

# INTELLECTUAL PROPERTY IN AGRICULTURE AND BILATERAL AGREEMENTS

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## 1. Mapping Bilateral IP Agreements

In 1994, when the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was signed, it was perceived as the ‘new frontier’ of the international intellectual property (IP) regime. Many observers believed that it would represent the end of the road in the global effort to regulate IP in agriculture. It is true that no major multilateral IP agreements related to agriculture has been concluded in the last fifteen years<sup>1</sup>. However, the ‘new frontier’ has moved from the multilateral to the bilateral level. Several bilateral agreements, the so-called ‘TRIPs-plus agreements’, provide standards that go beyond the obligations contained in TRIPs.

These bilateral agreements can take various forms. Many of those signed during or immediately after the TRIPs negotiations were exclusively devoted to IP. Since 2002, however, most bilateral arrangements have taken the form of broad trade agreements (called free trade agreements, trade promotion agreements, association agreements, or partnership agreements) that include a chapter or an annex devoted to IP. Their proliferation is a new trend in the world trading system and the slow progress of the current Doha Round seems to have accelerated this tendency. Since the creation of the WTO, notification has been given of more than 300 bilateral and regional trade agreements, most of which contain IP provisions.

Bilateral IP agreements are actively promoted and negotiated by most OECD countries<sup>2</sup>. The United States was one of the first to recognize that bilateralism offers the advantage of overcoming resistance by countries considered to be impeding multilateral negotiations – those that the former United States Trade Representative

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<sup>1</sup> The FAO International Treaty on Plant Genetic Resources for Food and Agriculture was adopted in 2001. It includes some provisions on IP but it is not usually considered as a IP agreement.

<sup>2</sup> Canada figures as an exception among OECD countries. Even its recent free trade agreement with the European Free Trade Association does not contain any provision on patent law.

(USTR) Robert Zoellick called the “won’t do countries<sup>3</sup>”. In the 6 years that followed the granting by the US Congress of the 2002 Trade Promotion Authority (TPA) to the President, the US government has signed 12 free trade agreements. The expiration of the TPA in 2007 might reduce the pace of US negotiations. On the other hand, the European Free Trade Association (EFTA), Japan, Australia, and the European Community (EC) are increasing the pace of new bilateral agreements.

OECD countries signed most of their bilateral IP agreements with middle-income countries. Few were signed among OECD countries, despite the fact that the high volume of trade and investment flows between those countries amplifies transaction costs created by even minor discrepancies in their IP standards<sup>4</sup>. Even fewer agreements were signed with large emerging countries, like China, India or Russia, which have often been pictured as major sources of counterfeit goods<sup>5</sup>. Apparently, OECD countries prefer to negotiate bilaterally with countries such as Tunisia, Chile, or Thailand, with whom they benefit from stronger asymmetrical relations. For these middle-income countries, the prospect of a privileged trade access to OECD markets provides a powerful incentive to sign those agreements. Thus, bilateralism in the IP regime is driven by a trade-off between trade access, including for food and agricultural products, and new IP standards, including those affecting agriculture and food production.

## **2. Key Provisions Related to Food and Agriculture**

Several bilateral agreements provided modest IP obligations, referring to existing multilateral agreements and establishing a joint committee on IP. Others, however, are more stringent and include several TRIPs-plus provisions. These provisions found their inspiration in national laws of the most advanced technological

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<sup>3</sup> Zoellick, Robert, “America Will Not Wait For the Won’t-Do Countries.” *Financial Times*. 22 September 2003, p. 23.

<sup>4</sup> Exceptions include the Free Trade Agreement between United States and Australia, the Free Trade Agreement between United State and Korea, as well as the Free Trade Agreement between Japan and Switzerland.

<sup>5</sup> Most of these countries were put under pressure and have agreed to sign bilateral memoranda of understanding on IP. These, however, are not considered as international treaties under international law. This trend might change in the near future as, for example, Australia is negotiating with China and the European Community is negotiating with India.

economies. The TPA instructing the US administration on its trade negotiations was explicit on this matter, stating that any “agreement governing intellectual property rights that are entered into by the USA [must] reflect a standard of protection similar to that found in US law.<sup>6</sup>”. EFTA countries share this objective and have included in some of their agreements a direct reference to the European system, stating that parties must ensure a protection “on a level similar to that prevailing in the European Patent Convention”<sup>7</sup>. Likewise, some EC agreements provide that signatories must offer “a level of protection similar to that existing the Community, including effective means of enforcing such rights<sup>8</sup>”. Thus, bilateral agreements act as a channel for legal transplantation from OECD to developing countries. The latter, with little agricultural technology of their own, must implement in their domestic legal systems standards crafted for the former, the holders of most agricultural technologies.

Three categories of TRIPs-Plus provisions are especially relevant for agricultural matters. First, some bilateral agreements require the patentability of higher life forms. Several US free trade agreements, for example, provide that patents should be available for plants and animals. This is a significant departure from the TRIPs agreement that explicitly authorizes WTO members to exclude plants and animals, other than micro-organisms, from patentability. Thus, several signatories of a trade agreement with the US, including Morocco, Vietnam, Chili, Costa Rica, and Dominican Republic, found themselves in a position in which they must offer a level of protection for plants and animal that even some developed countries with substantial investment in agricultural technologies, such as Canada, still deny.

Second, several bilateral agreements require the adhesion to the International Convention for the Protection of New Varieties of Plants (UPOV). Some agreements require that current signatories of the 1978 Act of the UPOV convention, like Chile and Nicaragua, update their system and adhere to the more stringent 1991 Act. The multilateral TRIPs agreement is less restrictive. It provides that “Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof” but leaves open the nature of the

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<sup>6</sup> US Trade Act of 2002, Section 2102

<sup>7</sup> See for example the EFTA-Jordan Free Trade Agreement of June 21, 2001, Annex VI, art. 3.

<sup>8</sup> See for example the Partnership and Co-operation Agreement Between the European Communities and their Member States, and Ukraine , art. 50

*sui generis* system required (art. 27.3). It is usually recognized that a UPOV compliant protection represents an “effective *sui generis* system” but that WTO members remain free to develop their own system, as long as it is “effective”, to better take into account the specific needs of their farmers and consumers. This option, however, is being closed for an increasing number of developing countries. Their concerns on the legal and economic implications of this requirement is noticeable in a footnote included in some US free trade agreements:

*The Parties recognize that the UPOV Convention 1991 contains exceptions to the breeder’s right, including for acts done privately and for non-commercial purposes, such as private and non-commercial acts of farmers. Further, the Parties recognize that the UPOV Convention 1991 provides for restrictions to the exercise of a breeder’s right for reasons of public interest, provided that the Parties take all measures necessary to ensure that the breeder receives equitable remuneration. The Parties also understand that each Party may avail itself of these exceptions and restrictions. Finally, the Parties understand that there is no conflict between the UPOV Convention 1991 and a Party’s ability to protect and conserve its genetic resources<sup>9</sup>.*

The third category of provisions found in bilateral agreements that are relevant for agriculture and the right to food are related to geographical indications. The TRIPSs Agreement contained modest requirements on geographical indications, especially for products other than wines and spirits. The 2001 Doha Declaration launched negotiations aimed at strengthening the protection for these products and to establish a multilateral registration system for wines and spirits. In 2009, at the time of writing this paper, these negotiations were not yet concluded. In the meantime, the EC has successfully negotiated, at the bilateral level, additional protection and the mutual recognition of specific indications. Their agreements cover “expanded definitions of GIs, wider scope, incorporation of exclusive rights, simplification of formalities, transparency regulations, GI and trademark registration, relationship with

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<sup>9</sup> US-Panama Trade Promotion Agreement, art. 15.1.3; Dominican Republic-Central America-United States Free Trade Agreement, art. 15.1.5.

trademarks and mutual recognition of protection among other features<sup>10</sup>”. At a time in which European countries are pressed to reduce their agricultural subsidies, enhanced global protection of their geographical indications seems to be a strategy to sustain higher prices for European agricultural products in foreign markets.

### **3. Synergies Between Bilateralism and Multilateralism**

Several analysts consider that bilateral agreements can be leveraged in order to influence regional and multilateral negotiations<sup>11</sup>. Arguably, by persuading more countries to accept stringent IP norms, they can create new coalitions at the WTO and at WIPO supporting enhanced international standards. They could also act as institutional laboratories for testing new rules prior to their diffusion via regional or multilateral negotiations. This at least seems to be the goal of some OECD countries. Former USTR Susan Schwab, among others, recognized that one of the objectives of bilateral negotiations was to “develop a precedent that could at some point be translated in a multilateral setting<sup>12</sup>”

To date, efforts to use bilateral agreements as tools for reforming the multilateral IP regime beyond the specific targeted countries have failed<sup>13</sup>. Peru, for example, signed a bilateral agreement with the US but remains one of the most active members at the TRIPs Council opposed the US position on genetic resources.<sup>1</sup> A good example of this opposition occurred when Peru, supported by two other signatories of bilateral agreements, Colombia and Dominican Republic, co-sponsored a WTO proposal for a mandatory disclosure of the origin of genetic resources or associated traditional knowledge used in biotech inventions.<sup>2</sup>

Bilateral agreements have been more successful as a leverage in promoting the accession to existing multilateral agreements. The requirement to adhere to the UPOV, for example, had a clear impact on its membership. Of the developing

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<sup>10</sup> David Vivas-Engui and Christophe Spennerman, *The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements*, Geneva, UNCTAD-ICTSD, 2006, p. 4.

<sup>11</sup> See for example Drahos, Peter, *Expanding Intellectual Property's Empire: The Role of FTAs*, 2003, [online]. available at <http://www.grain.org/rights/TRIPsplus.cfm?id=28i> [Accessed January 2008].

<sup>12</sup> Quoted in Rayasam, R. “Free-Trade Evangelist”, *US News World Report*, 2006, p. 22

<sup>13</sup> Morin, Jean-Frédéric, “Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?” *Journal of World Intellectual Property*, to be published in 2009.

countries that recently joined UPOV, at least 15 did so after concluding a bilateral treaty requiring their adhesion. As a result, since 2000, developing countries constitute the majority of the UPOV members, although the vast majority of applications come from residents of OECD countries. Paradoxically, the requirement to adhere to the UPOV convention might limit the ability of OECD countries to revise and amend the convention, as they did relatively smoothly in 1972, 1978 and 1991. The history of the Paris Convention for the Protection of Industrial Property, revised 7 times between 1883 and 1979, shows that once developing countries have the majority of membership, it is extremely difficult to reach a consensus on revision.

Recent developments with the Anti-Counterfeiting Trade Agreement (ACTA) project, however, indicate that it could soon become the first tangible success of the bilateral strategy. Although little is known on the substance of the ACTA project, many suspect that it will be a free-standing plurilateral agreement that will include more stringent patent protection norms than those stipulated under TRIPs. Interestingly, nearly half of the parties that participate at the last ACTA negotiation held in Washington on July 30-31 2008 were signatories of bilateral agreements with the US. One wonders whether Jordan, Korea, Mexico, Morocco, Singapore, and the United Arab Emirates would have actively participated in the process if they had not signed a bilateral agreement with the US or were not in the process of negotiating such an agreement.

If an extensive ACTA is made possible by the relations developed through bilateralism, it will constitute the first successful attempt since 1994 to use bilateral agreements as building blocks for multilateral negotiations. This goal, however, is far from being reached. The failure of OECD countries to agree on the Multilateral Agreement on Investment, despite the pre-existence of hundreds of bilateral investment treaties, shows that plurilateral negotiations among OECD countries, even when they share instrumental and normative preferences, could be more arduous than bilateral negotiations with developing countries having opposite interests.

The proliferation of bilateral agreements nevertheless enhances the strategic position of OECD countries at the multilateral level. In this context, it is surprising that developing countries are reluctant to replicate this strategy. They could have

signed bilateral agreements among themselves as a way of progressively propagating their favored norms. While they advocate the adoption of new rules facilitating technology transfer, ensuring better access to medicines, creating a synergy with the Convention on Biological Diversity and protecting their traditional knowledge, few South-South agreements propose these new rules, although they could be drafted in a way compatible with existing multilateral IP treaties. Thus, while developing countries do not experiment with new international rules among themselves, OECD countries sign new bilateral TRIPs-plus agreements every year that can serve as models for a future multilateral treaty on substantive patent law.

#### **4. Lessons from the Medicines and Biodiversity Cases**

It has been argued that bilateral agreements are being negotiated under the radar of social movements and parliamentarians. While this may have been true 10 years ago, this argument is not longer valid. Several transnational NGOs, such as Oxfam, GRAIN, and Médecins sans frontières, in addition to countless domestic groups, have brought bilateral agreements under the spotlight. Parliaments have served as channels of communication between social movements and governments. In 2007, the European Parliament has called on the European Commission “to ensure that intellectual property rights [...] are taken off the negotiating table if ACP countries do not wish to negotiate them.<sup>14</sup>”. The same year, the US Congress specified in its Bipartisan Agreement on Trade Policy that all future US bilateral agreements must strike a balance between the rights of drug companies to protect their patents and the need of developing countries for life-saving drugs.

As a result of this social and parliamentary pressure, some of the most recent bilateral agreements include provisions that address concerns frequently expressed by developing countries. Recent US trade agreements with Colombia, Peru and Panama do not go as far beyond TRIPs as did the 2003-2005 agreements. Several patent-related rules were relaxed, including rules on data exclusivity, patent-linkage, and patent extension. A reference to the Doha Declaration on TRIPs and Public Health was added in the body of these agreements instead of as an appended letter. In

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<sup>14</sup> European Parliament Resolution of 20 June 2007 on the Millennium Development Goals, paragraph 94.

addition, side letters on biodiversity were signed, recognizing the importance of “respecting and preserving traditional knowledge and practices of indigenous and other communities<sup>15</sup>”. Similarly, the free trade agreement between China and New Zealand, signed in April 2008, does not include substantive TRIPs-Plus provisions but mentions that “the Parties may establish appropriate measures to protect genetic resources, traditional knowledge and folklore<sup>16</sup>”. The agreement between the EFTA and Colombia, signed in November 2008, even provides that “Parties shall require that patent applications contain a declaration of the origin or source of a genetic resource, to which the inventor or the patent applicant has had access<sup>17</sup>”, a requirement that numerous developing countries would like to be recognized at the multilateral level. As Pedro Roffe and David Vivas-Eugui observed, “criticisms related to some aspects of the agreements, particularly those concerning the reduction of TRIPs flexibilities have produced concrete results<sup>18</sup>”.

In the last decade, two issues have led to major controversies in the international patent regime: the access to medicines issue and the biodiversity issue. In both cases, the charge led by social movements led to alteration of previous bilateral agreement models and to amendments to domestic legislation in some OECD countries. However, these two issues have eclipsed the campaign on farmers rights, which was a more prominent issue in the 1990s. Those interested by the right to food should learn from past experience and explore the reasons why the access to medicines and biodiversity debates have resulted in substantial changes in the patent regime while the issue of farmer rights has been largely ignored by policymakers of OECD countries since the conclusion of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture.

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<sup>15</sup> See the Understanding Regarding Biodiversity and Traditional Knowledge between the United State and Peru, concluded in parallel with the United States-Peru Trade Promotion Agreement.

<sup>16</sup> Free Trade Agreement Between the Government of New Zealand and the Government of the People’s Republic of China, art. 165.

<sup>17</sup> Free Trade Agreement between the Republic of Colombia and the EFTA States, art. 6.5.5

<sup>18</sup> Roffe, Pedro and David Vivas-Eugui, “A Shift in Intellectual Property Policy in US FTAs?”, *Bridges*, 15–6. 2007, p. 16.