



WIPO Sub-Regional Workshop on Patent Policy and its Legislative Implementation

Topic 8: Regional and bilateral preferential trade agreements

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Topic 8
Regional and Bilateral Agreements

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Objectives

Objectives:

- To make participants aware of the IP component of the various bilateral and regional trade agreements/arrangements in which CARICOM is involved
- To bring to attention any aspects of these agreements that require implementation by legislation
- To engender an appreciation of the interplay of bilateral and regional agreements with the TRIPS Agreement

Outline

- Identification of Regional and bilateral trade agreements that affect CARICOM states
- Overview of IP provisions
- Effect on agreements/arrangements on multilateral obligations re IPRS
- Policy and legislative implications of regional/bilateral agreements

Identification of Agreements

CARICOM Level

- Caribbean Basin Initiative
- Revised Treaty of Chaguaramas
- CARICOM/CUBA, 2000

National Level

- US/T&T Memorandum Concerning Protection of Intellectual Property Rights, 1994
- US/Jamaica Agreement on IPRS, 1994

EU/CARIFORUM Economic Partnership
Agreement (EPA) signed 2008

The Caribbean Basin Initiative: A programme of preferential treatment in the US for eligible articles from beneficiary countries

i.e. duty free, quota- free access for some goods

- Caribbean Basin Economic Recovery Act, 1983 (CBERA)-cornerstone of CBI
- U.S. President could grant unilateral duty-free treatment on US imports of certain eligible articles from beneficiary countries

Caribbean Basin Economic Recovery Expansion Act, 1990-(CBI II) made permanent the extension of the duty-free treatment that most goods produced in the Caribbean Basin region receive upon entry into the U.S. market.

- Caribbean Basin Trade Partnership Act, 2000
- Provides additional benefits beyond those provided in previous CBI legislation, mainly in the areas of apparel, liqueurs, and articles considered “import sensitive”

- CBTPA set to expire on September 30, 2020

- Under 1983 Act U.S. President could terminate beneficiary country status in certain circumstances among them- if a country violates intellectual property laws by broadcasting materials of American copyright owners without their consent.

(19 USC para 2702(b)(5))

- Among factors to be taken into account in determining whether a country is eligible for beneficiary status is *the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the TRIPS Agreement*

- Almost all CARICOM states requested and were granted beneficiary status
- Following are beneficiary countries

- 24 Beneficiary countries designated :
- Antigua & Barbuda, Aruba, The Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad & Tobago and British Virgin Islands

- CBI is a unilateral programme of preferential treatment which will continue in effect until September 30, 2020, or the date, if sooner, on which a free trade agreement enters into force between the United States and a CBTPA beneficiary country.

(The Caribbean-Canada Trade Agreement ("CARIBCAN")) is a programme of the Canadian Government established in 1986 to promote trade and investment and to provide industrial co-operation through preferential access of duty-free goods from the countries of the Commonwealth Caribbean

- Initial steps towards replacing CARIBCAN with a reciprocal Trade and Development Agreement, and there is every indication that Canada is interested in including the protection and enforcement of IPRs within the scope of the Agreement.)

(See Office of Trade Negotiations, *The Region's Preparations for the Negotiation of a CARCOM-Canada Trade and Development Agreement*, (CARICOM, Guyana, 2010) Ref. 31000.3/1-2010-07-28)

Revised Treaty of Chaguaramas

Establishes the Caribbean Community, including the CARICOM Single Market and Economy

Art. 66: provides the framework for regional approach to the administration of IPRs.

It mandates the Council on Trade and Economic Development of CARICOM (COTED) to promote the protection of IPRs in the Community by-

- a) the strengthening of regimes for the protection of IPRs and the simplification of the registration procedures in members states;
- b) the establishment of a system of regional administration for IPRs (except copyright);
- c) the identification and establishment by Member States of a mechanism to ensure -
 - (i) the use of protected works for the enhanced benefit of the Member States; and
 - (ii) the preservation of indigenous Caribbean culture;

- d) the increased dissemination and use of patent documentation as a source of technological information;
- e) measures to prevent the abuse of IPRs by right-holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology; and
- f) participation by the members states in international regimes for the protection of IPRs.

- As a complement to Art. 66, and in the interest of reducing barriers to cross-border trade and investments within CARICOM's single economic space, Art. 74 of the Revised Treaty mandates the harmonisation of the laws and administrative practices of member states in several areas of law, including laws relating to IPRs.

- Nothing in Art 66 is inconsistent per se with
- The TRIPS Agreement but in operationalizing this Article, an eye should be kept on TRIPS to ensure there is no con
- Implementation of Art. 66 would facilitate the implementation of the IP provisions of the EPA

Free Trade Agreements

- CARICOM / Cuba, 2000

Little needs to be said about the provisions on IPRs in this Agreement as the parties agreed to apply the TRIPS Agreement until another Agreement is made.

- FTAA Negotiations 1998-2004 aborted
- Result- series of bilaterals between US and various countries individually
- Trade Agreement with IP content with Chile, Peru, CAFTA bloc
- Each new bilateral show further whittling down of TRIPS flexibilities
- Same could be expected in a US/CARICOM bilateral trade agreement

Bilateral Agreements

Bilateral agreements :

- tend to more tailored to the specific requirements of the parties
- Normally one of several strategic actions aimed at achieving particular objectives.
- Often a clear demandeur- a country who desires a particular state of affairs and takes the initiative to engage in negotiations towards that end
- Bilaterals can be used to achieve goals not achievable under multilateral arrangements

Bilateral Agreements

- *US/Jamaica and US/Trinidad and Tobago*
- 1994 – stand alone IP Agreements – i.e. not part of a free trade agreement but negotiated in a trade context on parallel track with negotiations for a bilateral investment treaty

- Both agreements reflected many of the provision of the TRIPS agreement but also contained several that were “TRIPS-plus” i.e. provisions that elevated the minimum standards of TRIPS. E.g.

- a) There are no provisions similar to the Objectives and Principles in Articles 7 and 8, respectively, of the TRIPS Agreement or of any other development-oriented provisions relating, for example, to technology transfer, public health, social and economic interests or to the balance of rights and obligations.

- b) Enlargement of the international intellectual property agreements to which the countries should adhere; (Art. 1.2 US/Trinidad and Tobago; Art 1.2 US/Jamaica).

- c) The introduction of national exhaustion of rights in relation to works protected by copyright (Arts. 3.2; 3.6 US/Trinidad and Tobago; Art. 4.2 US/Jamaica).
- d) The introduction of criminal sanctions for certain acts done in relation to encrypted satellite signals. (US/Jamaica Art. 6; Art. 4 US/Trinidad and Tobago).

- f) The possibility of extending the period of patent protection beyond 20 years to compensate for delays in regulatory approval processes.(Art.6.9 US\Trinidad and Tobago);
- g) The coming into effect of the Agreement on signature, in contrast to the 5-year transitional period under TRIPS. (Art. 18 US/Trinidad and Tobago; Art. 17 US/Jamaica).

CARIFORUM-EC Economic Partnership Agreement

Agreement between the EC and CARICOM plus Dominican Republic

- The IP section offers a “mixed bag” of both “TRIPS - plus” and “TRIPS-neutral” provisions, and “soft” and “hard” commitments.
- Contains some of the “development” elements similar to those of the TRIPS Agreement
- Strong themes: regional integration and co-operation

Some “TRIPS-plus” provisions in EPA-

a) agreement to adhere to or comply with the provisions of a large body of international agreements and instruments on IPRs including :

-the Patent Co-operation Treaty;

the Patent Law Treaty (best endeavours for CARICOM states);

-the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977 as amended);

- the International Convention for the Protection of New Varieties of Plants – UPOV (Act of 1991) -parties to consider acceding) (Art 9).

(TRIPS- plus provision. The TRIPS Agreement which left it to member states to craft *sui generis* laws on plant variety, as they saw fit. This provision tilts the *sui generis* law in the direction of the UPOV model.)

- b) enlargement of the subject-matter to be protected – specific reference to biotechnology patents (both of interest to the EU) and utility models (of interest to some CARIFORUM states);

- Regarding plant varieties - the parties reserved the right to provide in their laws an exception to the exclusive rights given to plant breeders by allowing farmers to save, use and exchange protected seed or propagating material.

- Geographical Indications: the obligation to establish a system for the protection of geographical indications by January 2014 and to begin negotiations by that date with respect to the protection of the GIs of the respective countries.

- Protection of genetic resources & traditional knowledge: the parties agreed to continue to work towards the development of internationally agreed *sui generis* models for the legal protection of traditional knowledge.
- Both parties have the option to require applicants for patents concerning an invention that uses biological material as a necessary aspect of the invention, to identify the sources of the biological material.

- Technology transfer: the parties agreed to take measures to prevent or control licensing practices or conditions pertaining to IPRs which might adversely affect the international transfer of technology, and that constitute an abuse of IPRs by right holders or an abuse of obvious information asymmetries in the negotiation of licences.
- The EC also undertook to facilitate and promote the use of incentives to institutions and enterprises in their territories for the transfer of technology to institutions and enterprises of the CARIFORUM states in order to enable the latter to establish a viable technological base.

- Re the Doha Declaration on the TRIPS Agreement and Public Health, parties undertook to take steps to accept the Protocol

Effect of Bilaterals/EPA

- Bilateral agreement tend to reduce Flexibilities of the multi-lateral agreement (TRIPS)

Effect of Bilaterals/EPA

As regards specific provision of TRIPS:

Most –favoured nation treatment: Art 4 of the TRIPS Agreement

“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

Effect of Bilaterals/EPA

- This means that rights conferred and commitments assumed under bilateral/regional agreements are automatically “multilateralized”
- One exemption from MFN Provision is a advantage, favour privilege or immunity deriving from international agreements relating to the protection of intellectual

- property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Revised Treaty of Chaguaramas in so far as it relates to IPRS (Art 66) is said to fall within this exemption

Policy and legislative implications of regional/bilateral agreements

- In formulating policies re IPRS CARICOM states need to factor in the rights and obligations under the Agreements
- Also, states must identify those aspects that require legislative response and take deliberate and timely steps to implement the provisions within their legislative framework
- IP laws will have to be amended to be compliant with EPA

- National IP Policies/Strategies facilitate negotiations as there would be greater clarity as to what is in the national interest

This would anchor and focus negotiations : now negotiations often in vacuum with little understanding of what is in the national or regional interest.

Objectives Achieved?

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- I trust that from your point of view, these objectives have been achieved
