



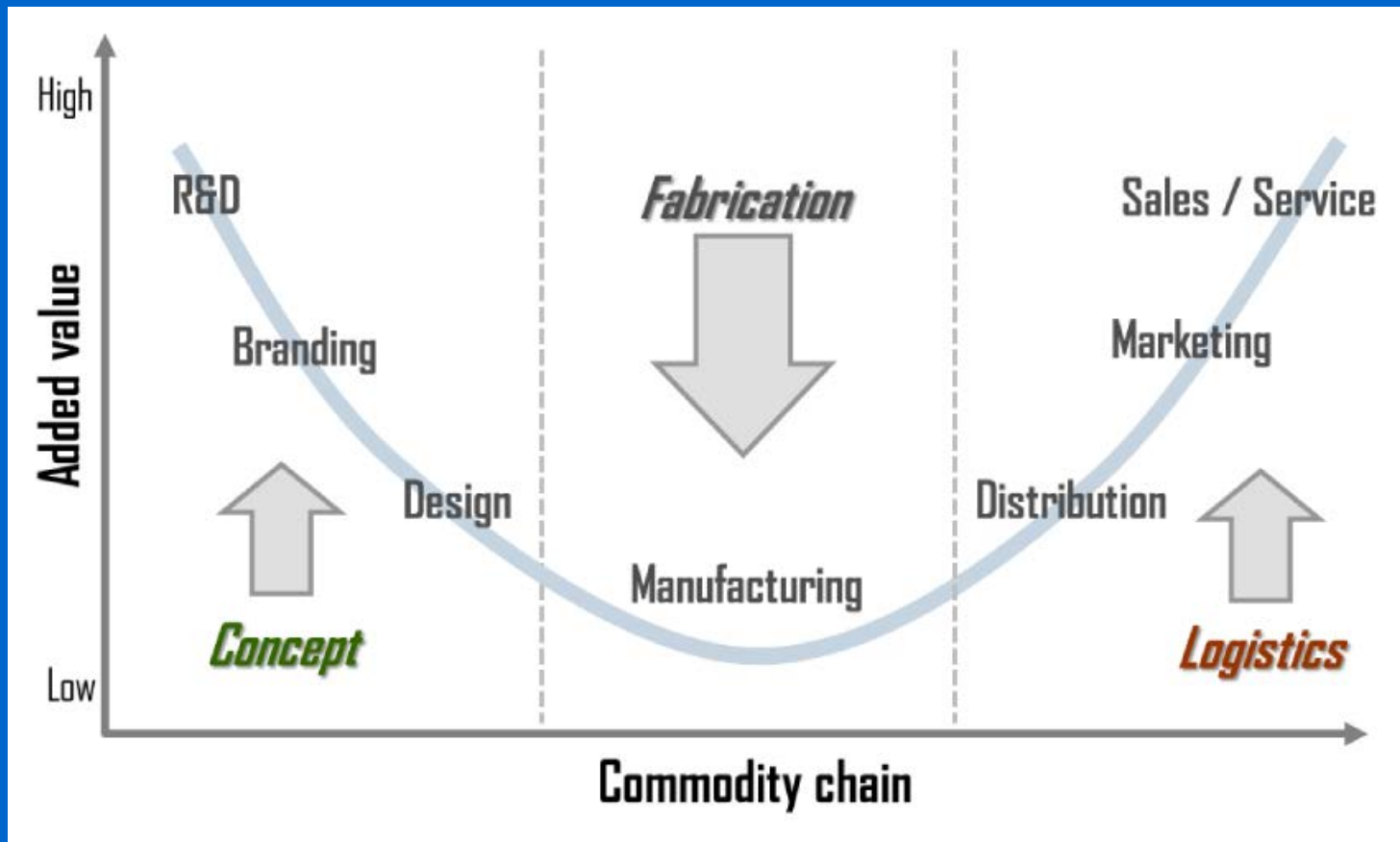
Setting the Scene – The Prospects of TRIPS Plus Protection in future Mega-Regionals



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Global Value Chains



Paramount importance of IPRs

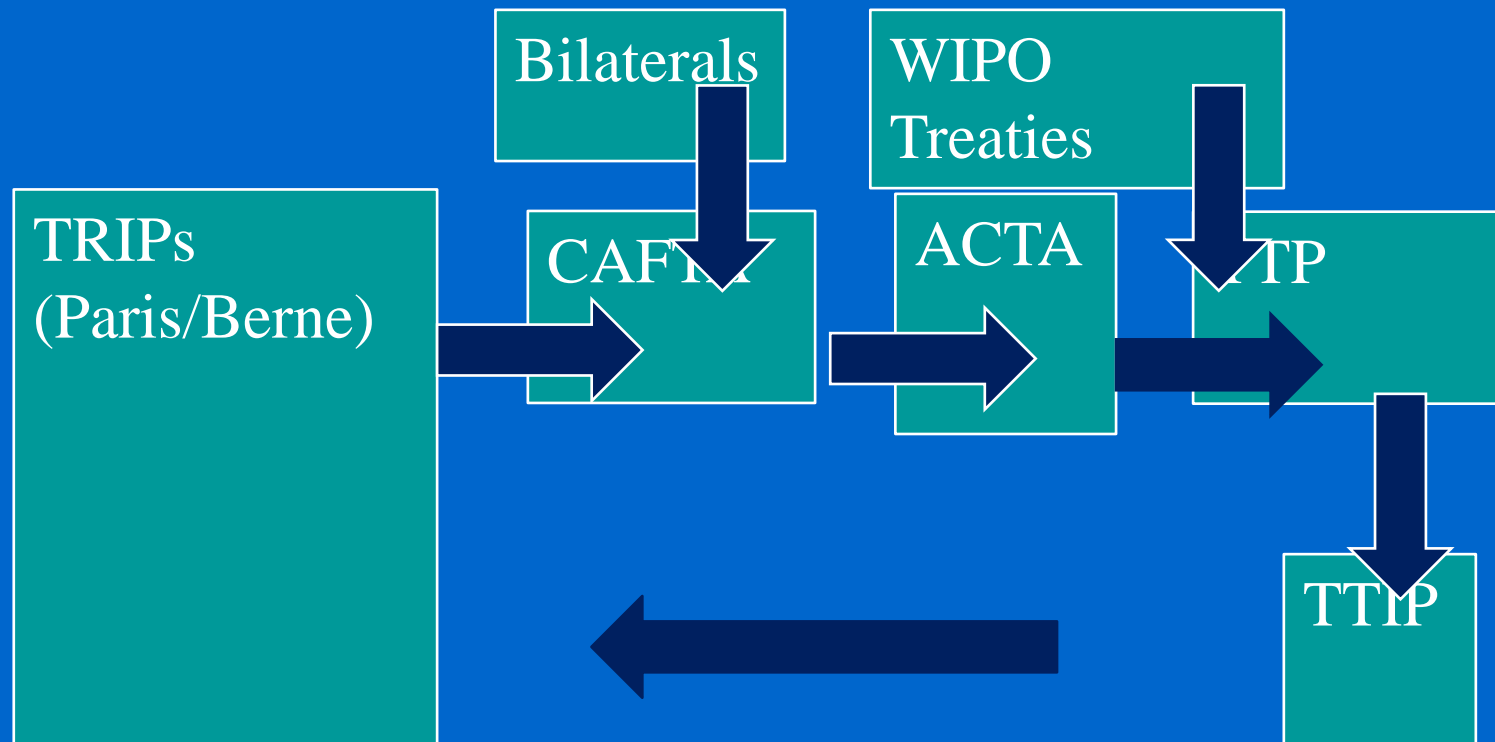
- IPR protection of paramount importance for knowledge based economies (R&D)
- Challenge of graduation for emerging economies and developing countries, in particular transfer of technology and growth based upon imitation
- Challenge within industrialised countries of balancing interests (e.g. health sector)
- How do Mega-Regionals respond to these challenges?

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Agreements

1. Anti-Counterfeiting Trade Agreement (ACTA)
 - CA/EU/US and others (not in force)
2. Comprehensive Economic and Trade Agreement (CETA)
 - CA/EU (negotiated completed)
3. Trans-Pacific Partnership Agreement (TPP)
 - CA/EU/US/others (leaked drafts)
4. Central American Free Trade Agreement (CAFTA)
 - US/Central America States
5. No confirmed data available on TTIP

Post TRIPs Process





Process builds upon TRIPs structure

1. Copyright and related rights (Art. 9-14 TRIPS)
2. Trademarks (Art. 15-21 TRIPS)
3. Geographical Indications (Art. 22-24 TRIPS)
4. Patents (Art. 27-34 TRIPS)
5. Undisclosed information (Art. 39 TRIPS)

No additional rules in the field of industrial designs and integrated circuits and general provisions.



Copyright (Art. 9-14 TRIPS) (1)

ACTA (Art. 23-32) Also relevant for trademarks	CETA (Art. 5.1-5.6)	TPP (Art. QQ.G.1-G.18)	CAFTA (Art. 15.5-15.8)
		Art. G.1 Right of Reproduction Art. G.4 Right of Distribution	Art. 15.5.1 Art. 15.5.2
Criminal Enforcement: Art. 23 -26	Art. 5.1 Protection granted Comply with WCT, WPPT!	Art. G.5 No Hierarchy Between author and performer or producer	Art. 15.5.3
Enforcement of IPRs in the Digital Environment Art. 27	Art. 5.2 Broadcasting and Communication to the public - Exclusive right to prohibit - Remuneration to be paid by the user	Art. G.6 Term of protection of a work (in discussion): - Based on life: 50/70/100 after death - Other than life: 50/70/75/95 and 25/50/70/100/120	Art. 15.5.4 Terms of protection: -70 years -70 years50, 70 years
Enforcement Practices Art. 28-32	Art. 5.3 Protection of Technological Measures Against circumvention of measures	Art. G.10 Technological Protection Measure Same as Art. 5.3 CETA	Art. 15.5.7
	Art. 5.4 Protection of Rights Management Information Against persons performing without authority : distribution, broadcast, copies of works, performances (...)	Art. G.13 Rights Management Information Criminal procedures do not apply to non-profit libraries, museums (...)	Art. 15.5.8

Copyright (Art. 9-14 TRIPS) (2)

CETA (Art. 5.1-5.6)	TPP (Art. QQ.G.1-G.18)	CAFTA (Art. 15.5-15.8)
Art. 5.5. Liability of Intermediary Service Providers Limitations covering hosting of infos, caching, mere conduit, others	Art. G.9 Contractual Transfers Economic right in work or phonogram may freely be transferred by contract .	
Art. 5.6 Camcording Criminal procedures for persons who make a copy of a movie in a motion picture exhibition without authorization	Art. G.14 Related Rights Rights in this chapter shall be accorded to performers or producers of phonograms nationals of another party.	
	Art. G.18 Collective Management Important role in collecting and distributing royalties.	
	Art. G.X No formalities Rule No party may subject enjoyment and exercise of the rights of authors to formality	
	Art. G.Y Limitations and Exceptions Giving consideration to: criticism, comment, teaching, news reporting, research (...)	
	Art. G.2 Right of communication to the Public	Art. 15.6

Trademarks (Art. 15-21 TRIPS) (2)

CETA (Art.6.1-6.3)	TPP (Art. QQ.C.1-C.12)	CAFTA (Art. 15.2 , 15.4)
	Art. C.7 Electronic Trademarks System System for electronic application and system for publicly available informations.	
	Art. C.8 Classification of Goods and Services Trademark classification system consistent with Nice Classification.	
	Art. C.9 Term of Protection Registration and renewal term of no less than 10 years (TRIPS: 7 years)	
	Art. C.12 Domain Name Cybersquatting In connection with each party's system for management of its country-code-top-level domain (ccLTD) should be available: procedure for settlement of disputes, online public access to a reliable database, appropriate remedies.	Article 15.4

Government agencies use of computer software only as authorized

TPP (Art. QQ.H.11)	CAFTA (Art. 15.5.9)
<p>Art. H.11 Government Use of Software /Government Use of Software and Other Materials Protected by Copyright or Related Rights</p> <p>Article still to be defined.</p> <p>Proposal 1:</p> <p>Each Party shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees (...)</p> <p>Proposal 2:</p> <p>Government agencies use only non-infringing computer software in a manner authorized by law and by relevant license.</p>	<p>Art. 15.5.9</p> <p>Use computer software only as authorized, each party shall issue appropriate laws, orders, regulations, or decrees to actively regulate the acquisition and managment of software for such use.</p>

Trademarks (Art. 15-21 TRIPS)

CETA (Art.6.1-6.3)	TPP (Art. QQ.C.1-C.12)	CAFTA
Art. 6.1. International Agreements Comply with Singapore Treaty, accede the protocol related to the Madrid Agreement	Art. C.1 Types of Signs Registrable as Trademarks Not requirable for registration: that sign be visually perceptible (≠ 15.1 TRIPS)	
Art. 6.2 Registration Procedure Provide for: system for registration of trademarks, publicly available electronic database of applications and registrations	Art. C.2 Collective and Certification Marks Provide protection .	
Art. 6.3 Exceptions in the Rights Conferred by a Trademark Provide fair use of descriptive terms, including terms descriptive of geographical origin	Art. C.5 Well Known Trademarks Protection of famous trademarks under Article 16(3) TRIPs extended to non-registered trademarks	Art. 15.2 Well Known Trademarks Protection of famous trademarks under Article 16(3) TRIPs extended to non-registered trademarks
	Art. C.6 Procedural aspects Provide a system including: writing communication for refusals, opportunity to respond and contest and appeal judicially.	

Geographical Indications (Art. 22-24 TRIPS) (1)

CETA (Art.7.1-7.8)	TPP (Art. QQ.D.1-D.13)	CAFTA (Art. 15.3)
Art. 7.1 Definitions Definiton of «product class» in Annex III.	Art. D.1 Recognition of GIs Recognize that Gis be protected through a trademark or sui generis system.	Art. 15.3 Basic procedures with respect to GI registration and protection, relationship between trademarks and Gis.
Art. 7.2 Scope Applying to products in Annex III.	Art. D.2 Administrative Procedures A party shall accept administrative procedures of another party without e.g. requiring intercession by a party on behalf of its nationals.	
Art. 7.3 Listed Gis Annex I, Part A for EU, Part B for Canada.	Art. D.10 List of GIs Annex, withing Meaning of Art. 22.1 TRIPS	
Art. 7.4 Protection for Gis listed in Annex I Protection even where the true origin of the products is indicated or GI is used in translation accompanied by «kind», «type», «style», «imitation» or the like.	Art. D.3 Grounds of Opposition and Cancellation Allow procedures and that allow objections and refusals.	

Geographical Indications (Art. 22-24 TRIPS) (2)

CETA (Art.7.1-7.8)	TPP (Art. QQ.D.1-D.13)	CAFTA (Art. 15.3)
Art. 7.5 Homonymous GIs Practical conditions for differentiating, if a party proposes to protect such a GI the other party shall be informed in order to ev.comment	Art. D.12 Homonymous Gis -	
Art. 7.6 Exceptions <ul style="list-style-type: none"> - Some GIs being commercially used before 18.10.13; transitional period of 5 years from the entry into force - Allowed: translations of GIs (containing common name), name of plant varieties or animal breed 	Art. D.8 Guidelines for whether a term is the term customary in the common language as the common name for the relevant goods in a party's territory Consumers' understanding of the term, (see list of criterias)	
Art. 7.7 Amendments to Annex I GI shall not be added to Annex I if it's a name registered in the relevant register of the EU, or if identical to a trademark that has been registered	Art. D.9 Multi-Component Terms Individual components of a multi-component term (protected as a GI) shall not be protected where individ.component is customary in common lang.	
	Art. D.13 Country Names Prevent commercial use of parties' countries' names in relation to goods in a misleading manner as to the origin of such goods.	

Patents (Art. 27-34 TRIPS) (1)

CETA (Art.9.1-9bis)	TPP (Art. QQ.E.1-E.23)	CAFTA (Art. 15.9-15.10)
Art. 9.1 International Agreements Comply with Patent Law Treaty	Art. E.2 Grace Period Disregard information contained in public disclosures.	
Art. 9.2 Sui Generis protection for Pharmaceuticals Shall provide a period of sui generis protection in respect of a product that is protected by a basic patent in force at the request of the holder of the patent or his successor in title.	Art. E.6 Patent Filing Inventions made independently by more than one inventor with separate applications. -> grant the patent on the application that is patentable and has the earliest filing or priority date.	
	Art. E.11 Publication of Patent Applications After 18 months from its filing date.	
	Art. E.13 Agricultural chemical products Submit information concerning safety or efficacy of product for at least 5/10 years from the date of marketing approval.	

Patents (Art. 27-34 TRIPS) (2)

CETA (Art.9.1-9bis)	TPP (Art. QQ.E.1-E.23)	CAFTA (Art. 15.9-15.10)
Art. 9bis Patent Linkage Mechanisms relating to pharmaceutical products All litigants are afforded equivalent rights of appeal.	Art. E.17 TPP Patent Linkage	
	Art. E. 14 Patent term adjustment Process applications without delays, for unreasonable curtailment of the effective patent term -> shall make adjustment available	
	Art. E.20 Biologics Protection for biologics : 0/5/8/12 years from the date of marketing approval of such pharmaceutical product.	
	Art. E. 21 New Pharmaceuticals Product that does not contain a chemical entity that has been previously approved by the party. !Art. E.16: new pharmaceutical = utilizes a chemical entity that has not been previously approved in the party,.	Art. 15.10 New product: does not contain a chemical entity that has been previously approved in the territory of the party.
	Art. E.23 Traditional Knowledge, Cultural Expressions and Genetic Resources Recognize the importance	

Protection of undisclosed data relation to pharmaceutical products and plant protection products

CETA (Art. 10-12)	TPP (Art. QQ.E.16)	CAFTA (Art. 15.10)
Art. 10 Protection of undisclosed data relation to pharmaceutical products If a party requires the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective => The party shall protect such data against disclosure of data of persons making such submissions	Art. E.16 Pharmaceutical data protection -If a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning the safety or efficacy of the product, the Party shall not permit third persons, without the consent of the person who previously submitted such information, to market the same product. -For at least five years from marketing approval.	Art. 15.10 Measures related to certain regulated products (...) at least 5 years for pharmaceutical products and 10 years for agricultural chemical products from the date of approval in the party.
Art. 11 Data Protection on plant protection products Parties shall determine safety and efficacy requirements before authorising the placing on the market of plant protection products.		
Art. 12 Plant varieties Protection based on International Convention for the Protection of New Varieties of Plants (UPOV)		

Trade Secrets (Art. 39 TRIPS)

TPP

(Art. QQ.H.8-H.9)

Art. H.8 Trade Secrets

- For natural and legal persons
 - Possess the legal means to prevent trade secrets lawfully in their control, from being disclosed to, acquired by, or used by others (including state commercial enterprises) ,
without their consent in a manner contrary to honest commercial practices
- ⇒ Parties shall provide for criminal procedures

Art. H. 9 Protection of Encrypted Program-Carrying Satellite Signals (and cable signals)

Each party shall make it a civil /administrative/ criminal offense.

Art. 15.8 CAFTA

Each Party shall make it a criminal offense.

Assessment

- MRTAs all characterized by TRIPs plus provisions
- Importation of existing treaty provisions
- New minimal standards on levels of protection, no general provisions added
- Enhanced obligations on enforcement
- Strong focus on producer interests so far

Impact of MFN Art. 4 TRIPs

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. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

Squaring the Circle

- CETA offers GI protection in Canada, resulting in restrictions of importation of third party products
- Lack of protection of third country GIs
- Compatibility with Article XXIV GATT (no additional barriers to third parties) ?
- Compatibility with MFN? (need to extend protection to all Members)
- Need for multilateral solutions in WTO law

Issues

- More recent discussions in literature does not translate into negotiating process:
 - Objectives of IPR protection
 - Problem of excessive protection (e.g. patent system: patent infarcts and patent trolls)
 - Fair use and compulsory licensing
 - Impact of human rights
 - Balance of IPRs and competition policy (parallel importations)
 - Ceilings of protection
 - Graduation for developing countries and phasing in obligations

Conclusions

- Adoption of TRIPs plus provisions (with MFN spill over effects) in return for market access concessions
- Process similar to TRIPs, mainly focusing on producer interests, absence of other constituencies, or coming in too late (e.g. access to essential drugs)
- Need to structure a well balanced domestic process taking into account all interested parties including consumers and sectors affected.



Thank you for your attention!