

**The U.S.-Dominican Republic Free Trade Agreement (FTA)
The Intellectual Property Provisions**

**Report of the
Industry Functional Advisory Committee on Intellectual Property
Rights for Trade Policy Matters (IFAC-3)**

April 22, 2004

**Advisory Committee Report to the President, the Congress and the
United States Trade Representative on the U.S.-Dominican Republic Free
Trade Agreement**

Prepared By the

**Industry Functional Advisory Committee on Intellectual Property
Rights for Trade Policy Matters (IFAC-3)**

I. Introduction

The U.S.-Dominican Republic Free Trade Agreement (“DRFTA”) was negotiated and completed on March 15, 2004 between the parties following the completion of the U.S.-Central American FTA (“CAFTA”) with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The negotiating process is known as “docking” and integrated the Dominican Republic into the CAFTA.

II. IFAC-3 Has Not Reviewed the “Final” DRFTA Text

This report is based on a review of the DRFTA “unscrubbed” side letters and negotiator’s notes posted on the USTR secure website on March 29, 2004 and the transition period text posted on April 19, 2004. IFAC-3 members have also not reviewed the actual “unscrubbed” text of the DRFTA, which was not posted on the secure website, and IFAC-3 has relied on the negotiators’ oral statement that the text of Chapter 15 is identical, *mutatis mutandis*, to the “unscrubbed” CAFTA text. In describing these texts as “unscrubbed,” we mean that they are not the “final” texts, and that, at a minimum, they will undergo a legal “scrub” before they are submitted to the Congress and to the President. Because the “final” DRFTA and the aforementioned ancillary documents may be different from the CAFTA text reviewed by IFAC-3 and the texts appearing on the USTR website upon which IFAC-3 has made these comments (and those differences could result in “substantive” and not merely “editorial” changes to the texts), IFAC-3 wishes to make clear that the opinions rendered herein, as well as those that IFAC-3 had rendered on the CAFTA text (see below), are based on documents that are not yet “final.”

IFAC-3 has been informed by the negotiators of the DRFTA that only the Final Provisions containing transition periods for the entry into force of various obligations in the text and three side letters/negotiator’s notes on broadcast piracy, enforcement and patents, described below, differ from the CAFTA. Accordingly, based on the representations that the text of the IPR Chapter of DRFTA is identical to the CAFTA, with the exceptions noted above, this report hereby incorporates by reference, *mutatis mutandis*, the IFAC-3 Report of the U.S.-Central American Free Trade Agreement, dated March 12, 2004, which

appears on the USTR website at <http://www.ustr.gov/new/fta/Cafta/advisor/ifac03.pdf>. The instant report does, however, discuss the transition periods and side letters/negotiator's notes unique to the DRFTA as well as express concern over whether there will be prompt and full implementation of this agreement.

III. Executive Summary of the Committee's Report

IFAC-3 believes that the DRFTA (like the CAFTA), taken as a whole, is a strong agreement and meets most of the negotiating goals and objectives contained in the Trade Act of 2002 and those of the U.S. intellectual property-based industries, creators and innovators. IFAC-3, therefore, supports the DRFTA chapter on intellectual property and commends the U.S. negotiators for a job well done. While IFAC-3 is particularly gratified that this agreement makes certain key improvements from the FTA negotiated with Chile, it is unfortunate that elements of the agreement fall short of providing the same levels of protection and enforcement provided in the Singapore FTA (particularly some of the long transition periods for implementation), though IFAC-3 is pleased that many of the transition periods applying to the Dominican Republic are not as long as those that apply to some of the other CAFTA countries. Nevertheless, IFAC-3 believes that the agreement establishes and reinforces a number of key precedents that should be included in the other FTAs now being negotiated, including the FTAA. IFAC-3 wishes to underscore the importance that it attaches to a close working relationship between IFAC-3 and industry, on the one hand, and U.S. negotiators, on the other, in ensuring that the model FTA intellectual property text, which has been carefully developed through the course of negotiation of seven FTAs, continues to form the basis for these other agreements.

IV. The Importance of Full Implementation of the DRFTA

In the CAFTA report, IFAC-3 noted "with much concern" the problems that U.S. industry was already facing in Chile with respect to its implementation of its FTA and urged the United States not only to monitor very closely the implementation by the CAFTA countries of their FTA obligations but also to be prepared to act to ensure proper and timely implementation of those obligations. Over the course of the last 20 years of engagement between the U.S. and the Dominican Republic on IPR matters, including law reform and enforcement, implementation of commitments made by that government and the record of meeting its TRIPS and bilateral obligations has been less than satisfactory. It is the expectation of IFAC-3 that the U.S., through a thorough and aggressive monitoring mechanism over agreement compliance, will ensure that the Dominican Republic promptly and fully implements all the obligations of the DRFTA and the various side letters and notes. In the area of broadcast and cable piracy and enforcement generally, IFAC-3 calls particular attention to the commitments made by the Dominican Republic. In both these areas, effective enforcement has been woefully deficient; the Dominican Republic must redeem these commitments immediately and effectively or be made subject to prompt withdrawal of benefits afforded under this agreement.

Similarly, in the area of patents, IFAC-3 believes that, based on past experience, there is little chance that the Dominican Republic will implement or enforce the intellectual property commitments made in the DRFTA without constant United States government attention and monitoring. It is the considered view of IFAC-3 that the United States should be prepared to move quickly to dispute settlement should the Dominican Republic, as we fear, fail to implement or enforce its patent and regulated product-related obligations under the DRFTA.

V. Side Letters and Negotiator's Notes

Three additional documents were agreed to in addition to the text itself and form a part of the overall DRFTA.

The first, designated as Reporting Letter regarding Chapter 15 (Intellectual Property Rights), is a letter from Sonia Guzman, the Secretary of Industry and Commerce to Robert Zoellick, confirming the Dominican Republic's commitments under Article 15.11.26 dealing with criminal enforcement to take action against the endemic broadcast piracy that has continued over the years in that country. It commits to provide for criminal prosecutions with deterrent sentences. It also establishes a reporting requirement to begin 60 days after signing of the agreement (and before entry into force) on progress against broadcast piracy and complements the Article 15.11.3 requirement to make information on enforcement publicly available. The letter also commits the Dominican Republic, with respect to all copyrighted works, to "make every effort to immediately achieve the expeditious resolution of pending criminal copyright infringement cases," including those on appeal, and acknowledges that while the Judiciary is independent, the obligations of the DRFTA go to the country as a whole.

The second document, designated as Chapter 15 Commitments on Broadcast Piracy, contains detailed recitals and commitments with respect to the mechanisms available to deal with broadcast and cable piracy in the Dominican Republic. It deals with withdrawal of licenses, closure of stations, application of sufficient enforcement resources and other remedies available under domestic law as well as reaffirming the quarterly reporting requirements mentioned above.

IFAC-3 applauds the securing of all these critical commitments which complement the country's overall enforcement obligations. IFAC-3 reiterates, however, our prior comments on the need for vigilant monitoring of the implementation of these documents and the agreement as a whole.

With respect to the third document, designated as Negotiator's Note on Patents, IFAC-3 observes that this Note responds to the Dominican Republic's request for clarifications with respect to Articles 15.9.4 and 15.10.1 (b). IFAC-3 further notes that the terms of the second paragraph of the letter relate to the expiration of patents and do not add to or detract from the obligation contained in Article 15.9.4 with respect to the restriction of

the grounds for the revocation of a patent to those relating to the patentability of the invention. With respect to the assurance given in the letter by the United States that the requirements of Article 15.10.1 (b) do not apply so long as a Party does not permit marketing approvals based on previous approvals in another country, IFAC-3 hastens to add that the Dominican Republic does not currently provide any data exclusivity, at all, as required by Article 15.10.1.

VI. Transitional Provisions

The following chart modifies the chart provided in the IFAC-3 Report on CAFTA by adding the transition periods agreed to for the Dominican Republic. All these periods are then compared to those found in the Chile FTA. IFAC-3 objected strenuously to the unnecessarily long transition periods in the Chile FTA and is gratified that transition periods for the Dominican Republic are shorter than, in some cases equal to, the transition periods in CAFTA. Nevertheless, IFAC-3 continues to believe that these periods remain too long.

ISSUE IN CAFTA IPR CHAPTER	COSTA RICA	EL SALVADOR	GUATEMALA	HONDURAS	NICARAGUA	DOMINICAN REPUBLIC	CHILE FTA
<i>TRADEMARKS</i>							
15.2.1 – trademark definition and scope			2 years	2 years		18 months	2 years for the entire Chile FTA sub-chapter 17.2 on trademarks
15.3.7 – relationship between trademarks and geographical indications	2 years		2 years	2 years	2 years	2 years	2 years for provisions on geographic indications (Articles 17.4(1)-(9))
<i>DOMAIN NAMES</i>							
15.4 – domain names on the internet (general)			2 years	2 years	2 years		
15.4.1 – domain names on the internet, requiring management of ccTLD includes dispute settlement procedures based on UDRP principles	1 year						
<i>COPYRIGHT & RELATED RIGHTS</i>							
15.5.4 – term of protection for copyrighted materials			6 months			6 months	
							2 years on temporary copies (Articles 17.5(1) and

							17.6(1))
ISSUE IN CAFTA IPR CHAPTER	COSTA RICA	EL SALVADOR	GUATEMALA	HONDURAS	NICARAGUA	DOMINICAN REPUBLIC	CHILE FTA
COPYRIGHT & RELATED RIGHTS (cont.)							
							4 years regarding the right of communication to the public and non-interactive digital transmissions for performers and producers of phonograms (Article 17.6(5))
15.5.7(a)(ii) – provision of legal remedies for anti-circumvention of technological measures, specifically the acts cited in sub (ii) (trafficking)	3 years	3 years	3 years	3 years	3 years	3 years	5 years regarding <u>all</u> aspects of effective technological measures (including exceptions) in Article 17.7(5))
15.5.7(e) – certain exceptions to technological protection measures	3 years	3 years	3 years	3 years	3 years	3 years	5 years
15.5.7(f) – certain exceptions to technological protection measures	3 years	3 years	3 years	3 years	3 years	3 years	5 years
15.5.8(a)(ii) - providing legal remedies for right management information	2 years	30 months	2 years	2 years	2 years		5 years
15.5.9 – issue laws and decrees regarding the acquisition and managements of computer software for government use			1 year	1 year	1 year	1 year	
15.8 – protection of encrypted program-carrying satellite signals (general)			18 months	18 months			
15.8.1(b) – criminal offenses regarding encrypted program-carrying satellite signals	18 months	18 months				18 months	

ISSUE IN CAFTA IPR CHAPTER	COSTA RICA	EL SALVADOR	GUATEMALA	HONDURAS	NICARAGUA	DOMINICAN REPUBLIC	CHILE FTA
PATENTS							
15.9.6 – Patent term restoration for Patent Office delays	1 year		1 year	1 year	1 year	1 year	2 years on almost <u>all</u> patent provisions (Articles 17.9(1) and 17.9(3) through 17.9(7))
ENFORCEMENT							
							4 years regarding <u>all</u> enforcement measures (including border measures)
15.11.8 – pre-established damages in civil judicial proceedings	3 years	3 years	3 years	3 years	3 years		4 years
15.11.14 – civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products	3 years	3 years	3 years	3 years	3 years		4 years
15.11.20 – providing information for suspension of pirated and counterfeit goods at the border			2 years	2 years	2 years		4 years
15.11.21 – authorities may require applicants for border measures to provide reasonable security or equivalent assurance			2 years	2 years	2 years		4 years
15.11.22 – authorities must inform right holders of names/address of consignor, importer, consignee and quantity of goods in question			2 years	2 years	2 years		4 years
15.11.23 – customs <i>ex officio</i> authority		2 years	4 years	4 years	4 years		4 years

ISSUE IN CAFTA IPR CHAPTER	COSTA RICA	EL SALVADOR	GUATEMALA	HONDURAS	NICARAGUA	DOMINICAN REPUBLIC	CHILE FTA
ENFORCEMENT (cont.)							
15.11.24 – destruction of pirated and counterfeit goods seized at the border by appropriate authorities pursuant as appropriate to judicial order or with the right holders’ consent			3 years	3 years	3 years		4 years
15.11.25 – application fee or merchandise storage fee shall not unreasonably deter recourse to these procedures			2 years	2 years	2 years		
15.11.27 – limitation on liability for internet service providers (general)	30 months	1 year	30 months	30 months	3 years	2 years	4 years regarding all enforcement measures (including ISP liability)

VI. Membership of the IFAC-3 Committee

Eric H. Smith
President
International Intellectual Property Alliance
Chairman

America

Jacques J. Gorlin
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The Gorlin Group
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