# "TRIPS-plus" through the back door

## How bilateral treaties impose much stronger rules for IPRs on life than the WTO

**GRAIN**
**in cooperation with SANFEC**[1]
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*Bilateral agreements are a powerful but hidden tool to achieve uniform market conditions for transnational corporations in developing countries. Silently hammered out between individual governments, they offer a direct means to cut deals over market access privileges, foreign investment, research funding or anchor-free profits. What's more, they're booming. The policies and procedures of multilateral institutions such as the World Trade Organisation or the International Monetary Fund are seen the world over as reason to riot. But the quietly crafted mini-pacts between Washington and Amman, or Brussels and Dhaka, are where more damage is sometimes being done. And patents on life have a central place on the agenda.*

## Introduction

In recent years, World Trade Organisation (WTO) measures for the protection of intellectual property have come under attack from all corners of the globe. The WTO agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS, requires all members to grant and enforce intellectual property rights (IPRs) on life forms. Specifically, it says that while plants and animals can be excluded from patent laws, all countries must allow for patents on microorganisms and either provide patents or an effective *sui generis* type of IPR on plant varieties. Since it was adopted in 1994, this treaty has come under severe criticism as it is the first international treaty to make the privatisation of biodiversity compulsory – and to do so as a principle of international trade.

Yet TRIPS is only about minimum standards. And those minimum standards are clearly not strong enough for industrialised countries and the transnational corporations (TNC) whose nerve centres they house. One by one, developed countries are negotiating special closed deals with governments of the South that establish much stronger requirements for IPRs on biological resources. These "TRIPS-plus" standards are being introduced through a range of bilateral, regional and subregional agreements. They take developing countries way beyond the commitments they agreed to under the multilateral trade system governed by the WTO. And they are making so much headway that TRIPS may soon be obsolete.

Given the secrecy of these bilateral negotiations, the extreme commitments they embody and the sheer speed with which they are tying the hands of developing countries, they must be stopped. If not, they will soon leave us with a disastrous *fait accompli* in terms of the global "playing field" for patents on life.

## What is "TRIPS-plus"?

GRAIN has done a limited, sample survey of bilateral agreements between developed and developing countries in five areas to see how TRIPS-plus standards are being pushed on developing countries with respect to biodiversity.[2] Five types of treaties were examined : trade, investment, aid, science and technology, and IPR. (An explanation of what they are about and why they were chosen can be found

in the Annex). By far the most specific, in terms of TRIPS-plus measures that developing governments are committing to, are the bilateral trade and IPR agreements. The bilateral investment treaties, by contrast, are far less explicit but potentially even more damaging.

Our criteria for what constitutes a TRIPS-plus treaty with respect to biodiversity are laid out in Table 1.

**Table 1: Criteria for TRIPS-plus status of bilateral treaties**

| SUBJECT MATTER | TRIPS-PLUS PROVISIONS ENCOUNTERED | WHY THIS IS TRIPS-PLUS |
|---|---|---|
| Plants | Extension of standards of protection, such as:<br>- reference to UPOV<br>- no possibility of making exclusions from patentability for life forms<br>- reference to "highest international standards" | - UPOV is not a reference in the TRIPS agreement. There is no explicit measuring stick for "effective sui generis system" and developing countries believe that they have options aside from UPOV.<br>- TRIPS allows countries to exclude plants and animals from patent protection.<br>- "Highest international standard" is vague and there is no indication that it refers to TRIPS. While not automatically TRIPS-plus, it is highly suspect, particularly in the context of Most Favoured Nation treatment of investments under the bilateral investment treaties. |
| Animals | same as plants | same as plants |
| Micro-organisms | Requirement to accede to the Budapest Treaty | There is no reference to Budapest in TRIPS. This treaty obliges parties to recognise the physical deposit of samples of microorganisms, in lieu of full written disclosure of the invention, through an international depository authority. |
| Biotech | Requirement to protect "biotechnological inventions" | There is no reference to "biotechnology" in TRIPS. This introduces a new category of subject matter for intellectual property protection. It also very strongly implies, where it is not stated, the availability of patent protection for plants and animals. |

The main elements of these treaties that render them TRIPS-plus are the following.

*1. Reference to UPOV*

TRIPS makes no reference to UPOV, a convention that was crafted in Europe 40 years ago as a special kind of patent system for commercial plant breeders and to which mostly industrialised countries subscribe.[3] Requiring countries to align with UPOV is very clearly TRIPS-plus, since TRIPS does not define "effective *sui generis* system" and WTO members have been told time and time again that the absence of a definition and the absence of any mention of UPOV both indicate sufficient flexibility. Under discrete bilateral agreements with different developed countries, Cambodia, Jordan, Morocco, Tunisia and Vietnam are now obliged to join UPOV. (Singapore may be in the same boat.) Bangladesh, Ecuador, Mexico, Nicaragua, Trinidad & Tobago and Vietnam were dealt the phrase "must make every effort to" instead. While at first glance, this "effort" terminology may sound less binding, it nevertheless implies a TRIPS-plus obligation. Because in practical terms, to make an effort to accede to UPOV, a government must draft a plant variety protection bill that aims to conform with the UPOV Convention and it must seek the Union's advice on that draft. And in some cases, the "make every effort" formula is accompanied by an obligation to implement the substantive provisions of UPOV in the meantime. As to the Free Trade Area of the Americas (FTAA), the draft negotiating text makes several references to UPOV.

2. *Reference to Budapest*

TRIPS makes no reference to the Budapest Treaty, which obliges countries to recognise the physical deposit of a sample of a microorganism as disclosure of an invention for the purpose of patent protection. Full disclosure of an invention is a basic feature of any patent system, yet life forms are too complex to fully describe. Under Budapest, deposit fulfills the requirement for disclosure. For this, the treaty – which has 49 member states, 47 of which are from the North – relies on a network of recognised international depository authorities (IRAs) which operate special rules on access to the biological samples, especially to avert potential patent infringement. There are 31 IRAs in 19 countries, all but two of them being industrialised countries. TRIPS does not advocate the Budapest system for patent protection of microorganisms, but under bilateral agreements with industrial countries, Korea, Mexico, Morocco and Tunisia have been required to join the system, while Jordan must implement its substantive provisions (thus Singapore may be in the same boat).

*3. No exclusions to life patenting*

TRIPS allows member to exclude plants and animals from their patent laws. But under bilateral agreements with industrialised countries, Jordan, Mongolia, Nicaragua, Sri Lanka and Vietnam are being required to provide patent protection on plants and animals. This may become reality in Latin America as well if the United States (US) gets its way under the FTAA negotiations. In all of these cases, there is simply no provision to exclude plants and animals from national patent law. Under another approach, South Africa and the 78 African Caribbean Pacific (ACP) countries are supposed to grant patents on "biotechnological" inventions. This presumably means plants and animals, in addition to the microorganisms required by TRIPS.

*4. "Highest international standards"*

Many texts call for implementation of IPRs in developing countries "in accordance with the highest international standards". These standards are not defined, but they may relate to new standards being generated through the investment treaties (see discussion in the Annex). And several policies coming out of the US specifically gauge bilateral trade benefits in function of developing countries' willingness to provide IPR protection "greater than" what TRIPS requires, or to the extent that the protection they offer is an "improvement" on TRIPS.

*5. New rules, new powers*

Most obscure, and most troubling perhaps, are the provisions of the bilateral investment treaties (BITs, see Annex). In essence, they provide that investments flowing into the South from the North receive the same level of protection that they would receive back home. The term "investments" includes IPRs, even potential IPRs in some cases. And the term "protection" is often specified to mean the possibility of protection, in other words that statutory laws allow for the broadest range of patentable subject matter. Suppose the US signs a typical BIT with Nigeria. It could be understood that if Monsanto has a patent on a given gene in the US and it wants to sell seeds containing that gene in Nigeria, then Nigeria must provide the same level of domestic patent protection to Monsanto over the gene that Monsanto enjoys in the US. This may not mean that Nigeria has to automatically honor the patent on the gene in its own territory. Nor that Nigeria suddenly has to rewrite its patent laws to suit the eventuality. But it would probably mean that, irrespective of TRIPS, Nigeria would have to allow for patent protection on plant genes in its territory *if and when* Monsanto seeks local protection. Because Monsanto can invoke the BIT to protect its investment in Nigeria. And any dispute on the matter would play itself out following the tailored provisions of that BIT. These would typically involve a joint committee of the two governments, and/or certain principles from the International Convention for the Settlement of Investment Disputes, and/or the arbitration rules of the UN Commission on International Trade Law. The WTO, its Dispute Settlement Body, and its TRIPS Agreement, simply don't form part of the picture. The leverage that this gives TNCs could go very far.

## TRIPS-plus here and now

Using the TRIPs-plus criteria described above, and looking at only a portion of these agreements, GRAIN has identified 23 cases of bilateral or regional treaties between developed and developing countries that should be classed as TRIPS-plus as far as IPR on life forms is concerned. These agreements affect more than 150 developing countries. Which means that something systemic is taking shape: the TRIPS-plus features of these treaties cannot be coincidental.

**Table 2: Bilateral and regional agreements through which developed countries secure commitments to TRIPS-plus standards for IPRs on life in developing countries ***

| PROPONENT NORTH | COUNTERPART SOUTH | TYPE OF AGREEMENT | DATE | TRIPS-PLUS PROVISIONS |
|---|---|---|---|---|
| **AFRICA & MIDDLE EAST** | | | | |
| EU | ACP (Cotonou Agreement) | trade | 2000 | must patent biotech inventions[4] |
| EU | Morocco | trade | 2000 | must join UPOV and Budapest by 2004[5] |
| EU | Palestinian Authority | trade | 1997 | "highest international standards"[6] |
| EU | South Africa | trade | 1999 | must patent biotech inventions; highest international standards; must undertake to go beyond TRIPS[7] |
| EU | Tunisia | trade | 1998 | must join UPOV and Budapest by 2002; "highest international standards"[8] |
| US | Jordan | trade | 2000 | must implement and join UPOV within one year and partially implement Budapest; no exclusions for plants and animals from patent law[9] |
| US | Sub-Saharan Africa (AGOA) | trade | 2000 | trade benefits gauged on extent to which countries go beyond TRIPS[10] |
| **ASIA & PACIFIC** | | | | |
| EU | ACP (Cotonou Agreement) | trade | 2000 | must patent biotech inventions |
| EU | Bangladesh | trade | 2001 | must make best effort to join UPOV by 2006[11] |
| Switzerland | Vietnam | IPR | 1999 | must join UPOV by 2002[12] |
| US | Cambodia | trade | 1996 | must join UPOV[13] |
| US | Korea | IPR | 1986 | must join Budapest[14] |
| US | Mongolia | trade | 1991 | no exclusions for plants and animals from patent law[15] |
| US | Singapore | trade | under negotiation | see US-Jordan[16] |
| US | Sri Lanka | IPR | 1991 | no exclusions for plants and animals from patent law[17] |
| US | Vietnam | trade | 2000 | must implement and make best effort to join UPOV; must provide patent protection on all forms of plants and animals that are not varieties as well as inventions that encompass more than one variety[18] |

| PROPONENT NORTH | COUNTERPART SOUTH | TYPE OF AGREEMENT | DATE | TRIPS-PLUS PROVISIONS |
|---|---|---|---|---|
| **LATIN AMERICA & CARIBBEAN** | | | | |
| EU | ACP (Cotonou Agreement) | trade | 2000 | must patent biotech inventions |
| EU | Mexico | trade | 2000 | must join Budapest within three years; highest international standards[19] |
| US | Andean countries (ATPA) | trade | 1991 | trade benefits gauged on extent to which countries go beyond TRIPS[20] |
| US | Caribbean countries (CBTP) | trade | 2000 | trade benefits gauged on extent to which countries go beyond TRIPS[21] |
| US | Ecuador | IPR | 1993 | must conform with UPOV if no patents on plant varieties[22] |
| US | Nicaragua | IPR | 1998 | must join UPOV; no exclusion for plants and animals from patent law[23] |
| US | Trinidad & Tobago | IPR | 1994 | must implement and make best effort to join UPOV[24] |
| US and Canada | Latin America (FTAA/ALCA) | trade | under negotiation | US negotiating position is no exclusions for plants and animals from patent law; actual negotiating text contains many proposals to implement UPOV[25] |
| US and Canada | Mexico (NAFTA/TLCAN) | trade | 1994 | had to implement and join UPOV within two years[26] |

* We only present the highly prescriptive trade and IPR agreements from those bilateral treaties surveyed. Omitted from the table in particular are the 1,000 bilateral investment treaties concluded between developed and developing countries which may eventually be classed as TRIPS-plus pending further research and discussion.

## Implications

There are perhaps two very broad conclusions to draw from this situation. Each is loaded with many sub-issues that need to be explored further and acted upon.

### > Harmonisation is the agenda – the *sui generis* "option" is a scam

The first important message is that there is a highly effective drive underway to raise IPR standards to one global level. The level that is currently being targeted is UPOV for plant varieties per se and patents for everything else (plant genes, animal breeds, human genetic sequences, etc.) This should not come as a surprise, for two simple reasons. TRIPS is about minimum standards, not optimum standards. We shouldn't mistake one for the other. Second, transnational corporations want maximum predictability, maximum profits and minimum bureaucracy in the markets where they operate. Much better to have one homogenous and trustworthy climate in terms of intellectual property than a patchwork of different systems with different levels of protection, different procedures and different results. Ultimately, the big companies that are involved in plant genetics (Monsanto, DuPont, Syngenta, etc.) do not care about UPOV. They prefer the patent system. So in terms of long term patterns, UPOV may disappear anyway.

What does come more as a surprise is how far this tunnel vision toward one global patent standard is being implemented – at least through the trade and aid agreements, but potentially also through the bilateral investment treaties. Aside from the unilateral sanctions imposed by the US government under

Section 301 of its own trade policy, the bilateral approach has already taken its toll on the domestic IPR regimes of Nicaragua, Ecuador, Mexico, Trinidad & Tobago. These countries all joined UPOV recently under bilateral agreements with the US.[27] The same can be expected very soon in the case of Jordan, Morocco, Tunisia, Vietnam and possibly Singapore. As to those bilateral agreements pushing a "no exceptions" approach to their signatories' patent laws, we have yet to see how effective they are.

If the push to force developing countries beyond their TRIPS obligations through bilateral channels gains much momentum, it means that in due time TRIPS will have to catch up and reflect the much harsher global IPR regime than it currently prescribes. Which brings us to the most pointed message of all: that the *sui generis* option is nothing but a scam. If there ever really was an intention to let developing countries adopt legal systems for the protection of plant varieties to their own liking and attuned to their own situations, it is fast evaporating. Restraint is not what is being played out. There is, instead, a tangible zeal to get UPOV adopted in as many developing countries as possible – as a first step towards full-blown patents on life.

This may be cold water in the face for those who believe that some flexible *sui generis* future for biodiversity-based innovations is on the horizon and just a matter of articulating in national laws. Transnational corporations don't want that legal uncertainty. The heterogeneity of such different systems would be both a headache and an undesired cost for them. In the case of the United States, the harmonisation agenda is clear, unfettered and unmistakable. In the case of Europe, the TRIPS-plus policy drive may be subject to more checks and balances, but is nevertheless gaining ground.

### > Destroying democracy

This is the deeper and more disturbing message from the emergence of a bilaterally-brokered TRIPS-plus intellectual property climate worldwide. There is no denying that unilateral, bilateral or regional pressure to scale up IPRs on biodiversity are undermining political processes all over the world. The negotiation of bilateral treaties is a generally confidential affair. The texts are kept secret until they are agreed on. Parliaments and congresses are not consulted. Public opinion is kept out of the deal. In general, only trade, finance and foreign affairs ministries are privy to the process. One exception may be the European Union (EU), if the European Parliament would read the fine lines as these deals fly by.

This has several immediate results in developing countries.

For a start, commitments to join international agreements, such as UPOV, are being made in total disregard of national processes. This was shockingly clear in the case of a US-Nicaragua arrangement and is evident right now under the simmering EU-Bangladesh pact (see box). In discussions among the parties to the EU-Mexico agreement last February, Green members of the European Parliament questioned the constitutionality of obliging Mexico to join the Budapest Treaty, since it leaves no space for Mexico's Congress to cast its vote on the matter.[28] But this concern for the political propriety of the deal came too late: Mexico became party to the Budapest Treaty a month later, on 21 March 2001.

In addition, bilateral agreements which contain IPR policy prescriptions very often carry links to their own dispute settlement processes. If something goes wrong, the conflict between the governments is sorted out through special channels. The WTO's dispute settlement mechanism is far from trustworthy or transparent. Bilaterally brokered procedures are bound to be even more opaque and undemocratic.

Finally, making national laws through bilateral treaties also erodes the political process in the industrialised countries themselves. Development cooperation agencies, national parliaments, NGOs, church groups and farmers' organisations don't even know about these deals that their governments

are pushing onto Southern countries. If they did, they would probably demand a lot more accountability and restraint than is now being exercised.

**Disarming the people**

Back in 1998, and completely out of the blue, Nicaragua's trade minister sent a Plant Variety Protection (PVP) bill for adoption by parliament under an "urgency" motion, i.e. a plea to adopt the bill within 15 days. The bill was pure UPOV – and Nicaragua's congress did not have PVP on its agenda at the time. Civil society groups, well aware of what UPOV means for genetic diversity and farmers' rights, swung into action to prevent passage of the bill and even drafted a counter bill. But their efforts didn't succeed. The trade minister went so far as to cow Congress into submission, arguing that joining UPOV was required under the WTO's TRIPS Agreement! What he did not tell Congress, but the NGOs found out, was that joining UPOV was a commitment that Nicaragua made privately – bilaterally, that is – with Washington. There was virtually nothing that civil society could then do.

As a member of WTO, Nicaragua has every right to participate in the review of the TRIPS Agreement and suggest amendments that further her own interests. But locked into a bilateral agreement with US which points to UPOV, what can Nicaragua do? If Nicaragua defaults on its commitments, a pipeline of support from Washington will be cut. How can Nicaraguan NGOs argue that their debt ridden, export-dependent government should cut that pipeline? For it is obvious that the government is entrapped. And this is fundamentally disempowering for the political process in Nicaragua.

For this reason it comes as a joke that, in its own bilateral treaties, the EU requires countries to both gear up for UPOV, irrespective of national preferences, and strengthen "grassroots democracy". What's the point of "grassroots democracy" if Brussels is determining Bangladesh's policies? Bangladesh actually drafted a *sui generis* bill on plant varieties for compliance with TRIPS, which the grassroots, NGOs, scientific community and government officials all contributed to over several years. But that effort is shot down the drain if Dhaka now has to "make every effort" to accede to UPOV by 2006.

## Conclusion

Industry's push to patent life is unrelenting. Bilateral treaties are just one more tool to secure the monopoly rights that it is seeking worldwide to make money from marketing genetic fixes for food and health. They are grotesque tools, in that they are so blatantly secretive and manipulative, they make a mockery of multilateral initiatives and they target poor countries head on. But they are indeed effective in skirting or neutralising political debate, improving market conditions for transnational corporations and raising financial returns to the rich. The many and diverse cases of TRIPs-plus outlined here represent only the tip of the iceberg. TRIPs-plus is not a new idea brewing quietly away in a corner: it is rampant and effective already.

The most important lesson to draw from this preliminary review of the situation is that something needs to be done. This back door route to a world of total acquiescence to patenting life forms has to be exposed, challenged and closed down. In so doing, a lot of conditional thinking will have to fall. Because the issue is not how far we should go. It's whether the bottom line – IPRs on life forms – is acceptable or not.

**ANNEX**

# The complex reality of bilateral & regional "TRIPS-plus" treaties

Bilateral treaties are direct, individual agreements between two or more countries on a range of topics such as trade, investment, scientific research, development cooperation/aid or intellectual property . The most important in terms of economic power relations are the trade and investment deals. But these five types of bilateral treaties (BTs for short) all have something special in common. They very often carry obligations in terms of how far the signatories have to go with respect to intellectual property rights on life forms. And as this paper shows, these measures often go well beyond TRIPS.

Bilateral means affecting two parties. But sometimes these treaties involve more than two parties. For example, the European Union (EU) has a special partnership agreement with the Africa, Caribbean and Pacific (ACP) countries. The EU is a supranational body representing 15 nations. The ACP group is comprised of 78 countries across Africa, the Caribbean and the Pacific. This partnership, familiar to most as the Lomé Convention, defines mutual relations in terms of trade, aid, migration and other affairs. Altogether it affects 93 countries. But we call it a bilateral agreement since it is negotiated between two collective blocs. Similar dynamics are at play under the African Growth and Opportunity Act (AGOA) and the Andean Trade Preferences Act (ATPA) which define US trade privileges for 34 sub-Saharan Africa countries and five Andean countries respectively. The benefits, and how to be eligible for them, are defined in one policy for all the countries together and allegedly involve agreement on all sides.[29] The inclusion of agreements such as these make the term "bilateral" highly imprecise and begs for caution. The bottom line, though, is that countries are clubbing together, either in pairs or in groups, to negotiate special economic relationships based on rules that apply only to them.

## 1. Bilateral trade agreements

There are presently more than 130 bilateral and regional trade agreements in effect, most of which have come into being only in the last ten years.[30] Often called "free trade agreements", or more accurately "preferential trade agreements", they define mutual privileges that two parties promise each other in terms of market access, tariff reduction schemes and other exclusive benefits. These schemes – which apply to defined trading spaces like the North American Free Trade Agreement (NAFTA), the ASEAN Free Trade Agreement (AFTA) or US-Vietnam exchanges – operate outside the jurisdiction of the multilateral trade system.[31] They have their own internal rules, their own dispute settlement arrangements, and they are multiplying far faster than the World Trade Organisation (WTO) can launch a new trade round.

> "Many countries are looking at regional alternatives. Sometimes this is good. Sometimes this is a building-block. But regionalism must never be seen as a substitute for the multilateral system. Because we know that the ones who will miss out the most from regional and bilateral agreements will be the smallest, the most vulnerable and the poorest."
> – Mike Moore, Director General, WTO, 2001

The EU is party to bilateral trade agreements with 27 countries (20 of which were negotiated in the past decade alone). The United States (US) has finalised two (NAFTA and Jordan, also in the last decade) while it is presently negotiating several more (Singapore, Chile and the hemispheric Free Trade Area of the Americas or FTAA). Japan is now discussing its first BT, with Singapore, but otherwise might be hedging its bets on regional approaches.[32]

Seventy-five per cent of world trade currently passes through these spaces rather than the amorphous global market. This doesn't necessarily mean that the global market is breaking up or that multilateralism is becoming obsolete, even if WTO is jittery about it. What it does mean is that these

exclusive trade pacts allow countries to move faster and farther with respect to building international market leverage in a highly targeted way. Even more important, though, is that these bilateral trade agreements carry obligations – and guaranteed "technical" assistance – for developing countries to implement major economic reforms towards further trade liberalisation. And that includes stronger intellectual property right (IPR) laws. Sometimes the industrialised countries require developing countries merely to reiterate their commitments to the World Intellectual Property Organisation (WIPO) and WTO. Sometimes they require them to make new commitments. Where enhanced IPR protection is demanded as part of the deal, the industrialised countries package in their direct assistance to revise developing countries' patent laws or draft plant breeders' rights legislation and to actually lobby for it among national legislators in the South. Countries like Egypt and the Philippines know how this works.[33]

**2. Bilateral investment treaties**

There are about 1,860 bilateral investment treaties or BITs currently in force, a fivefold increase since the end of the 1980s.[34] Most of them follow a pattern, providing the same definition of investments and similar principles for their treatment among BIT signatories.[35] Most BITs are between developed and developing countries, with Europe and Asia having signed the largest share. But a full quarter are now brokered between developing countries themselves.

In essence, these deals set up rules for the entry, protection and exit of investments between two countries – and "investment" in these treaties specifically includes intellectual property. Parties are expected to open their borders to foreign investments, provide the "highest international standards" of protection for them in their domestic territories under the mantra of "national treatment" and "Most Favoured Nation" (MFN) principles, and allow for their full repatriation (no expropriation allowed). This is frightening in and of itself because the terms of the treaties are imprecise and open-ended. It's not clear whose law or whose standards are being referred to or are meant to apply. It's not even clear whether these BITs cover established investments or potential investments. With respect to intellectual property, the sky seems to be the limit.

What a typical BIT between the US and a developing country says – and we use the case of intellectual property rights as the investment – is that the developing country has to accept the establishment of US-held IPRs in its own territory, provide "fair and equitable" treatment of those IPRs in accordance with the "highest international standards", and neither nullify the IPRs nor restrain the repatriation of royalties and license fees they may generate locally. The big question is what these "highest international standards" are. This phrase may sound like a reference to the WTO TRIPS Agreement. But it may be a reference to US standards instead. There are at least two reasons to suspect this. First, those are the highest IPR standards worldwide. And secondly, under the MFN clause, the developing country is usually supposed to provide the same level of protection for the investor's IPR as the investor would enjoy back home (in the US, in this case).

> Intellectual property issues are at the heart of ongoing negotiations for a Bilateral Investment Treaty (BIT) between Venezuela and the United States, U.S. officials here have said. Recent negotiations in Caracas did not produce a BIT, in large part because the Venezuelan government did not agree to sign a side letter pledging to implement the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) a year earlier than the 2000 deadline set by the World Trade Organization, according to U.S. Embassy officials.
> – *World Intellectual Property Report*, 15 February 1998

The underlying concern is that these BITs – which are patterned on a similar model text – are *generating their own standard* of what constitutes "fair and equitable" IPR protection, outside the framework of current international law. The Organisation of American States, which has analysed all the BITs in Latin America, points out that "fair and equitable", aside from having no definition, sets out a standard that is not related to a host country's domestic law[36] – so we effectively don't know whose law

is the benchmark. But the US government is unequivocal about its intentions when it states that its own BIT programme has as a basic objective to "support the development of international law standards".[37] If there is no benchmark standard for the protection of IPRs under these treaties and they are supposed to provide the highest level of protection, then the sky – meaning US law – may well be the new emerging international limit.

It is worth stressing that sometimes these BITs refer specifically to plant breeders' rights as incoming investments to a developing country[38] and sometimes they refer to patent*able* inventions (products or processes that are not under formal legal protection anywhere yet).[39] For these and many other reasons, the current explosion of BITs as a tool to facilitate the freest movement and most generous treatment of foreign capital – including *unestablished intellectual property rights* – has been referred to as a "miasma of mini-MAIs".[40]

**3. Development cooperation, aid and partnership or association agreements**

In the past, development assistance usually meant money to build elementary schools in Maputo or shipments of PL480 rice to Manila. Today, a typical development cooperation agreement is not much different from a bilateral trade agreement. The immediate benefits may be construed as valuable for the developing country, but the long term payoff clearly favours transnational corporations from developed countries. Why? Because these agreements often contain an arsenal of policy prescriptions and structural adjustments – deregulation, financial market reforms, stronger intellectual property systems, etc. – that developing countries must implement to receive support, with a smattering of labour, environmental and human rights advice thrown in for good measure.

There are countless development cooperation agreements in force between industrial and developing countries and this is not the place to analyse them. What we need to notice, though, is that they do include requirements to strengthen intellectual property laws – irrespective of national lawmaking procedures – and they are essentially about trade, not aid. The EU euphemistically calls them "partnership" or "association" agreements nowadays. But they are operated through the EU's Directorate General for Trade and they focus on market reforms that will allow better penetration by European corporations. The EU partnership arrangements either completed or under negotiation under the Barcelona Process (to establish a common Mediterranean market), with Bangladesh or with Mexico are all geared toward trade liberalisation and include TRIPS-plus demands on the IPR front.

In Australia, AusAID is now analysing how to incorporate protection of IPRs within its development cooperation projects. This includes "seeking plant breeders' rights in developed countries where the varietal products of the AusAID supported program may be grown" and the belief that "innovations resulting from AusAID projects are potentially protectable through PBR or patents and may generate a revenue stream that can defray project costs".[41] How these proactive IPR practices will be integrated into AusAID's development assistance agreements remains to be seen.

**4. Bilateral science & technology (or research cooperation) agreements**

Bilateral science and technology (S&T) agreements are important because they contribute to market-building and intellectual capital accumulation for transnational corporations. The US alone has over 800 bilateral S&T agreements being implemented in over 60 countries all over the world, involving research expenditures of an unknown amount. The federally-supported agreements[42] carry stringent obligations to secure and protect US intellectual property concerns and a good number of them focus on the life sciences. It is common practice for bilateral S&T agreement to serve non-S&T policy objectives[43] and in

the US, a prominent discussion is going on about how to better integrate S&T cooperation within national foreign policy.[44]

In the case of the US , these agreements teeter well into the IPR policy-pushing arena. Up until recently, a 1990 model IPR protocol was annexed to each agreement. That protocol says that each party has full rights to any IPR generated under the agreement in its own country, while rights in third countries will be negotiated separately. But it also says that if one participating country does not protect such IPR under its domestic laws, and the other does, the IPR-protecting country will walk away with all the rights – worldwide. This provision has been extremely controversial and caused several countries to either haggle over the text or walk away from the research funds. The most famous case is India, which carried out an open dispute with the US over this policy from 1987-1992.[45] The US was basically asking for all the rights to any drug patents coming out of joint vaccine and diagnostics research, since India does not allow for patents on pharmaceutical products – unless, of course, India would like to revise its patent law. The dispute put all Indo-US research cooperation on hold for six years, until the US was willing to amend its protocol to respect India's rights.

At present, the US still uses the 1990 model text in its bilateral S&T agreement with countries that have "inadequate" IPR laws.[46] Countries whose patents laws are more in line with US preferences are subject to a revised 2000 protocol which is more flexible.

**5. Bilateral IPR agreements**

Numerous developed countries establish sectoral IPR agreements with governments in the South, essentially to strengthen both legislation and enforcement. This usually a *quid pro quo* through which the developing country is asked to accede to specific international IPR conventions, make special efforts in specific industries (e.g. copyright protection of software or audiovisuals) or adopt specific patent laws provision (e.g. on patentable subject matter) in exchange for training, funds or enforcement cooperation. Again, how this should work to the advantage of patent holders in the industrialised countries, from Microsoft to Monsanto, should be obvious.[47]

Europe, Australia and the US are active proponents of bilateral IPR agreements – often with either very poor countries that are far from having functional IPR systems (Laos, Cambodia, Viet Nam) or very important IPR infringers (China). One third of the US agreements with developing countries push those countries to strengthen their IPR regimes beyond the standards set by the WTO.

## NOTES:

[1] This report stems from a process initiated in March 2001 by UBINIG (Bangladesh) on behalf of the South Asia Network for Food, Ecology and Culture (SANFEC).
[2] Given that these treaties number well into the thousands, we only covered the US and the EU systematically, and Japan, Australia and Switzerland very partially, between March and June 2001.
[3] For more information about UPOV, see various documents on GRAIN's website. http://www.grain.org/themes/dsp_theme.cfm?theme_id=101
[4] *Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States*, CE/TFN/GEN/23-OR, ACP/00/0371/00, 8.2.00. http://europa.eu.int/comm/trade/pdf/acp.pdf [Art 45]
[5] *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part*, Official Journal of the European Communities (OJ) L 070 of 18 March 2000, p. 0002-0204. http://europa.eu.int/eur-lex/en/lif/dat/2000/en_200A0318_01.html [Annex 7, Art 1]
[6] *Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part,* Official Journal L 187 of 16 July 1997, p. 0003-0135. http://europa.eu.int/eur-lex/en/lif/dat/1997/en_297A0716_01.html [Title II, Art 33]
[7] *Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part*, Official Journal L 311 of 4 December 1999 p. 0003-0297. http://europa.eu.int/eur-lex/en/lif/dat/1999/en_299A1204_02.html [Art 46]
[8] *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part*, Official Journal L 097 of 30 March 1998 p. 0002-0183. http://europa.eu.int/eur-lex/en/lif/dat/1998/en_298A0330_01.html [Annex 7]
[9] *Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*. http://192.239.92.165/regions/eu-med/middleeast/textagr.pdf [Art 4.1(b), Art 4.18, Art 4.21 and Art 4.29(b)].
[10] *Trade and Development Act of 2000*. http://www.agoa.gov/agoa/agoatext.pdf [Sec B.211.5.b.ii]
[11] *Cooperation Agreement between the European Community and the People's Republic of Bangladesh on partnership and development*, OJ C143 of 21 May 1999. [Art 4.5]
[12] *Abkommen zwischen dem Schweizerischen Bundesrat und der Sozialistischen Republik Vietnam über den Schutz des geistigen Eigentums und über die Zusammenarbeit auf dem Gebiet des geistigen Eigentums.* http://www.admin.ch/ch/d/ff/2000/1521.pdf [Art 2 and Annex 1]
[13] *Agreement between the United States of America and the Kingdom of Cambodia on Trade Relations and Intellectual Property Rights Protection*. http://199.88.185.106/tcc/data/commerce_html/TCC_Documents/CambodiaTrade.html [Art XI.1]
[14] *Record of Understanding on Intellectual Property Rights.* http://199.88.185.106/tcc/data/commerce_html/TCC_2/KoreaIntellectual.html [Sec. B.6]
[15] *Agreement on Trade Relations between the Government of the United States of America and the Government of the Mongolian People's Republic*. http://199.88.185.106/tcc/data/commerce_html/TCC_2/MongoliaTrade.html [Art 9(c)i]
[16] The negotiating text is confidential but it is allegedly modeled on the US-Jordan bilateral trade agreement.
[17] *Agreement on the Protection and Enforcement of Intellectual Property Rights between the United States of America and the Democratic Socialist Republic of Sri Lanka.* http://199.88.185.106/tcc/data/commerce_html/TCC_2/Sri_Lanka_Intellectual_Property/Sri_Lanka_Intellectual_Property.html (Sec 2c)
[18] *Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations.* http://usembassy.state.gov/vietnam/wwwhbta.html [Chpt II: Art 1.3 and Art 7.2(c)]
[19] *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part*, Official Journal L 276/45 of 28 October 2000. http://europa.eu.int/comm/trade/pdf/oj276_mex.pdf [Art 12.1]. Decision No 1/----- of the Joint Council. http://europa.eu.int/comm/trade/pdf/text_dec.pdf [Title IV, Art 36.2 and 36.4].
[20] *Andean Trade Preferences Act*. http://www.mac.doc.gov/atpa/webmain/legislation1.htm [Sec 3202(d)9 and 3202(c)2b.ii]
[21] *US-Caribbean Trade Partnership Act of 2000*. http://www.mac.doc.gov/CBI/Legislation/cbileg-00.htm [Sec B.211.5.b.ii]
[22] *Agreement between the Government of the United States of America and the Government of Ecuador Concerning the Protection and Enforcement of Intellectual Property Rights.* http://199.88.185.106/tcc/data/commerce_html/TCC_Documents/EcuadorIntellectual.html [Art 6.1(c)]
[23] *Agreement between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning Protection of Intellectual Property Rights.* http://199.88.185.106/tcc/data/commerce_html/TCC_2/NicaraguaIPR.html [Art 1.2 and Art 7.2]
[24] *Memorandum of Understanding between the Government of the United States of America and the Government of Trinidad and Tobago Concerning Protection of Intellectual Property Rights.* http://199.88.185.106/tcc/data/commerce_html/TCC_2/TrinidadTobago_Intellectual_Property/TrinidadTobago_Intellectual_Proporty.html (Art 1.2)

[25] The US negotiating position as of early 2001: http://www.ustr.gov/regions/whemisphere/intel.html. Free Trade Area of the Americas, *Draft Agreement*, Chapter on Intellectual Property Rights, FTAA.TNC/w/133/Rev.1, 3 July 2001. http://www.ftaa-alca.org/ftaadraft/eng/ngip_e.doc

[26] *North America Free Trade Agreement*, Chapter 17, Intellectual Property. http://www.mac.doc.gov/nafta/ch17.htm [Art 1701.2 and Annex 1701.3]

[27] See, for example, Susanne van de Wateringen, "USA Pushes Ecuador to Sign IPR Agreement", *Biotechnology & Development Monitor*, No. 33, University of Amsterdam, 1997, p. 2022. http://www.pscw.uva.nl/monitor/3309.htm

[28] "Parliament Clears IP Provisions of Trade Agreement with Mexico", *World Intellectual Property Report,* Vol. 15, No. 3, Bureau of National Affairs, Inc., Washington DC, 15 March 2001.

[29] The AGOA is a domestic US law. It was not negotiated between the US and Africa. However, the US claims that the criteria it operates on are espoused by the beneficiary governments. http://www.agoa.gov/Contact_Us___FAQ/FAQ/faq.htm

[30] Jean Heilman Grier, Senior Counsel for Trade Agreements, US Department of Commerce, "The Future of Global Leadership", presentation made at the *Leadership for Attacking Global Food & Agribusiness Barriers* conference, Fairfax VA, 13-14 March 2001. http://www.ita.doc.gov/legal/GMUpaper.htm

[31] They are notified to WTO, but WTO rules and procedures do not govern them.

[32] Keidanren (Japan Federation of Economic Organisations), *Urgent Call for Active Promotion of Free Trade Agreements: Towards a New Dimension in Trade Policy*, Tokyo, 18 July 2000. http://www.keidanren.or.jp/english/policy/2000/033/proposal.html

[33] US Agency for International Development, *United States Government Initiatives to Build Trade-Related Capacity in Developing Countries and Transitional Economies*, USAID, Washington DC, June 2000. http://www.usaid.gov/economic_growth//egad/usg-assist-survey/full-ch2.htm

[34] UN Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2, Internet Edition, United Nations, Geneva, 2000. http://www.unctad.org/en/docs/poiteiiad2.en.pdf

[35] The US uses a model BIT that is more comprehensive than the Europeans' and specific treaties will usually carry a few particularities. Otherwise, they are highly similar.

[36] Trade Unit, Organisation of American States, *Investment Agreements in the Western Hemisphere: A Compendium*, FTAA.ngin/w/10/Cor.1, OAS, 14 October 1999. http://www.sice.oas.org/cp_bits/english99/compinv1.asp

[37] US Department of State, *U.S. Bilateral Investment Treaty Program*, Washington DC, 1999. http://www.state.gov/www/issues/economic/7treaty.html

[38] See the US-Bahrain bilateral investment treaty. http://199.88.185.106/tcc/data/commerce_html/TCC_Documents/BahrainBIT.html

[39] See the US-Jamaica bilateral investment treaty. http://199.88.185.106/tcc/data/commerce_html/TCC_Documents/Jamaica_Investment_Treaty/Jamaica_Investment_Treaty.html

[40] Aziz Choudry, "We Must Mobilise Against a Miasma of Mini-MAIs", Znet Commentary, 21 June 2001. http://www.zmag.org/ZSustainers/ZDaily/2001-06/21choudry.htm

[41] AusAID, *Growing Rice and Protecting Forests: An Evaluation of Three Food Production Projects in S.E. Asia*, 1999, p. 78. www.ausaid.gov.au/publications/pdf/qas15_growriceprotectforests.pdf

[42] Some 600 of the 800+ involve federal expenditure.

[43] J. Thomas Ratchford, "Science, Technology and Foreign Relations", *The Bridge*, National Academy of Engineering, Summer 1998. http://www.nae.edu/nae/naehome.nsf/weblinks/NAEW-4NHMJR?opendocument

[44] See US Secretary of State Madeleine Albright's speech before the American Association for the Advancement of Science on 21 February 2000. http://secretary.state.gov/www/statements/2000/000221.html

[45] See R. Ramachandran, "On the S&T Front", *Frontline*, New Delhi, 1-14 April 2000. http://www.indiaserver.com/frontline/2000/04/01/17071050.htm

[46] US Department of State, *Supplementary Handbook on the C-175 Process: Routine Science and Technology Agreements*, Released by the Bureau of Oceans and International Environmental and Scientific Affairs, O. Appendix H, Washington DC, January 2001. http://www.state.gov/g/oes/rls/rpts/175/index.cfm?docid=1456

[47] Industrialised countries hold around 97% of all patents in the world. This skewed reality has not changed in the past 30 years.