Preferential Trade Agreements and IPRs

The Economics of IPRs and Innovation, Knowledge, and Technology Transfer

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Objectives of chapter

- To show extent & breadth of changes brought by PTAs: shift in balance between rights holders and users
- To show how PTAs contribute to expansion of international IPR architecture
- Focus: PTAs signed by DCs with US, EU and EFTA

From TRIPS to PTAs (1)

- Since 1995: more than 250 PTAs among WTO Members
- Focus on PTAs with full IP chapters (US; recent EU; EFTA)
- Trend: upward harmonization & strengthening of exclusive rights, shift in balance; loss of TRIPS flexibilities

From TRIPS to PTAs (2)

- PTAs legitimate consequence of TRIPS Art 1
- DCs are often demandeurs
  - Market access to OECD
  - But hesitant on IP (ex. Chile)
- OECD countries push for stronger IP
  - Response to domestic industry

Overview of EU PTAs

- Traditionally: no particular model, no detailed provisions
  - Commitment to multilateral IP treaties
  - Substantive obligations mainly on Gis
- Major shift: EPA with CARIFORUM
  - Detailed provisions on enforcement
  - Optional disclosure of origin requirement
  - Data exclusivity (DE) in proposals to Andean countries

Overview of EFTA PTAs

- Comparable to former EU PTAs
  - No uniform model
  - Main thrust on adherence to multilateral IP conventions
- Important exception: protection of pharmaceutical & agrochemical test data
  - Exclusivity
  - Compensation
  - Broad reference to TRIPS Art 39

Overview of US PTAs

- Very detailed & expansive coverage of IPRs
  - Prior to TRIPS (NAFTA), but mainly with US – Jordan (2001) → uniform model
- 2002 Trade Promotion Authority (TPA)
  - Standard of protection similar to that in US law
- Important shift 2007: expiry of TPA
  - Bipartisan understanding reflecting public health concerns
  - Outstanding PTAs with Colombia, Panama, Peru

US PTAs: « certification »

- PTA implementation bills by Congress: PTA enters into force upon satisfaction by US President regarding other Party's domestic implementation (« certification »)
- After PTA negotiation, second negotiation on domestic law
- Impact on DCs' freedom under Art 1 TRIPS
- By contrast, PTAs do not affect US domestic law (unless express authorization by Congress)

Specific areas: public health

- Multilateral debate shifted to regional & bilateral level after Doha Declaration & TRIPS draft Article 31*bis*
- Concerns remain:
  - Access to medicines (high prices)
  - Building of domestic capacities
    - No reverse engineering (India, OECD history)
    - Foreign generic investment (example Uganda)

Example 1: patentability criteria

- US PTAs introduce notion of « utility »
- Potentially broader than EPO's « industrial application »
  - Business models
  - Research tools → safeguards in US law
- Patents on new uses of known products
  - Process patents in US law → unclear in PTA
  - Promotion of domestic producers?

Example 2: test data exclusivity (1)

- TRIPS: strategically vague (« unfair commercial use »)
- PTAs (mainly US): exclusive rights in test data → no reliance by DRA
- Impact on generic industry:
  - No bioequivalence during term of protection → full clinical trials dossier
  - New exclusive right on off-patent drugs
  - Effect on CLs

Example 2: test data exclusivity (2)

- US – Peru: modifications
  - E.g. subjects DE to Doha Declaration and Art 31*bis* waivers (CL)
- EU: opposite development
  - No DE in earlier PTAs, 10/11-year DE in Andean proposals
- EFTA: some PTAs with DE
  - Korea: compensatory liability option
  - Colombia: compensatory liability for agrochemicals only

Specific areas: biodiversity

- Area of important multilateral deliberations (WTO, WIPO, CBD)
- Will PTAs pre-empt DCs' multilateral position?
- Opposite US/EU approaches
  - Opposite strategic interests

Example: TRIPS-CBD relationship (1)

- Patents on genetic resources & traditional knowledge
- DCs: disclosure of origin, prior informed consent and access & benefit sharing as elements of patent law (TRIPS amendment)
- TRIPS: silent
- EU: use disclosure of origin to gain DCs' support for enhanced GIs protection under TRIPS
- US: no interest in GIs

Example: TRIPS-CBD relationship (2)

- US PTAs: lack of disclosure, etc. has no impact on validity of patent
  - Peru affected: main proponent of TRIPS amendment
- EU CARIFORUM: disclosure of origin may be required in patent application
  - Review of PTA in light of results in multilateral discussions

Specific areas: copyright in digital area

- WIPO Internet Treaties (WCT & WPPT)
- Preambles reflect need for balance (protection – public interest)
- US DMCA more restrictive
- US PTAs export US model to DCs
- Concern: dissemination of knowledge essential to creativity & follow-on innovation

Example: TPMs & anti-circumvention

- US PTAs: no circumvention if not authorized by right holder (irrespective of fair use doctrine or legislation)
- Restrictions on reverse engineering of software
- Combination in practice with electronic access contracts waiving fair use rights

Specific areas: dispute settlement & enforcement

- Different approaches by US and EU on dispute settlement: non-violation complaints
- US and EU follow same approach on strengthened enforcement; in line with multilateral efforts: Anti-Counterfeiting Agreement (ACTA)

Example: non-violation

- EU PTAs: only violation complaints
- US PTAs: also non-violation complaints
  - Frustrated marketing expectations due to narrow patentability criteria, CLs, price controls?
  - Example of intrusion in multilateral processes: factual moratorium in TRIPS Council

Conclusions

- Trend: shift of balance between owners and users, upward harmonization
- PTAs modify international IP architecture (new standards & MFN; impact multilateral negotiations)
- DCs implement PTAs without required checks & balances

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