

Intellectual Property in Preferential Trade Agreements: What Treaties, What Content?

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Preferential trade agreements have become a major source of international intellectual property regulation. This paper analyses the preferential trade agreements notified to the World Trade Organization and identifies which among them regulate intellectual property in a significant manner, which is the level of development of treaty members, what the general structure of the covenants is, what categories of intellectual property are covered and what areas of intellectual property enforcement are addressed in each treaty. The objective is to present the wider picture, describe the characteristics of intellectual property regulation *via* PTAs, and facilitate future research in particular areas of interest. The analysis of the 141 PTAs that regulate intellectual property in a meaningful allows drawing the attention on aspects such as the transplantation of intellectual property law and the increasingly detailed and demanding content of the treaties, as well as observing other probably unexpected features, particularly concerning intellectual property enforcement and the interests of developing countries.

Keywords TRIPS; bilateralism; free trade; developing countries

Preferential Trade Agreements as a Major Source of Intellectual Property Regulation

Intellectual property has become a common area of regulation in preferential trade agreements (PTAs).¹ There are currently 141 treaties that address intellectual property in a significant manner,² although their level of detail and the areas regulated greatly diverge. While some covenants only contain norms on specific aspects of intellectual property law, others enshrine fairly complete statutes ready to be transposed to national legislations. Moreover, the percentage of PTAs that do not deal with intellectual property or that only contain vague or tangential references to it is rapidly decreasing, while the number of treaties that annually enter into force and regulate intellectual property has dramatically risen.

For decades, intellectual property was not a relevant issue in trade negotiations, or at least it was not the object of regulation in the context of PTAs. Trade agreements adopted between the 1950s and the late 1980s did not include provisions regulating intellectual property.³ In the majority of treaties, intellectual property was only mentioned as an exception to trade liberalization principles, in line with what General Agreement on Tariffs and Trade (GATT)⁴ article XX sets forth.⁵ This changed dramatically in the 1990s, when a new wave of PTAs anticipated, coincided and followed the adoption of the World Trade Organization Agreement (WTO) on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁶ The wave has continuously grown and its *in crescendo* trend seems to not yet have reached its peak (Figure 1).

The normative and policy implications of intellectual property provisions in PTAs have been intensively studied,⁷ and the growing complexity of the interaction between PTAs and intellectual property has attracted a very significant attention. However, most of the research has focused on specific areas of concern—particularly health, access to knowledge and agriculture—or has analyzed a limited number of treaties.⁸ This paper aims to add to the already existing literature by contributing to the identification and comprehensive mapping of the intellectual property content of PTAs in force.

In order to fulfill this goal, a thorough examination of 256 PTAs notified to the WTO by March 2013 has been conducted. These treaties have been analyzed to determine which among them regulate

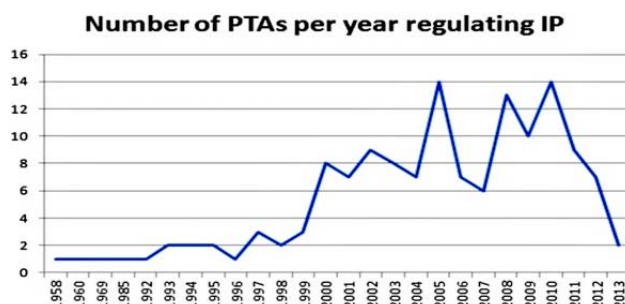


Figure 1. Number of treaties regulating IP entered into force each year. Since mid-1990s the quantity of PTAs containing significant intellectual property obligations has increased exponentially. The final drop in the chart merely reflects the fact that many treaties concluded in 2009, 2010 and 2011 have not yet entered into force

intellectual property in a significant manner, which is the level of development of the countries that conclude said treaties, what the general structure of the covenants is, what categories of intellectual property are covered and what areas of intellectual property enforcement are addressed in each treaty.

The objective is to present the wider picture and facilitate future research. Although the numerous and intricate legal challenges arising from PTAs are not addressed, this is not merely a quantitative or descriptive tool. The criteria chosen to select the treaties and analyze its content permit inferring relevant conclusions. The number of treaties addressing specific institutions, when have these treaties been adopted and which are the countries involved, capture the trends and goals of international intellectual property negotiation at the bilateral—and frequently also multilateral—level.

Sample of Research

The World Trade Organization Regional Trade Agreements Information-System

The WTO Regional Trade Agreements Information-System (RTA-IS)⁹ is a database containing all the agreements that have been notified to the Organization, and permits dynamic search according to a set of selected criteria. The RTA-IS database, as displayed in the WTO web page as of March 2013, has been the main source of information to conduct the present analysis. “Intellectual property” was selected among the options offered in the search engine of the RTA-IS database. This selection delivered the preliminary group of 116 treaties object of this research.¹⁰ However, that sample of research was not exhaustive enough. Other relevant treaties notified to the WTO were not displayed in the RTA-IS when “intellectual property” was chosen as parameter. This made necessary to explore the entire list of PTAs notified to the WTO. This means that 256 PTAs displayed when no substantive areas of regulation are selected in the search engine have been object of analysis.¹¹

There are 34 PTAs notified to the WTO that, in our view, regulate intellectual property regardless of the fact that the RTA-IS does not count them as treaties dealing with intellectual property.¹² This may be due to several reasons, ranging from simple omissions to more restrictive criteria on the side of the WTO RTA-IS. With respect to the latter, it has to be noticed, however, that the criteria followed in the present research to decide whether a PTA should be counted as an “intellectual property” treaty seem to be more restrictive than the criteria adopted by the WTO.

Discrepancies have been found not only with regard to treaties not listed in the WTO RTA-IS but also with respect to treaties listed therein. Some covenants identified by the RTA-IS as treaties regulating intellectual property are considered, in this research, not to be related with intellectual property. This is the

case of 9 PTAs.¹³ One possible explanation to this discrepancy relates to the criteria followed to select treaties. Our criteria include five negative parameters which determine that, even when intellectual property is mentioned in the PTA, the treaty is not included among treaties object of analysis. Full details on which are these criteria are given below, but they revolve around the generality of the reference to intellectual property contained in the PTA: if the reference is too vague, the treaty has not been considered relevant. In other cases, however, the discrepancy with the WTO RTA-IS responds to the fact that no reference at all to intellectual property has been found in the covenant selected in the WTO RTA-IS as regulating intellectual property.¹⁴

Previous Estimates

A WTO Staff Working Paper on “Intellectual property provisions in regional trade agreements” was released when an earlier version of the present investigation had been finalized (Valdés and Tavengwa, 2012). The WTO Staff Working Paper is the first document to offer such a complete and broad perspective on the intellectual property content of regional trade agreements.

The WTO Staff Working Paper and this study have several commonalities in terms of research interests and outcomes, although notable differences do also exist. Among the shared points, it is worth noting that both studies analyze the same sources (PTAs) and have identified and researched similar and sometimes coincidental criteria. Moreover, both take as source of information the WTO RTA-IS and seem to share the perception that it was necessary to offer a comprehensive view on the current mapping of PTAs regulating intellectual property. There are, however, also notable differences.

The number of PTA considered to regulate intellectual property in both studies differs. In line with what was commented above with regard the WTO RTA-IS, an important number of treaties (25) are, in our view, relevant as far as the protection of intellectual property is concerned. However, these treaties have not been included in the WTO Staff Working Paper as treaties regulating intellectual property.¹⁵

Other differences relate to the specific content searched within the treaties. While sharing several points of interest, the selected area of concern differs. While the WTO Staff Working Paper has analyzed in great depth the provisions affecting public health, we focus the attention in the area of intellectual property enforcement. Another difference relates to the criteria searched into the treaties, which have been more numerous in the WTO Working Paper. This concerns both intellectual property categories searched¹⁶ and cross-cutting principles.¹⁷ Another difference concerns the fact that the present analysis does not try to classify treaties with regard its content and distinguish them into more or less severe treaties. Finally, the criteria to classify countries have also been different and, for the reasons explained below, we have privileged the United Nations Development Program Human Development Index.

Criteria Adopted to Include Treaties in the Sample of Research

In order to identify the PTAs that regulate intellectual property, treaties that effectively mention it but are too general or only contain tangential or indirect references have been excluded. The intended outcome is to show a those treaties that *meaningfully* regulate intellectual property. In order to achieve this goal, a restrictive stance based on the following exclusions has been adopted.

A first exclusion is that of treaties that only mention intellectual property as an exception to trade liberalization, in line with GATT article XX(d).¹⁸ A provision of this type is found in the majority of PTAs,¹⁹ and it is indeed a very important clause that enables the adoption of statutes on intellectual property regardless of its trade restrictive effects. Nevertheless, the understanding of intellectual property as a legitimate exception to free trade is probably already a customary norm, and the inclusion of all the treaties that allude to intellectual property as admissible derogation to free trade would mask the outcomes of the research.²⁰

Another exclusion from the selected covenants concerns treaties where intellectual property is only mentioned in the investment or competition chapters, to, respectively, state that it is one among the protected investments²¹ and that it is not considered a monopoly.²² The growing importance of these provisions renders this decision disputable. Indeed, norms on investment alluding to intellectual property are increasingly used by rightholders to defend their interests,²³ something which already caused concern years ago (Correa 2004b, p. 331; 2004c). The decision to exclude them from this work, however, responds to the objective of focusing as much as possible the research in intellectual property regulation, and not in intermediate areas of intellectual property and trade, competition or investment.

Additionally, PTAs that only allude to TRIPS reaffirming the commitments adopted in TRIPS have also been excluded.²⁴ Although general references to TRIPS may have relevance to attract TRIPS disputes to the bilateral dispute settlement system (Burrell and Weatherall, 2008, p. 265; Seuba, 2013a, p. 417) this does not change the substantive protection that must be offered: by definition, parties to the PTA were already parties to TRIPS. This is, however, different in the case of treaties where at least one of the parties could still benefit from TRIPS transitory periods, which have been included in the database.²⁵ In this case, the reference to TRIPS does indeed change the normative situation. Finally, treaties that only include a general reference to the cooperation on intellectual property have also been excluded.²⁶ In all cases, it has been understood that, to refine the research and better focus our analysis, it was more useful excluding than including them.

With regard to the satisfaction of the selected criteria, covenants containing indirect references to the selected topics have not been considered relevant. The case of treaties concluded by the European Union with countries aspiring to become members of the Union deserves particular mention. These agreements include the commitment to respect, in a short-term, a level of protection equivalent to that found in the European Union.²⁷ It can be held that this obligation implies that all intellectual property categories or enforcement institutions regulated in the European Union are the object of the agreement. This is, however, an inference that has not been made, and these treaties have not been included if nothing more specific is found therein. If the opposite had been the criteria, there would have been no justification to not include as well treaties that contain the requirement to respect the “highest international standards” of protection, or the subject matter of treaties included *by reference* in PTAs.

The case of customs organizations and regional integration areas deserves particular attention.²⁸ Some customs unions have given place to powerful intellectual protection systems regardless of the fact that the original treaty only alluded to intellectual property in general terms. Both the European Union and the Andean Community²⁹ are relevant examples, since complete regimes for the protection of intellectual property have been developed years after the creation of the customs union.³⁰ Other customs unions also address some aspects of intellectual property law, although the level of detail does not reach that of the European Union or the Andean Community.³¹ A third group of customs organization includes those with no intellectual property regulation at all.³²

In order to illustrate more accurately the present situation, our research reflects whether the criteria are currently fulfilled. Hence, while for the purposes of chronological description the date taken as reference is the date when the customs union was created, the analysis did not stop in the original treaty but extended to the regime adopted afterwards. The same has been done with respect PTAs since, in a number of cases intellectual property has been regulated through bilateral decisions adopted after the original PTA was concluded. This is the case of some agreements promoted by China,³³ as well as the case of the agreement between the European Union and Mexico.³⁴

The analysis has been confined to the sample of PTAs obtained from the identification of intellectual property provisions in the strictest sense. This includes explicit references to intellectual property, intellectual property categories and intellectual property enforcement. Consequently, the analysis does not consider regulatory measures impacting on products that may also be protected by intellectual property

rights. Although it is indeed true that in areas such as public health the inclusion of compromises regarding price control of pharmaceutical products,³⁵ or the creation of bilateral committees empowered to supervise pharmaceutical policy and legislation,³⁶ has been considered a new source of pressure that may impact access to health in a manner akin to intellectual property (Seuba, 2013b, pp. 38, 41), the examination of these compromises is better addressed in the context of technical barriers to trade.

Criteria for Searching the Selected Treaties

The criteria searched reflect three major topics. A first set of criteria intends to ascertain the relevance that intellectual property has in the overall treaty and the internal architecture adopted for the regulation of intellectual property. A second set of criteria reflects whether specific categories of intellectual assets are regulated. A third group goes into the analysis of secondary norms of adjudication such as those related to enforcement institutions.

First, the structure of the treaties has been analyzed to ascertain the number and organization of the provisions on intellectual property. Treaties including one specific chapter or annex on intellectual property have been differentiated from those including one or a reduced number of provisions. In terms of structure and systemic effects, it has also been considered important to reflect which treaties legislate *by reference* that is which treaties order to fulfil or ratify specific intellectual property conventions, either adopted by the World Intellectual Property Organization or elsewhere.

The second group of criteria subject of our search concerns intellectual property categories covered in PTAs. The selection includes copyright, patents, trademarks, industrial designs, geographical indications and undisclosed information. With regard to the latter, a distinction is made between treaties that generally regulate the protection of undisclosed information and treaties that specifically establish the obligation to protect regulatory test data for a specific number of years.

The third group of criteria concerns intellectual property enforcement. In this regard, treaties regulating intellectual property but not mentioning enforcement, treaties making a general reference to enforcement, and treaties with detailed regulation on enforcement have been distinguished. Distinct areas of enforcement have also been identified in each treaty: civil, criminal, digital and border enforcement. Another aspect identified concerns cooperation on enforcement which, as it will explained, has been treated separately.

Classification of Countries

The UNDP Human Development Index as Criterion to Classify Countries and Treaties

The asymmetry between PTAs members is a frequent area of debate and attention. This is the reason why it has been deemed useful to classify countries according to their level of development, and to group PTAs in accordance with the level of development of treaty members. In order to do this, the United Nations Development Program (UNDP) 2013 Human Development Index (HDI) (UNDP, 2013, pp. 143–7) has been selected as the relevant standard.

Three groups of treaties have been identified: treaties between countries pertaining to the group of “very high human development” states; treaties between countries pertaining the group of “very high human development” and the other three groups (high, medium and low human development) and treaties between countries pertaining to the last three mentioned groups. The goal is to reflect whether treaties have been concluded between countries that, following the more colloquial terminology, are generally considered to be developed or developing countries, the latter encompassing high, medium and low human development countries in the HDI.

Several options had been considered to illustrate the level of development of the parties to PTAs. One option was to differentiate states according to their membership to regional or interest groups, which tend to reflect either the level of development or the development concerns of their members. In the same line, it was considered to identify countries as belonging to one of the four lists of the United Nations Conference on Trade and Development (UNCTAD),³⁷ or distinguish them depending on whether they pertain to the Organisation for Economic Co-operation and Development (OCDE). It was also considered to merely take into account World Bank stats on the selected criteria, such as the gross domestic product or the *per capita* income.

The mentioned criteria have been considered unsatisfactory either because the diversity existing within the groups is still too significant (this is the case of regional and interest groupings) or they do not reflex anymore the economic and social international reality (this is arguably the case of UNCTAD lists, OCDE membership and individual criteria such as the *per capita* income). At the end, the UNDP HDI has been regarded as the adequate criterion. Its combination of indicators on life expectancy, education and income into a composite index offers a comprehensive approach to development. Each of the four groups into which the HDI is split comprises more than forty countries. Although sometimes the grouping of one specific country may seem surprising when other questions are considered (particularly the relevance of the country in international trade debates³⁸ and the global subjective perception on their level of development³⁹), the HDI is still an excellent and objective indicator.

PTAs and Developing Countries

The majority of intellectual property provisions in PTAs are included out of the demands of developed countries, particularly when the provisions are detailed and highly demanding. Although this is commonly acknowledged, it is still worth mentioning. On the one hand because the present research gives quantitative evidence that the most detailed and demanding treaties are always participated by a developed country and hardly ever by two developing countries alone.⁴⁰ It also shows that treaties including provisions related to highly sensitive topics such digital enforcement or pharmaceutical test data protection are never concluded by developing countries between themselves.⁴¹

The same stats showing that in the majority of cases the inclusion of intellectual property is a demand from developed countries, demonstrate that developing countries do conclude between them PTAs regulating intellectual property, sometimes in a fairly detailed way.⁴² This phenomenon, which seems to contradict the general perception of developing countries as net importers of intellectual property standards, has several explanations.

In some cases, developing countries adopt said provisions because they have negotiated earlier on a PTA with a developed country. The previous treaty might have been already implemented in the national law, and the developing country acts as intellectual property “pollinator” of another developing country.⁴³ This phenomenon, however, does not explain why developing countries would transfer previous commitments to other international treaties if they were not satisfied with them. In fact, the position of states such as Mexico and Chile, with very open trade policies, would seem to obey to the conformity with their current level of intellectual property protection, either because they have found the way to implement PTAs in a competitive fashion or just because they overall agree with the standards negotiated.

Reality is, however, richer and it is also possible that some developing countries use PTAs to expand and internationalize their views. That is, developing countries can find in PTAs a tool to foster their position on subjects such as traditional knowledge, disclosure of origin of genetic resources (Valdés and Tavengwa, 2012) to promote international cooperation between themselves,⁴⁴ or to deal with cross-cutting issues of their concern, such as dispute settlement. In this last regard, it is noticeable for instance that some of the treaties concluded between developing countries expressly exclude the intellectual property chapter from the dispute settlement mechanism.⁴⁵ This is probably only incipient, but some of the

reasons offered to justify the adoption of intellectual property in PTAs could work both for developing and developed countries. This is for instance the case of the argument holding that the inclusion of intellectual property in PTAs permits to export national views and create momentum for their multilateralization: if this was already the case of NAFTA in relation to TRIPS (Stewart, 1995, p. 560), it could also work for agreements reached between emerging economies and later on exported to developing countries.

Structure of the Treaties

The study of the structure of the PTAs may give valuable clues about its substantive content. Whether there is one specific chapter devoted to intellectual property, or whether the treaty follows the technique of legislation by reference, among other relevant criteria, may offer information to anticipate the overall relevance of the treaty.

Treaties With One Provision

Some treaties include only one article specifically devoted to intellectual property. When this is the case,⁴⁶ there are two possibilities: either the relevant provision regulates one particular institution (usually border measures⁴⁷ or geographical indications⁴⁸) and remains silent on other issues, or the reference to intellectual property is drafted in general terms and mixes principles, objectives and commitments of broad nature, with references to issues such as dispute settlement and cooperation.

In the latter case, the provision on intellectual property frequently alludes to questions such as the commitment to respect intellectual property obligations in line with TRIPS or the “highest international standards,”⁴⁹ the recognition of the importance of intellectual property as a factor of economic competitiveness⁵⁰ or the willingness of the parties to collaborate in the area of intellectual property.⁵¹ These references are accompanied by the mention of dispute settlement or cooperation in the context of intellectual property.⁵²

In other occasions, treaties that include only one provision on intellectual property enshrine ambitious commitments. In this case, if interpreted pursuant the conventional rules on treaty interpretation, drastic changes may be necessary to fulfil obligations as broad and ambitious as to “improve the intellectual property system” or “become member to international agreements to which it is not party.”⁵³

Extensive Regulation

Numerous PTAs incorporate detailed regulation on a variable set of intellectual property institutions. Some trends with regard to the number, content and organization of the articles in the context of the treaty can be found.

Among the treaties that include more than one article specifically devoted to intellectual property, the majority of them contain one specific section or chapter on the matter (Figure 2). In the rest of the cases, only two, three or four articles regulating substantive issues are found scattered in the text.⁵⁴

PTAs that include one specific section devoted to intellectual property have become common. Intellectual property regulation therein is usually organized in two different ways. Some covenants incorporate a single article in the main body of the text, which refers the reader to an annex specifically devoted to intellectual property.⁵⁵ In this case, the article in the text of the treaty announces the intentions of the parties and recognizes fundamental principles, while detailed regulation is found in the annex.⁵⁶ A different case is that of treaties that devote one specific chapter within the treaty to regulate intellectual property, having the number of the treaties that follow this model radically augmented in the last years.

When a treaty includes either a chapter or an annex on intellectual property, its organization can follow different patterns of complexity and detail. In the bottom end, there are treaties with specific intellectual property chapters or annexes that do not make further internal delimitation. No sections and

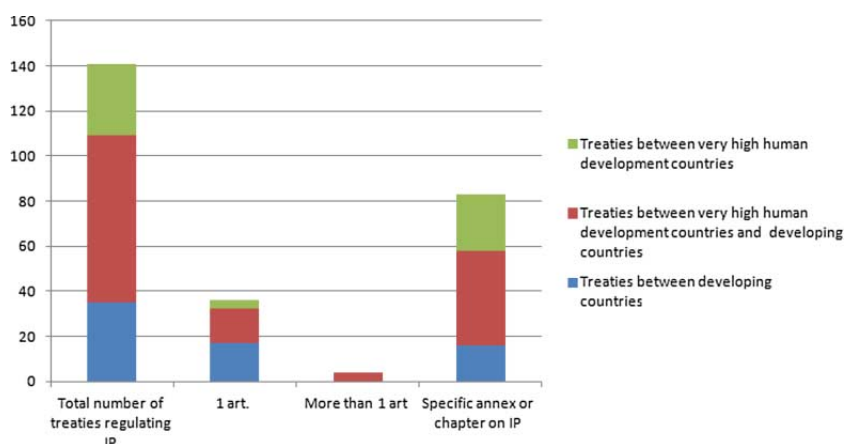


Figure 2. Structure of the treaties, and distribution between developing and developed countries: number of treaties regulating intellectual property; with one provision; between two and four provisions; with an annex or specific chapter

subsections are found therein, and topics with no further connection among themselves follow consecutively. In fact, some treaties with a specific chapter on intellectual property only touch upon a single substantive area.⁵⁷ In the bottom up, other treaties are structured in a highly detailed fashion, with numerous sections and sub-sections. In some cases, intellectual property chapters even include a preface, or more commonly a section on general provisions, which are policy oriented and can fulfil a valuable function when interpreting the treaty.⁵⁸ The introductory provisions are usually followed by sections regulating intellectual property categories, intellectual property enforcement, intellectual property acquisition and some final provisions on a diverse range of topics: dispute settlement, cooperation and institutional provisions.

Legislation by Reference

In addition to the internal organization, also the connections made with external sources may be relevant in terms substantive content and interaction with the rest of public international law. One common technique in international law making is legislation by reference (Michajlovič, 1992). Fundamentally, it implies that one state undertakes the compromise to respect or access to a treaty. This was already the case of the TRIPS, which incorporated some of the main international intellectual property agreements that existed before the WTO was created (Cottier and Veron, 2008). PTAs also follow this technique and refer to conventions not mentioned in TRIPS.

In the research conducted 61 treaties have been identified as having recourse to legislation by reference as a technique to broaden the scope of the PTA.⁵⁹ Thirty-three out of those 61 treaties correspond to covenants subscribed between developed and developing countries, 22 to treaties adopted between developed countries and 6 to treaties adopted between developing countries (Figure 3).

The terminology used when legislating by reference is varied and sometimes confusing. Some expressions are clear enough, being for instance the case of the obligations undertaken to “accede to,” “give effect to” or “give effect to and make effort to accede to.” Frequently, though, the link made to other international treaties is ambiguous or does not seem logical from the strictly legal point of view. For instance, which are the specific obligations arising from expressions such as “make best efforts to accede to,” “make all reasonable efforts to accede to” or “affirm accession to” is dubious.

Legislation by reference has been used to integrate a large number of treaties. However, four treaties are the most commonly referred to. These are the Patent Cooperation Treaty, the International Convention

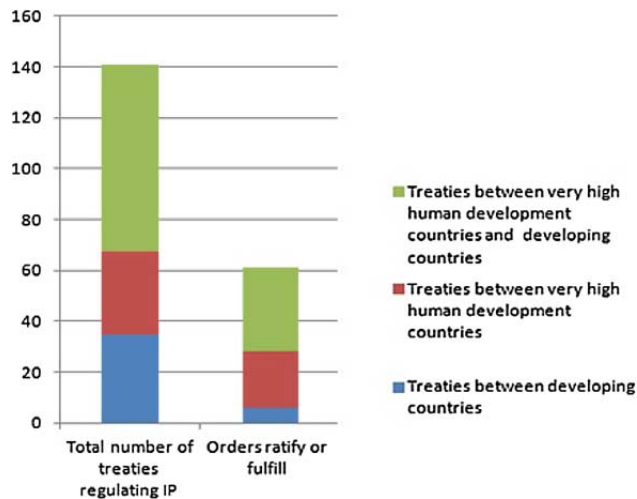


Figure 3. Legislation by reference. Treaties that order to ratify, fulfil, implement or respect other international treaties on intellectual property, disaggregated in accordance to the HDI of the parties

for the Protection of New Plant Varieties of 1991, WIPO Copyright Treaty, WIPO Performances and Phonograms and the Convention relating to the distribution of program-carrying signals transmitted by satellite.

Intellectual Property Categories Covered

A significant number of PTAs regulate specific intellectual property categories and have been concluded between countries pertaining to very different levels of development. Our research has been focused on which treaties include specific regulation on patents, trademarks, geographical indications, copyright, undisclosed information, regulatory test data and/or designs.

In the case of patents, 58 treaties have been identified as regulating some aspects of patent law.⁶⁰ Of these treaties, 6 have been concluded between developing countries, 32 between developed and developing countries and 20 between developed countries.

As far as trademarks are concerned, 60 treaties have been identified as regulating trademark law.⁶¹ Of these, 9 have been concluded between developing countries, between 32 developed and developing countries and between 19 developed countries.

With regard to copyright, 50 treaties have been identified as regulating copyright law.⁶² Of these, 8 have been concluded between developing countries, between 27 developed and developing countries and between 15 developed countries.

The protection of undisclosed information is mandated in 51 PTAs⁶³: 7 out of 51 have been concluded between developing countries, 27 between developed and developing countries and 17 between developed countries. As a subset of this type of protection, a more limited number of treaties—21—oblige to protected pharmaceutical and agrochemical test data by granting a number of years of exclusivity. Only 1 treaty out of 21 covenants has been concluded between developing countries, while 13 were concluded between developed and developing countries and 7 adopted between developed countries (Figure 4).

This chart shows two different and important aspects. On the one hand, it reflects the number of treaties among the selected group of 141 PTAs that include specific regulation of selected intellectual

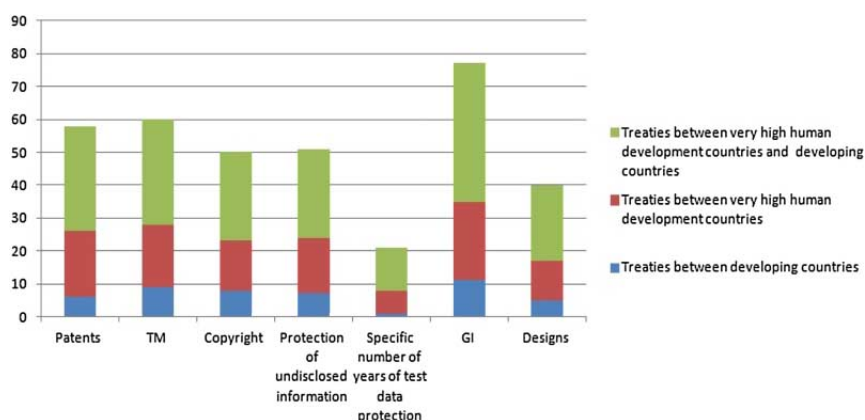


Figure 4. Number of PTA that regulate distinct intellectual property categories and whether they have been adopted between developing, developed or developing and developed countries

property categories. On the other hand, it also shows whether the treaties have been adopted between developed countries, developed and developing countries or between developing countries.

Following with the remaining intellectual property categories, 77 PTAs regulate the protection of geographical indications.⁶⁴ In this case, 11 treaties have been concluded between developing countries, 24 between developed countries and the rest, 42, between developing and developed countries.

Designs have been also object of regulation in 40 PTA⁶⁵: 5 were concluded between developing countries, 12 between developed countries and 23 between developing and developed countries.

The fact that several treaties regulate one specific intellectual property category does not say much about the substantive content of these treaties. The differences from treaty to treaty can be very relevant. In some instances, the level of generality may be notable and the impact of the concerned provisions correspondingly limited.⁶⁶ Frequently, however, the references to an intellectual property category target very specific questions, sometimes related with an ongoing debate in the international arena,⁶⁷ a disputed issue between the parties,⁶⁸ or just one specific claim of rightholders.⁶⁹ Hence, regardless of the fact that two treaties are considered to fulfil the same criteria, its specific impact will vary significantly and has to be studied individually.⁷⁰

Stats showing the treaties that regulate particular intellectual property categories are, however, useful to arrive to some preliminary conclusions. They show that countries pertaining to all levels of development adopt treaties regulating the most important intellectual property categories in a meaningful way. Nevertheless, the stats also reflect that the promoters of the incorporation of specific regulation on intellectual property categories in PTAs are countries pertaining to the group of “very high human development countries.” This statement can be confirmed through several ways, for instance examining the two categories of intellectual property having, respectively, the lowest and the highest number of developing countries as the sole members. The protection of undisclosed information for pharmaceutical and agrochemical test data has only been an option for the 0.21% of the treaties concluded by developing countries alone, while geographical indications was only an option for the 7% of treaties concluded between developing countries alone. The rest of categories fall within these extremes, which seem fairly low to argue that intellectual property is a meaningful target for developing countries if no other incentives are provided. As a proof of this, at least the 93% of PTAs that regulate one or several intellectual property categories involve a “very high human development” country.

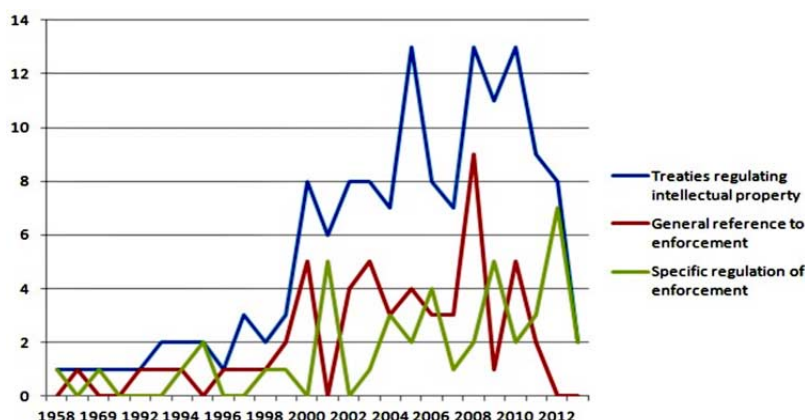


Figure 5. Number of treaties per year that regulate intellectual property, that allude to intellectual property enforcement in general or that contain specific regulation of enforcement

Enforcement Provisions

PTAs have been one of the leading sources of new normative compromises in the area of intellectual property enforcement. Beginning with the United States but soon after the European Union, the main trading powers have made intellectual property enforcement a prominent component of the PTAs negotiated in the last 10 years (Figure 5).

The two basic sources of new enforcement compromises in PTAs were adopted within a short period of time. In 2002, the United States adopted its Trade Promotion Act,⁷¹ which stated the objective to export United States intellectual property standards through PTAs⁷² and that the purpose of the United States in this area is that of “providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms.”⁷³ The other text of relevance is the 2004 European Union’s *Strategy for the Enforcement of Intellectual Property Rights in Third Countries* (Strategy for the Enforcement) (European Commission, 2004) which mapped the future actions of the European Union as far as international enforcement is concerned. Among other activities, it announced the promotion of the adoption of new legal undertakings on enforcement. In congruence with that goal, the EU has inserted powerful intellectual property enforcement provisions in ambitious economic treaties.⁷⁴

Not all the PTAs that regulate intellectual property address enforcement.⁷⁵ The present research has distinguished between treaties that make a general reference to intellectual property enforcement⁷⁶ and treaties that introduce detailed regulation in this area.⁷⁷ Although our attention has been focused on the latter, some differentiation among those treaties making a general reference to intellectual property enforcement can be made.

First, not all levels of generality are equal. While some treaties just mention enforcement in a general fashion, being difficult to extract concrete consequences,⁷⁸ other treaties containing general references are of more practical implications. This is the case of treaties where parties compromise to fulfil enforcement obligations as foreseen in TRIPS.⁷⁹ In the majority of cases, this adds nothing to the already existing compromises of the parties,⁸⁰ since all of them are Members of the WTO. However, it may have relevance if dispute settlement mechanisms set forth if the respective treaties are triggered.

Treaties have also been identified depending on whether or not they regulate several areas of intellectual property enforcement: civil,⁸¹ criminal,⁸² border⁸³ and digital⁸⁴ enforcement (Figure 6).

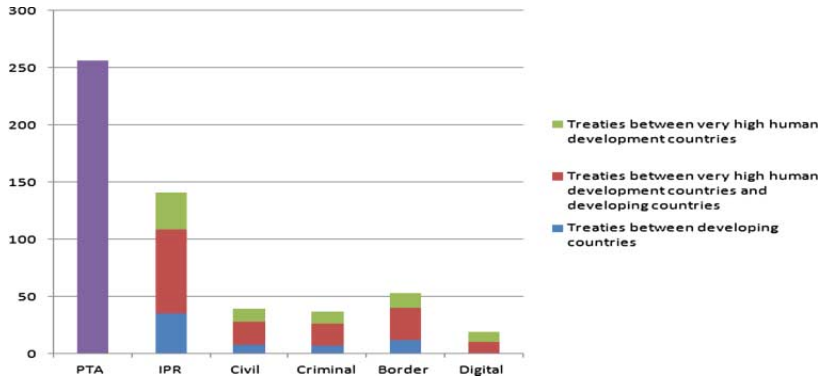


Figure 6. Number of treaties addressing different areas of intellectual property enforcement

When compared with the structure of TRIPS Part III, the areas of enforcement identified in this research present two important differences. The first concerns the inclusion of precautionary measures within the area of civil enforcement, while the second relates to the identification of specific provisions on digital enforcement.

The regulation of intellectual property enforcement in the digital domain is one of the major post-TRIPS changes. Since the adoption of the WIPO Internet treaties in 1996, PTAs started to order its ratification. Treaties effectively counted in this research are not those having recourse to that technique, but those other that directly regulate digital enforcement. In this context, it has been considered that an agreement contains measures in the digital enforcement area when it alludes to anti-circumvention of effective technological measures, electronic rights management information or the possibility to order an on-line service provider to disclose information to a right holder.⁸⁵

With regard to border enforcement, the number of treaties selected could have been higher if all treaties potentially affecting goods protected by intellectual property rights had been counted. In PTAs, it is very common to find provisions on customs, which regulate questions such as inspection and transit. In fact, this is one of the central aspects of all PTAs. However, in line with what has been previously held, only treaties directly regulating intellectual property—in this case, at the border—are included. This means that treaties that regulate border measures but do not foresee anything in particular with regard intellectual property are not reflected in this research.

Another aspect identified has been whether or not treaties include provisions related to cooperation on enforcement.⁸⁶ It was deemed interesting to reflect this provision for a double reason. First, it is the basis of an important number of activities currently taking place worldwide. International cooperation to improve enforcement has increased dramatically, and PTAs have a very clear role in that regard. Second, cooperation on enforcement pertains to a set of obligations of distinct nature when compared to civil, administrative or criminal enforcement. While the main addressee of the former is the State, in the latter the private relations between rightholders, competitors and users take center-stage.

Conclusions

The number of PTAs regulating intellectual property is impressive. The analysis of the treaties notified to the WTO permits to conclude that 141 out of 256 PTAs regulate intellectual property in a meaningful way. To this number must be added those other treaties that mention intellectual property in a general, tangential or indirect manner, which have not been considered relevant for the purposes of this research.

The diversity within the 141 PTAs is very important. Some treaties regulate very specific aspects while others set forth complete chapters with detailed provisions. For the purpose of this research, both cases may fulfill the same criterion. For instance, both may be found to regulate patents, or civil enforcement. However, its specific impact can vary significantly and has to be studied individually. Additional sub-criteria need to be added in further research.

The WTO RTA-IS is not totally accurate when offering the list of PTAs that have been notified to the Organization and regulate intellectual property. Some treaties are missing while others which have been included do not seem to regulate intellectual property. In fact, the complex and diverse reality of PTAs gives place to different accounts with regard to their number, scope and content.

There are several templates for the organization of intellectual property norms in PTAs. In addition to norms that put into relation intellectual property with free trade, investment and competition, treaties follow three different ways of organizing the intellectual property content. In some cases, one general provision in the main text of the treaty remits the specific regulation to an annex. In other occasions, more and more frequent, PTAs include one specific chapter on intellectual property. Finally, there are also treaties that contain one or a reduced number of provisions specifically related to intellectual property.

The findings show that intellectual property regulation is dynamic. Intellectual property obligations are not only adopted in the text of the original PTA, but are also fruit of the normative action undertaken in the context of the regime created therein. Although in the majority of cases the original PTA has been the source to determine the fulfillment of the selected criteria, custom unions show that intellectual property norms are also adopted years after the conclusion of the original agreement. In fact, the creation of regimes where intellectual property evolves in a closed context is not unfamiliar to bilateral PTAs. Moreover, considering that more and more treaties create organs such as intellectual property committees, this will probably become more and more frequent.

Deciding on whether a treaty fulfills the criteria of the research is not always conclusive. Given that the criteria selected are wide-encompassing and intend to embrace very different situations, the difficulties to classify treaties are frequently related with two characteristics of a relevant number of PTAs: the ambiguity and level of generality of the obligations undertaken. Obligations of unclear meaning or drafted in merely aspirational terms abound in PTAs. Moreover, the technique of legislation by reference frequently introduces vague commitments, while the obligation to fulfill the “highest international standards” or to “improve the intellectual property system” is a source of uncertainty.

This article offers a tool to deepen the research as well as an instrument to reach some substantive insights around PTAs. Some of the observations are well acknowledged, such as the fact that the majority of intellectual property provisions in PTAs are included out of the demands of developed countries, particularly when the provisions are detailed and highly demanding. But other observations, particularly with regard the content of treaties concluded between developing countries, call for further reflection and monitoring.

About the Author

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Notes

1. Under this term, are grouped trade agreements notified to the World Trade Organization under paragraph 8(a) and 8(b) of article XXIV of GATT 1994 (customs union and free trade agreements); article V of GATS (economic integration agreements); and under paragraph 4(a) of the Enabling Clause (partial scope agreements).
2. The treaties quoted in this text can be found in <http://rtais.wto.org>.
3. One of the first PTAs that changed that pattern was the US-Israel FTA of 1986, which stated in article 14 that “The Parties reaffirm their obligations under bilateral and multilateral agreements relating to intellectual property rights, including industrial property rights, in effect between the Parties. Accordingly, nationals and companies of each Party shall continue to be accorded national and most favored nation treatment with respect to obtaining, maintaining and enforcing patents of invention, with respect to obtaining and enforcing copyrights, and with respect to rights in trademarks, service marks, trade names, trade labels, and industrial property of all kinds.”
4. General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
5. This is also an exception found in almost all, if not all, the PTAs later on notified to the WTO. See for instance, among more than 200 similarly drafted articles, article 11 of the Free Trade Agreement between Armenia and Kazakhstan, WT/REG123/1, 8 March 2001.
6. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
7. Without being exhaustive, the following works can be quoted Abbott (2004, 2005, 2006), Correa (2004a), Drahos (2005), Fink (2011), Heath and Kamperman (2007), Matthews and Muñoz-Tellez (2006), Roffe (2004), Roffe *et al.* (2007), Roffe and Santa Cruz (2006), Seuba (2009, 2013a).
8. In fact, the only work covering all the content of TRIPS as re-drafted or endorsed in PTAs was published already 9 years ago and used a limited number of treaties to exemplify how intellectual property legislation had evolved after TRIPS, mainly through the adoption of PTAs (UNCTAD-ICTSD, 2005).
9. World Trade Organization Regional Trade Agreements Information-System (RTA-IS), <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed March 2013).
10. <http://rtais.wto.org/UI/PublicSearchByCrResult.aspx> (accessed March 2013).
11. <http://rtais.wto.org/ui/PublicAllRTAList.aspx> (accessed March 2013).
12. ASEAN–New Zealand–Australia; ASEAN–India; Japan–ASEAN; Korea–ASEAN; CARICOM; Dominican Republic–Central America–United States; EFTA–Montenegro; EFTA–Hong Kong; EFTA–Colombia; EFTA–Republic of Lebanon; EFTA–Palestinian Authority; EFTA–Peru; EFTA–Turkey; EFTA–Ukraine; EU–Algeria; EU–Bosnia; EU–Cameroon; EU–Cariforum; EU–Colombia; EU–Peru; Gulf Cooperation Council; Japan–India; Japan–Peru; Korea–India; Korea–United States; Panama–Honduras; Panama–Peru; Turkey–Palestinian Authority; Turkey–Syria; Turkey–Bosnia; United States–Bahrein; United States–Oman; United States–Colombia; United States–Panama; United States–Israel.
13. Agreements between Armenia and Ukraine, CEMAC, Georgia and Ukraine, Kyrgyz Republic and Ukraine, Kyrgyz Republic and Moldova, Peru and Singapore, Jordan and Singapore, China and Macao, Australia and Singapore.
14. In the case of the agreements between Peru and Singapore, and Jordan and Singapore, official web pages of the mentioned agreements expressly exclude intellectual property.
15. These are the cases of treaties between Costa Rica–China; EFTA–Albania; EFTA–Colombia; EFTA–Hong Kong; EFTA–Montenegro; EFTA–Peru; EFTA–Serbia; EFTA–Ukraine; EU–Colombia; EU–Korea; EU–Peru; Gulf Cooperation Council; Hong Kong China–New Zealand; Japan–India; Japan–Peru; Korea–United States; New Zealand–Malaysia; Panama–Peru; Peru–Chile; Peru–Republic of Korea; MERCOSUR; Turkey–Chile; Turkey–Jordan; United States–Colombia; United States–Panama.

16. While we identified six categories of intellectual property rights, Valdés and Tavengwa identified not only intellectual property categories but also areas of concern, to search 11 distinct topics.
17. Reference to the most favored nation treatment and the national treatment.
18. "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...) (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of article II and article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."
19. For instance, this reference is found in article 68 of the EU-Cote d'Ivoire. In the treaties effectively selected in this research, the same reference can be found for instance in article 23 of the EU-Lebanon; article 13 of the Turkey-Bosnia Herzegovina; and article 8 of the EFTA-Palestinian Authority.
20. In fact, it does not say much about the substantive protection of intellectual assets, as happens as well with other norms in PTAs indirectly affecting intellectual property. Although it has effects on the implementation of intellectual property norms, the same could be said with regard other articles commonly found in PTAs, for instance those on goods in transit or those other ordering the communication of laws.
21. This is for instance the case of the article 56 of the free trade agreement between Brunei-Japan or, in the case of customs unions, the COMESA agreement article 159.2(e).
22. Hence, free trade agreements such as that between Canada and Israel have not been included. In the treaties, effectively selected this reference is almost always found. See for instance article 15.02 of the Chile-Central America agreement.
23. *Request for Arbitration, FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID case no. ARB/10/7 (19 February 2010).
24. This is the case of treaties including only affirmations such as article 57 of the Singapore-New Zealand FTA "The Parties agree that the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights shall govern and apply to all intellectual property issues arising from this Agreement." In the regional context, the case of article 24 of the 1996 SADC Protocol on Trade can be mentioned.
25. This is the case of the Agreement between Chile and Mexico, concluded in 1998 and entered into force in 1999, thus anticipating the implementation of TRIPS, as well as going beyond in some aspects. See Roffe (2004). In <http://www.uno.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf> (accessed April 2013).
26. This is for instance the case of the treaty between Japan and ASEAN, or the COMESA treaty, which specifically mention cooperation in the area of patent regulation article 128(e).
27. A provision of this type is found in agreements with Albania, Macedonia, Croatia, Bosnia, Montenegro, Serbia and Turkey.
28. These are also considered PTAs, in the terms described above in fn. 1.
29. Although the WTO does not count it among those that have regulated IP.
30. Article 36 of the 1957 Treaty Establishing the European community stated that "The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States."

31. The East African Community (EAC), the European Free Trade Association (EFTA), CARICOM, the Gulf Cooperation Council and Mercosur. The particularities of EFTA deserve some specific mention, since it has endorsed EU legislation in the area of intellectual property.
32. SADC, ECOWAS and other African regional organizations have rarely mentioned intellectual property in their constitutive texts.
33. There are two cases: the Mainland and Hong Kong closer Economic Partnership Agreement, and the ASEAN and China Agreement on Trade in Goods. In the case of the Mainland and Hong Kong closer Economic Partnership Agreement, the subsequent Supplement V to the Agreement makes a very general reference to IP. In the case of the ASEAN and China Agreement on Trade in Goods, it was only in the 2004 when the Memorandum of Understanding between ASEAN and China on Cooperation in the Field of Intellectual Property addressed intellectual property. In fact, in this case the WTO was not notified the original Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China of 2002, but an agreement concluded 2 years later on trade in goods. A number of agreements followed the adoption of the Framework Agreement. The Agreement on Trade in Goods, of 29 November 2004, is the one containing the Memorandum of Understanding between ASEAN and China on Cooperation in the Field of Intellectual Property. Even in this memorandum, the protection of IP results very light, since its article 6 establishes that "This Memorandum of Understanding is an expression of intent by All Participants to cooperate in their mutual interests. The aim under Articles 2 and 3 therefore are not binding but rather All Participants are encouraged to use their best endeavors to promote and achieve the objectives of this Memorandum of Understanding."
34. It was after the conclusion of the PTA that the EU–Mexico Council adopted a decision to create an IP Committee.
35. See article 3.4.1, Annex 2-D, of the Association Agreement between the EU and Republic of Korea.
36. See article 15.3.1 of the Free Trade Agreement between the United States and the Republic of Korea as well as article 5 of Annex 2-D of the Association Agreement between the EU and Republic of Korea.
37. Lists of States referred to in paragraph 6 of General Assembly resolution 1995 (XIX).
38. This is very particularly the case of India and China, which are found in the third group, "medium human development," while their power is indeed more similar to several States found in the group of "very high human development."
39. This is the case of Chile and Argentina, which are commonly considered emerging economies or developing countries, but that in the UNDP list pertain to the group of "very high human development."
40. This observation results from combining the data that reflect what treaties include one specific chapter on intellectual property, the categories covered and the areas of research regulated.
41. See below section on "Intellectual property categories covered."
42. This is the case for instance of the agreement between Mexico and Costa Rica.
43. This seems to be the case of the treaties between Mexico and several Central American states, negotiated after the conclusion of the NAFTA.
44. Interestingly, agreements between developing countries sometimes contain provisions where parties to the agreement engage in consulting each other in the context of multilateral negotiations (see for instance the MOU between ASEAN–China, and the agreements between Ukraine–Moldavia; Ukraine–Macedonia).
45. See for instance the agreement between Korea and India, article 12.6, on "NON-APPLICATION OF DISPUTE SETTLEMENT PROVISIONS: Chapter Fourteen (Dispute Settlement) shall not apply to any matter or dispute arising under this Chapter" (intellectual property). The agreement between Brunei Darussalam–Japan, article 100, states that "The dispute settlement procedures provided for in Chapter 10 shall not apply to this Chapter." Chapter 10 includes IP. In the case of the agreement between Chile and China, its intellectual property chapter states that "No Party shall have recourse to Chapter X for any issue arising from or relating to this Chapter."
46. ASEAN–Republic of Korea; Brunei Darussalam–Japan; Canada–Chile; Canada–Costa Rica; Caribbean Community and Common Market (CARICOM); Chile–Central America; Chile–Panama; China–Hong Kong, China; East African Community (EAC); EFTA–Palestinian Authority; EFTA–SACU; Egypt–Turkey; EU–

- Cameroon; EU–Mexico; EU–Palestinian Authority; EU–South Africa; Faroe Islands–Norway; Gulf Cooperation Council; India–ASEAN; Pakistan–China; Peru–Chile; Southern African Development Community (SADC); Turkey–Albania; Turkey–Bosnia and Herzegovina; Turkey–Croatia; Turkey–Former Yugoslav Republic of Macedonia; Turkey–Georgia; Turkey–Jordan; Turkey–Montenegro; Turkey–Morocco; Turkey–Palestinian Authority; Turkey–Serbia; Turkey–Syria; Turkey–Tunisia; Ukraine–Former Yugoslav Republic of Macedonia; Ukraine–Moldova; United States–Israel.
47. See for instance, article 10 of the Agreement between Pakistan and China.
 48. Case of the treaties between Chile and Canada; Canada–Costa Rica; Chile–Central America; Chile–Panama.
 49. EFTA–Palestinian Authority article 15.1.
 50. ASEAN–Republic of Korea, article 10.1.
 51. EFTA–Palestinian Authority article 15.2; ASEAN–Republic of Korea, article 10.1 and 10.2.
 52. EFTA–Palestinian Authority articles 15.2 and 15.3.
 53. See article 97 of the Brunei and Japan agreement, which also engages parties to “respect international obligations,” “ensure transparent and streamlined administrative procedures,” “ensure adequate and effective enforcement” and “endeavor to promote further awareness of intellectual property.”
 54. Chile–China, article 10 on geographical indications, article 11 on border measures, article 111 on cooperation on intellectual property; the same for the case of Japan and Mexico: geographical indications in article 8; intellectual property in article 73; and cooperation in intellectual property in 144; in the case of Mexico and Israel, the relevant article regulate geographical indications in annex 2-05 and reaffirmation of TRIPS in article 7.
 55. EFTA–Albania; EFTA–Chile; EFTA–Croatia; EFTA–Egypt; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Republic of Korea; EFTA–Lebanon; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Serbia; EFTA–Singapore; EFTA–Tunisia; EFTA–Turkey; EFTA–Ukraine; EU–Albania; EU–Algeria; EU–Bosnia and Herzegovina; EU–Chile; EU–Croatia; EU–Egypt; EU–Former Yugoslav Republic of Macedonia; EU–Israel; EU–Jordan; EU–Lebanon; EU–Montenegro; EU–Morocco; EU–Serbia; EU–Tunisia; EU–Turkey; Japan–India; Japan–Indonesia; Japan–Singapore; Turkey–Israel.
 56. Annexes, however, do differ: while the annexes of EFTA PTAs tend to be detailed, when the EU regulates intellectual property in an annex and not in a chapter, the annex frequently only contains a list of treaties to ratify.
 57. Case of the chapter 11 of the Agreement between Singapore and India, dealing with cooperation in the area of intellectual property.
 58. In this section, the objectives and principles of the IP section are spelled out, as it is was an entirely new agreement. In fact, in some cases, this has been stressed by the addition of a preface, which has led commentators to underline that IP appears to be an agreement within another (Roffe, 2004).
 59. Australia–Chile; Colombia–Mexico; Costa Rica–Mexico; EC; EFTA–Albania; EFTA–Chile; EFTA–Colombia; EFTA–Croatia; EFTA–Egypt; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Republic of Korea; EFTA–Lebanon; EFTA–Mexico; EFTA–Montenegro; EFTA–Peru; EFTA–Serbia; EFTA–Singapore; EFTA–Turkey; EFTA–Ukraine; EU–Albania; EU–Bosnia and Herzegovina; EU–CARIFORUM; EU–Chile; EU–Colombia; EU–Croatia; EU–Egypt; EU–Former Yugoslav Republic of Macedonia; EU–Israel; EU–Jordan; EU–Republic of Korea; EU–Lebanon; EU–Montenegro; EU–Morocco; EU–Palestinian Authority; EU–Peru; EU–Serbia; EU–South Africa; EU–Tunisia; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Japan–Switzerland; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Panama—and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore–Australia; United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.

60. Andean Community of Nations; Australia–Chile; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Albania; EFTA–Chile; EFTA–Colombia; EFTA–Croatia; EFTA–Egypt; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Republic of Korea; EFTA–Lebanon; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Peru; EFTA–Serbia; EFTA–Singapore; EFTA–Tunisia; EFTA–Turkey; EFTA–Ukraine; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Japan–India; Japan–Indonesia; Japan–Malaysia; Japan–Peru; Japan–Philippines; Japan–Singapore; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–Singapore; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
61. Andean Community of Nations; ASEAN–Australia–New Zealand; Australia–Chile; Chile–Japan; Chile–Mexico; China–Costa Rica; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Albania; EFTA–Colombia; EFTA–Croatia; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Peru; EFTA–Serbia; EFTA–Singapore; EFTA–Turkey; EFTA–Ukraine; EU–CARIFORUM; EU–Chile; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Japan–India; Japan–Indonesia; Japan–Malaysia; Japan–Mexico; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–Chile; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); Southern Common Market (MERCOSUR); United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
62. Andean Community of Nations; ASEAN–Australia–New Zealand; Australia–Chile; Chile–Mexico; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Colombia; EFTA–Croatia; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Peru; EFTA–Turkey; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Japan–Indonesia; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); Peru–Republic of Korea; United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
63. Andean Community of Nations; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Albania; EFTA–Chile; EFTA–Colombia; EFTA–Croatia; EFTA–Egypt; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Republic of Korea; EFTA–Lebanon; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Peru; EFTA–Serbia; EFTA–Singapore; EFTA–Tunisia; EFTA–Turkey; EFTA–Ukraine; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–Turkey; European Economic Area (EEA);

- European Free Trade Association (EFTA); Japan–Indonesia; Japan–Peru; Japan–Switzerland; Japan–Thailand; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
64. Andean Community of Nations; ASEAN–Australia–New Zealand; Australia–Chile; Canada–Chile; Canada–Costa Rica; Canada–Peru; Chile–Central America; Chile–China; Chile–Japan; Chile–Mexico; Chile–Panama; China–Costa Rica; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Albania; EFTA–Chile; EFTA–Colombia; EFTA–Croatia; EFTA–Egypt; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Republic of Korea; EFTA–Lebanon; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Peru; EFTA–Serbia; EFTA–Singapore; EFTA–Tunisia; EFTA–Turkey; EFTA–Ukraine; EU–CARIFORUM; EU–Chile; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Israel–Mexico; Japan–India; Japan–Malaysia; Japan–Mexico; Japan–Peru; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–Chile; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); Panama–and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Peru–China; Peru–Republic of Korea; Singapore–Australia; Southern Common Market (MERCOSUR); Trans-Pacific Strategic Economic Partnership; Turkey–Bosnia and Herzegovina; United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
65. Andean Community of Nations; EC; EFTA–Albania; EFTA–Chile; EFTA–Colombia; EFTA–Croatia; EFTA–Former Yugoslav Republic of Macedonia; EFTA–Hong Kong; EFTA–Israel; EFTA–Jordan; EFTA–Republic of Korea; EFTA–Lebanon; EFTA–Mexico; EFTA–Montenegro; EFTA–Morocco; EFTA–Peru; EFTA–Serbia; EFTA–Singapore; EFTA–Tunisia; EFTA–Turkey; EFTA–Ukraine; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Japan–Indonesia; Japan–Mexico; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); North American Free Trade Agreement (NAFTA); Southern Common Market (MERCOSUR).
66. See for instance article 4 of annex 8 of the EU and Turkey Agreement.
67. See for instance article 86 of the Japan and Viet Nam agreements, on computer programs and patents.
68. For instance, the provision on patents contained in the agreement between Japan and Philippines, article 123, states that “any applicant for a patent may file a request to the competent authority that his application be examined promptly.”
69. Compensatory terms of protection for pharmaceuticals is for instance almost the sole real issue in article a of the agreement between EFTA and Ukraine.
70. For instance, almost all the agreements concluded by EFTA include substantive regulation. However, not always the substantive regulation is the same. While some treaties really enter into the regulation of substantive questions such as patents, TM and copyright, others simply mention all these areas to include generic or ambiguous obligations that point at the direction of enhanced protection. This is the case of the agreements between EFTA and Croatia, Egypt, Macedonia, Israel, Jordan, Mexico, Morocco and Turkey.

71. Trade Act 1974, 19 U.S.C.A. § 2411 (2010).
72. Since it declares that among the principal negotiating objectives is “ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law.” *Ibid.*, 4.A.(I)(ii).
73. *Ibid.*, 4.A.(I) (v).
74. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Application of the Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights*, Brussels, 22 December 2010, COM(2010)779 final, p. 4.
75. This is the case of the agreements concluded between ASEAN–China; ASEAN–Australia–New Zealand; ASEAN–Korea; Canada–Chile; Canada–Costa Rica; Canada–Peru; Caribbean Community and Common Market (CARICOM); Chile–Central America; Chile–Panama; China–Hong Kong, China; Egypt–Turkey; EU–Egypt; EU–Palestinian Authority; Faroe Islands–Norway; Gulf Cooperation Council; India–Singapore; Israel–Mexico; Pakistan–Malaysia; Panama–Honduras (Panama–Central America); Peru–Chile; Southern African Development Community (SADC); Southern Common Market (MERCOSUR); Turkey–Jordan; Turkey–Palestinian Authority; Turkey–Syria; Turkey–Tunisia; Ukraine–Former Yugoslav Republic of Macedonia; Ukraine–Moldova; United States–Israel.
76. EU–Mexico; EU–Montenegro; EU–Morocco; EU–Serbia; EU–Tunisia; EU–Turkey; European Economic Area (EEA); European Free Trade Association (EFTA); Hong Kong, China–New Zealand; Japan–India; Republic of Korea–Chile; Republic of Korea–India; Korea–Singapore; Panama–Costa Rica (Panama–Central America); Panama–El Salvador (Panama–Central America); Turkey–Albania; Turkey–Bosnia and Herzegovina; Turkey–Croatia; Turkey–Former Yugoslav Republic of Macedonia; Turkey–Georgia; Turkey–Israel; Turkey–Montenegro; Turkey–Morocco; Turkey–Serbia.
77. Andean Community of Nations; Australia–Chile; Chile–China; Chile–Japan; Chile–Mexico; China–Costa Rica; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Albania; EFTA–Colombia; EFTA–Hong Kong; EFTA–Mexico; EFTA–Montenegro; EFTA–Peru; EFTA–Serbia; EFTA–Ukraine; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; Japan–Indonesia; Japan–Malaysia; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); Pakistan–China; Panama–Peru; Panama–and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Peru–China; Peru–Republic of Korea; Singapore–Australia; Thailand–Australia; United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
78. Apart from those derived from declarations of good intentions.
79. This is frequently the case of agreements concluded by EFTA. See for instance article 5 of annex XII of the agreement between EFTA and Turkey.
80. Exceptions would be the case of those treaties benefiting from periods of transition.
81. Andean Community of Nations; Australia–Chile; Chile–Japan; Chile–Mexico; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Colombia; EFTA–Mexico; EFTA–Montenegro; EFTA–Peru; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; Japan–Indonesia; Japan–Malaysia; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; North American Free Trade Agreement (NAFTA); United States–

- Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
82. Andean Community of Nations; Australia–Chile; Chile–Japan; Chile–Mexico; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Mexico; EFTA–Montenegro; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; Japan–Indonesia; Japan–Malaysia; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; North American Free Trade Agreement (NAFTA); United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
83. Albania–EFTA; Andean Community of Nations; Australia–Chile; Chile–Japan; Chile–Mexico; China–Costa Rica; Colombia–Mexico; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EFTA–Colombia; EFTA–Hong Kong; EFTA–Mexico; EFTA–Montenegro; EFTA–Peru; EFTA–Serbia; EFTA–Ukraine; EU–CARIFORUM; EU–Colombia; EU–Republic of Korea; EU–Peru; Japan–Indonesia; Japan–Malaysia; Japan–Peru; Japan–Philippines; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; Republic of Korea–United States; Mexico–El Salvador (Mexico–Northern Triangle); Mexico–Guatemala (Mexico–Northern Triangle); Mexico–Honduras (Mexico–Northern Triangle); Mexico–Nicaragua; North American Free Trade Agreement (NAFTA); Pakistan–China; Panama–Peru; Panama—and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Peru–Republic of Korea; Peru–China; Singapore–Australia; Thailand–Australia; United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Jordan; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
84. Australia–Chile; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); EC; EU–Colombia; EU–Republic of Korea; EU–Peru; Japan–Peru; Japan–Switzerland; Republic of Korea–United States; Mexico–Nicaragua; North American Free Trade Agreement (NAFTA); United States–Australia; United States–Bahrain; United States–Chile; United States–Colombia; United States–Morocco; United States–Panama; United States–Oman; United States–Peru; United States–Singapore.
85. This is, in general terms, the content of ACTA section on digital enforcement.
86. Australia–Chile; Brunei Darussalam–Japan; Chile–China; Chile–Japan; Chile–Mexico; China–Costa Rica; China–New Zealand; Costa Rica–Mexico; Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR); East African Community (EAC); EC; EFTA–Mexico; EFTA–Montenegro; EU–Cameroon; EU–CARIFORUM; EU–Chile; EU–Colombia; EU–Republic of Korea; EU–Peru; EU–South Africa; European Economic Area (EEA); European Free Trade Association (EFTA); India–ASEAN; Japan–Indonesia; Japan–Malaysia; Japan–Mexico; Japan–Peru; Japan–Singapore; Japan–Switzerland; Japan–Thailand; Japan–Viet Nam; New Zealand–Malaysia; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); Panama–Peru; Panama—and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Peru–Republic of Korea; Singapore–Australia; Thailand–Australia; Thailand–New Zealand; Trans-Pacific Strategic Economic Partnership; Turkey–Chile.

References

- Abbott, F.M. (2004) *The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements*, QUAKER, Occasional Paper No. 14, Geneva.
- Abbott, F.M. (2005) 'Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism', *Journal of International Economic Law*, 8(1), 77–100.

- Abbott, F.M. (2006) *Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law*. ICTSD, Geneva.
- Burrell, R. and Weatherall, K. (2008) 'Exporting Controversy? Reactions to the Copyright Provisions of the US-Australia Free Trade Agreement: Lessons for U.S. Trade Policy', *Journal of Law, Technology and Policy*, 2008(2), 259–319.
- Correa, C.M. (2004a) *Protection of Intellectual Property and Public Health within the Framework of the Chile-US Trade Agreement*, QUNO, Occasional Paper No. 1, Geneva.
- Correa, C. (2004b) 'Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses', *Michigan Journal of International Law*, 26, 331–53.
- Correa, C. (2004c) *Tratados Bilaterales de Inversión, ¿Agentes de Normas Mundiales Nuevas para la Protección de los Derechos de Propiedad Intelectual?* GRAIN, Barcelona.
- Cottier, T. and Veron, P. (eds) (2008) *Concise International and European IP Law*. Kluwer Law International, Dordrecht.
- Drahos, P. (2005) 'BITS and BIPS: Bilateralism in Intellectual Property', *The Journal of World Intellectual Property Law*, 4(6), 791–808.
- European Commission (2004) Strategy for the Enforcement of Intellectual Property Rights in Third Countries, 10 November 2004, Official Journal of the European Union, 26/6/2005, C 129/3-C 129/16.
- Fink, C. (2011) 'Intellectual Property Rights', in J.-P. Chauffour and J.-C. Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook*. The World Bank, Washington, DC, pp. 387–405.
- Heath, C. and Kamperman Sanders, A. (eds.) (2007) *Intellectual Property and Free Trade Agreements*. Hart Publishing, Oxford and Portland, pp. 87–126.
- Matthews, D. and Muñoz-Tellez, V. (2006) 'Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in a Comparative Perspective', *Journal of World Intellectual Property*, 9(6), 629–53.
- Michajlovič, G. (1992) *Law-Making in the International Community*. Martinus Nijhoff, Dordrecht.
- Roffe, P. (2004) *Bilateral Agreements and a TRIPS plus World*, Quaker International Affairs Programme, TRIPS Issues Paper No. 4, Ottawa.
- Roffe, P. and Santa Cruz, M. (2006) *Los Derechos de Propiedad Intelectual en los Acuerdos de Libre Comercio Celebrados por Países de América Latina con Países Desarrollados*. CEPAL, Santiago de Chile.
- Roffe, P. Vivas-Eugui, D. and Veá, G. (2007) *Maintaining Policy Space for Development*. ICTSD, Geneva.
- Seuba, X. (2009) *Health Protection in the European and Andean Association Agreement*. HAI, Amsterdam.
- Seuba, X. (2013a) 'Checks and Balances in the Intellectual Property Enforcement Field: Reconstructing EU Trade Agreements', in C. Geiger (Dir), *Constructing European Intellectual Property: Achievements and New Perspectives*. Edward Elgar Publishing, Cheltenham.
- Seuba, X. (2013b) *Propiedad Intelectual, Competencia y Aspectos Regulatorios del Medicamento. Determinantes Internacionales y Política Pública*, PUJ-ICTSD, Bogotá.
- Stewart, T.P. (1995) *The GATT Uruguay Round: A Negotiation History*. Kluwer Law International, The Hague.
- UNCTAD-ICTSD (2005) *Resource Book on TRIPS and Development*. Cambridge University Press, New York, Geneva.
- UNDP (2013) *Human Development Report. The Rise of the South: Human Progress in a Diverse World*. UNDP, New York.
- Valdés, R. and Tavengwa, R. (2012) *Intellectual Property Provisions in Regional Trade Agreements*, WTO Staff Working Paper ERS-2012-21, World Trade Organization, Geneva.