Innovation, Creativity and IP Policy: An Indo-European Dialogue

TRIPS, FTAs and BITs: Impact on Domestic IP- and Innovation Strategies in Developing Countries

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Outline

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2. **Multilateral IP Treaties** and Domestic IP and Innovation Strategies – the Example of TRIPS

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Introduction

Do harmonized (strong) IPRs foster innovation?

- **Historical evidence** from the IP policies of industrialized countries in the 19th and early 20th century as well as more recent experience of far-eastern countries indicates that in order to facilitate domestic technological development, IP policies must be tailored to the individual circumstances and respond to the domestic strengths and weaknesses in innovation and dissemination of technology (CIPR, 2000)

- From a *trade theory* perspective, “the level of intellectual property protection each country decides to afford will thus be rationally related to whether its comparative advantage resides more in innovation or imitation and adaptation of innovations made elsewhere (...) More precisely still, a rational country would have different levels of protection for different industries, representing different trade-offs between innovation and imitation in each industry, depending upon where its comparative advantage lies.” (Trebilcock & Howse, 2005)

→ **One Size Does Not Fit All!**
TRIPS and Domestic IP- and Innovation Strategies

The Int. IP System and Innovation

- International **Harmonization** of Domestic IP Regimes via Minimum Standards (see e.g. Art.27-34, 41-61 TRIPS)

- Harmonization **benefits IP-exporting industries** in accessing markets abroad → increasing returns may incentivize further innovation for these industries...

- Benefits for local industries / **domestic innovation** (in net IP-importing countries)?
  - Increased **FDI, Technology Transfer**?
    → ‘trickle down effect’ resulting in technological learning, increased domestic innovation?
  - **Dynamic competition** fostering innovation?
  - **Less flexibility to adopt a tailored IP regime**, e.g. less ability for local industries to imitate...

→ Need for sufficient **policy space** in Int IP Law!
TRIPS and Domestic IP- and Innovation Strategies

Innovation Related Flexibilities in TRIPS

- Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice (Art.1:1) – but no right to ignore specific TRIPS obligations…

- The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. (Art.7) – no binding provision, but decisive for TRIPS interpretation (Art.31:1 VCLT)
TRIPS and Domestic IP- and Innovation Strategies

Innovation Related Flexibilities in TRIPS

- Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties. (Art.30); see also Art.13, 17, 26:2 TRIPS

→ open to a balanced understanding which allows exceptions for derivative & other commercially relevant uses of IP protected material?

- ‘Sustainable development objective’ (WTO Preamble)
  → “must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement” (WTO AB in US – Shrimp, 1998)
  → what role for interpreting TRIPS?
FTAs and EPAs

Norm Transplantation – Examples

- **Copyright Infringement in the Digital Environment**: See sec.1201, 1202 DMCA and Art.15.5:7&8 CAFTA on TPMs, DRMs

- **ISP Liability**: See Art. 12-15 EU E-Commerce Directive and Art.242-246 EU – Peru, Colombia FTA (as well as Art.26.1-26.5 EU – India FTA, draft text of 9 Sep 2008) on the different forms of ISP liability

- **IP Enforcement (via border measures)**: See Art.1:1 & 2:1 BMR and Art.163 EU – CARIFORUM EPA, CEPA (as well as Art.27 EU – India FTA, draft text of 9 Sep 2008) on the type of trade activity and IP infringements covered
FTAs and EPAs

Development-Sensitive Levels of IP Protection

- Chapter on ‘Innovation and IP’, Art.131 CEPA (Context)
  - fostering innovation and creativity improves competitiveness and is a crucial element (…) in achieving sustainable development
  - the protection and enforcement of intellectual property plays a key role in fostering creativity, innovation and competitiveness
  - [The Parties] are determined to ensure increasing levels of protection appropriate to their levels of development

- Art.132 (Objectives)
  - (a) promote the process of innovation, including eco-innovation, of enterprises located in the Parties
  - (c) facilitate the production and commercialisation of innovative and creative products between the Parties
FTAs and EPAs

CEPA IP Section, Art.139 (Nature & Scope of Obligations)

- The Parties also agree that an adequate and effective enforcement of intellectual property rights should take account of the development needs of the CARIFORUM States, provide a balance of rights and obligations between right holders and users and allow the EC Party and the Signatory CARIFORUM States to protect public health and nutrition.

- Nothing in this Agreement shall be construed as to impair the capacity of the Parties and the Signatory CARIFORUM States to promote access to medicines.

→ Nature and Scope of IP enforcement under CEPA should allow an interpretation and domestic implementation that takes development needs of the contracting parties into account.
FTAs and EPAs

Art.190 (General Principles) EU – Peru, Colombia FTA

1. With due regard to the provisions of this Title, each Party may, in formulating or amending its laws and regulations, make use of the exceptions and flexibilities permitted by the multilateral intellectual property agreements; particularly when adopting measures necessary to protect public health, to guarantee access to medicines and nutrition.

2. The Parties recognize the importance of the Doha Declaration and especially the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 by the Ministerial Conference of the World Trade Organization and its subsequent developments. In this sense, in interpreting and implementing the rights and obligations under this Title, the Parties shall ensure consistency with this Declaration.

Also, the Parties recognize the importance of promoting the implementation of Resolution WHA61.21 of May 24, 2008, adopted by World Health Assembly, on public health, innovation and intellectual property.
FTAs and EPAs

FTA/EPA Effect on Domestic Innovation

**Norm Transplants** primarily serve legal security interests of IP exporting industry

→ Does this lead to increased FDI, TT?
→ Fewer policy space to draft nat. IP regimes to serve needs of domestic industry

Impact of ‘Development-Norms’?

→ Effect on Interpretation, implementation (Art.31 VCLT) in case of open, ambiguous treaty terms – not in case of Norm-Transplants…

Overall **cost-benefit analysis**: Gaining (or avoid loosing preferential) market access to foreign markets as trade-off for constraints on policy space?

→ Need to consider (1) preference erosion, (2) TRIPS MFN-effects, (3) long term nature of policy constraints
Bilateral Investment Treaties (BITs)

IP Protection under BITs

- IP rights as protected investment; see e.g. India – Germany BIT Art.1 b) (iv)
- What follows from the application of substantive investment protection standards to IP rights?
  - ‘fair and equitable treatment’
  - ‘full protection and security’
  - prohibition of (direct or indirect) ‘expropriation’
  - prohibition of performance requirements relating to technology transfer or ‘other proprietary knowledge’

→ Depending on the individual circumstances, domestic regulation may conflict with investment standards
- Role of investor – state arbitration for IP: → No need to exhaust local remedies… (see Art.9 (3) India – CH)
Bilateral Investment Treaties (BITs)

TRIPS-Flexibility Safeguards

Do Investment standards afford protection for IP which curtails innovation-flexibilities under TRIPS?

→ Safeguarding TRIPS flexibilities via consistency clauses: e.g. standards on expropriation do “not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.” (see e.g. US Model BIT)

→ However: In Investor-State disputes, the host state may have to prove TRIPS consistency…

→ Defining IP “in accordance with the relevant laws of the respective party” (India – Germany, Art.1 b) (iv)) as general limitation to investment protection to the scope & limits of national IP laws?
Bilateral Investment Treaties (BITs)

BIT Effect on Domestic Innovation

**Effect of ambiguous standards** for IP as protected investment:

→ So far little (publicly available) case law – with a focus on public interests measures
→ Ambiguity resulting in ‘**regulatory freeze**’?

**Role of TRIPS Flexibility Safeguards**

→ Explicit safeguards for public health may be relevant for innovation in the **generic industry**
→ General TRIPS consistency clauses in FTA Investment chapters uphold TRIPS obligations – but not **optional TRIPS flexibilities** …
Conclusion

- Since **domestic innovation calls for** an IP system which is tailored to domestic needs, the international IP system must allow sufficient **policy space**

- **TRIPS** *(de jure or de facto)* arguably contains innovation related flexibilities – WTO members must use them more bravely

- **FTAs** which attempt to transplant IP rule systems further **limit policy space** – ‘development’ norms can be utilised in case of open treaty terms

- While **BIT standards** might affect domestic IP regulation **countries should not ‘freeze’**…
Thank you for your attention!

Any comments and critique to 
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