Chapter 6

TRIPS-plus and “Raising the Bar”

6.1 Introduction

With the arguable exception of Bahrain and Kuwait, which still have in place some pre-TRIPS laws or laws with pre-TRIPS origins, the GCC states now have intellectual property regimes which are generally TRIPS-compliant, even if they still show some shortcoming in some matters of detail. The states have also demonstrated a general willingness to address the contentious issue of the enforcement of their intellectual property protection obligations – albeit still with mixed success. Yet, in common with other developing and least developed countries, they now face additional pressures from the major industrialised countries, and from the United States in particular, to adopt more comprehensive and higher standards of intellectual property protection that go well beyond those required by TRIPS – in other words, TRIPS-plus standards.[1] This pressure is being applied in two ways:

- directly, through bilateral trade and investment agreements which include extensive and detailed intellectual property protection frameworks, and which require accession to or compliance with a number of TRIPS-plus international intellectual property protection conventions;[2]

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1 The term "TRIPS-plus" lacks precise definition, but has come into increasingly common usage in the debate on post-TRIPS intellectual property rights. It has been described, in a general sense, as a "commitments which go beyond what is already included or consolidated in the TRIPS Agreement." (David Vivas, "Regional and bilateral agreements and a TRIPS-plus world: The Free Trade Area of the Americas", TRIPS Issues Papers No. 1, 4; available at www.iprsonline.org/icstd/docs/WIPO_Vivas.pdf, last accessed 20 December 3005.
More specifically, it has been described as a "concept which refers to the adoption of multilateral, plurilateral, regional and/or national IP rules and practices which have the effect of reducing the ability of developing countries to protect the public interest." (Sisule Musungu & Graham Dutfield, "Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation", TRIPS Issues Papers No. 3, 3; available at www.iprsonline.org/ictsd/docs/WIPO_Musungu_Dutfield.pdf, last accessed 20 December 2005.
The term covers "both those activities aimed at increasing the level of protection for right holders beyond that which is given in the TRIPS Agreement and those measures aimed at reducing the scope or effectiveness of limitations on rights and exceptions under the TRIPS Agreement." (Vivas, supra).

2 The international conventions which commonly form part of the US bilateral treaty negotiating agenda include WIPO's Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT) in particular, but also generally include the:
- Patent Cooperation Treaty (PCT);

- indirectly, through the coercive use of a threatened or actual withdrawal of preferential trade provisions or imposition of trade-related sanctions or retaliation to "persuade" trading partners to adopt TRIPS-plus intellectual property protection standards.

Bilateral trade and investment agreements, particularly free trade agreements (FTAs), are the most common medium for imposing TRIPS-plus provisions. They typically contain extensive intellectual property protection provisions, which the major industrialised countries use to establish standards which exceed those enshrined in TRIPS, or to remove or reduce the flexibilities provided by or permitted in TRIPS, or to even establish protection in new areas of intellectual property rights which go beyond the parameters of TRIPS.[3]

The process of utilising bilateral trade and investment agreements to impose TRIPS-plus intellectual property protection has been described as a process which constitutes "raising the bar" or a "global ratcheting" of intellectual property protection benchmarks.[4] This process, which is seeing certain national intellectual property norms globalise upwards to those higher standards at a remarkable rate, is dependent upon the following key elements:

- forum shifting – in which the standard-setting agenda is moved from fora in which difficulties are encountered in imposing TRIPS-plus standards (such as the WTO) to fora

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- Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) (Brussels Convention);
- Protocol relating to the Madrid Agreement Concerning the International Registration of Marks (1989) (Madrid Protocol);
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1980);
- Hague Agreement Concerning the International Registration of Industrial Designs (1999);
- International Convention for the Protection of New Varieties of Plants (1991) (UPOV Convention);
- Trademark Law Treaty (TLT);
- Patent Law Treaty (PLT).

3 See Report of the Asian Regional Workshop on Bilateral Free Trade Agreements, Kuala Lumpur, August 2005, 8; available at www.twnside.org.sg/title2/twninfo254.htm , last accessed 30 November 2005.

4 Peter Drahos, "BITs and BIPs - Bilateralism in Intellectual Property", (2001) 4 *Journal of World Intellectual Property* 6, 798-99.

in which success is more likely to be achieved (such as bilateral and regional agreements);

- co-ordinated bilateral and multilateral intellectual property protection strategies; and
- entrenchment in bilateral agreements of the principle of ever-increasing minimum protection standards.[5]

The two major protagonists in this process of global integration are the United States and the European Union, although the United States has been the lead player in respect of the Middle East region. Utilised as key elements of the US bilateral strategy is the tactic of reward and coercion - the former illustrated by the application of its Generalized System of Preferences (GSP) and the promise of preferential access and tariff treatment to US markets, and the latter by the use of its annual Special 301 Listing and the threat of trade retaliation.

The intellectual property provisions of the FTAs that the United States has recently concluded with Bahrain (Bahrain FTA) and Oman (Oman FTA) dramatically illustrate how the United States continually strives to "raise the bar", and mostly (but not always) succeeds.[6] There is every possibility that current and impending FTA negotiations between the United States and the other GCC states will cause the bar to be raised even higher. While the United States has stated that it is pleased with the strengthened protection of intellectual property rights in its most recent FTAs (including those with Morocco, Australia, Bahrain and Oman), it has also stated that it would be seeking even higher levels of protection and enforcement provisions in agreements currently under negotiation, including those in the Gulf with the UAE, Kuwait and Qatar.[7]

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5 Ibid, 798.

6 The nature of "raising the bar" in the context of the Bahrain and Oman FTAs is discussed in further detail in Sections 6.5.2 and 6.5.3 following.

7 USTR 2005 Special 301 Report, 2; available at www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/assets_upload_file195_7636.pdf , last accessed 20 December 2005.

6.2 Bilateralism - "Multilateralism By the Backdoor"

Bilateral trade and investment agreements are promoted by their advocates as being stepping stones towards full integration of their participants into a global free market economy, by ensuring that governments implement the liberalisation, privatisation and deregulation measures of the globalisation agenda.[8] They argue that the introduction of free trade and the removal of regulations on investment that the bilateral agreements generate will lead to economic growth, the reduction of poverty, increased living standards and employment opportunities.[9] The critics of bilateral agreements, on the other hand, argue that there is ample evidence to show that, on the contrary, the agreements merely allow transnational corporations more freedom to exploit workers and to shape the national and global economies of the junior partners to suit the corporations' interests.[10] They further posit that these binding international agreements severely constrain future governments in their policy options and help lock in existing economic reforms which may have been imposed by the International Monetary Fund, the World Bank or the Asian Development Bank, or pursued by national governments of their own volition.[11] Some commentators have argued at length that the self-interest mechanisms which are particular to the US-sponsored bilateral agreements, such as the conditions relating to the protection of intellectual property rights, their enforcement, and the control or check mechanisms for managing the agreements are tantamount to an intrusion into domestic lawmaking.[12]

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8 Aziz Choudry, "Bombarded by Bilateral Trade and Investment Agreements", *Bilaterals.org*, March 2004, 3; available at www.bilaterals.org/IMG/pdf/Bombarded_by_Bilatera_92909-2.pdf, last accessed 6 January 2006. See also Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Global Economy* (2002), and Carlos Correa, "Bilateral Investment Agreements: Agents of new global standards for the protection of intellectual property rights?", *GRAIN*, August 2004; available at www.grain.org/briefings/?id=186

9 Choudry, above n 8, 3.

10 Ibid, 4.

11 Ibid, 4.

12 See Drahos, above n 4, 798.

Bilateral agreements have been critically painted as part of an insidious fast-expanding and bewildering web, popping up like hydra's heads throughout the world, and constructing in patchwork fashion what the developed nations have not been able to impose through such international fora as the WTO, or through multilateral negotiations.[13] They are also seen as insidious because they are invariably conducted in unequal contest in closed session between unequal partners – mainly a developed country and a developing or least developed country. With the stronger partner having an established objective to protect its own economic and trade interests, and having little or no interest in making allowance for the divergent or conflicting national and developmental interests of the weaker partner, the resultant agreement is both inevitable and predictable. As two commentators on bilateralism so colourfully, yet accurately, describe the outcome of such a scenario, "Bilateralism is like cooking an elephant and rabbit stew: however you mix the ingredients, it ends up tasting like elephant stew".[14]

It has been suggested that, on intellectual property issues that really matter to it, the United States has been able to utilise webs of coercion.[15] One of those webs of coercion is its strategy of establishing bilateral agreements which include the introduction of TRIPS-plus standards of intellectual property protection. Developing countries operate within an intellectual property paradigm dominated by the United States and the European Union, and by international business. TRIPS sets minimum standards, while bilateral arrangements raise the bar.[16] Developing countries can expect very few concessions on intellectual property issues, but are

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13 Aziz Choudry, "Bilateral Trade and Investment Deals a Serious Challenge to Global Justice Movements", *GRAIN,* December 2003, 1. Available at www.grain.org/rights/tripsplus.cfm?id=2 , last accessed 30 September 2005.

14 Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2002), 194.

15 Peter Drahos, "Developing Countries and International Intellectual Property Standard-Setting", (2002) 5 *Journal of World Intellectual Property* 5, 781.

16 Ibid, 788.