

IPR in regional trade agreements : What is hot and what is not

Any attentive observer of international trade would acknowledge that regional trade agreements (RTAs) are spreading all around the planet, mainly under the form of free trade areas (FTAs). RTAs nowadays concentrate more than 40% of global trade and on average a country is a member of six RTAs. Most of the current 300 RTAs contain very detailed provisions regarding intellectual property rights¹ (IPR).

The logic of RTAs is indeed very favourable for the inclusion of such provisions (I) and the American example is a very telling illustration of how far IPR provisions can go (II).

FTAs and IPRs: rather hot than not

First of all, it is important to stress that in any negotiation, the process has a major influence on the outcomes. TRIPS agreements were negotiated at the WTO and are the result of a consensus that remains unsatisfactory for most countries. They are a set of common basic principles.

When negotiating a FTA, the dynamic is actually very different. As John Odell pointed it out², countries tend to link issues to reach better outcomes. In the present case, a developing country would be eager to make more concessions on IPR than TRIPS agreements require if the other party, a developed country, gives assurance that a larger market access will be granted. FTAs are indeed a way to make developing countries comply with TRIPS provisions or even having them to commit to go further, despite the fact that the impact of IPR on developing economies seems to most economists to be very mitigated³.

As Peter Drahos has shown⁴, the multiplication of RTAs containing IPR provisions leads developing countries to go beyond their commitment under the TRIPS agreement. The principle of minimum standards plays a vital role in this strategy. Each bilateral or multilateral agreement dealing with intellectual property contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favourable treatment. This means that each subsequent bilateral or multilateral agreement can establish a higher standard. That's what Drahos calls the "global IP ratchet": "*The global ratchet for IPR consists of waves of bilaterals followed by occasional multilateral standard-setting. Each wave of bilateral or multilateral treaties never derogates from existing standards and very often sets new ones*"⁵. As a result, FTAs can be seen as a key element for a TRIPS-plus strategy.

This view should not however be generalised. Endeshaw's article⁶ in particular shows that EU and Japan mainly seek compliance with TRIPS provisions from developing countries through RTAs and do not impose more stringent provisions on them. FTAs are simply a way to convince developing countries to implement some of the TRIPS provisions in exchange of incentives from the developed world such as greater market access⁷.

¹ IPR deal with copyrights, trademarks, geographical indications, patents and data protection

² Odell, J. S. 2000.

³ See for example Maskus, K. 2000.

⁴ Drahos, P. 2003.

⁵ Drahos, P. 2003.

⁶ Endeshaw, A. 2006.

⁷ One may refer to the example of the Agreement between Japan and the United Mexican States for the Strengthening of Economic Partnership that contains large terms such as *public awareness activities of the importance of IP protection or policy measures conducive to ensuring adequate enforcement of IP rights*

⁹ See the report's section 'FTAs and Implementation', p3.

http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html

The United States of America, on the other hand, tends to use FTAs to impose higher standards within the developing world. These standards reflect the American legislation regarding IPR and sometimes go further by being more directive.

The American example

The last Special 301 Report from the American administration makes it clear that the US intend to seek the establishment of high IP standards via FTAs⁹. To better understand the dynamic behind this statement, one has to look briefly at how trade negotiations are carried out in the US.

Pursuant to the American Constitution, the power to negotiate trade agreements belongs to the President of the US. The power is delegated to the US Trade Representative (USTR), a member of the President's cabinet¹⁰. Once trade deals have been negotiated, Congress has to authorize the President to ratify the agreement. It usually does so under a so-called "fast-track" procedure pursuant to which Congress has agreed to forgo conditioning its approval of the agreements on amendment to the negotiated and signed in exchange for commitment by USTR to consult with Congress during the negotiation process. Many MNCs therefore lobby the Congress to defend their views on IPR and as a result USTR is strongly asked to secure high IPR standards when negotiating deals if those are to be approved by Members of Congress. Another striking issue is that FTA provisions can be overruled by the introduction of a new domestic legislation in the US¹¹. This has lead some authors to wonder whether bilateral agreements were only binding for the other party¹².

Patents are a good illustration on how far the US can go when negotiating RTAs. First, American negotiators will ask for an extension of the patent term to encompass the time of processing the patent registration in the other countries. Under the US Patent Act, certain provisions restrain this extension to take into account specific cases such as national security issues that may delay the registration pas the US Patent Office. Such provisions are usually not included in FTAs and the term is more generously extended that it would be under American law. Furthermore, the domain of patentability is much wider than required under TRIPS provisions or even American law. In the US-Morocco FTA for instance, it is specified that every form of life can be patented. Finally, as far as the burning issue of medicine is concerned, FTAs would tend to limit the introduction of competition from generic medicine producers. For instance, in the US-Australia trade agreement, compulsory licenses can be granted on a much more restrictive basis than American law permits¹³ and this effectively eliminates any flexibility provided by TRIPS agreements.

Copyrights could also illustrate the TRIPS-plus strategy of the US. TRIPS provisions require the copyright to be protected for the whole life of the author plus fifty years. It's very common that FTA provisions add another 20 years to that period! Moreover, FTA clauses often create obligations against the circumvention of Digital Right Management systems though TRIPS agreements are dumb on these issues. Some commentators see this as a way for the US to export their famous Digital Millenium Copyright Act of 2000.

In a nutshell, it seems clear that RTA through the way they are negotiated enable more flexibility than within the WTO arena. EU and Japan would use these tools to persuade developing nations to implement their commitments under the TRIPS agreements. On the other hand, the US tries to pursue a TRIPS-plus strategy, imposing higher standards on developing countries, sometimes regardless of the effects of these norms on their economy. Since IPR are connected with very sensitive issues such as public health, it should be shed more light on such practices and the interests of the developing world should be better taken into account.

¹⁰ The USTR is currently Susan C. Schwab

¹¹ See for instance U.S.-Australia Free Trade Agreement -- Questions and Answers About Pharmaceuticals, July 8, 2004, http://www.ustr.gov/Document_Library/Fact_Sheets/2004/US-Australia_Free_Trade_Agreement_-_Questions_Answers_About_Pharmaceuticals.html?ht=

¹² Abott, F. M. 2006.

¹³ Abott, F.M. 2006. p 11.

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