

TPP: The New Gold Standard for Intellectual Property Protection in Trade Agreements?

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The Trans-Pacific Partnership, or TPP, with its emphasis on dismantling behind-the-border trade restrictions and on fostering regulatory coherence, is often referred to as the new “gold standard” for preferential trade agreements. The road ahead – in terms of its ratification by the parliaments of TPP members – will be a treacherous one. So far, only Malaysia has ratified the agreement, which was signed last October in Atlanta after five years of negotiations. Moreover, in the case of the US, the public is increasingly skeptical about the benefits of trade agreements and the leading potential candidates to the presidency have expressed doubts about the TPP. All of this suggests that a decision by the US Congress is unlikely to occur in the near term amid the 2016 presidential campaign.

Supporters and opponents of the agreement have been producing conflicting estimates of the TPP’s impact on the economies of its member countries. Most standard models, however, tend to confirm a positive (although small) impact in terms of economic welfare. One area in which the TPP is particularly innovative concerns the protection of intellectual property rights, or IPRs.

The history of the “marriage of convenience” between trade policies and IPR protection goes back many decades. IPRs are territorial by nature (i.e., the rights are awarded and enforced at national level), and attempts to promote harmonization and coordination across countries can be traced back to the 19th century. As international trade in knowledge products and foreign direct investment flows expanded significantly in the post-World War II era, conflicts between innovators (at the level of countries and enterprises) and imitators began to increase.

In the 1970s, the United States began to push for the adoption of an anti-counterfeiting code at the level of GATT negotiations. This effort – launched at the final stages of the Tokyo Round (1973-79) of multilateral trade negotiations – was driven by the lobbying of trademark-holding companies, which were trying to constrain flows of counterfeited products in international trade. It did not succeed, but it signaled the way of the future for innovation-leading nations, in particular the US

When the 8th round of multilateral trade negotiations (the Uruguay Round) started in 1986, the strategy was refined to go beyond anti-counterfeiting with a view to establish minimum standards of protection and enforcement across a broad array of IPR instruments. The appeal of this approach was to connect the strengthening of IPR protection to the broader trade agenda and to provide access to the dispute settlement mechanism of the multilateral trade system. Most developing countries, in turn, preferred the World Intellectual Property Organization (WIPO) as the institutional locus for IPR discussions. The lack of effective enforcement powers in the WIPO conventions, however, is often presented as the reason behind the American efforts in favor of a trade-related solution. This led to the adoption of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) as an outcome of the Uruguay Round that led to the creation of the WTO in 1995.

Since then, however, industry groups from innovation-led countries have continued to lobby for the inclusion of IPR chapters in trade agreements, focusing on preferential trade negotiations. The new generation of preferential trade agreements negotiated by the USA – starting with NAFTA – typically included “TRIPS plus” provisions. The EU also followed a similar track. Moreover, IPR provisions became standard in bilateral investment treaties entered by both the

US and the EU with other nations.

In negotiating the TPP, the US put emphasis on longer terms of copyright protection and regulatory changes that would effectively translate into longer patent terms and constrain the entry of generic drugs into TPP markets, as well as additional rules for biologic medicines (pharmaceutical products developed from living organisms) including minimum standards for data protection.

The final terms of the TPP agreement did not deliver on all the demands of the US negotiators. Still, several of these “TRIPS plus” measures were adopted. Some noteworthy measures adopted in the TPP agreement include:

- Trademark terms of protection of no less than 10 years (TRIPS requirement is of 7 years) and the removal of barriers for the protection of sound marks;
- A minimum copyright term of protection of at least 70 years (TRIPS minimum standard is 50 years) and stronger copyright enforcement, including the possibility of criminal prosecution against acts of removal of rights management information and the requirement that TPP countries be signatories of WIPO “Internet treaties”;
- Requirement of enforceable legal means for the protection of trade secrets (TRIPS does not specify these means);
- Protection of undisclosed test data submitted for marketing approvals (at least 10 years in the case of agricultural chemicals and 5 to 8 years in the case of pharmaceuticals; TRIPS does not have such a requirement);
- Explicit protections for new pharmaceutical products that are or contain a biologic (the TPP is the first trade agreement to do this); and
- Adjustment for patent office delays in the granting of patents that will promote harmonization of patent granting practices among TPP parties.

It is worth noting that some of these provisions go beyond the “TRIPS plus” aspects that the US had already negotiated on a bilateral basis in the context of its FTA treaties with countries such as Australia, Chile, and Peru. In short, TPP will provide for higher standards of IPR protection that better reflect existing US law.

The TPP (once ratified) offers a natural experiment for the implications of higher standards of IPR protection with respect to innovation and transfer of knowledge. Will the developing countries that are TPP members experience an increase in innovation activities and better access to foreign know-how vis-à-vis countries at similar stages of development that have weaker standards of protection? Or will the TPP simply “export” to other countries the flaws of the US IPR system with its emphasis on litigation (as illustrated by the growing role of non-practicing entities – i.e., entities that focus on licensing and litigation of IPRs rather than production and innovation) and loopholes that allow for strategic behavior to block the introduction of generic drugs. Only time will tell.

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