A 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

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
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

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
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
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

Merits of TRIPS-Plus Provisions

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

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
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

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