

Intellectual Property and RTAs:

IP Provisions in RTAs Viewed from an IP Policy Perspective

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What is the IP system?

- System to grant monopolistic rights for a certain period of time to specific persons (e.g., creators, inventors) for public policy purposes
 - “Analogous to government subsidies or regulation”
 - Conflicting interests of the haves and the have-nots
 - IP rights (IPRs) are private rights
 - Importance of enforcement
 - Difficulty in weakening or dismantling IPRs
- Level of IP protection should be appropriate (“effective and adequate protection”)



The IP System and Trade Policy/WTO

- Trade-promoting measures which “reduce distortions and impediments to international trade” (Preamble of TRIPS Agreement [TRIPS])
 - Trade restrictive measures
 - cf. GATT Art. XX (d)
- From standpoint of trade policy as well, level of IP protection should be balanced

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International Efforts on IP

- Establishing international IP system
 - international registration system (e.g., Madrid Protocol)
 - regional IP system (e.g., European Community Trade Marks)
 - global IP system (e.g., World Patent System)
- Harmonization of substantive rules for IP protection
- Ensuring effective enforcement of IP
- Harmonization of procedural aspects of IP Protection
- Cooperation/capacity building

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Multilateralism, Regionalism, Bilateralism and IP

- Cycles of bilateralism (and regionalism) and multilateralism in respect of international protection of IP
 - e.g. 1883 Paris Convention - 69 bipartite treaties which contained rules to protect foreigners' rights in industrial property
 - One reason for conclusion of TRIPS was to avoid harm from bilateralism

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Regionalism/Bilateralism after TRIPS

- Under MFN principle in TRIPS (Art. 4), most commitments (by a WTO Member) regarding IP protection in bilateral or regional agreements are required to be accorded to nationals of all other WTO Members
- However, if subject matter is not "IP" covered by TRIPS, MFN principle is not applicable

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Different Approaches to Regionalism/ Bilateralism on IP-related Matters

- US Approach
 - Aggressive use of RTAs/BITs
- European Approach
 - Preference for Multilateral agreements
 - Shift in recent years (?)
- Japanese Approach
 - Moderate use of RTAs

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IP provisions in RTAs (1)

- Major examples of issues dealt with in RTAs:
 - substantive and/or procedural aspects of IP protection
 - enforcement of IP
 - accession to and/or observance of existing treaties
 - cooperation in IP-related areas
 - follow-up mechanism among parties

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IP Provisions in RTAs (2)

- “TRIPS-Plus” provisions

e.g.,

- Provisions which require parties to protect certain kinds of IP beyond their obligations under TRIPS
- Provisions which restrict use of flexibility permitted by TRIPS

- others

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Merits of TRIPS-Plus Provisions

- Means to ensure effective protection of IP
- Steps to promote international efforts for global IP regime

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Possible Negative Effects of TRIPS-Plus Provisions (1)

- Possibility of discriminatory treatment
 - Despite MFN principle under TRIPS, possibility of discrimination remains because of limited scope of TRIPS
- e.g.,
- (1) Protection of traditional knowledge (TK) in FTAA (3rd draft) and Directive in ANDEAN Community
 - (2) Protection of (non-copyrightable) databases in EU
 - (3) Treatment of parallel imports from non-member countries into EU
- *might be challengeable under GATT

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Possible Negative Effects of TRIPS-Plus Provisions (2)

- Possibility of hindering global harmonization of IP system
 - Prejudging issues still under multilateral negotiation
 - Adopting different rules in different RTAs on same issues
- e.g.,
- (1) Protection of traditional knowledge in FTAA (3rd draft) and Directive in ANDEAN Community
 - (2) Grace period for patent application in US-Korea FTA
 - (3) Different criteria for anti-circumvention measures in several US-related FTAs

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Possible Negative Effects of TRIPS-Plus Provisions (3)

- Possibility of forcing excessive "concessions"
 - Difference between determination of level of IP protection and decision to reduce tariffs
 - Negotiations for RTAs may be problematic as decision-making process on IP-related matters, because they may reflect raw demands of particular business interests (IPR holders) on one hand, and concessions for non-IP-related gains on the other
 - Such excessive concessions may eventually cause doubts about justifiability of IP system and TRIPS

e.g.,

- (1) Protection of information concerning pharmaceutical or agricultural chemical products
- (2) Anti-circumvention measures to protect digital information (in some respects, stricter than US law)
- (3) Prohibition of parallel imports

* All of these examples are seen in US-related FTAs

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Conclusion

- Regional/bilateral agreements on IP can generally be effective for promoting international protection of IP, but TRIPS-Plus provisions might have negative impacts on international efforts on IP (and even the international free trade regime)
- Problem should be recognized as a global matter, not only "North-South" issue

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