
Argentina	November 14, 1991	October 20, 1994
Armenia	September 23, 1992	March 29, 1996
Azerbaijan	August 1, 1997	August 2, 2001
Bahrain	September 29, 1999	May 30, 2001
Bangladesh	March 12, 1986	July 25, 1989
Belarus	January 15, 1994	N/A
Bolivia	April 17, 1998	June 6, 2001
Bulgaria	September 23, 1992	June 2, 1994
Cameroon	February 26, 1986	April 6, 1989
Congo, Democratic Republic of the	August 3, 1984	July 28, 1989
Congo, Republic of the (Brazzaville)	February 12, 1990	August 13, 1994
Croatia	July 13, 1996	June 20, 2001
Czech Republic	October 22, 1991	December 19, 1992
Ecuador	August 27, 1993	May 11, 1997
Egypt	March 11, 1986	June 27, 1992
El Salvador	March 10, 1999	N/A
Estonia	April 19, 1994	February 16, 1997
Georgia	March 7, 1994	August 17, 1997
Grenada	May 2, 1986	March 3, 1989
Haiti	December 13, 1983	N/A
Honduras	July 1, 1995	July 11, 2001
Jamaica	February 4, 1994	March 7, 1997
Jordan	July 2, 1997	June 12, 2003
Kazakhstan	May 19, 1992	January 12, 1994
Kyrgyzstan	January 19, 1993	January 12, 1994
Latvia	January 13, 1995	December 26, 1996
Lithuania	January 14, 1998	November 22, 2001
Moldova	April 21, 1993	November 25, 1994
Mongolia	October 6, 1994	January 1, 1997
Morocco	July 22, 1985	May 29, 1991
Mozambique	December 1, 1998	N/A
Nicaragua	July 1, 1995	N/A
Panama	October 27, 1982	May 30, 1991
Panama (Amendment)	June 1, 2000	May 14, 2001

Poland	March 21, 1990	August 6, 1994
Romania	May 28, 1992	January 15, 1994
Russia	June 17, 1992	N/A
Senegal	December 6, 1983	October 25, 1990
Slovakia	October 22, 1991	December 19, 1992
Sri Lanka	September 20, 1991	May 1, 1993
Trinidad & Tobago	September 26, 1994	December 26, 1996
Tunisia	May 15, 1990	February 7, 1993
Turkey	December 3, 1985	May 18, 1990
Ukraine	March 4, 1994	November 16, 1996
Uzbekistan	December 16, 1994	N/A

Source: Bureau of Economic and Business Affairs, *Fact Sheet. U.S. Bilateral Investment Treaty Program*, Washington, DC., July 1, 2003

Although investment agreements do not include detailed regulations on IPRs, they incorporate a broad definition of "investment" that generally covers such rights. Such agreements, hence, may influence the exercise of IPR laws and, particularly, the capacity of host countries to control the acquisition and use of IPRs by foreign title-holders.

This paper focuses primarily on BITs, as well as FTAs and RTAs that include investment rules,[11] negotiated between developed and developing countries. It examines whether and how investment agreements:

- expand the scope and effectiveness of IPR beyond current national and international standards;
- reduce flexibilities in managing IPR that are currently available to developing country governments under the TRIPS Agreement; and
- might be used to expand the reach of IPR over biodiversity and related processes and information.

The core of the study is an analysis of key provisions of investment agreements[12] that could have a bearing on the scope and effectiveness of IPR in developing countries.

1. Assets as investments

As contained in BITs, the Energy Charter Treaty, NAFTA and recently negotiated FTAs, "investment" is an all-encompassing concept including almost any kind of business activity. The definition of "investment" in generally based on the concept of

[11] Hereinafter called "investment agreements".

[12] There has been no attempt to review the large number of investment agreements adopted or in force. The study is rather based on a sample of provisions identified in agreements entered into with different developed countries. Given the extensive use of "model" BIT agreements and of pre-existing FTAs to negotiate new ones, it is expected that the study will provide a fairly comprehensive analysis of the subject.

asset. All assets of an enterprise, such as movable and immovable property, equity in companies, claims to money, contractual rights, intellectual property rights, concessions, licenses and similar rights are included. This concept is broader than FDI, as it encompasses portfolio investments (UNCTAD, 1996, p. 174).[13] Box 1 contains, as an example, the definition of "investment" incorporated into the recent US-Chile FTA.

Box 1: Definition of "investment" in the US-Chile FTA

Investment includes:

a) an enterprise;
b) shares, stock, and other forms of equity participation in an enterprise;
c) bonds, debentures, other debt instruments, and loans;
d) futures, options and other derivatives;
e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
f) intellectual property rights;
g) licenses, authorisations, permits and similar rights conferred pursuant to applicable domestic law, and
h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

Some investment agreements generally refer to IPRs, while others explicitly indicate the types of IPR covered. For instance, the BIT between USA and El Salvador (1999) specifies that "investment" includes:

- copyrights and related rights,
- patents,
- rights in plant varieties,
- industrial designs,
- rights in semiconductor layout designs,
- trade secrets, including know-how and confidential business information,
- trade and service marks, and
- trade names.

In some investment agreements[14] reference is also made[15] to "technical process" or "know how" and "goodwill".[16] An open question is also the extent to which modalities

[13] Some agreements, however, are limited to foreign direct investments. See, e.g., the agreement between EFTA and Mexico (2000), which applies to "investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof " (article 45).

[14] See, e.g., the United Kingdom 1991 model BIT, article I(a)(iv).

[15] See, e.g., the EFTA-Singapore agreement (2002).

[16] See, e.g., one of the (still bracketed) proposals in FTAA (article 1.1). According to current IPR law, secret "technical process" or "know how" may be protected as *trade secrets* or *undisclosed information* (see article 39 of the TRIPS Agreement). "Goodwill" is the benefit and advantage of the good name, reputation and connection of a business. It may be protected under unfair competition law (which condemns dishonest commercial practices) or, in common law countries, under the doctrine of "passing-off" (the wrong of misrepresenting one's business goods or services as another's, to the latter's injury, generally by using a confusingly trademark or trade name). Protection often encompasses not only the use of trademarks, but also of a particular packaging, "get up" or "trade dress" and advertising styles (Bently and Sherman 2001, p. 673-678).

of IPRs not existing in the host country at the time of entry into an investment agreement (e.g. plant variety protection)[17] would be considered covered investments. An affirmative reply to this question may be grounded in the fact that investment agreements are intended to protect current and future investments, and in the application of catch-all provisions embracing, as in the example above, any other "intangible property".

The definition of "investment" in investment agreements covers assets in *all sectors* of the economy, including agriculture, natural resources, manufacturing and services. The implications for biological resources are addressed below.

Investment agreements protect assets under the direct or indirect control of foreign investors. National laws differ on what "control" means. There is no international standard to judge when certain types of rights, or even a *de facto* situation, may be considered as equivalent to an actual control over assets. In addition to the difficulties in determining when control exists, a broad concept of "indirect" ownership or control may lead to the protection of investors who lack a substantial business activity in the host country, such as when an investment is made by a firm established in another contracting party, but owned or controlled by a party in a non-contracting party.[18]

Given the broad coverage of these definitions, some investment agreements -- like NAFTA Chapter 11[19] -- include a general rule accompanied by an illustrative list of covered investments, as well as a "negative" list of areas specifically excluded from the scope of the agreement. In the negotiation of the draft MAI, a proposal was made to include an interpretive note indicating that in order to qualify as an investment, certain characteristics must be present, such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk (Schekulin, 1997, p. 12). This characterisation appears in recent FTAs, like the US-Chile FTA, and in the draft US model BIT (2004).

These characteristics would exclude from the definition trade operations and financial transactions as such.[20] However, claims to money and any form of credit may be covered assets; therefore, the definition would apply to the rights arising from trade transactions or from bank operations, including bank deposits. Moreover, case law under NAFTA seems to indicate a troubling trend to consider some of those features as sufficient to define, by themselves, when a covered investment exists -- for instance, when the expectation of a market share is frustrated. In *S.D. Myers v. Canada,* the Tribunal ruled that the scope of "investment" includes such assets as market share in a sector, and access to markets in the host state, whether or not the investor owns a physical plant or retail store in that country.[21] In short, almost any

[17] Most developing countries that introduced plant variety protection did it during the last ten years, in many cases after having entered into BITs.

[18] This issue was discussed during the negotiation of the draft MAI. See OECD, DAFFE/MAI/NM(97)2, p. 101.

[19] See section 1101.2.

[20] See, e.g., the clarification contained in the Canada-Costa Rica BIT (1998), article 1.

[21] *S.D. Myers v. Canada*, para. 232, stating that Myers' market share in Canada constituted an investment. Also see *Pope, Talbot v. Canada*, para. 96, defining access to US markets by a foreign investment as a protected property interest.

kind of business activity can constitute an investment that is subject to protection (IISD, 2001, p. 23).

2. IPRs as investments

Intellectual property rights (IPRs) are deemed an "investment" in investment agreements, which generally include a specific reference to that effect. In the absence of exceptions or other specifications,[22] the usual broad "assets" definition would cover *any* type of IPRs acquired in the host country. Some questions, however, may arise with regard to the scope of the definition.

Unregistered IPRs

Copyright and trade secret protection do not require registration to confer rights against third parties. The lack of registration does not seem to affect the status of such rights as covered investments. As noted, some BITs and FTAs explicitly mention these categories of non-registered rights.

IPR applications

Patents, trademarks, industrial designs and other IPRs can only be acquired through a registration process, upon demand by the interested party.[23] The right is conferred once the application is processed and approved. Thus, a patent application creates a mere expectation of obtaining an exclusive right and, hence, a profit. However, patent applications may be traded and, in some countries, they generate rights even before grant, for instance to act against infringers. Though it is clear that a still unregistered invention is not an IPR, it may be argued that the application is, in any case, an "intangible property", as long as it is "owned" and can be assigned to third parties.

Some investment agreements (e.g. Canada-Argentina BIT, 1993) refer in the definition of "investment" to "rights *with respect to* copyrights, patents…" (article 1 (a)(iv)) rather than to "copyrights, patents…", etc. as such (e.g. Canada-Barbados, (article 1(f)(v)). This wording may be intended to encompass not only granted intellectual property rights, but also IPR applications.

The US-Jamaica BIT refers to "patent*able*" inventions (article I.1.(a)(iv)). Could this be understood as covering inventions which are potentially patentable in the host country but for which a patent has not yet been obtained or a patent application filed? It would be very hard to successfully make this argument. According to the same BIT, "investment" includes every kind of investment "in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party" (article I.1(a)). If no patent was obtained, even if the invention were patentable, there would be no investment "in the territory" of the host country, as the invention would be in the public domain and, hence, out of the control of the inventor.

[22] For instance, during discussions of the draft MAI, some delegations proposed excluding copyrights and neighboring rights, as well as databases. See OECD, DAFFE/MAI/NM(97)2, p. 117.

[23] It is to be noted that in countries of common law tradition, trademarks may be acquired by use of the sign, without registration.

Subject matter not protected in the host country but protected in the investor's or other countries

There are cases where subject matter may be off protection in the host country while protected elsewhere. This situation may arise in any of these cases:

- the IPR owner in a foreign country has not claimed his rights in the host country;[24]
- the IPR has expired or been revoked in the host country, while remaining valid in foreign countries;
- the subject matter is deemed not protectable in the host country -- for instance, in the case of countries applying the exception allowed by article 27.3(b) of the TRIPS Agreement for plant or animals, or in the case of countries which refuse patents on merely isolated genes.

Since IPRs are granted on a territorial basis, subject matter that is not protected in a given country belongs to the public domain there. It cannot be deemed an asset owned or controlled by a juridical or natural person. There is one exception, though, in the case of *well known* trademarks which receive protection without prior registration (article 16.2 of the TRIPS Agreement). Recent FTAs have not only confirmed this exception but expanded it beyond the TRIPS standard, by incorporation of WIPO's Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999).[25]

3. National treatment

The national treatment principle is well established in IPR law. Since the adoption of the Paris Convention for the Protection of Industrial Property in 1883, it became a standard feature in most international agreements[26] on IPRs, as well as in most national IPR laws.[27] It is also incorporated in the TRIPS Agreement (article 3).

However, the adoption of the national treatment principle in the TRIPS Agreement, as well as in other international agreements on IPRs (such as the Paris, Berne and Rome Conventions as well as the Washington Treaty), is subject to a number of carefully negotiated and drafted exceptions.[28] Thus, article 3.1 of the TRIPS Agreement stipulates the following:

> Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of

[24] This is a very common situation. For instance, developing countries only receive a fraction (in some cases a very minor one) of patent applications made in the USA or Europe. See WIPO Industrial Property Statistics at http://www.wipo.int/ipstats/en/.

[25] See, e.g., article 17.2.9 del of the FTA between USA and Chile.

[26] A noticeable exception is the UPOV Convention, which adopted a reciprocity principle.

[27] Some laws, however, require reciprocity. See, e.g., the US Semiconductor Chip Protection Act ("SCPA") of 1984.

[28] Some investment agreements also include exceptions of a general nature (e.g. public order, health, national security) with regard to national treatment and the MFN clause. See Moncayo von Hase, 2003, p. 76 and UNCTAD, 1999, p. 15.

> intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organisations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

The implications of these exceptions in the context of investment agreements raise interesting issues. For instance, in the case of performers, producers of phonograms and broadcasting organisations, the fact that protection under the TRIPS Agreement is limited to "the rights provided under this Agreement" means that Members may discriminate with regard to other rights, such as the participation of local and foreign performers in funds generated by levies on blank tapes. It is unclear the extent to which an exception of this type would survive the all-encompassing national treatment principle as applied in the context of investment agreements. Could a foreign performer successfully claim that denial of national treatment discriminates him as an "investor"? It may be argued that protected rights are only those conferred under the domestic law. However, the solution to this and to similar cases may remain an open question until the issue is clarified by case law.

The vast majority of BITs does not include binding provisions relating to the pre-establishment (admission) phase, but only apply *after* an investment has been made. However, most BITs of the United States and some recent treaties of Canada require the application of the national treatment to both the pre- and post-establishment phases.[29] This broad coverage may provide, unless a specific exception is made,[30] a legal platform to claim national treatment with regard to the acquisition of IPRs.[31]

4. Most-favoured-nation clause

The most-favoured-nation (MFN) clause is not present in pre-TRIPS international conventions on IPRs. It was incorporated in article 4 of the TRIPS Agreement, with a number of exceptions.[32] This provision means, for instance, that in case more

[29] See, e.g. article 3.1 of the draft US model BIT (2004) and article 15.4.1 of the US-Singapore FTA. The MFN clause is also applicable in these agreements to the pre-establishment phase.

[30] See, e.g., article 1108 of NAFTA quoted below.

[31] See article 3.1, footnote 2 (referring to the "acquisition" of rights), and part IV of the TRIPS Agreement.

[32] Exempted from the MFN obligation are any advantage, favour, privilege or immunity accorded by a Member: "(a) deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorising that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organisations not provided under this 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 Agreement Establishing the WTO, provided that such agreements are notified to the Council for Trade-Related Aspects of Intellectual Property Rights and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members" (article 4).

advantageous conditions were granted to members of a regional agreement (established after the entry into force of the WTO Agreement), such conditions should be extended, automatically and unconditionally, to all WTO Members.

The MFN clause in the context of investment agreements obliges the host country to extend to investors from the contracting party treatment no less favourable than it accords to investors from other countries. Different formulations of this clause may be found in investment agreements. While the MFN clause aims at creating equality of competitive opportunities between investors from different foreign countries, it limits host countries' room for maneuver with respect to future investment agreements, as it obliges the host country to unilaterally extend to investors from treaty partners any additional rights that it grants to third countries in future agreements (UNCTAD, 1999, p. 5)

Most agreements refer to "treatment no less favourable". NAFTA (article 1103) and the draft US model BIT (2004) include the qualification that such treatment applies only "in like circumstances".[33] Many investment agreements entitle both foreign investors and their investments to MFN (e.g. NAFTA and BITs concluded by Germany, Switzerland and the United Kingdom). Others, such as US BITs, only grant MFN to the *investment*. Still another approach has been followed in the French model BIT, which gives MFN to the investors with regard to their investments (UNCTAD, 1999, p. 6).

The MFN principle as applied to IPRs in the context of investment agreements implies that any future concession made will apply to IPR holders protected under current investment agreements, even if the latter provide for narrower rights. While in some cases tribunals have cautioned against importing into an agreement rights recognised in other agreements that may be inconsistent with the clear intent of, or significantly impact, the substantive rights agreed upon by the parties (Cosbey, Mann, Peterson and von Moltke, 2004, p. 11), there is a risk that the MFN clause be invoked to override exceptions to certain rights specified in a particular agreement and not recognised in an agreement with other parties.

The majority of investment agreements only contain MFN obligations for the post-establishment phase. They, therefore, apply to IPRs *after* they have been granted, and the host country can condition the acquisition of IPRs on the fulfillment of certain requirements, including the granting of reciprocity to its own nationals. In fact, reciprocity is required under some IPRs laws[34] and treaties,[35] and it will not be affected as long as an investment agreement only applies to the post-establishment phase.

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[33] Although GATT/WTO jurisprudence on "like goods" may illustrate how this issue could be tackled, it does not provide concrete guidance for interpreting the "like circumstances" concept in the context of investment rules. In practice, it may be quite difficult to establish when "like circumstances" arise.

[34] E.g., the US Semiconductor Chip Protection Act (1984) and the European Directive on the Protection of Data Bases (Directive 96/9/EC, 11 March 1996).

[35] See, e.g., article 3 (3) of the UPOV Convention 1978 ("Notwithstanding the provisions of paragraph (1) and paragraph (2), any member State of the Union applying this Convention to a given genus or species shall be entitled to limit the benefit of the protection to the nationals of those member States of the Union which apply this Convention to that genus or species and to natural and legal persons resident or having their registered office in any of those States").

The right to require reciprocity has been retained, via an explicit exception to the MFN clause, in some investment agreements. For instance, article 1108 of NAFTA stipulates that articles 1102 (national treatment) and 1003 (MFN clause) "do not apply to any measure that is an exception to, or derogation from, the obligations under article 1703 (Intellectual Property-National Treatment) as specifically provided in that article".[36]

5. Fair and equitable treatment

The MFN clause sets forth a contingent, relative standard of investment protection. Many investment agreements also contain absolute standards[37] such as "reasonable" or "fair and equitable" treatment,[38] generally with regard to the post-establishment phase.

Although the wording of this standard is ambiguous, and it may allow for different interpretations,[39] it provides a rule against which the policies and regulations of Contracting Parties would be judged.[40] While, historically, the "fair and equitable standard" was considered to be breached when the State conduct was of an "egregious and shocking nature", it has been applied in recent cases to conduct taken in good faith, when investor expectations are frustrated by State action (Cosbey, Mann, Peterson and von Moltke, 2004, p. 11-12).

In some cases, the provisions relating to "fair and equitable" treatment in investment agreements are supplemented by an obligation not to impair investments by "unreasonable" and/or "discriminatory" measures. Under the draft US model BIT (2004), this principle is also meant to include the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings "in accordance with the principle of due process embodied in the principal legal systems of the world" (article 5.2(a)).

Could a "fair and reasonable" type of standard be invoked in order to challenge national IPR laws consistent with the TRIPS Agreement? Investors are subject in each contracting party to the regulations and policies generally applicable to the type of investment they hold or to the type of activity they undertake. As stated by one commentator in relation to the draft OECD MAI, the "fair and equitable" standard

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[36] This exception is not limited to reciprocity; it also allows for MFN exceptions in respect of IPRs in general (UNCTAD, 1999, p. 20).

[37] See Moncayo von Hase (2003, p. 74). For a distinction between "relative" and "absolute" standards, see UNCTAD, 1996, p. 182.

[38] For example, the US-El Salvador BIT (1999) provides in article II.3(a) that "each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law".

[39] The diverging views about the content of this standard are well illustrated by the heavily bracketed text contained in the FTAA draft: "[Article 9.1. Each Party [shall accord] [shall at all times ensure] [to the investments of investors of another Party [made in its territory]] [to the investors of another Party and their investments] [treatment in accordance with international law, including] fair and equitable treatment [as well as full protection and security] in accordance with the [norms and] principles of international law [and shall not impair their management, maintenance, use, enjoyment or disposal through unjustified or discriminatory measures]".

[40] As noted below, depending on its formulation, this principle may provide the basis for the application of disciplines of international law other than those contained in an investment agreement.

cannot be deemed as "designed to forbid any form of regulation against foreign investors, but only discriminatory policies" (Charolles, 1997, p. 18). In other words, said standard should not be used to challenge the legitimacy of a regulation or a public action connected with IPRs that is consistent with the applicable international rules as well as with national laws, if it is not discriminatory.

It is to be noted that *differentiation* in legal treatment is not the same as *discrimination*, and that WTO members can adopt different rules for particular areas, provided that the differences are adopted for *bona fide* purposes. A WTO panel held in this regard that:

> [TRIPS] Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit *bona fide* exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than frustration of purpose.[41]

The Doha Declaration on the TRIPS Agreement and Public Health,[42] in particular, may be considered as authorising differentiation in intellectual property rules if necessary to protect public health.[43]

6. Compulsory licenses

Inherent to most intellectual property rights is the granting of *exclusive rights*. They give the right holder the legal power to prevent third parties from using, producing or commercialising the protected invention, sign or work. Such power, however, is not absolute. Exceptions to exclusive rights may adopt different forms.

On the one hand, national laws may determine acts that can be performed by third parties without infringing the applicable IPRs, such as the use of a patented invention for private purposes, teaching and scientific research. This kind of exception operates automatically -- that is, there is no need to request authorisation from a court or other authority to use the protected subject matter, and any party can benefit from the exception at any time without any remuneration to the right holder. States' right to establish exceptions of this type is recognised by the TRIPS Agreement.[44]

On the other hand, it is possible to subject IPRs to a compulsory license.[45] This is an authorisation given by the government to a third party for the use, without the consent of the right owner, of a patent or other intellectual property right. A compulsory license may be subjected to time restrictions and other conditions, particularly the payment

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[41] *See* Report of the WTO Panel, *Canada - Patent Protection for Pharmaceutical Products*, WT/DS114/R, 2000, at 7.92.

[42] WT/MIN(01)/DEC/W/2, 14 November 2001

[43] See, e.g., Correa (2002).

[44] See, e.g., articles 13, 17 and 30 of the TRIPS Agreement.

[45] See, e.g., article 31 of the TRIPS Agreement.

of remuneration to the right holder. Governments may also decide to use a patented invention for non-commercial purposes (hereinafter "government use"), either by itself or through a subcontractor.

The granting and effective exploitation of a compulsory license may limit the economic benefits that the patent holder may obtain from his "investment". An important question in the context of this study is whether the granting of a compulsory license may be deemed, under an investment agreement, as an *expropriation* that could trigger legal actions against the host State and compensation claims. Expropriation rules, if found applicable, may in some cases be more beneficial to the patent owner than the compulsory licenses rules, particularly because the obligation to pay will rest with the government, and because investment agreements normally provide for the investor's right to directly sue the State.[46]

Although a compulsory license does not transfer the property of the affected IPRs, this may not be sufficient to disregard a possible qualification of expropriation. The reason for this is that the concept of expropriation is generally broadly construed,[47] and investment agreements do not only include direct and full takings of property but also *de facto* or *indirect* expropriation. Thus, Section 1110 of NAFTA prohibits direct expropriation, indirect expropriation and measures tantamount to expropriation. The cases to date have held that these last two terms have the same meaning: measures that do not directly take investment property, but which amount to the same thing (IISD, 2001, p. 31). Article 42.1 of the EFTA-Singapore agreement (2002) stipulates that "None of the Parties shall take, either *de jure* or *de facto*, measures of expropriation or nationalisation against investments of investors of another Party…".[48] The draft US model BIT (2004) indicates that "neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation" (article 6.1).[49]

The determination of whether a compulsory license amounts to a *de facto* or *indirect* expropriation must be made case-by-case. The mere fact that it may have an adverse economic effect on an investment, standing alone, does not establish that a *de facto* or *indirect* expropriation has occurred.[50] Moreover, a compulsory license would not be questionable if it has been taken in the public interest and there is no indication that it has an illicit purpose or is discriminatory, provided that, in addition, an adequate remuneration is available.

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[46] While the number of expropriation cases that have arisen from BITs was small in the past, in the last few years it has jumped substantially. Having settled about 60 cases in four decades, ICSID had over 40 cases pending by 1993 (Hallward-Driemeier, 2003).

[47] For instance, the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of his investment, even though the property remains vested in him, is often considered "creeping expropriation" (UNCTAD 2000b, p. 12).

[48] US BITs also include a clause stipulating that "neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments".

[49] See also the Germany-Bangladesh BIT (1981) which includes in its protocol, section 3, "the taking away or *restricting* of any property right which in itself or in conjunction with other rights constitutes an investment" (emphasis added).

[50] See, e.g., Annex B, p. 4 (a) (i) of the draft US model BIT (2004).

A legally granted compulsory license, hence, cannot be rightly described as an act of expropriation. But the broad definition of "investment" and the coverage of *de facto* expropriation, may be used to raise expropriation complaints in case a compulsory license were granted. This possibility has been anticipated by some investment agreements. For instance, NAFTA's provision on expropriation and compensation (article 1110.7) includes an exception with regard to compulsory licenses. Similarly, the FTA between Chile and USA stipulates that the provision on expropriation and compensation "…does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement" (Article 10.9.5).

The incorporation of this exception[51] confirms that expropriation rules are potentially applicable to compulsory licenses. While it may be difficult for an affected patent owner to prove that an illegal expropriation has taken place, if the conditions referred to above were complied with, cases may arise in which claims of this type could be made -- for instance, when a patent owner is dissatisfied with the determination of the level or mode of remuneration.[52] Given the grey area that overlapping protections of investment and IPRs create, investor's rights may be used to dissuade governments from using compulsory licenses or to challenge their decisions. An exception to the expropriation clause may protect against this possibility, provided that it is not neutralised by the MFN clause incorporated in other investment agreements applicable to the parties.

7. Revocation/forfeiture

Another situation where expropriation rules may be invoked arises when a patent is revoked or the rights otherwise forfeited before the normal expiry of the patent. A patent may be generally revoked when it is found, by the administration or a court, that it was granted in violation of patentability rules or other provisions of the relevant law. In the USA, a patent may be also declared non-enforceable in case of lack of candor in providing information to the patent office[53].

Aggressive patenting strategies by firms, particularly in the pharmaceutical and biotechnology sectors, overload of work in patent offices, lack of qualified staff and low standards applied to assess patentability have all led to the granting of a growing number of "low quality" patents, or patents that should never have been granted if properly examined.[54]

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[51] An exception of this type is also contained in the draft US model BIT (2004) (article 6.5).

[52] One reason to seek protection under expropriation rules of investment agreements, is that the rule generally applicable is based on payment of a "prompt, adequate and effective compensation", while under the TRIPS Agreement, the right holder shall only be paid an "adequate remuneration in the circumstances of each case, taking into account the economic value of the authorisation" (article 31 (h)).

[53] See Pires de Carvalho (2000), p. 395-399.

[54] See, e.g., US Federal Trade Commission (FTC) (2003) and National Research Council (2003); see also http://www.pubpat.org.

Though patents enjoy a presumption of validity, as noted by the US Federal Trade Commission, the circumstances in which they are granted "suggest that an overly strong presumption of a patent's validity is inappropriate" and that "it does not seem sensible to treat an issued patent as though it had met some higher standard of patentability" (FTC, 2003, p. 8 and 10). When the validity of a patent is successfully challenged, could the affected patent owner raise claims under an investment agreement and, for instance, sue the State and request the review of the decision or claim compensation?

The grounds for revocation/forfeiture of a patent have not been dealt with in the TRIPS Agreement. A patent may, thus, be revoked due to the lack of payment of annual maintenance fees[55] or for other reasons, such as abuse of a dominant position. The only provision in TRIPS on this matter ensures the availability of a judicial review of any decision to revoke/forfeit a patent. Recent FTAs however, restrict the right to determine the reasons for revocation/forfeiture.[56]

The effect of the revocation/forfeiture of any IPR, such as a patent or plant breeders' right, is that the protected subject matter is put back into the public domain. There is no "taking" of the property, *stricto sensu*, but certainly the value of the IPR as an "investment" is diluted and arguments about *indirect* or *de facto* expropriation can be made. NAFTA and other FTAs provide for an exception to the expropriation clause if the revocation/forfeiture is made consistently with the IPR rules contained in the treaty.[57] The FTA between Chile and USA stipulates that the provision on expropriation and compensation:

> …does not apply to…the revocation, limitation, or creation of intellectual property rights, to the extent that such revocation, limitation, or creation is consistent with Chapter Seventeen (Intellectual Property Rights) (Article 10.9.5).

A particularly controversial case may arise in connection with a requirement to inform the country of origin or source of a biological material and its associated traditional knowledge (TK) if non-compliance led to the revocation of a patent. The disclosure of origin obligation may contribute to address a major concern of developing countries: the "biopiracy" of biological resources and TK. Despite the complaints and pleas by developing countries affected by these practices, they continue unabated as no preventive measures have been taken by countries that most benefit from them, while the TRIPS Agreement has no rules to prevent such occurrences.[58] Some

[55] See Article 5.A(3) of the Paris Convention for the Protection of Industrial Property (1967), which permits revocation in case of lack of payment of maintenance fees.

[56] Thus, in the case of the Chile-US FTA "[a] Party may revoke or cancel a patent only when grounds exist that would have justified a refusal to grant the patent" (Article 17.9.5). A footnote adds that fraud in obtaining the patent may also be cause for revocation. Article 15.9.4 of the US-Central America FTA (CAFTA) is broader in permitting that a Party may also provide that "inequitable conduct may be the basis for revoking, cancelling, or holding a patent unenforceable" and explicitly referring to revocation in accordance with Article 5.A(3) of the Paris Convention. The US-Singapore FTA stipulates that the patent may be revoked, besides fraud and misrepresentation, on grounds that pertain to the insufficiency of or unauthorised amendments to the patent specification, nondisclosure or misrepresentation of prescribed material particulars, fraud, and misrepresentation (article 16.6.4).

[57] A provision to this effect is also contained in the draft FTAA (article 13.6).

[58] See Correa (2003).

countries (e.g. Brazil, Costa Rica, India and the Andean Community) have already implemented an obligation of disclosure eventually leading to the revocation/forfeiture of IPRs[59] or the invalidation of rights obtained in violation of access regulations.[60] Additionally, a number of developing countries have proposed to amend the TRIPS Agreement in order to formally introduce such an obligation.[61]

Although Switzerland has suggested the adoption of a disclosure obligation of this type in the context of the Patent Cooperation Treaty[62] and the European Union has also accepted the possible consideration of this matter in the context of the TRIPS Agreement,[63] they oppose, together with other developed countries, the introduction of an obligation the non-compliance of which would lead to revocation/forfeiture of the conferred rights.

To the extent that a particular country applies its national law consistently with the TRIPS standards, both substantively and procedurally, and has not otherwise limited its capacity to enforce a disclosure obligation of the type discussed above, expropriation complaints would seem legally unfounded. It has been argued, however, that providing for revocation/forfeiture in case of wrong or lack of disclosure of the origin of biological materials and the associated knowledge, would be tantamount to incorporating a *new* requirement for patentability not contemplated in the TRIPS Agreement and, hence, incompatible with TRIPS article 27.1. If this theory prevailed, the likelihood of succeeding in an investment complaint would increase. Until the matter is clarified, or until the TRIPS Agreement is amended, an investor-to-State claim would be a real threat to countries willing to adopt and enforce a disclosure of origin obligation.

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[59] The Indian Patent Second Amendment Act (2002) provides that applicants must disclose in their patent applications the source of origin of the biological material used in the invention (section 10). It also allows for oppositions to be filed on the ground that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention. The grounds for rejection of the patent application, as well as revocation of the patent, include non-disclosure or wrongful disclosure of the source of origin of biological resource or knowledge in the patent application, and prior disclosure of knowledge, oral or otherwise.

[60] For instance, the Andean Community's Decision 391 (1996) establishes that any IPRs or other claims to resources shall not be considered valid if they were obtained or used in violation of the terms of a permit to access biological resources found in any of the Andean countries, as regulated under that Decision.

[61] Brazil has suggested that "Article 27.3 (b) should be amended in order to include the possibility of Members requiring, whenever appropriate, as a condition to patentability: (a) the identification of the source of the genetic material; (b) the related traditional knowledge used to obtain that material; (c) evidence of fair and equitable sharing; and (d) evidence of prior informed consent from the Government or the traditional community for the exploitation of the subject matter of the patent" (Submission by Brazil "Review of article 27.3(b)", IP/C/W/228, 24 November 2000, p. 5). See also "The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge", Submission by Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand, Venezuela, IP/C/W/403, June 24, 2003.

[62] See "Article 27.3(b), The relationship between the TRIPS agreement and the Convention on Biological Diversity, and the protection of traditional knowledge", Communication from Switzerland, IP/C/W/400, 28 May 2003, para. 9.

[63] "Review of article 27.3(b) of the TRIPS Agreement, and the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore . A concept paper", Communication from the European Communities and their Member States, IP/C/W/383, 17 October 2002, para. 55.

It is open to discussion, however, whether failing to comply with the disclosure obligation may be deemed as fraud or misrepresentation in obtaining the patent or as "inequitable conduct" [64], as provided for in some FTAs (e.g. US-Singapore, article 16.7.4).[65]

8. Parallel imports

"Parallel imports" take place when a product is imported into a country without the authorisation of the title holder or his licensees, to the extent that the product has been put on the market elsewhere in a legitimate manner.[66]

Article 6 of the TRIPS Agreement recognises the possibility of legally admitting parallel imports, based on the principle of "exhaustion of rights". The principle was extensively developed in the framework of the European common market in order to avoid market fragmentation and the exercise of discriminatory pricing by title holders within the Community (Graz, 1988).

The doctrine of exhaustion, which justifies parallel imports, has been applied with respect to industrial property (e.g. patents and trademarks) as well as in relation to copyright. This is also the approach followed by the TRIPS Agreement. It is based on the concept that the title holder has no right to control the use or resale of goods which he has put on a foreign market or has allowed a licensee to commercialise in such market. According to a broad version of this doctrine, the consent of the title holder in the exporting country would not be necessary; it would be enough to determine that the product was lawfully put on the market (e.g. under a compulsory license).

The admission of parallel imports may diminish the value of intellectual property rights. Can this be considered an expropriation? To the extent that parallel imports are legitimate, there is no or little room to argue that expropriation has taken place. However, the above mentioned decisions adopted in the framework of NAFTA Chapter 11, stating that market share constitutes an "investment", raise concerns about possible expropriation claims in cases parallel imports diminish an IPR owner's market share.

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[64] The US Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) has argued that the possibility of preventing enforcement of a patent due to actions that are found to constitute inequitable conduct should be limited to acts that are material to the patentability of the invention. See "Report of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3)" of February 28, 2003, available at http://www.ustr.gov/new/fta/Cafta/advisor/ifac03.pdf, p. 14.

[65] It may be argued that the lack of disclosure of the origin of claimed biological materials may be deemed a "fraud or misrepresentation" and that concerns of developing countries may be thereby addressed. However, most patent laws will not consider, in the absence of a specific rule, that failing to disclose the origin of such materials amounts to fraudulent behaviour.

[66] This concept does not include imports of counterfeiting products.

9. Highest international standards

Some bilateral agreements, such as those entered into between the EC and their Member States and South Africa (1999), Tunisia (1998) and the Palestinian Authority (1997), among others, require the latter to ensure adequate and effective protection of intellectual property rights "in conformity with the highest international standards".[67]

It is not evident what "the highest international standards" are. This wording clearly excludes *national* standards. But when can a standard be deemed "international" for the purpose of this provision? There are international conventions with a large number of members, while many others have attracted little interest. There are also conventions, such as the WIPO Patent Law Treaty, that have not entered into force, as well as a growing number of bilateral and regional agreements setting IPR standards.

It may be interpreted that the concept of "international standard" includes any standard adopted in an international instrument. This would, however, impose too broad and imprecise obligations on the concerned countries. "International" may reasonably be understood as covering multilateral, and not merely bilateral or regional, agreements that were in force at the time such an obligation was accepted.[68]

There are other complications, however. The reference to the "highest" standard assumes that there is no single standard. If different levels of standards exist, there would be no *generally* accepted practice that may be invoked in the context of said clause. The role of international customary law under this clause is also unclear. Customary law is a general practice accepted as binding law.[69] The proof of customary law requires not only the existence of a practice by particularly interested parties that can be objectively established, but also a subjective element, the sentiment of being bound by a particular rule (Verhoeven, 2000, p. 325-330).

There are also ambiguities in relation to what the "highest" standard is. Significant room may exist to interpret this rule in particular cases. For instance, all international conventions, including TRIPS, allow for exceptions to patent protection (e.g. for plants and animals pursuant to article 27.3(b) of TRIPS) as well as exceptions to title holders' exclusive rights (e.g. article 30 of TRIPS). Since the international standards *include* such exceptions, it would be illogical to argue that the "highest" standard clause obliges contracting countries to forego their right to provide for permissible exceptions.

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[67] *See*, e.g., Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting* 14-18 (2002), study prepared for the UK Commission on Intellectual Property Rights, available at http://www.iprcommission.org.

[68] States cannot be assumed to have accepted *future* international standards, such as those that may emerge from the negotiation (if successful) of a Substantive Patent Law Treaty in WIPO. See, e.g., GRAIN (2003) and Correa and Musungu (2002).

[69] See article 38 of the Statues of the International Court of Justice.

Finally, questions may arise as to whether "international standards" also include protections based on non-IPR laws, such as investment rules. If, as mentioned above, intellectual property is a covered investment, would "the highest international standards" clause allow for claims based on the application of investment agreements? The context of that clause would suggest that the referred to "highest" standards are only IPR standards, but the vagueness of the clause may leave room for invoking other interpretations.

A key consideration is that in the area of investment there are no multilateral rules.[70] OECD countries attempted to evolve a comprehensive GATT-type multilateral framework on investment -- beyond what is covered under the WTO Agreement on Trade-Related Investment Measures (TRIMs) and General Agreement on Trade in Services (GATS) -- through the aborted initiative to establish a Multilateral Agreement on Investment initiated in 1995.[71] MAI was to be a legally binding treaty, open to non-OECD member states, to ensure higher standards of protection and legal security for foreign investors. OECD expected the proposed MAI to become a sort of benchmark for investors to rate the treatment accorded to foreign investors. The OECD negotiations on the MAI, however, could not be successfully concluded because of differences among the OECD countries and were abandoned in 1998.

Even before the MAI negotiations in OECD concluded, an attempt was made to push the investment issue on the WTO's agenda. The EU and Canada proposed to create a Possible Multilateral Framework on Investment (PMFI) under the auspices of the WTO at its first Ministerial Conference in Singapore in 1996. OECD's MAI was to provide a model for PMFI, if not to be adopted bodily. However, developing countries resisted a negotiating mandate on the issue. A compromise was found to establish a Working Group on Trade and Investment (WGTI) in the WTO to study the issue without a negotiating mandate.[72] The study process at the WGTI has continued since 1996. Before it could conclude its work and recommend the desirability, if any, of a multilateral framework on investment within WTO's ambit, the EU with the support of other industrialised countries pushed the investment issue for negotiations at the Fourth Ministerial Conference of WTO held in Doha in November 2001. Despite the resistance of developing countries, who wanted to complete the study process at the WGTI before agreeing to a negotiating mandate, the Doha Declaration provided for the launch of negotiations on trade and investment after the Fifth Ministerial Conference "on the basis of a decision taken, by explicit consensus, at that Session on the modalities of negotiations".[73]

Despite significant efforts by developed countries to push forward the development of a new WTO investment agreement, the Cancun Ministerial Conference showed a strong resistance by developing countries to initiate negotiations on this subject, as well as on other "Singapore issues".

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[70] Unless bilateral and regional treaties were deemed "international" for the purposes of that clause -- an interpretation that would be hard to sustain.

[71] See Correa and Kumar (2003).

[72] See Singapore Ministerial Declaration, WT/MIN((96)/DEC dated 18 December 1996.

[73] See Doha Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1.

In sum, there is no "international standard" relating to the protection of IPRs as an investment that could be invoked in the context of a clause requiring compliance with "the highest international standards".

10. Genetic resources in investment agreements

The acquisition of IPRs over genetic materials obtained by foreign companies will give them, under investment agreements, an investors' status. Governments' acts affecting such a property may raise complaints under applicable investment agreements. There are situations in which some claims might be raised even in the absence of IPRs. This section examines some of these possible situations.

Contracts or permits to access or exploit genetic resources

Some countries (e.g., Brazil, Costa Rica, Andean Community, Philippines) have enacted regulations on the access to and benefit sharing from genetic resources. Access to such resources is subject to States' authorisation, which is often materialised in the form of one or several contracts with the State and other stakeholders. In the case of Decision 391 of the Andean Community,[74] for instance, the main contract is entered into between the State and the recipient ("access contract"), but accessory contracts must be established, as appropriate, between the applicant and the owner, possessor or manager of the land where the biological resource containing the genetic resource is located, the ex situ conservation centre, or the owner, possessor or manager of the biological resource containing the genetic resource. An annex to the access contract also needs to be established with the local, indigenous or Afro-American community that provides the intangible component. One peculiar feature of the regime is the way in which all these contracts are legally interlinked. The invalidity of the access contract, established with the State, entails the invalidation of the accessory contracts (article 44 of Decision 391), and the opposite is also true. The access contract may be invalidated or terminated if an accessory contract, while entered into between private parties, is found void (articles 35 and 44 of Decision 391).

Once signed, an access contract may be deemed as an "investment" under the standard definition of investment agreements, as such definition generally covers licenses, authorisations, permits and similar rights conferred pursuant to applicable domestic law. For example, the Canada-Argentina BIT (1993) defines investment as inclusive of "a right conferred by law or under contract to search for, cultivate, extract or exploit natural resources" (article I(a)(v)).[75] Thus, if an access contract were invalidated or a permit cancelled, the affected party might consider that his "investment" has been jeopardised, provided that the authorisation to get access created rights protected under domestic law.[76]

[74] Available at http://www.grain.org.

[75] See also Canada-Lebanon, 1997 (article I(d)(vi)).

[76] See, e.g., the definition of "investment" under article 1, footnote 2, of the draft US model BIT (2004).

Materials collected under a contract or permit to obtain access to genetic resources

The previous section refers to the right to collect genetic resources emerging from a license or permit. A further question is whether investors' rights may be invoked with regard to collected materials in possession of a company or a genebank.

Genetic resources are physically embodied in biological materials.[77] The samples collected under an access permit may be considered the "property" of the collector, since pursuant to general principles of civil law, legitimate possession of a movable good attributes the possessor its property.[78] This means that the collector might, under a broad definition of investment, claim protection as an investor with regard to collected materials. If he were requested, for instance, to give back the samples to the State or to share them with third parties, claims of violation of investor's rights might arise.

It is interesting to note that some investment agreements[79] have explicitly expanded the concept of "investor" to include not only nationals and enterprises of the Party, but non-profit organisations, such as research institutes or NGOs, that may undertake bio-prospecting activtities. Under such definition, those entities would be entitled to investor protection.

Materials received under material transfer agreements and license contracts

Subject matter not protected by IPRs may not be considered, as such, a covered investment, as long as no specific right could be claimed therein under the host country's domestic law. Non-protected materials may, however, be the object of material transfer agreements (MTAs) or licensing contracts. Could investors' rights be claimed on the basis of these contractual arrangements?

To examine this hypothesis the case of Monsanto's RoundUp-Ready (RR) gene in Argentina may be illustrative. Monsanto obtained State permission to commercially release the gene but failed to obtain patent protection in Argentina. Transgenic soybeans varieties soon became the preferred seed and 90% or so of all Argentine soybean production is based on RR varieties. Despite the lack of legal protection over the gene, some local seed companies entered into licensing agreements with Monsanto. Has Monsanto obtained by this reason the "investors" status under a broad definition of "investment"?

[77] For instance, under Decision 391 of the Andean Community a distinction is made between "genetic resources", which are deemed "goods or patrimony of the Nation or of the State" and "inalienable and not subject to prescription or to seizure or similar measures" (article 6), and "biological materials" that contain them, which are subject to the applicable property regimes.

[78] The materials in possession of the CGIAR Centres are held "in trust" of the international community under an agreement with FAO. Hence, the Centres do not claim property rights therein.

[79] E.g. Article 15.1.7 of the US-Singapore FTA defines "enterprise" as "any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally *owned or controlled*, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organisation; and a branch of an enterprise".

Some BITs (e.g. article 1(2)(e) of Switzerland-Venezuela BIT) expressly limit the applicability of the concept of investment to concessions and other rights conferred in accordance with *public* law. Quite clearly, the State cannot be liable if the termination of a contract were due to a decision by the other party (or parties) to the contract. If the government prohibited, however, the sale and cultivation of transgenic seeds, thereby making it impossible to execute the contract, the licensor would lose the potential income that it could have otherwise generated. In this case, a complaint may be based on the cancellation of the governmental license to commercialise the transgenic variety in question (for instance if negative environmental effects were found). Regulatory action of this kind cannot be understood as being expropriation under traditional legal approaches on the matter. As noted above, however, jurisprudence under NAFTA has used the scale of impact rather than the purpose of the measure as the critical test to assess whether State action amounts to expropriation (IISD, 2001, p. 32).[80]

Seed technology in use agreements, sales agreements or other end-user contracts and at the post-harvest stage

Can seed companies invoke the provisions of an investment agreement to secure protection of their technology in use agreements, sales agreements or other end-user contracts with farmers in countries that otherwise do not provide statutory protection of that technology (i.e. it is not protected by IPRs)? Can seed companies invoke rights in the same way at the post-harvest stage, such as among processors or traders?

As mentioned, investment agreements protect against certain measures by the host States. They do not confer rights which are not recognised by the domestic law. A private contract cannot create property rights over the materials it refers to. As a result, seed companies would have little or no legal basis to claim investors' rights in case of breach of or impediments to enforce a private contract. Similarly, it seems unlikely that complaints relating to the post-harvest stage, such as against processors or traders, could be upheld on the basis of investors' rights.

Due to the territoriality of IPRs, this legal scenario would not change if the technology at stake were protected in the home country and/or in other countries, but were off-protection in the country where the complaint is made.

Lack of effective enforcement of IPRs

Hypothetically, a seed company might also argue that the lack of adequate State enforcement mechanisms to combat the unauthorised reproduction of seeds ("brown bagging") generates losses of income or market share that the State should compensate. Although the overlapping investment and TRIPS protections create a grey area, arguably the lack of enforcement procedures may be considered a State's violation to TRIPS obligations but not a *measure* indirectly amounting to a taking or expropriation.

[80] The draft US model BIT (2004) apparently aims at attenuating this test by indicating that in determining whether an indirect expropriation exists, "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred" (Annex B, section 4.(a)(i)).

Access to genomic data on a "non-commercial use only" basis

Can a company which provides access to genomic data on a "non-commercial use only" basis use an investment agreement as leverage to protect its interests over the commercial use of research results?

This question may arise in the case of data from a genomic database (e.g. Syngenta's rice genome database used in Bangladesh). While contract law protects commercial interests in the context of private relationships, investment agreements protect against certain States' acts. Hence, claims grounded on investors' rights could only arise if the State took measures that prevented the database owner to exploit its "asset" or reduced the benefits that may be derived therefrom. For instance, if the State enacted legislation stipulating that genomic data would be freely accessible for public institutions, including for use in research with potential commercial application, investors' rights-based claims might be raised with some likelihood of success.

Access to technology and benefit sharing

The Convention on Biological Diversity requires Contracting Parties to take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment, for the benefit of both governmental institutions and the private sector of developing countries (article 16, para. 1 and 4).

Moreover, according to article 16.3, "each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights…". Several countries, such as Costa Rica,[81] have implemented this provision.

Investment agreements, however, limit the ability of parties to apply "performance requirements" in a manner that goes well beyond the standards set forth by the WTO Agreement on Trade-Related Investment Measures.[82] For instance, the US-Singapore FTA stipulates that "neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory…(f) to transfer a particular technology, production process, or other proprietary knowledge to a person in its territory" (article 15.8.1(f)).[83]

[81] See article 63 (3) of the Biodiversity Law. See also article 17 of Decision 391 of the Andean Community.

[82] For an analysis of the obligations under WTO rules relating to performance requirements, see Correa and Kumar (2003).

[83] Similar wording is contained in the draft US model BIT (1994), article 8.1(f).

Although there is some room for interpretation of the scope of this obligation, it may be read[84] as preventing a contracting party to impose or enforce the requirements for transfer of technology contained in access legislation.

11. Right to sue the State

Friendship, Commerce and Navigation (FCN) treaties, and investment treaties that pre-dated the establishment of the international Centre for Settlement of Investment Disputes (ICSID), provided for State-to-State disputes, as it is still the case today in the framework of the WTO. However, investment agreements developed in recent decades have also opened the possibility to resort to investor-State procedures based on binding arbitration[85] through the ICSID, or other organisations, such as the International Chamber of Commerce and the United Nations Commission on International Trade Law (UNICTRAL). Investors can also, in the case of regional agreements, directly bring a claim before regional dispute settlement bodies.

While both contracting parties have equal access to State-to-State dispute settlement, in the case of investor-State procedures, there are ad hoc and institutional processes, access to which may be left to the preference of the investor. The only limitation in some cases is that once the investor submits a dispute to an investor-State procedure, this choice can prevent recourse to other procedures.[86]

Moreover, investor-State proceedings

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[84] The only exceptions admitted in the US-Singapore FTA are the following: (i) when a Party authorises use of an intellectual property right in accordance with Article 16.7.6 (Patents), and to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws" (article 15.8.3 (b)).

[85] For instance, article 48 of the EFTA-Singapore treaty, 2002, stipulates the following:

> 1. If an investor of a Party considers that a measure applied by another Party is inconsistent with an obligation of this Chapter, thus causing loss or damage to him or his investment, he may request consultations with a view to solving the matter amicably.
>
> 2. Any such matter which has not been settled within a period of six months from the date of request for consultations may be referred to the courts or administrative tribunals of the Party concerned or, if both parties to the dispute agree, be submitted to one of the following:
>
> a) arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if this Convention is available;
>
> b) conciliation or arbitration under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes;
>
> c) arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law.
>
> 3. A Party may conclude contractual agreements with investors of another Party giving its unconditional and irrevocable consent to the submission of all or certain types of disputes to international conciliation or arbitration in accordance with paragraph 2 above. Such agreements may be notified to the Depositary of this Agreement.

[86] However, the investor's State may become engaged in the dispute if the investor is denied, unjustifiably, the remedy available under the investor-State dispute settlement procedure (UNCTAD, 2003b, p. 56 and 59).

> are not bound by precedents, are not necessarily obliged to be open to the public, or to publish final decisions. The decisions have only limited avenues for appeal and cannot be amended by the domestic legal system or a supreme court. The nature of the dispute resolution procedures can provide a great deal of leeway in how cases will be decided. ..[T]hey could encourage investors to pursue their case even if the merits are not all that strong (Hallward-Driemeier, 2003).

Investment agreements thus "give ascendancy to the investor, who is the principal beneficiary of rights contained in agreements entered into between States" (UNCTAD, 2003b, p. 4). Not surprisingly, the principal disputes relating to investment agreements have arisen[87] between the investor and the host State, not inter-States. Given the broad definition of "investment", as examined above, States may confront claims of substantial damages in cases where investors lose market share or the value of their companies is diminished due to host State measures. For instance, last year, a tribunal in Stockholm required the government of the Czech Republic to pay one company, Central European Media, US$350 million for violation of a BIT that deprived the company of a stake in an English-language television station in Prague (Newfarmer, 2003, p. 25).

The consideration of intellectual property rights as an investment adds more confusion to an already unclear scenario for the interpretation and application of international IPR conventions. "Forum shopping" and conflicting decisions are the likely outcome of the coexistence of different layers of IPR protection and mechanisms for dispute settlement.

Under WTO rules, there is no requirement of reparation of damages suffered by the private parties involved. A WTO panel may instruct the offending Member to bring the inconsistent measure in conformity with WTO obligations and, failing that, allow the prevailing Member to resort to unilateral counter-measures, suspension of the treaty and temporary compensation or suspension of concessions. To the extent, however, that a TRIPS-inconsistent measure is also inconsistent with the host State's obligation under an investment agreement, the foreign investor may not be restricted to seeking prospective withdrawal of the measure by petitioning his government to initiate State-to-State dispute settlement procedures at the WTO. He may file for binding arbitration and seek for damages under the applicable investment agreement. Additionally, the initiation of arbitration proceedings against the host State by an investor does not preclude the investor's State from exercising at the same time diplomatic protection and launching WTO dispute settlement proceedings (Verhoosel, 2003, p. 495).

An important question is whether WTO rules may be deemed part of the international customary law that a tribunal may apply in deciding on an investor-State dispute. If such were the case, the implications would be far reaching: an IPR holder might, as an investor, seek direct reparation of damages from the State that allegedly failed to recognise his rights under the TRIPS Agreement. This would nullify the principle that private parties cannot directly invoke WTO law and claim damages thereunder. Interestingly, USA argued in the *Methanex* case, initiated by a Canadian company,

[87] Evidence points to a significant increase in the use of investor-State dispute settlement procedures under investment agreements since 1997. See Cosbey, Mann, Peterson and von Moltke, 2004, p. 15-16.

that WTO agreements are not part of the customary international minimum standard of treatment under article 1105(1) of NAFTA.[88] Otherwise, USA argued, the NAFTA Parties would potentially be subject to a vast number of claims for monetary damages based on obligations that were not assumed with the understanding that their breach could give rise to such claims.[89] In the *Mondev* case, the tribunal expressly excluded the possibility of using the provisions of other treaties, such as the WTO agreements, between the NAFTA parties, to define the content of the "fair and equitable treatment".[90]

Although this jurisprudence would seem to limit the possible use of investment agreements as a vehicle for obtaining direct reparation of TRIPS violations, it does not exclude that possibility, especially in the absence of clear provisions in such agreements. But even if WTO law were not directly applicable to an investment dispute, it may be part of the interpretative context[91] of obligations provided for under investment agreements.

Conclusions

Investment agreements generally apply to all types of "assets", regardless of their tangible or intangible nature and the sector where they are invested, including various forms of intellectual property. Thus, intellectual property rights, whether registered or not, are protected investments under BITs and trade agreements that incorporate rules on investment. This adds another layer of treaty-based protection on rights protected under the TRIPS Agreement and other international conventions. But it goes beyond TRIPS, since investment agreements apply to rights not covered by the TRIPS Agreement, and incorporate the national treatment principle without the exceptions provided for under international IPR treaties.

It is unclear the extent to which rights granted by investment agreements may be used to substantiate claims in the area of intellectual property rights. An area of particular concern may be the granting of compulsory licenses, since the patent owner would be normally able to claim an economic loss, even though the patent rights will continue in force and he will be able to compete with the compulsory licensees. The revocation of patents and some exceptions to patents and other IPRs *may* also be challenged on the grounds of violation of investors' rights in some circumstances.

Investment protection generates grey areas that may be used to challenge national measures, even if they are TRIPS-consistent. Although there are good arguments to counter such challenges, there is legal scope for dispute and for threatening host countries with trade retaliations. Should the IPR title holders prevail, there would also be room for the dispute mechanisms to induce changes of national IPR legislation in host countries to conform to the rights practiced under the agreement.

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[88] "Article 1105§.1: Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[89] See an explanation of this case in Verhoosel, 2003, p. 501.

[90] *Idem*, p. 502.

[91] See Article 31 (3) (c) of the Vienna Convention.

The standards set forth in investment agreements may influence not only national IPR legislation and practices, but also multilaterally negotiated IPR standards. The MFN clauses in investment agreements contribute to a global elevation of protection standards. If negotiations on investment were initiated in the framework of the WTO, pressures to replicate the highest levels of investment protection for IPRs can be expected.

In view of the important implications that investment agreements may have for the implementation of national policies in the area of intellectual property rights, a number of safeguard provisions seem necessary, even inevitable, in order to preserve under national control basic aspects of IPR policies and the management of genetic resources and data. Careful attention should be given, in particular, to the impact of MFN clauses, which may erode exceptions agreed upon in particular agreements, and to the possibility of multiple claims based on alleged violations or "non-violations"[92] of IPRs as well as of investors' rights.

[92] Although developing countries have resisted in WTO the application of "non-violation" complaints in the context of the TRIPS Agreement (article 64), recent free trade agreements with the USA provide for the application of such complaints to intellectual property cases, thereby potentially expanding the scope of obligations under the Agreement. See, e.g., Annex 22.2 of the US-Chile FTA. See also Abbott (2003).

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