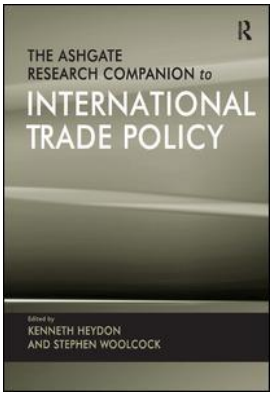

The Ashgate Research Companion To International Trade Policy

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Intellectual Property Rights and Trade

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Intellectual Property Rights and Trade

Meir P. Pugatch[1]

Introduction

Twenty-five years ago, when the Uruguay Round negotiations had just begun, many people asked whether intellectual property rights (IPRs) had anything to do with international trade agreements. The common view among trade experts at the time was that, while trade agreements ultimately focus on the liberalization of international trade in goods and services, IPRs do just the opposite; that is, they increase the propensity for protectionism.

Although few denied the importance of international treaties dealing with IPRs (such as those discussed at the World Intellectual Property Organization – WIPO) there was little support for – and even antagonism against – the inclusion of this odd bird in the new international trading architecture of the World Trade Organization (WTO).

Are IPRs trade-related? Should IPRs be regulated by international, regional and bilateral trade agreements? These are important theoretical questions that will be summarized later in this chapter. But, practically speaking, IPRs are now an inseparable part of the international trade agenda, not least because the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of WTO agreements and institutions. Furthermore, preferential trade agreements – such as those negotiated between the United States and the European Union on one hand and their various trading partners on the other – now also include extensive provisions relating to IPRs. Whether we like them or not, IPRs are closely linked to the international trading system, both affecting it and being affected by it. It is therefore important to address the major questions and debates concerning IPRs and how IPRs relate to the world trading system.

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A Brief Discussion on IPRs and Their Complex Economic Nature

Any discussion on trade-related intellectual property agreements is far from being straightforward. Unlike other trade agreements, the international regulation of IPRs deals with a unique commodity – knowledge. Therefore, it is subject to a set of constraints and interests that differ substantially from the 'conventional' challenges of international trade agreements. Suffice to say that while trade liberalization agreements aim to reduce protection, international intellectual property (IP) agreements aim to increase it. As such, there is merit in considering some of the theoretical aspects and challenges associated with the creation, exploitation and distribution of IPRs.

IPRs in a Closed Economy

Economists explore ways of efficiently allocating scarce resources to unlimited wants and find that private property rights are a plausible way of dealing with scarcity in an efficient manner. Knowledge, however, is a unique resource that is not inherently scarce. Theoretically, the potential use of existing knowledge is unlimited and may be diminished only when such knowledge becomes obsolete. Thus, the use of an invention by one individual does not reduce its accessibility to others, but rather is more likely to increase it. Patents, copyrights, trademarks and other forms of IPRs establish exclusive ownership of varying types of knowledge, allowing their owners to restrict, and even prevent, others from using that knowledge. The result, as Hindley (1971) puts it, is that 'the establishment of private property rights in these cases artificially creates the symptoms of scarcity; they do not derive from it'.

Consider, for example, the case of patents. The structural tradeoff built into the patent system – that in order to increase the amount of available knowledge in the future, the efficient use of existing and available knowledge is inhibited in the present – is probably its most problematic aspect (Arrow 1962). On the one hand, there would be underproduction in inventive activities due to free-riding (Arrow 1962). This represents a particular situation of market failure in which the incentive to innovate is diminished as work is copied without any reward for the innovator. Establishing property rights, that is patents, therefore allows inventors – both firms and individuals – to secure commercial returns for their work and thus provides an incentive to invest in future inventive activities. On the other hand, a patent system inhibits the free and rapid dissemination of existing knowledge because an inventing firm that has been granted a patent essentially gains monopoly powers through its exclusive right to control both the quantity and the price of its invention.

In principle, economists should be able to say whether protection of IPRs generates a net loss or a net benefit to society, or what is more important to society: does more available knowledge in the future justify less accessible knowledge

in the present? As yet, no conclusive answer to these questions is available notwithstanding the availability of a rich and in-depth literature on the economics of IPRs.[2] In this context, the term 'paradox of patents', which was coined by Joan Robinson as early as 1956, seems to capture the true nature of the patent tradeoff: 'by slowing down the diffusion of technical progress, patents insure that there will be more progress to diffuse' (1956: 87).

Economists disagree about the effects of patents on the allocation of resources to inventive activities, the allocation of resources within the sphere of inventive activities and on the allocation of inventions as a factor of production (Hindley 1971: 1–31). The optimum term of protection is also disputable. A longer patent term increases the incentive to invent but also prolongs the restriction on the use of existing knowledge. Therefore, not only is it difficult to establish a single optimal patent term, but it is also likely that different inventions require different terms of protection. Thus, since a decision on a specific patent term for all inventions is bound to be arbitrary, for different inventions there may be a term that is more socially desirable than the current period of 20 years (Nordhaus 1969; Scherer 1972). Back in the 1950s, Machlup (1958) argued that 'no economist on the basis of present knowledge could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss to society'. This statement also seems to be true today.

IPRs and Trade

Different countries may find it in their interests for various reasons to either support or reject a stronger international IP system. Of central importance are the effects of such a system on trade in IP-related products and its impact on the rate and magnitude of technology transfer and FDI.

Regarding trade in IP-related products, there is a divergence between the interests of developed and developing countries. Countries with strong IP capabilities will benefit from membership of a strong international system of IPRs thanks to improved terms of trade as an exporter of IP-related products and from additional income thanks to the higher prices IP owners can charge by virtue of their monopolistic position (Chin and Grossman 1990; Penrose 1951; Vernon 1990). On the other hand, countries with weak IP capabilities are likely to benefit most from trade in IP-related products when they are not part of such a system. Remaining outside an international system of IPRs will enable such countries to freely exploit and imitate IP-related products in their own domestic economies. Where they are successful, these countries may even be able to compete with the original IP owners, thus becoming exporters of such products themselves (Penrose 1951: 95–6).

[2] For an in-depth economic review of the patent system, see Arrow (1962); Machlup (1958); Primo-Braga (1990).

Empirical data confirm the above theoretical statements. The global ownership and commercial exploitation of IPRs is still dominated by developed countries and a select number of emerging economies. For example, the *World Intellectual Property Indicators Report* for 2010 shows that the lion's share of worldwide patent filings (using the Patent Cooperation Treaty – PCT System[3]) is concentrated in the hands of applicants from a select group of countries, notably the United States, which still accounted for the largest share (29.6 per cent) of PCT applications in 2009, followed by Japan (19.1 per cent) and Germany (10.7 per cent). These top three countries thus accounted for 59 per cent of all PCT filings in 2009 (though their share has decreased from 64 per cent in 2005). Moreover, applicants from the business sector accounted for the majority (83.2 per cent) of PCT applications published in 2009. Universities and public research institutions jointly accounted for 7.7 per cent of published PCT applications, and individuals made up the remaining 9 per cent. In terms of the distribution of 'rents' from trade in IP-related goods and services, there is therefore a clear tension between 'north' and 'south'.

On the other hand, there is growing statistical evidence suggesting that a stronger environment of IPRs contributes to an enhanced level of economic development, foreign direct investment (FDI) and technology transfer in developing countries. Based on the most comprehensive empirical research to date, an OECD study of the relationship between IPRs, technology transfer and FDI in 115 countries found that in developed countries an increase of 1 per cent in the strength of patent rights resulted in an increase of 0.5 per cent in FDI flow (based on licensing deals), which in turn resulted in the transfer of know-how, that is, innovative capabilities (Park and Lippoldt 2008). The study found that in developing countries, including least developed countries (LDCs), the effect is even stronger so that an increase of 1 per cent in the strength of patent rights could be associated with an increase of 1.7 per cent in FDI flows.

Léger (2006) has conducted a similar study of developing countries only, in which he estimates the link between innovation and IPRs and corrects for other determinants of innovation such as market demand, past innovative activities, economic conditions, political stability, human capital, financial capital and openness to trade. Comprising observations from 36 developing countries over 26 years (1970–1995), Léger reports that IPRs have a strong positive impact on investment and innovation in developing countries. Robbins (2006, 2008) also finds that countries that have increased the level of patent protection over time, including developing countries such as Taiwan and South Korea, become larger recipients of income from IP-based activities in the form of FDI and technology transfer, as compared to other countries. Robbins finds that these countries benefit considerably from activities that are based on the licensing of patents and trade secrets.

[3] The PCT makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an 'international' patent application. For an overview of the PCT, see the Wipo website, at: www.wipo.int/pct/en/treaty/about.htm.

While the above studies establish a more positive link between the strengthening of IPRs and FDI activity in developing countries, this does not tell us much about the level of IPR protection. As it is not possible to say at what point IPR protection becomes counterproductive, the main focus of the above studies is on the effect on FDI flows and technology transfer of narrowing IP gaps between north and south. In terms of IPRs and trade, there remains therefore a built-in tension between the static and dynamic costs and benefits, the distribution of rents from trade in IP-related products and the gains generated by increased levels of FDI and technological inflows.

If economic theory and research therefore provides no clear-cut answers, it is necessary to look at how IPRs are being regulated and managed in the international trading system.

IPRs and the Multilateral Trading System

Generally speaking, international IP agreements aim to achieve two major goals. The first is to level the playing field and establish the ground rules according to which trade in IP-related products will take place. The second is to standardize the level of IP protection granted by signatories to international IP agreements.

In this context, the most significant step towards the harmonization of international trade in IP-related goods and services was the creation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) by the WTO.

A Short Overview of the TRIPS Agreement

Signed in Marrakesh (15 April 1994) as Annex 1C to the Final Act establishing the WTO, the TRIPS Agreement came into effect in January 1995. At the time, it was one of the most innovative and important subjects to be included in the multilateral negotiations of the Uruguay Round. With respect to IPRs specifically, the TRIPS Agreement represented a significant increase in the global level of IP protection. Some scholars, such as Reichman (1998), considered it to be a 'revolution in international intellectual property law'.

The negotiating process leading to the establishment of the TRIPS Agreement proved to be one of the most controversial and complicated tasks in the Uruguay Round.[4] The inclusion of IPRs in the Uruguay Round negotiating agenda in the form of the ministerial declaration of 20 September 1986, was primarily initiated by the United States, backed by the European Community (EC), Switzerland and Japan. These countries, particularly the United States and the EC, exerted heavy pressure, including threats of unilateral trade retaliation in the case of the United States, on

[4] For the history of TRIPs see: Abbott (1989); Stewart (1993); Emmert (1990).

some key developing countries such as India, Korea and Brazil to get them to agree to negotiate on a comprehensive IP agreement under the auspices of the General Agreement on Tariffs and Trade (GATT). There were also disagreements within the north, such as between the United States and the EC on more detailed issues such as specific elements of the patent system, but it is safe to say that negotiations – both on the essence of TRIPS and on its practical outcome – were shaped by the north–south divide.

As described above, the TRIPS Agreement aimed to increase and harmonize the global protection of IPRs (at the national, regional and international levels) in five main areas, namely international principles of National Treatment (NT) and Most Favoured Nation (MFN) treatment, minimum standards of protection, enforcement, dispute settlement and technical assistance.

First, as part of the WTO agreements, the TRIPS Agreement incorporated the principles of NT and MFN (Blakeney 1996). The former (TRIPS, Article 3) requires all members to treat nationals of other members no less favourably than their own nationals, on all issues concerning IPRs, subject to the exemptions laid down in previous IPR conventions and treaties. The MFN principle (Article 4) requires that any advantage, favour, privilege or immunity granted by a member to the nationals of any other member must be extended unconditionally to the nationals of all other members.

Second, the TRIPS Agreement specified the minimum protection standards that member countries must adopt under their domestic IP legislation (Article 1.1). In this context, the TRIPS Agreement incorporates four major international treaties: the 1883 Paris Convention for the protection of industrial property, as revised by the Stockholm Act of this convention (14 July 1967), the 1886 Berne Convention for the protection of literary and artistic works, as revised in the Paris Act of this convention (24 July 1971), the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations (26 October 1961) and the Treaty on intellectual property in respect of integrated circuits (IPIC) of 26 May 1989.[5] More importantly, the TRIPS Agreement provided a detailed 'technical guide' for member countries with regard to the protection of IPRs. TRIPS articles refer specifically to copyright and related rights (Article 9–14), trademarks (Article 15–21), geographical indications (Article 22–4), industrial designs (Article 25–7), patents (Article 27–34), layout designs of integrated circuits (Article 35–8) and the protection of undisclosed information (Article 39).

Third, the TRIPS Agreement specified minimum provisions on enforcement (Article 41–61) (Blakeney 1996: 123–39). According to these, each WTO member is required to introduce civil and judicial procedures in order to prevent, or at least inhibit, the infringement of IPRs (Article 41). Members' remedies must include injunctions – 'to prevent the entry into channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right'

[5] See: TRIPS Agreement, Article 2 and Arrow (1962); Text of the agreement between WIPO and WTO, Geneva (22 December 1995); WTO Dispute Settlement Body; Blakeney (1996: 20–4).

(Article 44), damages for injuries (Article 45) and the destruction of infringed goods without compensation of any sort (Article 46). Member countries are also required to adopt adequate border measures, aimed at preventing the importation and circulation of counterfeit and pirated IP-related goods (Article 51–60). Finally, in order to combat the illegal trade in pirated products involving copyright or trademark rights infringements, WTO members are required to provide for criminal actions under their domestic IP legislation (Article 61).

Fourth, the TRIPS Agreement also relies on the WTO's Dispute Settlement Body (DSB), which is responsible for settling disputes between member countries (Dispute Settlement Understanding, Article 1).[6] The DSB has the sole authority to establish panels of experts for each and every dispute, to accept or reject panel findings and decisions and to monitor member states' compliance with the WTO dispute rulings. If and when a member country chooses not to comply with a given ruling, the DSB has the power to authorize trade-retaliation measures against that member (DSU, Article 22).

Finally, there is the provision of technical assistance to developing and least developed countries (LDCs) to help them implement IPRs in general and the TRIPS agreement in particular. It is well established that LDCs, as well as some developing countries, are bound to face considerable obstacles in meeting their international IP obligations. As a result, TRIPS Article 67 clearly states that developed countries should provide technical and financial assistance to developing countries and LDCs. Accordingly, international organizations and institutions, such as WIPO, the World Bank, the WTO, as well as some of the developed countries, such as the United States and the EU, provide technical, educational and, to some extent, technological, assistance to developing countries and LDCs in order to promote TRIPS benefits in these countries. But there is also criticism that such assistance has not fully taken into account the special needs and circumstances of developing countries and LDCs (Kostecki 2006).

The Rise and Fall of the TRIPS Framework

The 17-year life of the TRIPS can roughly be divided into three periods. The first period – 1995 to early 1999 – may be described as the period of 'determination'. Developed countries were convinced that TRIPS could provide a long-term platform for the protection and enforcement of their IP rights worldwide. One need only look at the different WTO disputes between the United States/EU and India/Pakistan on the so-called patent 'mail-box' provisions in order to understand such optimism (WTO Dispute Settlement Body 1998). But developed countries underestimated the growing opposition to TRIPS among developing countries, and particularly the LDCs.

The second period – November 1999 to November 2001 – may be described as the period of 'resentment'. Developing countries, backed by a new wave of anti-IP

[6] In fact, when reviewing disputes the General Council functions as the DSB.

sentiment within the NGO community, expressed a growing sense of antagonism towards their implementation of the TRIPS as of 2000. Many developing countries felt that the TRIPS Agreement was too one-sided in favouring developed countries and offered little to their own nationals. This resentment was fuelled, in part, by two separate events; the colossal failure of the Seattle WTO Ministerial Conference in late 1999 and the debate on patented AIDS medicines in South Africa.

The third period – November 2001 to date – may be described as the period of 'flexibility', though not necessarily in a positive sense for all parties concerned. This period has brought two major changes. First, the discussion on TRIPS has narrowed to an almost exclusive focus on pharmaceutical IPRs. Second, the focus is no longer on the implementation, but rather on the 'flexible' interpretation of TRIPS, in other words on the manner in which developing and least developed countries could essentially avoid or bypass the agreement. Most representative of this period are the 2001 Declaration on the TRIPS Agreement and Public Health (as part of the Doha Development Agenda) and the August 2003 Agreement on the implementation of Paragraph 6 of the declaration (focusing on the manner in which LDCs with no manufacturing capacities can import generic substitutes to existing patented pharmaceutical drugs) (WTO 2003).

Flexibility, while celebrated in the media and by some NGOs as elevating concerns about the restrictive effect of TRIPS on the access to medicines, has had two important implications. The first is the (almost) complete stagnation in the negotiating agenda of TRIPS. In the past decade, we have experienced vast and rapid technological developments, such as in the World Wide Web and mobile and digital mediums. These fields encompass highly complex and important IP issues, most of which have not been incorporated into TRIPS, with the result that the resultant other global platforms, such as the Anti-Counterfeiting Trade Agreement (ACTA), are currently being considered.[7] In contrast, negotiations on TRIPS tend to focus today mostly on the possible creation of a multilateral geographical indications (GIs) register for wines and spirits (WTO 2010), although one can argue that the issue of GIs is of a lesser importance compared with the other pressing issues relating to the global IP architecture.

The second and perhaps more important outcome is inclusion of IPR protection in the regional and bilateral agreements initiated by the United States, the EU and other developed countries. These agreements are discussed in the next section.

IPRs and Regional/Bilateral Trading Agreements – Going for 'TRIPS Plus'

Despite the rather deep freeze at the multilateral level, developed and developing countries have, since 2000, been signing preferential trade agreements (PTAs)

[7] See: European Commission (2007).

at both the regional and bilateral levels that include IP provisions, and there is growing evidence that the agreements between the United States or the EU on the one hand and developing countries on the other have been based on TRIPS Plus provisions (Abbott 2004; OECD 2002; Vivas-Eugui 2003; World Bank Development Prospects Group 2005). To date, the US-led agreements seem to be more detailed and comprehensive than the EU-led ones, both in terms of their framework (that is, enforcement, administration, etc.) and specific provisions.

US-led PTAs

While the TRIPS Agreement specifies the minimum IP commitments of WTO members, US-led PTAs are in essence based on a 'to-do list' approach (some would argue, a 'nanny' approach) that specify IP amendments and actions that its trading partners should implement.

Chapter 15 of the Central American–Dominican Republic Free Trade Agreement (CAFTA–DR) of May 2004 is probably the clearest example of the manner in which the United States pursues its TRIPS Plus framework. CAFTA–DR requires its signatories to significantly strengthen their level of IP protection, as well as their civil, administrative and enforcement procedures. For example, Articles 26 and 27 require CAFTA–DR signatories to strengthen their criminal remedies by, for example, imposing 'sentences of imprisonment or monetary fines, or both, sufficient to provide a deterrent to future acts of infringement'.

Similar to this approach at the regional level, the United States also expects comprehensive IP protection in the bilateral agreements it negotiates, such as those in the US–Republic of Korea FTA (KORUS FTA, 2007), US–Chile FTA (2003), the US–Singapore FTA (2003), the US–Morocco FTA (2004), the US–Bahrain FTA (2004) and, to some extent, the US–Jordan FTA (2000).[8] Generally speaking, US agreements include TRIPS Plus provisions for both copyrights and trademarks by, for example, prohibiting the parallel importation of pharmaceutical products, a practice allowed under the international exhaustion regime of TRIPS (Heydon and Woolcock 2009).

US autonomous trade legislation in the shape of Section 301 (commonly referred to as Special 301) of the Trade Act of 1974 enables the United States Trade Representative (USTR) to identify Priority Foreign Countries which, according to US criteria, provide inadequate protection for IPRs and thereby cause the greatest adverse impact on right holders. The 301 process can eventually lead to a situation in which the United States may take unilateral action and possibly impose sanctions against countries found to be significant violators of IP rights. The Special 301 lists include two categories – the Priority Watch List and a Watch List – for countries whose actions meet some, but not all, of the criteria for increased bilateral attention concerning the problem areas.

[8] Available at: www.ustr.gov.

EU-led Trade Agreements

Compared to those of US agreements, the IP provisions of new-generation PTAs, such as recent Association Agreements or the Economic Partnership Agreements (EPAs) between the EU and the African, Caribbean and Pacific (ACP) states are much more general in nature. Typical EU-led PTAs – both older agreements such as the EU–Israel FTA (2000), the EU–Chile FTA (2002), the EU–Jordan FTA (2002) or the EU–Mexico FTA, and more recent agreements, such as the Framework Agreement on Trade and Cooperation between the EU and South Korea (2007) – are characterized by 'objectives' and 'scope'. The objectives generally require signatories to 'grant and ensure adequate and effective protection of the highest international standards including effective means of enforcing such rights'. The agreements' scope enumerates the different types of IPRs that the agreement covers, such as copyrights, patents, industrial designs, GIs, trademarks, layout designs (topographies) of integrated circuits, and the protection of undisclosed information. Some recent agreements, such as EU–Caribbean Economic Partnership Agreement (CARIFORUM – 2007), do tend to be more detailed, but more towards the direction of identifying the developmental needs of the partnering countries (especially on issues of medicines, biodiversity and traditional knowledge). At the same time, for the more established forms of IPRs (copyrights, trademarks and patents) the Agreement adheres to the 'general approach' identified above (EC 2008).

Instead of specifying the IP requirements that signatories should implement (as in the US to-do list model), EU-led PTAs specify what international conventions and treaties signatories should implement, based on three stages of IPR protection.

The first stage relates to existing international conventions that require 'adequate and effective implementation', such as the TRIPS Agreement; the Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967); the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961) and the International Convention for the Protection of New Varieties of Plants 1978 (the 1978 UPOV Convention) or the International Convention for the Protection of New Varieties of Plants 1991 (the 1991 UPOV Convention). The second stage relates to conventions that were to have been implemented and ratified by 2007 and 2009, such as the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks (Geneva, Act 1977, amended in 1979); the World Intellectual Property Organization Copyright Treaty (Geneva, 1996); the Patent Cooperation Treaty (Washington, 1970, amended in 1979 and modified in 1984); and the Convention for the Protection of Producers of Phonograms against the Unauthorized Reproduction of their Phonograms (Geneva, 1971). The third stage concerns agreements that require implementation at 'the earliest possible opportunity', such as the Protocol to the Madrid Agreement concerning the International Registration of Marks (1989); the Madrid Agreement Concerning the International Registration of Marks (Stockholm Act, 1967, amended in 1979); and

the Vienna Agreement establishing an International Classification of Figurative Elements of Marks (Vienna, 1973, amended in 1985).

Despite this general approach based on existing international standards of IPR protection, the EU seeks much more specific protection of GIs. For example, Roffe (2004) finds that, as regards the EU–Chile FTA: 'probably, the most significant intellectual property related provisions are contained in Annex v, on the "Agreement on the Trade in Wines" and Annex vi concerning Spirits. These annexes include provisions on the reciprocal protection of geographical indications related to wines and spirits, and the protection of traditional expressions [of both Parties]'.[9] He concludes that 'the Association Agreement between Chile and the EU is also a TRIPS–Plus Agreement especially on the protection of geographical indications'.

Finally, unlike the US model, EU-led PTAs do not have specific provisions on enforcement, civil and criminal remedies, or administration. Some, such as the EU–Jordan FTA, have a consultation mechanism, according to which: 'if problems in the area of intellectual, industrial and commercial property affecting trading conditions … occur, urgent consultation shall be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions' (EU–Jordan Association Agreement, 2002, Article 56). But this more flexible approach has, however, made it difficult to ensure that the EU's trading partners implement their IP commitments in bilateral agreements. As a result, it appears that the EC is becoming more proactive in enforcing IPRs. This can be seen in several instruments that have been adopted by the EC, such as the *Strategy for the Enforcement of IPRs in Third Countries* (European Commission Directorate General for Trade 2004a, 2004b).

Implications

What are the implications of these trends? First, although the common view is that the current emphasis on the so-called TRIPS flexibilities would serve the interests of developing countries, the recent surge in US- and EU-led TRIPS Plus bilateral agreements, where the United States and EU can use their asymmetric bargaining strength, suggests that this strategy (particularly in pharmaceuticals) may have been counterproductive. Second, the US-, and now EU-led bilateral agreements, are both raising the level of protection in developing countries as well as strengthening implementation and enforcement provisions. These suggestions on the direction and pace that the North's global enforcement of IPRs will take are arguably controversial and need much more empirical research in order to be validated (or disproved).

[9] Also see: Vivas-Engui (2003).

Conclusion

Seventeen years after the launch of the TRIPS Agreement, the debate about the desirability of international scale IPRs is far from being settled. On the contrary, future debates on IP issues promise to be both extensive and heated. They encompass issues across the board, such as incentives for innovation, industrial development, trade policy, access to available technologies and effective commercialization in the age of knowledge-intensive industries.

It would be unrealistic to expect policymakers to come up with the perfect policy toolkit that would address all the challenges and opportunities associated with the IP field. But a more efficient and practical IP policymaking process is needed. Such a process – conducted at the national, bilateral and multilateral level – should be based on three major pillars.

The first pillar concerns the preferred approach to policymaking in each given IP area, taking full account of different social, industrial, environmental and developmental needs. While there is an obvious case for taking all of these perspectives into account, the policymaker must eventually decide on relative priorities. For example, when it comes to making a decision about the scope and term of patent protection in pharmaceuticals, policymakers have, for example, to balance the aim of encouraging innovation against improved developing country access to medicines, while also balancing the aim of attracting FDI from multinational companies against policies in support of domestic industries. Whilst the policymakers' aim is to achieve such balances, in practice there is always a need to identify a strategic preference, towards one goal over the other. In order to make such decisions, policymakers need a clear understanding of the range of IP issues and objectives.

The second pillar concerns the need for coherence between the various elements of national IP policies and other relevant policy areas. Most of the focus here should fall on collaboration and coordination between the different ministries and agencies that are responsible for IP policies. For example, there is a need for much better coherence between policies that deal with IPRs from the perspective of *competition issues* (anti-trust) and policies that deal with IPRs from the perspective of *competitiveness* (that is, policies aimed at enhancing the global competitive position of one country vis-à-vis other countries). The IP-related aspects of different areas are often being dealt with by different entities (for example, DG Competition and DG Enterprise in the EU deal with the issue of competition and competitiveness respectively). These entities may well differ in how they perceive IPRs and the objectives and challenges that they choose to focus on. This can result in a lack of coherence, inconsistency or even conflict between the entities.

Finally, for each and every IP topic, there is a need for much better monitoring to ensure, throughout the entire policymaking process, that the strategic objectives identified by policymakers are indeed reflected in the final outcomes, for example in a given free trade agreement.

To sum up, when it comes to IPRs, there is no grand theory that can be followed. Policy formulation will remain an uphill struggle that reflects both the joint as well

as rival interests of different parties as well as the underlying 'paradox of IPRs'. What is clear, however, is that given the growing importance of the so-called 'global knowledge economy', there is increasingly a need for skilled IP policymakers who understand the complexities within the uneasy marriage of IPRs and international trade.

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