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Intellectual Property in the FTAA: Little Opportunity and Much Risk

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INTELLECTUAL PROPERTY IN THE FTAA: LITTLE OPPORTUNITY AND MUCH RISK

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INTRODUCTION

Intellectual property is heralded by some as the "foundation of human existence,"[1] protecting invention and innovation while

improving standards of life through choices for consumers and new outlets for human activity. Others see intellectual property rights ("IPRs") as merely a government sanctioned monopoly and subsidy that puts territorial borders around technologies and other inventions so that firms can maximize their profits. Charged with analyzing whether, and how, IPRs could play a role in reducing poverty and hunger, improving health and education, and ensuring environmental sustainability, the Commission on Intellectual Property Rights ("IPR Commission"), established by the United Kingdom government, concluded that the value of intellectual property protection for society varies according to factors such as the economic and social circumstances in which it is applied. In other words, in order for intellectual property to act as an effective instrument of sustainable development, countries must design their regimes according to their particular needs and conditions.

Attempts to adapt IPRs to national requirements, however, now face hurdles set by international intellectual property rules. Multilateral intellectual property agreements establish standards of protection that must be implemented at the national levels and thus delineate and circumscribe countries' prerogatives in the field of intellectual property. The Agreement on Trade-Related Aspects of


5. See infra notes 6-8 (explaining how multilateral agreements seek to establish minimum standards which countries must implement within their own systems).
Intellectual Property Rights ("TRIPS Agreement"), for instance, establishes minimum standards of intellectual property protection with which all World Trade Organization ("WTO") Members will eventually have to comply. These increased standards of protection create challenges to developing countries that attempt to fulfill TRIPS standards while trying to adopt policies to achieve economic and social development. Nevertheless, the TRIPS Agreement still allows countries some flexibility to overcome the obstacles that high intellectual property standards may pose to sustainable development.

Other intellectual property rules currently being developed, though, may erode these flexibilities. Particularly worrisome are rules agreed upon through bilateral negotiations. Both the United States and the European Union ("EU"), for example, are pursuing an increasing number of bilateral trade and investment negotiations that often include intellectual property. These negotiations have resulted in agreements that take intellectual property protection standards beyond the levels established at the multilateral sphere and seriously threaten countries' ability to tailor intellectual property laws to correspond to their public policy objectives. What role does the


7. See CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 5 (2d ed. 2000) (stating that the TRIPS Agreement restricts the options available to developing countries and ignores profound differences in economic and technological capabilities between the North and the South).

8. See id. (recognizing that the TRIPS Agreement leaves a certain room for maneuver at the national level).


10. See IPR COMMISSION, supra note 4, at 162 (recommending that developing nations should not accept additional IPRs imposed by the developed world through
Free Trade Area of the Americas ("FTAA") play in this context? Can this regional trade agreement counter the wave of higher IPRs standards generated through bilateralism? Can developing countries use their numerical advantage in the FTAA negotiations to include such fundamental issues to sustainable development as traditional knowledge that still have not been resolved by the WTO or the World Intellectual Property Organization ("WIPO")? Or, is the FTAA merely another stepping stone to higher intellectual property standards that primarily benefit developed countries that are home to the producers of knowledge and owners of IPRs?

This article asserts that the FTAA presents more of a risk than an opportunity for intellectual property to act as a tool for sustainable development.\(^1\) It analyzes some of the intellectual property provisions in the draft Chapter on IPRs that exemplify the loss of countries' ability to take measures indispensable to ensure IPRs do not negatively affect key areas to sustainable development.\(^2\) In addition, it looks at the uncertain possibilities of the FTAA having positive outcomes for development, such as precluding bilateral negotiations.\(^3\)

Specifically, section I will provide background on the nature of IPRs, the process of international intellectual property standard-setting, and the challenges it presents to sustainable development.\(^4\) Section II will focus on the inclusion of intellectual property in the FTAA analyzing some of the potential opportunities and risks of the draft Chapter on IPRs.\(^5\) Finally, this article will conclude by highlighting the reasons why the draft Chapter on IPRs poses more problems than possibilities for sustainable development.

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1. See infra Part II.B (assessing the particular risks that the FTAA poses to sustainable development).
2. See infra Part II.A-B (examining both general and specific provisions of the FTAA).
3. See infra Part II.A (analyzing the potential opportunities of the FTAA).
4. See infra Part II (providing background information on IPRs).
5. See infra Part II.A-B (examining the benefits and risks of including intellectual property protection in the FTAA).
I. IPRS, RISING INTERNATIONAL STANDARDS, AND SUSTAINABLE DEVELOPMENT

A. INTELLECTUAL PROPERTY: INSTRUMENT OF PUBLIC POLICY OR A SACRED COW?

Intellectual property plays a key role in society. IPRs encourage innovation by protecting intellectual activity and granting their holder, the creator or innovator, the ability to exclude others from certain activities for a defined period of time. IPRs also promote creativity by ensuring ideas ultimately are disseminated to generate more innovation. For example, patents reward inventors by excluding others from commercially exploiting the invention for a limited period, but at the same time ensure that others gain the benefit of the invention by requiring its disclosure and its eventual lapse into the public domain. Moreover, even during the term of protection of the private right, intellectual property is not absolute; limitations ensure that privileges do not threaten the public interest. Common exceptions to patents include acts done privately and for non-commercial purpose, use of the invention for research or teaching, and importation of a patented product that has been marketed in another country with the consent of the patent owner. IPRs must then balance the interests of the individual to secure a fair value for his intellectual effort or investment of capital and labor and

16. See W. R. CORNISH, INTELLECTUAL PROPERTY 5 (Sweet and Maxwell 1989) (believing the importance of intellectual property stems from its function of protecting “applications of ideas and information that are of commercial value”).

17. See Aubrey, supra note 2, at 6 (naming other benefits as providing “new, cheaper or improved commodities and a general enhancement of the standard of living”).


19. See Aubrey, supra note 2, at 5 (describing how, once a government grants a patent, third parties still have the right to attack its validity).

20. See CORREA, supra note 7, at 75 (listing the exceptions allowed by article 30 of the TRIPS Agreement).
the interests of society in its economic and cultural development.\textsuperscript{21} As one commentator put it, IPRs are not a "sacred cow;" that is, they are not rights that cannot be tailored or restricted.\textsuperscript{22} They are justified to the extent that benefits to society exceed any associated costs.\textsuperscript{23} Intellectual property, in other words, should be an instrument of public policy and never an end in itself.

Traditionally, countries have designed their intellectual property systems to respond to economic and social interests and to promote sustainable development.\textsuperscript{24} Korea, for example, had lax intellectual property protection during the 1960s and 1970s as local firms were acquiring, assimilating, and adapting large amounts of foreign technology through reverse engineering.\textsuperscript{25} In the 1980s and 1990s, however, Korea focused on adequate protection and enforcement of IPRs as its industrialization process unfolded and local firms undertook creative imitation through formal technology transfer.\textsuperscript{26} Countries presently pursuing development still need the flexibility to make IPRs work towards their increased growth and well-being, but

\begin{itemize}
\item \textsuperscript{21} See Cornish, supra note 16, at 6 (arguing also that IPRs should balance "the interests of the individual to secure a fair value for his intellectual effort or investment of capital [and] labor" and the interests of society in its economic and cultural development).
\item \textsuperscript{22} See Jeremy Phillips \& Alison Firth, Introduction to Intellectual Property Law 10 (3d ed. 1995) (stating that IPRs are a means to achieve societal objectives).
\item \textsuperscript{23} See IPR Commission, supra note 4, at 15 (stating that costs of the IP system need to be weighed against the benefits arising from that system).
\item \textsuperscript{25} See IPR Commission, supra note 4, at 20 (highlighting that this method played an important part in Korea's development of indigenous technologies and innovative capacity); see also Kim, supra note 24, at 16 (noting the role of the government funded Korea Institute of Science and Technology).
\item \textsuperscript{26} See Kim, supra note 24, at 21 (describing how this is a natural progression from the mature technology stage to the intermediate technology stage).
\end{itemize}
current trends in international intellectual property standard-setting seriously limit their room to maneuver.27

B. INTERNATIONAL STANDARDS AND REGULATORY FLEXIBILITY

While it was national legislation that customarily established intellectual property standards in accordance with the needs and circumstances of individual countries, multilateral intellectual property agreements began defining and delimiting countries’ options in this respect.28 Early agreements, however, such as the Paris Convention of 1883 and the Berne Convention of 1886, set up only minimal structures and still allowed countries to adopt different substantive standards.29

More recently such flexibility started coming under intense pressure.30 In 1995, the TRIPS Agreement came into force and required all WTO Members to provide minimum standards of intellectual property protection.31 The insertion of IPRs into the multilateral trading system reflects their growing importance in the international economy and the consequent interest of countries with a high level of technological and industrial capacity in ensuring global

27. See id. at 6 (concluding that the “result of stronger IPR protection [in developing countries] is a reduction in knowledge flows from advanced countries, and a lower rate of innovative activity).


29. See Paris Convention for the Protection of Intellectual Property, supra note 28 (giving minimum structure while allowing flexibility in determining intellectual property standards); see also Berne Convention for the Protection of Literary and Artistic Works, supra note 28, (limiting the design of a country’s intellectual property standards).

30. See IPR COMMISSION, supra note 4, at 5 (listing several manifestations of the recent increase in IPRs protection).

31. See TRIPS Agreement, supra note 6, art. 1 (requiring Members to give effect to the provisions of the Agreement). The TRIPS Agreement also allows, but does not require, Members to “implement in their law more extensive protection than is required.” Id.
standards of protection.\textsuperscript{32} However, those minimum standards universalized the levels of intellectual property protection established by industrialized countries only after reaching a certain level of development.\textsuperscript{33} The broad protection of IPRs thus limited the options for developing countries in the design of their intellectual property systems. Nevertheless, the TRIPS Agreement maintained some space for countries to adopt different strategies.\textsuperscript{34} For instance, the TRIPS Agreement does not define "invention," thus allowing countries to choose the definition that responds to their own needs.\textsuperscript{35} Such flexibility becomes critical for countries to be able to use their intellectual property legislation as a means of achieving a set of economic development, social development, and environmental protection objectives.\textsuperscript{36} Thus, the TRIPS Agreement represents, for many developing countries, the "upper limit" of acceptable standards.\textsuperscript{37}

Notwithstanding, international intellectual property negotiations persist and new and higher intellectual property standards continue to be set. WIPO’s "Patent Agenda," for instance, aims to further harmonize patent law partly through a treaty creating substantive standards for patents.\textsuperscript{38} The most active forum in intellectual property

\begin{flushright}
\textsuperscript{32} See Cornish, supra note 16, at 5 (claiming the subject is of greater importance due to the fact that, among other reasons, "the fund of exploitable ideas [is becoming] more sophisticated").

\textsuperscript{33} See Correa, supra note 7, at 3 (placing the negotiation of the TRIPS Agreement in context).

\textsuperscript{34} See Correa, supra note 7, at 5 (recognizing that the TRIPS Agreement leaves some room for maneuver).

\textsuperscript{35} See TRIPS Agreement, supra note 6, art. 27 (requiring the invention only to be "new, involve an inventive step and [be] capable of industrial application").

\textsuperscript{36} See Correa, supra note 7, at 21 (arguing that the "main guiding criterion for the reform of national laws for that purpose should lie in striking a proper balance between... the protection of technology on the one hand and the promotion of its transfer and dissemination on the other").

\textsuperscript{37} See id. at 8 (discussing how this upper limit provides a defense for developing countries "against the demands for higher levels of protection or for ignoring the transitional terms provided for by the [TRIPS] Agreement").

\end{flushright}
negotiations, however, remains at the bilateral level. Many commentators believe that developing countries accept such negotiations as an unavoidable price to pay for increased market access or investment agreements with developed countries.\textsuperscript{39} Industrialized countries are thus able to design the bilateral agreements specifically to respond to the perceived "shortcomings" of the TRIPS Agreement and extend intellectual property protection standards far above multilateral levels.\textsuperscript{40} As a consequence, "TRIPS-plus" standards, that is, standards more extensive than those of the TRIPS Agreement or that eliminate options existent under the TRIPS Agreement, emerge as the norm in bilateral agreements.\textsuperscript{41} The free trade agreements signed between the United States and countries such as Jordan, Chile, and Singapore clearly demonstrate this phenomenon. The same model is also being used for regional agreements, which may eventually make futile any flexibility provided by the multilateral system. As expressed by the Commission on Intellectual Property Rights, developing countries face "unprecedented limits on the freedom . . . to act as they see fit" in the field of intellectual property.\textsuperscript{42}

C. CHALLENGES TO SUSTAINABLE DEVELOPMENT

Intellectual property becomes a tool for promoting innovation and advancing development when private rights are balanced with the interests and needs of society. However, when high standards limit

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\end{quote}

\textsuperscript{39} See Peter Drahos, Bilateralism in Intellectual Property (Oxfam, Policy Paper No. 9, 2001) (stating that developing countries have little or no control over the highly complex multilateral/bilateral web of IPRs developed countries are creating), available at http://www.oxfam.org.uk/policy/papers/bilateral/bilateral.rtf (last visited Sept. 10, 2003).

\textsuperscript{40} See id. at 8 (explaining that developed countries like the United States can resolve ambiguities they perceive in the TRIPS Agreement through bilateral agreements).

\textsuperscript{41} See id. at 4 (summarizing the two types of provisions considered to be "TRIPS-plus" provisions).

\textsuperscript{42} See IPR Commission, supra note 4, at 155 (denoting that developing countries are limited to act "as they see fit" towards intellectual property protection).
countries' abilities to achieve the particular balance demanded by their circumstances, IPRs raise concerns in several key areas of public interest, particularly for developing countries, including technological development, public health, and food security.

Contrary to some of the key tenets of intellectual property, for instance, broad protection for IPRs may impede technological development. Intellectual property systems designed for highly industrialized countries may actually hinder innovation relevant to developing countries, which is often informal. Moreover, though transfer and dissemination of technology should result from intellectual property protection, stronger protection and enforcement of IPRs may also increase their holders' control over technology, resulting in anti-competitive practices and prohibitive high prices.

Prior to the TRIPS Agreement, countries had the freedom to provide intellectual property protection to inventions relating to public health only insofar they considered it appropriate to their particular conditions and needs. In fact, most countries have, at some point, denied patents over pharmaceutical products and processes as a matter of public policy. The TRIPS Agreement obliges countries to provide patent protection to any invention, whether product or process, in all fields of technology, in a provision that many feared would negatively impact the affordability and availability of medicines in developing countries. The Doha Declaration on the TRIPS Agreement and Public Health ("Doha Declaration"), however, clarified that the TRIPS Agreement "does not and should not prevent Members from taking measures to protect public health." Intellectual property negotiations outside of the WTO


44. See id. at 16 (commenting on how over-broad patents could stifle research).

45. See TRIPS Agreement, supra note 6, art. 27 (requiring Members to make patents available for any inventions in technology fields).

46. World Trade Organization, Doha Declaration on the TRIPS Agreements and Public Health, para. 4, WT/MIN(01)/DEC/2 [hereinafter Doha Declaration] (affirming how Members should interpret the TRIPS Agreement), available at
should therefore be especially careful not to limit countries’ rights to
develop policies promoting broad access to safe, effective, and
affordable treatments.

Agriculture is another area where most developing countries did
not provide intellectual property protection since, to a large extent,
their food supply structures are based on the practice of passing on
and exchanging homebred varieties of plants.47 The TRIPS
Agreement, however, required Members to provide for some form of
plant variety protection, raising concerns that restrictions on seed
saving and exchange could adversely affect food security. The
Agreement does provide some flexibility, though. WTO Members
can decide whether plant variety protection is achieved through
patents, an “effective sui generis system,” or a combination of the
two options.48

The option to develop a system with the characteristics that would
ensure farmers’ and breeders’ access to seeds is crucial for
developing countries, but bilateral and regional intellectual property
standards may be eroding this possibility. For example, these
standards designate the International Union for the Protection of
New Varieties of Plants (“UPOV”)49 as the system of plant variety
protection. However, UPOV has been criticized for responding to the
needs of commercial breeders and for failing to consider the varieties
developed and used by small farmers in developing countries.50 In

http://www.wto.org/english/thewto_e/minist_e/mindecl_tripse.htm (last visited

47. See GEOFF TANSEY, QUAKER UNITED NATIONS OFFICE, FOOD SECURITY,
BIOTECHNOLOGY AND INTELLECTUAL PROPERTY 3-6 (2002) (stating the reasons
the developing countries may not provide strong intellectual property rights),
available at http://www.geneva.quno.info/pdf/Fsomo.pdf (last visited Sept. 13,
2003)

48. See TRIPS Agreement, supra note 6, art. 27.3(b) (listing the means that
Members can choose to protect plant varieties).

49. See International Convention for the Protection of New Varieties of Plants,
UPOV] (proposing a new system to protect different varieties of plants).

50. See, e.g., Phillippe Cullet, Farmers’ Rights in Peril, FRONTLINE (Apr. 1-14,
2000) (arguing that the revisions to the UPOV Convention resulted in
“strengthening the rights of commercial breeders and conversely reduced the rights
addition, some of the latest bilateral agreements attempt to introduce the option to patent plants. This type of provision thus threatens to prevent countries from taking the necessary steps to assure the food supply of their populations and the maintenance of structures for local self-sufficiency with respect to seed and food.  

II. INTELLECTUAL PROPERTY IN THE FTAA

By negotiating the FTAA, countries aim to achieve "development and prosperity." In 1994, thirty-four countries in the Americas agreed to construct a free trade agreement to progressively eliminate trade barriers. Their commitment to jointly pursue prosperity did not merely include opening markets, however, but also preserving and strengthening democracy, eradicating poverty and discrimination, and guaranteeing sustainable development. Countries pledged, for instance, to facilitate the participation of individuals and associations in political and economic activity, to improve access to primary health care, and to advance social and economic prosperity in a manner compatible with environmental protection. Negotiations began towards reaching "balanced and comprehensive" agreements on issues like tariffs and non-tariff barriers, agriculture, subsidies, investment, intellectual property rights, technical barriers to trade, safeguards, and antidumping and

51. See ActionAid, Food Rights: Patents (noting that "up to 1.4 billion people in poor countries depend on seeds" and that the developing ability to patent plants and seeds is threatening poor farmers in developing countries), at http://www.actionaid.org/ourpriorities/foodrights/patents/patents.shtml (last visited Oct. 15, 2003).


53. See id. (stating that countries negotiated the FTAA to remove "barriers to trade and investment").

54. See id. (mentioning that the major goal of the FTAA was to guarantee "sustainable development").

55. See id. (asserting that the governments drafting the FTAA are "united in pursuing prosperity through open markets, hemispheric integration, and sustainable development").
countervailing duties. The eventual drafts of the FTAA Agreement, however, raised questions as to whether many of the chapters and provisions are compatible with such high-reaching objectives.

Provisions on intellectual property have particularly attracted criticism. The Chapter on IPRs, like the rest of the draft FTAA Agreement, is still mostly in brackets, but certain troublesome tendencies can already be identified. Many groups within civil society have denounced the FTAA negotiations approaching IPRs in a way that would pose an obstacle to development and improved quality of life in the countries in the Americas.

The FTAA, like the TRIPS Agreement, sets minimum standards for the protection of IPRs such as copyrights, trademarks, geographical indications, industrial designs, and patents. The FTAA’s levels of intellectual property protection, however, go far beyond those established by the TRIPS Agreement. Commentators have called the Chapter on IPRs the “most ambitious and diverse intellectual property agreement ever written.” It also includes provisions on new areas such as program-carrying satellite signals,


57. See infra notes 61-87 and accompanying text (describing problematic aspects of the FTAA Draft).


domain names on the Internet, access to genetic resources, traditional knowledge, and folklore. While some of the innovative provisions could represent opportunities for developing countries seeking to protect and develop their resources, the high levels of protection for private rights constitute an important loss of space for using intellectual property regulations to respond to the needs of society.

A. POTENTIAL OPPORTUNITIES

Many see the FTAA as a "historic opportunity." In the intellectual property arena, the FTAA could be positive because it constitutes a multilateral, standard-setting process and establishes protection for issues considered fundamental by developing countries. Multilateral agreements on intellectual property protection levels could be beneficial for developing countries insofar that they may preclude bilateral negotiations from setting standards. Developing countries may thus set intellectual property standards while having a numerical advantage and the possibility of building alliances. Multilateral standards, however, were not able to stop bilateral standard-setting in the past. Developing countries expected the TRIPS Agreement to phase out efforts to raise intellectual property standards bilaterally.

As an example of non-multilateral tinkering with intellectual property standards, the United States was, at the time of the TRIPS negotiations, conducting an aggressive campaign based on Section 301 of the U.S. Trade Act. Section 301 allows the U.S. government to impose trade sanctions against foreign countries whose acts, policies, and practices deny U.S. rights or unjustifiably restrict U.S.

61. See Second Draft, supra note 59, pt. II, secs. 4, 6 (describing the new draft provisions protecting folklore, traditional knowledge, and access to genetic resources).

62. See Declaration of Miami, supra note 52 (recognizing that bringing together thirty-four nations to "create a Partnership for Development and Prosperity in the Americas" is truly a "historic opportunity").

63. See infra notes 65-70 and accompanying text (providing an example of how the TRIPS Agreement has done little to rectify countries from seeking bilateral standards).

64. See Drahos, supra note 39, at 3 (noting the likely expectations of developing nations with respect to the TRIPS Agreement).

commerce.\textsuperscript{66} The United States presented the diminution of such actions as one of the incentives for developing countries to reach an agreement on intellectual property at the WTO. The minimal standards of the TRIPS Agreement, however, only became a catalyst for further bilateral negotiations.\textsuperscript{67}

Furthermore, commentators have criticized the FTAA for not rectifying the problems of bilateral negotiations.\textsuperscript{68} One important advantage of a multilateral approach is the capacity to avoid the "confidential affair" of bilateral negotiations, where parties keep the drafts secret, refrain from consulting congresses, and disregard public opinion.\textsuperscript{69} In the FTAA, however, participating countries have kept the negotiating documents confidential and have released the draft agreement only after great delay and with no identification of the countries that introduced or supported each provision.\textsuperscript{70}

\begin{itemize}
  \item \textsuperscript{66} See id. § 2411 (setting forth the provisions of Section 301 as amended).
  \item \textsuperscript{67} See DRAHOS, supra note 39, at 3 (demonstrating that the United States has steadily established bilateral agreements, even after the TRIPS Agreement entered into force).
  \item \textsuperscript{68} See Letter from Robert Weissman, Co-Director, Essential Action, to Gloria Blue, Executive Secretary, Trade Policy Staff Committee, Office of the USTR (Aug. 22, 2001) [hereinafter Essential Action Letter] (echoing the notion that the FTAA will exclude weaker nations in the future, just as bilateral agreements do currently, thus making the FTAA undesirable), available at http://lists.essential.org/pipermail/ip-health/2001-August/001761.html (last visited Sept. 6, 2003).
  \item \textsuperscript{69} See GENETIC RESOURCES ACTION INTERNATIONAL, "TRIPS-PLUS" THROUGH THE BACK DOOR: HOW BILATERAL TREATIES IMPOSE MUCH STRONGER RULES FOR IPRs ON LIFE THAN THE WTO (2001) (highlighting how bilateral agreements often fail to address the needs of all the parties they affect, essentially "undermining political processes all over the world"), available at http://www.grain.org/publications/trips-plus-en.cfm (last visited Sept. 6, 2003). Notably, the Committee of Government Representatives on Civil Society, established in 1998, suffers from a severe lack of credibility. See SARAH ANDERSON & JOHN CAVANAGH, STATE OF THE DEBATE ON THE FREE TRADE AREA OF THE AMERICAS 27 (Rockefeller Foundation, 2002) (remarking that many of the Committee's members were not present at the first North American forum in Merida, Mexico, thus hindering the Committee's ability to address the needs of society groups who wished to make the Committee more accountable), available at http://www.tradeobservatory.org/library/uploadedfiles/State_of_Play\_on_the_FTAA.pdf (last visited Sept. 6, 2003).
  \item \textsuperscript{70} See Essential Action Letter, supra note 68 (noting how the FTAA will lock in only TRIPS provisions that "diminish the public domain," including access to necessary information associated with agreements).
\end{itemize}
As mentioned, the Draft Chapter on IPRs incorporates provisions on the protection of genetic resources, traditional knowledge, and folklore, which were persistently requested by developing countries. Gaps in the international intellectual property system routinely allow for the commercial exploitation of the developing world’s vast biodiversity resources and valuable traditional knowledge without authorization from the country or the local community. Developing countries have repeatedly asserted, in different fora, a need for international intellectual property norms to ensure adequate protection, but such proposals have never gained consensus. In the FTAA framework, agreement between the Members may not be forthcoming either. FTAA Members have, in fact, not reached consensus on these issues and the entire sections dealing with folklore, traditional knowledge, and genetic resources remain in brackets. While including these provisions would be a positive outcome, their fate remains uncertain.

B. RISKS

The potential limitations that the Draft Chapter on IPRs would impose on countries’ regulatory abilities are much more definite. The Draft Chapter on IPRs creates “TRIPS-plus” standards, both in provisions establishing the general principles of the system and in

71. See Second Draft, supra note 59, pt. II, secs. 4, 6 (providing for the protection of folklore, traditional knowledge, and access to genetic resources).


73. See Second Draft, supra note 59, pt. II, secs. 4, 6 (outlining material that is still under debate by Members).
dealing with specific IPRs areas. Such an extensive protection of intellectual property would deprive countries of essential room to take measures to protect the public interest and to ensure sustainable development.

1. General Provisions of the Draft Chapter on IPRs

The general provisions of the Draft Chapter on IPRs establish key elements of the FTAA intellectual property system and incorporate several concepts that may have negative consequences for a balanced intellectual property system. In Part I of the Draft Chapter, these provisions describe the nature and scope of the obligations, the general objectives and principles, and the relationship of the FTAA Agreement with other intellectual property treaties. Several of these provisions may limit important flexibility in implementing national legislation. For example, the Draft Chapter on IPRs requires parties to provide "adequate and effective protection and enforcement" of IPRs. While effective enforcement measures are an essential part of the intellectual property system, they must be geared not only towards protecting the private rights of the IPRs holders but also towards enforcing their obligations to society. The language in the Draft Chapter is derived from instruments in which the enforcement of IPRs focuses on compulsion; it does not incorporate any other mechanisms that acknowledge the delicate balance between various societal interests in intellectual property. Such instruments include, for instance, the North American Free Trade Agreement ("NAFTA"), Special 301 of the U.S. Trade Act, and other bilateral intellectual property or trade agreements. For example, Section 301 of the U.S. Trade Act requires the U.S. Trade Representative to identify those foreign countries that deny "adequate and effective protection" for intellectual property, even if they are in compliance

74. See infra Part II.B.2 (discussing the Draft Chapter's intellectual property standards).

75. See id. pt. I, arts. 1-5 (stating the basic purpose and principles of the FTAA Chapter on IPRs).

76. See id. pt. I, art. 1.1 (requiring also that these rights do not restrict trade).

with obligations under the TRIPS Agreement. The same unbalanced approach to enforcement in the FTAA may eliminate the flexibility left in other parts of the Draft Chapter on IPRs.

Another potentially problematic provision in this section is the establishment of the doctrine of regional exhaustion. One of the inherent tenets of IPRs is that they are limited privileges. Exhaustion is the principle that addresses the point at which the IPR holder’s control over the good or service ceases. Once the IPR holder is able to obtain an economic return from the first sale or placing on the market, the right is exhausted and the purchaser is entitled to use and dispose of the good or service without further restriction. A country may choose to recognize that exhaustion when a good or service is first sold or marketed anywhere outside its own borders, only in a country of the region, or only within its territory. The option depends on national policy concerns, such as the need to ensure competitiveness of local companies and to recognize consumers’ “right to buy legitimate products from the lowest price source.” Consequently, the TRIPS Agreement left the matter in the hands of individual countries. In contrast to the TRIPS Agreement, the draft FTAA requires each party to adopt the principle of regional

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80. See id. at 80 (elaborating further on the concept of exhaustion).


82. See Doha Declaration, supra note 46, para. 5(b) (stating that “[t]he effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge.”).
exhaustion within five years after the Agreement enters into force, which would terminate an important element of flexibility in international intellectual property standards.\textsuperscript{83}

The FTAA Agreement also requires parties to implement provisions from other IPRs treaties, further eliminating flexibility.\textsuperscript{84} This type of integration is not new; the TRIPS Agreement itself incorporates provisions of other treaties, particularly those included in the framework of WIPO.\textsuperscript{85} The reference in that case resolved questions regarding the relationship between the two institutions, but also, according to some commentators, created a loophole for raising the minimum standards of the TRIPS Agreement without the need for WTO consensus.\textsuperscript{86} The same loophole is particularly worrisome in the FTAA Agreement. The number of treaties the FTAA will conceivably incorporate is higher and includes several still being negotiated.\textsuperscript{87} Since the tendency in multilateral and bilateral instruments is to increase intellectual property standards, the FTAA Agreement may, through this process, incorporate these higher standards and further diminish countries' ability to shape their own intellectual property systems.\textsuperscript{88}

\textsuperscript{83.} See Second Draft, supra note 59, pt. I, art. 4 (asserting the FTAA draft agreement position on exhaustion of rights).

\textsuperscript{84.} See id. pt. I, art. 5.2 (listing eighteen agreements to which parties shall give effect).

\textsuperscript{85.} See TRIPS Agreement, supra note 6, arts. 1 & 2 (incorporating the protections of various legal instruments).

\textsuperscript{86.} See UNCTAD/ICTSD, supra note 79, at 12 (discussing WIPO as a means of increasing intellectual property protections even where international consensus is otherwise lacking), available at http://www.iprsonline.org/unctadictsd/docs/RB_part1_corrected.pdf (last visited Sept. 13, 2003).

\textsuperscript{87.} See Eugui, supra note 60, at 18 (arguing that serious concerns are raised "about potentially giving intellectual property negotiators a 'blank check' to actually write . . . the IPR protection obligations that FTAA members would have \textit{a priori} committed to enforce").

\textsuperscript{88.} See generally IPR COMMISSION, supra note 4. The purpose of the Commission on Intellectual Property Rights is to integrate development rights into the policy of IPRs. Id. at i.
2. Specific IPR Provisions

Part II of the Draft Chapter on IPRs, which addresses concrete categories of IPRs, also presents clear examples of rising intellectual property standards that may have perilous implications for sustainable development.89 The provisions regarding patents demonstrate a pattern of broader and more extensive rights. The FTAA Agreement would extend the period and the scope of protection, and eliminate key limitations on patent rights.90 It would thus decrease the flexibility needed to adapt patent regimes to countries' individual economic and social conditions.91

While the term of protection for patents in the Draft Chapter on IPRs is twenty years from the filing date, as in the TRIPS Agreement, the FTAA would require parties to extend the term of patent protection in certain circumstances. Countries would have to extend the period of patent protection, for instance, to compensate for any unreasonable delays in granting a patent and to match the period of extension provided by the country conducting the examination of the invention.92 The Draft Chapter on IPRs also expands the scope of patents to include any biological material derived through multiplication or propagation of the patented product, or directly obtained from the patented process.93 In other words, the FTAA would require countries to grant patent protection to plants and animals obtained from patented microorganisms or through patented processes, thus undermining the inclusion of plants

89. See Second Draft, supra note 59, pt. II (providing provisions that decrease the flexibility necessary to adapt intellectual property protections to developing countries).

90. See id. pt. II, sec. 5 (defining the rights of patents holders).

91. See IPR COMMISSION, supra note 4, at 113 (stating that different countries may want to adopt systems with different degrees of patent protections).

92. See Second Draft, supra note 59, pt. II, sec. 5, art. 8 (stating that each party “shall extend the term of a patent to compensate for unreasonable delays that occur in the granting the patent”). Additionally, when one party grants a patent based on an examination of an invention conducted in another country, “that Party, at the request of the patent owner, shall extend the term of a patent granted under such procedure by a period equal to the period of the extension, if any, provided in respect of the patent granted by such other country.” Id.

93. See id. pt. II, sec. 5, art. 3 (covering patents that protect a “biological product or process that claims to have specific characteristics”).
and animals in the exceptions to patentability.\textsuperscript{94} In addition, the chapter on IPRs incorporates the UPOV Convention for plant variety protection,\textsuperscript{95} which raises a number of questions for sustainable development.

Moreover, the FTAA limits the use of compulsory licensing,\textsuperscript{96} a critical instrument for developing countries to ensure that patents fulfill their sustainable development needs.\textsuperscript{97} Compulsory licensing refers to the right of governments to authorize itself or third parties to use the subject matter of a patent without the authorization of the right holder for public policy reasons.\textsuperscript{98} The TRIPS Agreement names anti-competitive prices, non-commercial use, emergency, and extreme urgency as reasons to allow compulsory licensing.\textsuperscript{99} However, it does not limit countries' rights to establish compulsory licenses on other grounds not explicitly mentioned. The Doha Declaration states that "[e]ach member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."\textsuperscript{100} The FTAA, however, limits the

\textsuperscript{94} See id. (requiring Members to not only protect the patented microorganism, but to any biological material derived from the patented material).

\textsuperscript{95} See id. pt. I, art. 5 (requiring parties to give effect to various agreements, including the UPOV Convention).

\textsuperscript{96} See id. pt. II, sec. 5, art. 5 (listing the various restrictions on compulsory licenses).


\textsuperscript{99} See TRIPS Agreement, \textit{supra} note 6, art. 31 (providing provisions that a Member must respect when using the subject matter of a patent without the right holder's authorization).

\textsuperscript{100} \textit{Doha Declaration}, \textit{supra} note 46, para. 5.
use of compulsory licensing.\textsuperscript{101} Under the chapter on IPRs, a
government may only grant compulsory licenses for public, non-
commercial purposes, and during declared national emergencies or
other situations of extreme urgency.\textsuperscript{102}

In addition, the FTAA intellectual property system fails to
recognize the difficulties that countries with insufficient or no
manufacturing capacities in the pharmaceutical sector face in making
effective use of compulsory licensing, as acknowledged by the Doha
Declaration. While article 31(f) of the TRIPS Agreement states that
compulsory licensing shall be authorized “predominantly for the
supply of the domestic market of the Member authorizing such use,”
WTO Members concede that certain circumstances call for waiving
this provision.\textsuperscript{103} The draft Chapter on IPRs of the FTAA clearly
states, though, that the authorization for a compulsory license would
“not entitle a private party acting on behalf of the Government to sell
products produced pursuant to such authorization to a party other
than the Government, or to export the product outside the territory of
the Party.”\textsuperscript{104} Countries without pharmaceutical manufacturing
capacity in the Americas would thus lose any flexibility to ensure
access to essential medicines and the right to health.

CONCLUSION

The Commission on Intellectual Property Rights concluded that,
“[j]ust because some is good, more isn’t necessarily better.”\textsuperscript{105} In fact,
higher standards of protection for IPRs in some circumstances are

\textsuperscript{101} See Second Draft, supra note 59, pt. II, sec. 5, art. 5 (listing various
restrictions on compulsory licenses).

\textsuperscript{102} See id. (subjecting a patent to compulsory licensing possibly any time
“following the declaration by a Party of the existence of public interest,
emergency, or national security considerations”).

\textsuperscript{103} A decision to allow countries with no pharmaceutical manufacturing
capacity to effectively use compulsory licensing was reached shortly before the
Fifth Ministerial Conference of the WTO in Cancun.

\textsuperscript{104} Second Draft, supra note 59, pt. II, sec. 5, art. 5.

\textsuperscript{105} See IPR COMMISSION, supra note 4, at 123-24 (noting that the purpose of
the modern patent system is to stimulate invention by rewarding inventors).
against the public interest.106 Developing countries need the flexibility to design and regulate their intellectual property protection to meet their unique conditions. International intellectual property rules, however, are slowly eradicating that flexibility.107

The FTAA negotiations, rather than turning the tide for sustainable development, are merely another stepping stone to higher intellectual property standards. Developing countries may find themselves in a position of having to protect exhaustively the broad rights of intellectual property holders because they are unable to establish limitations on IPRs in the public interest.

As presented today, the FTAA Agreement poses serious risks to sustainable development. It establishes TRIPS-plus standards, which will greatly hamper the ability of developing countries in the Americas to regulate intellectual property and will limit their ability to meet their own needs and objectives. Intellectual property protection would need to be rebalanced in terms of strength and scope and even then, the question remains: should intellectual property be dealt with at all in regional trade agreements?

106. See id. at 8 (asserting that high levels of intellectual property protection may not be appropriate in developing countries).

107. See supra Part I.B. (positing that international standards are decreasing the flexibility of IPRs).