The new generation of FTAs with IP provisions and implications for developing countries

Maximiliano Santa Cruz S.

Recent Multilateral and Bilateral Trends in IP Policy Making: Lessons and Challenges for Africa

Cape Town, South Africa, 6 October 2006
Main interests

**EU**
- Accession to multilateral treaties
- Protection of GIs for wine and spirits

**US**
- Copyrights in the digital environment
- Patents and protection of undisclosed information
- Enforcement
EU IPRs Chapters

1. Broad definition of IPRs
2. Confirmation of the importance of IPRs
3. Desired level of protection: (highest - prevailing) international standards or level of protection similar to that existing in the EU
4. Accession to multilateral treaties
5. Open to incorporation of new treaties
6. Referral of problems in the area of IPRs to committees
7. MFN treatment
8. Agreements on Wines and Spirits
US IPRs Chapters

1. Preamble
2. Ratification or Accession to multilateral IPRs Treaties and principles
3. Trademarks
4. Domain Names on the Internet
5. Geographical Indications
6. Copyrights and Related Rights
7. Protection of Encrypted Program-Carrying Satellite Signals
8. Patents
9. Regulated Products
10. Enforcement
11. Transition Periods
Patents and regulated products

- Notify to patent holder
- Identity of third parties
- Requesting marketing approval

- Extension of patent term for unreasonable curtailment due to marketing approval or sanitary permit process

- Undisclosed information
  - Data exclusivity for 5 years

- Revocation only when same grounds exist that would have justified a refusal to grant the patent
  - Linkage between Health and Patent authorities

- TRIPS +

- Extension of patent term for unreasonable curtailment due to patent approval

- Undisclosed information
  - Linkage between Health and Patent authorities

TRIPS +
Patents and regulated products

- Undisclosed information: Exceptions necessary to protect the public
- Exceptions to patentability preserved
- No limitation of Compulsory licensing
- Limited exceptions permitted
- Inclusion of Doha Declaration in Preamble
- No mention of parallel importations
- Bolar exception
Copyrights

Main provisions

- New exclusive rights
- *Increase of term of protection*
- Presumption of ownership and subsistence of copyright
- *TPMs*
- RMI
- Liability of Internet Service Providers
- Enforcement
Copyrights – term of protection

Life of the Author
+ 50 years
or
50 years since publication or performance

or
Life of the Author
+ 70 years
or
70 years since publication
or
70 years since creation if not published within 50 years
Copyrights – technological protection measures (TPMs)

Civil/Criminal measures if:

• Circumvention of TPMs which control access to a work;
• Manufacture, import, distribution, sale or rental, of devices, products or components or of services useful for circumvention of TPMs which control access or protects any copyright.

Exceptions:

• Reverse engineer / Compatibility; Identify flaws and vulnerabilities in encryption; Protection of minors; Test, investigate, correct security of computer; Disabling collection of personal information function; Gov. Employees / intelligence activities; Libraries for acquisition decisions.

***Adverse effect on non-infringing uses through administrative or legislative process***
Copyrights – other provisions

- Recognition of temporary copies (exception);
- Interactive digital right of communication to the public for performers;
- Rights Management Information (RMIs);
- Limitation of liability of Internet Service Providers;
- Use of authorized software by government agencies;
- Domain Names in the Internet UDRP – ‘whois’;
Enforcement

- Destruction of goods in civil procedures w/ exceptions for purpose of charity
- Statutory damages
- Border measures – goods in transit and for export
- Presumption of ownership and subsistence of copyright
Implementation of TRIPS and FTAs

Flexibilities

Patents

• International exhaustion;
• exceptions to patentability;
• compulsory licensing;
• Bolar exception
Implementation of TRIPS and FTAs
Flexibilities
Undisclosed information

• Definition of undisclosed (reasonable measures, not generally known or readily available);

• must indicate that data is undisclosed;

• definition of NQE (active principle not been registered or commercialized in Chile);

• what shall not be considered a NQE (new uses, changes in administration or dosage, changes in formulations and combinations, etc.);

• prohibited conducts/grounds for no protection (1. anticompetitive practices, 2. reasons of public health, national security, non-commercial public use, national emergencies, 3. compulsory license, 4. not been commercialized within 12 months from registration, 5. registered in Chile after 12 months of register abroad);

• **Data protection – Linkage**: Improvement of judicial procedures.
MUCHAS GRACIAS

Maximiliano Santa Cruz S.

Maximiliano.santacruz@misionchileomc.ch