



## I. INTRODUCTION

Intellectual property is heralded by some as the “foundation of human existence,<sup>2</sup>” protecting invention and innovation while improving standards of life through choices for consumers and new outlets for human activity.<sup>3</sup> 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.<sup>4</sup> 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 established by the UK government (“IPR Commission”) 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.<sup>5</sup> 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 their 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 Intellectual Property Rights (“TRIPS Agreement”), for instance, establishes minimum standards of intellectual property protection that all World Trade Organization (“WTO”) Members will eventually have to comply with.<sup>6</sup> These increased standards of protection present many challenges to developing countries attempting to fulfill them while adopting policies to achieve economic and social development. These facts notwithstanding, the TRIPS Agreement does contain some flexibilities which may allow countries to overcome some of the obstacles that high intellectual property standards may present to their sustainable development.

Other intellectual property rules currently being developed, though, may erode these flexibilities. Particularly worrisome are those rules being agreed upon through bilateral negotiations. Both the United States and the European Union, for example, are pursuing an increasing number of bilateral trade and investment negotiations that often include intellectual property.<sup>7</sup> These negotiations have resulted in agreements that take intellectual property protection standards beyond the levels established at the multilateral sphere and seriously threaten countries’ room to tailor intellectual property to correspond to their public policy objectives.

What role does the 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 issues fundamental to sustainable development, traditional knowledge, for instance, that have still 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. 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. In addition, it looks at the uncertain possibilities of the FTAA having positive outcomes for development, such as precluding bilateral negotiations.

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. 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. Finally, this article will conclude by highlighting the reasons why the draft Chapter on IPRs poses more problems than possibilities for sustainable development.

## II. IPRs, RISING INTERNATIONAL STANDARDS AND SUSTAINABLE DEVELOPMENT

### A. Intellectual Property: Instrument of Public Policy or 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. They also promote creativity by ensuring ideas are ultimately disseminated to generate more innovation. Patents, for instance, 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.<sup>8</sup> Moreover, even during the term of protection of the private right, intellectual property is not absolute. Limitations ensure that these privileges don't counter the public interest. Common exceptions to patents, for example, include acts done privately and for non-commercial purpose, use of the invention for research or teaching purposes, and importation of a patented product that has been marketed in another country with the consent of the patent owner.<sup>9</sup>

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 the interests of society in its economic and cultural development.<sup>10</sup> As one commentator put it, they are not a "sacred cow," rights that cannot be tailored or restricted, but rather a means to achieve societal objectives.<sup>11</sup> They are only justified to the extent that their benefits to society exceed their cost as exclusive rights over knowledge.<sup>12</sup> Intellectual property, in other words, should be an instrument of public policy and never an end in itself. Traditionally, countries have in fact designed their intellectual property system to respond to their economic and social interests and to promote their development. Korea, for example, had a lax IPR protection during the 1960s and 1970s as local firms were acquiring, assimilating and adapting large amounts of foreign technology through reverse engineering.<sup>13</sup> 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.<sup>14</sup> Countries presently pursuing development still need the flexibility to make IPRs work towards their increased growth and well-being, but current trends in international intellectual property standard-setting seriously limit their room to maneuver.

## **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 the country, multilateral intellectual property agreements began defining and delimiting countries' options in this respect. Early agreements, however, such as the Paris Convention of 1883 and the Berne Convention of 1886, only set up minimal structures and still allowed countries to adopt different substantive standards.<sup>15</sup>

More recently, though, such flexibility started coming under intense pressure. In 1995, the TRIPS Agreement came into force and required all WTO Members to provide minimum standards of intellectual property protection. 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 standards of protection. However, those minimum standards in fact universalized the levels of intellectual property protection that industrialized countries had only established after

reaching a certain level of development.<sup>16</sup> The broad protection of IPRs thus limited the options for developing countries in the design of their intellectual property systems. Nevertheless, the TRIPS Agreement did maintain some space for countries to adopt different strategies. For instance, the TRIPS Agreement does not define "invention," thus allowing countries to choose the definition that responds to their own needs.<sup>17</sup> These flexibilities become critical for countries to be able to use their intellectual property legislation as means of achieving a set of economic development, social development, and environmental protection objectives. In that sense, the TRIPS Agreement represents for many developing countries the "upper limit" of acceptable standards.<sup>18</sup>

Notwithstanding, international intellectual property negotiations persist and new and higher intellectual property standards continue to be set. In the World Intellectual Property Organization (WIPO), for instance, an initiative known as the "Patent Agenda" aims for further harmonization of patent law, including through a treaty intended to create substantive standards for patents.<sup>19</sup> The most active forum in intellectual property negotiations is not at the multilateral level, however, but at the bilateral one. Many commentators believe developing countries accept these negotiations as an unavoidable price to pay for increased market access or investment agreements with developed countries.<sup>20</sup> 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.<sup>21</sup> As a consequence, "TRIPS-plus" standards, either because they are more extensive than those of the TRIPS Agreement or they eliminate options existent under the TRIPS Agreement, are becoming the norm in bilateral agreements.<sup>22</sup> The free trade agreements signed between the United States and countries such as Jordan, Chile, and Singapore, are clear examples of 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.<sup>23</sup>

## **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. When high standards limit countries' abilities to achieve the particular balance demanded by their circumstances, however, IPRs raise a number of 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 techno-

logical development. Intellectual property systems designed for highly industrialized countries may actually hinder innovation relevant to developing countries, which is often informal.<sup>24</sup> 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.<sup>25</sup>

The potentially negative effects of intellectual property protection on public health have especially been the subject of debate. Prior to the TRIPS Agreement, countries had the freedom to provide intellectual property protection to inventions relating to public health only insofar as they considered it appropriate to their particular conditions and needs. In fact, most countries have, at some point, denied patents over pharmaceutical products and/or processes as a matter of public policy. The TRIPS Agreement, however, obliges countries to provide patent protection to any invention, whether product or process, in all fields of technology, in a provision many feared would negatively impact the affordability and availability of medicines in developing countries. The Doha Declaration on the TRIPS Agreement and Public Health, however, clarified that the TRIPS Agreement "does not and should not prevent Members from taking measures to protect public health."<sup>26</sup> Intellectual property negotiations outside of the WTO should thus pay special attention to not limit countries' rights to develop policies to promote broad access to safe, effective and affordable treatments.

Agriculture was another area where most developing countries did not provide intellectual property protection.<sup>27</sup> In fact, agricultural food supply structures in developing countries are based to a large extent on the practice of passing on and exchanging home-bred varieties of plants. The TRIPS Agreement, though, required Members to provide for some form of plant variety protection, raising concerns that food security could be adversely affected by restrictions on seed saving and exchange. It did leave an important flexibility, however. Members can decide whether plant variety protection is through patents, an "effective *sui generis* system" or a combination of the two.<sup>28</sup>

The option to develop a system with the characteristics that would ensure farmers' and breeders' access to seeds is crucial for developing countries, albeit bilateral and regional intellectual property standards may be eroding this possibility. For example, these agreements tend to designate the International Union for the Protection of New Varieties of Plants ("UPOV") as the system of plant variety protection, which has been criticized for responding to the needs of commercial breeders and not considering the characteristics of the varieties developed and used by small farmers in developing countries. In addition, some of the latest bilateral agreements attempt to introduce the requirement to patent plants. This type of provisions 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.

### III. INTELLECTUAL PROPERTY IN THE FTAA

By negotiating the FTAA, countries aim to achieve "development and prosperity".<sup>29</sup> In 1994, thirty-four countries in the Americas agreed to construct an FTAA in which barriers to trade and investment would be progressively eliminated. 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.<sup>30</sup> 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.<sup>31</sup> Thus, 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 countervailing duties.<sup>32</sup> 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 as approaching IPRs in a way that would pose an obstacle to development and improved quality of life in the countries in the Americas.<sup>33</sup>

The FTAA, like the TRIPS Agreement, sets minimum standards for the protection of IPRs such as copyright, trademarks, geographical indications, industrial designs, and patents.<sup>34</sup> However, the Chapter on IPRs has been called the "most ambitious and diverse intellectual property agreement ever written."<sup>35</sup> Its levels of intellectual property protection go far beyond those established by the TRIPS Agreement. In addition, it includes provisions on a number of new areas such as program-carrying satellite signals, 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."<sup>36</sup> In the intellectual property arena, for instance, the FTAA could be positive because it would constitute a multilateral standard-setting process and establish protection for issues considered

fundamental by developing countries. Agreeing on intellectual property protection levels multilaterally could be beneficial for developing countries insofar as it may preclude standards being set through bilateral negotiations. Developing countries may thus set intellectual property standards while having a numerical advantage and the possibility of building alliances.<sup>37</sup> Multilateral standards, however, have not been able to stop bilateral standard-setting in the past.<sup>38</sup> Developing countries expected the TRIPS Agreement to phase out efforts to bilaterally raise intellectual property standards,<sup>39</sup> but, on the contrary, the minimum standards of the TRIPS Agreement became a catalyst for further bilateral negotiations.<sup>40</sup>

Furthermore, the FTAA has been criticized for not rectifying the problems of bilateral negotiations.<sup>41</sup> One of the important advantages of a multilateral approach, in theory, 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.<sup>42</sup> In the FTAA, however, participating countries have kept the negotiating documents confidential and released the draft agreement only after great delay and with no identification of the countries that introduced or supported each provision.<sup>43</sup> Additionally, the Committee of Government Representatives on Civil Society, established in 1998, suffers from a severe lack of credibility.<sup>44</sup>

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.<sup>45</sup> Gaps in the international intellectual property system routinely allow the commercial exploitation of the South’s vast biodiversity resources and valuable traditional knowledge without the appropriate country’s and local community’s authorization.<sup>46</sup> Developing countries have repeatedly stated in different fora the need for international intellectual property norms to ensure adequate protection, but such proposals have never achieved consensus.<sup>47</sup>

In the FTAA framework, agreement may not be forthcoming either. 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.<sup>48</sup> Thus, while including these provisions would be a positive outcome, their fate is still uncertain.

## **B. Risks**

The potential limitations that the draft Chapter on IPRs would impose on countries’ regulatory abilities are much more definite, however. The draft Chapter on IPRs creates “TRIPS-plus” standards, both in provisions establishing the general principles of the system and in provisions 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. Comprised in Part I of the draft Chapter on IPRs, 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.<sup>49</sup> Several of these provisions may limit important flexibilities for national legislation.

The draft IPRs Chapter requires parties, for example, to provide “adequate and effective protection and enforcement” of IPRs.<sup>50</sup> Effective enforcement measures are an essential part of the intellectual property system and 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, however, comes from instruments in which the enforcement of IPRs focuses on compulsion and 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, statute Special 301 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 with obligations under the TRIPS Agreement. The same unbalanced approach to enforcement in the FTAA may thus eliminate even the flexibilities 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. As previously mentioned, one of the inherent tenets of IPRs is that they are limited privileges. The principle that addresses the point at which the IPR holder’s control over the good or service ceases is called “exhaustion.” The idea is that once the IPR holder has been 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 good or service without further restriction.<sup>51</sup> A country may choose to recognize that exhaustion of an IPR occurs 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 the territory of that country.<sup>52</sup> 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.”<sup>53</sup> Consequently, the TRIPS Agreement, for example, left the matter in the hand of countries.<sup>54</sup> In contrast, the FTAA draft requires each Party to adopt, within five years after the Agreement enters into force, the principle of regional exhaustion, which would put

an end to an important flexibility in international intellectual property standards.<sup>55</sup>

An additional increase in the level of these standards would result from the draft FTAA Agreement requiring parties to implement the provisions of a number of IPRs treaties.<sup>56</sup> This type of provision is not unheard of: the TRIPS Agreement itself incorporated provisions of other treaties, particularly those concluded in the framework of WIPO. 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.<sup>57</sup> The same form of loophole could be particularly worrisome in the draft FTAA Agreement. The number of treaties the FTAA will conceivably incorporate is higher and includes several still being negotiated.<sup>58</sup> Since, as mentioned, the tendency in multilateral and bilateral instruments is towards increasing intellectual property standards, the FTAA Agreement may, through this process, incorporate these higher standards and further diminish countries' flexibilities in shaping their intellectual property systems.

## 2. *Specific Provisions of the Draft Chapter of IPRs*

Part II of the draft FTAA IPRs Chapter, which addresses concrete categories of IPRs, also presents clear examples of rising intellectual property standards that may have perilous implications for sustainable development. The provisions regarding patents, whose current international protection already raises a number of concerns for essential issues such as the right to health, demonstrate the pattern of broader and longer rights. The FTAA Agreement would extend the period and expand the scope of protection, as well as eliminate key limitations to patent rights.<sup>59</sup> Thus, it would diminish the critical policy space needed to adapt patent regimes to particular economic and social circumstances.<sup>60</sup>

First, while the stated term of protection for patents in the draft IPRs chapter is twenty years from the filing date, same as the TRIPS Agreement, the FTAA would require parties to extend the term of a patent's protection in certain circumstances. Countries would be obliged to indirectly extend the period of patent protection, for example, 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.<sup>61</sup>

Second, the draft Chapter on IPRs 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.<sup>62</sup> In other words, the FTAA would oblige countries to grant patent protection to plants and animals obtained with parts of patented microorganisms or through patented processes, thus undermining the inclusion of plants and animals in the exceptions to patentability.<sup>63</sup> In addition, the draft Chapter

on IPRs incorporates the UPOV Convention for plant variety protection, which raises a number of questions for sustainable development, as previously analyzed.

Third, the draft FTAA Agreement would limit the use of compulsory licenses, a critical instrument for developing countries to ensure that patents fulfill sustainable development needs. 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 reasons of public policy.<sup>64</sup> The TRIPS Agreement, for instance, names anti-competitive prices, non-commercial use and emergency and extreme urgency as examples of grounds for granting compulsory licenses, although it does not limit countries' rights to establish compulsory licenses on other grounds not explicitly mentioned. Moreover, the Doha Declaration on the TRIPS Agreement and Public Health (Declaration on TRIPS and Health) reaffirms that "[e]ach member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."<sup>65</sup> The FTAA, however, establishes a number of limitations on the grounds for compulsory licensing. Under the draft Chapter on IPRs, compulsory licenses may only be granted for public, non-commercial purposes and during declared national emergencies or other situations of extreme urgency.<sup>66</sup>

In addition, the FTAA intellectual property system not only fails to recognize the difficulties countries with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing, as acknowledged by the Declaration on the TRIPS and Health, but it further complicates the situation. 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 this provision should be waived in certain circumstances.<sup>67</sup> The idea is to allow countries capable of manufacturing generic drugs under compulsory licenses to act as the agents for countries lacking such a capacity.<sup>68</sup> 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."<sup>69</sup> Countries without pharmaceutical manufacturing capacity in the Americas would thus lose essential policy room to ensure access to essential medicines and fulfill their people's right to health.

## IV. CONCLUSION

The IPR Commission compared intellectual property protection with taxation and concluded that, "[j]ust because some is good, more isn't necessarily better."<sup>70</sup> In fact, higher standards of protection for IPRs in some circumstances are plainly against the public interest. Developing countries, particularly, need the flexibility to design and regulate their

intellectual property protection in a way to respond to their needs and conditions. International intellectual property rules, however, are slowly eradicating that flexibility.

In that context, FTAA negotiations, rather than turning the tide for sustainable development, have merely become another stepping stone to higher intellectual property standards. The draft Chapter on IPRs focuses on the effective protection and enforcement of IPRs, seemingly at all costs. Developing countries may thus find themselves in a position of having to exhaustively protect the broad rights of intellectual property holders while they in turn would have few obligations to comply with. They would lose much of the room to establish limitations in the public interest. The draft Chapter on IPRs would, for instance, restrict countries from determining the end of intellectual property protection, both by extending some periods of protection and by imposing the principle of regional exhaustion.

The draft Chapter on IPRs would also limit other flexibilities essential to sustainable development. For example, it

would undermine the inclusion of plants in the exceptions to patentability, thus seriously threatening developing countries' ability to maintain structures of self-sufficiency with respect to seed and food. Moreover, it would constrain countries' decisions to use or grant third parties the right to use the subject matter of a patent without authorization of public policy. This could have disastrous effects for countries facing grave public health problems that may not qualify, though, as "national emergencies."

As presented today, the draft Chapter on IPRs of the FTAA Agreement poses serious risks to sustainable development. It establishes a number of TRIPS-plus standards that will greatly hamper developing countries in the Americas regulating intellectual property to respond to their needs and objectives. Intellectual property protection in the FTAA would need to be rebalanced in terms of strength and scope, in no case going beyond TRIPS Agreement standards, and even then, the question remains: should intellectual property be dealt with at all in regional trade agreements?

**FOR MORE INFORMATION, PLEASE CONTACT MARIA JULIA OLIVA AT [JOLIVA@CIEL.ORG](mailto:JOLIVA@CIEL.ORG)**

15 Rue des Savoises, 1205 Geneva, Switzerland  
Phone/Fax: 41-22-789-0500 • E-mail: [geneva@ciel.org](mailto:geneva@ciel.org)

1367 Connecticut Avenue NW, Suite 300, Washington, DC 20036-1860 USA  
1-202-785-8700 • Fax 1-202-785-8700 • E-mail: [info@ciel.org](mailto:info@ciel.org)

<http://www.ciel.org>

## ENDNOTES

- <sup>1</sup> A version of this paper will be published in the *American University International Law Review*, Volume 19:1.
- <sup>2</sup> Dr. Kamil Idris, Director General of the World Intellectual Property Organization (WIPO), in his acceptance speech, quoted in WIPO Press Release PR/2003/348, Geneva, May 27, 2003, available at <http://www.wipo.int/pressroom/en/index.html>.
- <sup>3</sup> See J.M. Aubrey, "A Justification of the Patent System," in PATENTS IN PERSPECTIVE (ed. by Jeremy Phillips, Oxford, 1985).
- <sup>4</sup> See Genetic Resources Action International, "Intellectual Property Rights and Biodiversity: The Economic Myths" in Global Trade and Biodiversity in Conflict, Issue no. 3, October 1998, available at [www.grain.org/publications/issue3-en.cfm](http://www.grain.org/publications/issue3-en.cfm).
- <sup>5</sup> See Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, 5 (2002), available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf) (last visited July 22, 2003).
- <sup>6</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, article 1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [TRIPS Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (last visited July 19, 2003).
- <sup>7</sup> U.S. current Free Trade Agreement negotiations are listed in <http://www.ustr.gov/new/fta/index.htm> and bilateral trade relations between the EU and other countries in [http://www.europa.eu.int/comm/trade/issues/bilateral/index\\_en.html](http://www.europa.eu.int/comm/trade/issues/bilateral/index_en.html).
- <sup>8</sup> World Intellectual Property Organization, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE, 17, available at <http://www.wipo.org/about-ip/en/>.
- <sup>9</sup> See Carlos M. Correa, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS, 75 (Zed Books and Third World Network).
- <sup>10</sup> W.R. Cornish, INTELLECTUAL PROPERTY, 6 (London 1989).
- <sup>11</sup> Jeremy Phillips and Alison Firth, INTRODUCTION TO INTELLECTUAL PROPERTY LAW, 10 (London, 1995).
- <sup>12</sup> Commission on Intellectual Property Rights, *supra* note 4 at 15.
- <sup>13</sup> Linsu Kim, Technology Transfer and Intellectual Property Rights: Lessons from Korea's Experience, 16 UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development (October 2002), available at <http://www.ictsd.org/iprsonline/unctadictsd/docs/Kim2002.pdf>.
- <sup>14</sup> *Id.* at 21.
- <sup>15</sup> See Paris Convention for the Protection of Intellectual Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 306 (amended 1979), available at <http://www.wipo.int/clea/docs/en/wo/wo020en.htm> (last visited July 19, 2003); see also Berne Convention for the Protection of Literary and Artistic Works, July 14, 1967, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 222 (amended 1979), available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm> (last visited July 19, 2003).
- <sup>16</sup> See, e.g., Carlos M. Correa, *supra* note 8 at 75.
- <sup>17</sup> TRIPS Agreement, *supra* note 5 at article 27.
- <sup>18</sup> See Carlos M. Correa, *supra* note 8 at 8.
- <sup>19</sup> See WIPO document A/36/14, *Agenda for Development of the International Patent System* (August 2001).
- <sup>20</sup> Peter Drahos, *Bilateralism in Intellectual Property*, 8 Oxfam Policy Paper (Dec. 2001) available at <http://www.oxfam.org.uk/policy/papers/bilateral/bilateral.rtf> (last visited July 19, 2003).
- <sup>21</sup> *Id.* at 8.
- <sup>22</sup> *Id.* at 4.
- <sup>23</sup> Commission on Intellectual Property Rights, *supra* note 4 at 155.
- <sup>24</sup> Simon Walker, THE TRIPS AGREEMENT, SUSTAINABLE DEVELOPMENT AND THE PUBLIC INTEREST: DISCUSSION PAPER, 32 (IUCN and CIEL).
- <sup>25</sup> *Id.*
- <sup>26</sup> World Trade Organization, *Doha Declaration on the TRIPS Agreements and Public Health*, para. 4, WT/MIN(01)/DEC/2 [Declaration on TRIPS and Health], available at [http://www.wto.org/english/thewto\\_e/minist\\_e/minidecl\\_tripse.htm](http://www.wto.org/english/thewto_e/minist_e/minidecl_tripse.htm) (last visited Sept. 13, 2003).
- <sup>27</sup> See Geoff Tansey, FOOD SECURITY, BIOTECHNOLOGY AND INTELLECTUAL PROPERTY, 11 (QUINO, 2002).
- <sup>28</sup> TRIPS Agreement, *supra* note 5 at article 27.3b.
- <sup>29</sup> Free Trade Area of the Americas, *First Summit of the Americas: Declaration of Miami* (Dec. 1994) (Miami Declaration) available at [http://www.ftaa-alca.org/ministerials/miami\\_e.asp](http://www.ftaa-alca.org/ministerials/miami_e.asp) (last visited July 19, 2003).
- <sup>30</sup> *Id.*
- <sup>31</sup> *Id.*
- <sup>32</sup> Free Trade Area of the Americas, *First Summit of the Americas: Plan of Action* (Dec. 1994), available at [http://www.alca-ftaa.org/ministerials/plan\\_e.asp](http://www.alca-ftaa.org/ministerials/plan_e.asp).
- <sup>33</sup> See, e.g., Oxfam, *Make Trade Fair for the Americas: Agriculture, Investment and Intellectual Property: Three Reasons to Say No to the FTAA*, 23, available at [http://www.oxfam.org/eng/pdfs/pp030126\\_FTAA.pdf](http://www.oxfam.org/eng/pdfs/pp030126_FTAA.pdf).
- <sup>34</sup> See Second Draft Agreement for the Free Trade Area of the Americas, Nov. 1, 2002, Chapter on Intellectual Property Rights (draft IPR Chapter), available at <http://www.ftaa->

alca.org/ftaadraft02/eng/ngipe\_1.asp#IPR (last visited July 19, 2003).

<sup>35</sup> See David Vivas Eugui, *Intellectual Property in the FTAA: New Imbalances and Small Achievements*, BRIDGES: ICTSD ANALYSIS 18-22 (2002), available at <http://www.ictsd.org/iprsonline/ictsd/docs/VivasBridgesYear6N8NovDec2002.pdf> (last visited July 19, 2003).

<sup>36</sup> Miami Declaration, *supra* note 28.

<sup>37</sup> Draft IPR Chapter, *supra* note 33 at pt. I. art. 2.

<sup>38</sup> Oxfam, *supra* note 32 at 3.

<sup>39</sup> For instance, the United States was at the time conducting an aggressive campaign based on Section 301 of the U.S. Trade Act, which allows the U.S. government to “impose trade sanctions against foreign countries that maintain acts, policies and practices that violate” or deny U.S. rights or unjustifiably burden or restrict U.S. commerce, including failure to provide “adequate and effective” protection of IPRs. The United States presented the diminution of such actions as one of the incentives to reach an agreement on intellectual property at the WTO.

<sup>40</sup> *Drahos*, *supra* note 19 at 17-18.

<sup>41</sup> See Letter from Robert Weissman, Co-Director, Essential Action, to Gloria Blue, Executive Secretary, TPSC, Office of the USTR (Aug. 22, 2001) [Essential Action Letter], available at <http://lists.essential.org/pipermail/ip-health/2001-August/001761.html> (last visited July 19, 2003).

<sup>42</sup> 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*” (July 2001), available at <http://www.grain.org/publications/trips-plus-en.cfm> (last visited July 19, 2003).

<sup>43</sup> See Essential Action Letter, *supra* note 40.

<sup>44</sup> See Sarah Anderson & John Cavanagh, Rockefeller Foundation, *Institute for Policy Studies, State of the Debate on the Free Trade Area of the Americas* 27 (2002), available at [http://www.tradeobservatory.org/library/uploadedfiles/State\\_of\\_Pla\\_y\\_on\\_the\\_FTAA.pdf](http://www.tradeobservatory.org/library/uploadedfiles/State_of_Pla_y_on_the_FTAA.pdf) (last visited July 19, 2003).

<sup>45</sup> See draft IPR Chapter, *supra* note 33 at pt. II, secs. 4, 6.

<sup>46</sup> In genetic resources, this phenomenon has been called “bio-piracy.”

<sup>47</sup> Developing countries have requested such international norms both within the Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklore at WIPO and within the TRIPS Council in the WTO.

<sup>48</sup> See e.g. draft IPR Chapter, *supra* note 33 at pt. II, secs. 4, 6.

<sup>49</sup> *Id.* at pt. I, arts. 1-5.

<sup>50</sup> *Id.* at pt. I, art. 1.

<sup>51</sup> UNCTAD/ICTSD, Capacity Building Project on Intellectual Property Rights and Sustainable Development, *TRIPS and Development: Resource Book Part One: Nature of Obligations, Principles and Objectives (Draft)* 80 (2002), available at

[http://www.ictsd.org/iprsonline/unctadictsd/docs/RB\\_Part1\\_nov02.pdf](http://www.ictsd.org/iprsonline/unctadictsd/docs/RB_Part1_nov02.pdf) (last visited July 19, 2003).

<sup>52</sup> *Id.*

<sup>53</sup> South Centre, *The TRIPs Agreement: A Guide for the South, The Uruguay Round Agreement on Trade-Related Intellectual Property Rights*, Annexe III (Nov. 1997), available at <http://www.southcentre.org/publications/trips/toc.htm> (last visited July 19, 2003).

<sup>54</sup> See TRIPS Agreement, *supra* note 5 at article 6 and the Doha Declaration on the TRIPS Agreement and Public Health, *supra* note 25 para. 5(b).

<sup>55</sup> See draft IPR Chapter, *supra* note 33 at pt. I, art. 4.

<sup>56</sup> *Id.* at pt. I, art. 5.

<sup>57</sup> UNCTAD/ICTSD, *supra* note 50 at 80.

<sup>58</sup> See Eugui, *supra* note 34, at 18.

<sup>59</sup> See draft IPR Chapter, *supra* note 33 at Section 5.

<sup>60</sup> See Commission on Intellectual Property Rights, *supra* note 4, at 113.

<sup>61</sup> See *id.* 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.”

<sup>62</sup> Draft IPR Chapter, *supra* note 33 at pt. II, sec. 5, art. 3.

<sup>63</sup> *Id.* at pt. II, sec. 5, art. 2.

<sup>64</sup> See Jerome H. Reichman and Catherine Hasenzahl, *Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS and an Overview of the Practice in Canada and the USA*, 4 (Draft October 2002), available at [http://www.ictsd.org/iprsonline/unctadictsd/docs/reichman\\_hasenzahl\\_Canada.pdf](http://www.ictsd.org/iprsonline/unctadictsd/docs/reichman_hasenzahl_Canada.pdf) (last visited August 8, 2003).

<sup>65</sup> Declaration on TRIPS and Health, *supra* note 25 para. 5.

<sup>66</sup> *Id.*

<sup>67</sup> TRIPS Agreement, *supra* note 5 at article 31 (f). The Doha Declaration on TRIPS and Health recognized that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. The decision that implements paragraph six that part of the Doha Declaration on TRIPS and Health was finally reached in August, 2003. It is available at [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm).

<sup>68</sup> Reichman and Hazenstahl, *supra* note 63 at 16.

<sup>69</sup> Draft IPR Chapter, *supra* note 33 at pt. II, sec. 5, art. 5.

<sup>70</sup> Commission on Intellectual Property Rights, *supra* note 4 at 123-24.