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Intellectual property rights in regional trade agreements of Asia-Pacific economies

Teemu Alexander Puutio, LL.B,LL.M

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Any remaining errors are the responsibility of the author who can be contacted at puutio@un.org.

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Abstract

Economic growth across the globe increasingly depends on knowledge-based industries. As a consequence Intellectual Property Rights, or IPRs, are becoming increasingly integral to trade agreements. With the stagnation of the Doha Round the prospect of new global standards, to augment those already agreed through TRIPS (the Agreement on Trade Related Aspects of Intellectual Property Rights administered by WTO) is diminishing. Therefore some countries are using bilateral and multilateral trade agreements to push for strengthened IPR standards which they hope will become the new de facto international standards.

At the turn of the millennium there were less than 10 agreements containing IPRs in the Asia-Pacific. At the end of April 2013, 51 trade agreements that include IPR provisions were in some stage of existence, according to Asia-Pacific Trade and Investment Agreements Database (APTIAD). The proliferation of IPRs within trade agreements has been notable and IPRs have become common subject matter for bilateral and multilateral treaties in the Asia-Pacific. Not all agreements give IPRs equal treatment however. In fact, as our research shows, the extent to which IPRs are included varies greatly from agreement to agreement. For example, the agreement between Japan and Switzerland is more than 10 times more significant in terms of IPRs than the agreement between New Zealand and Thailand according to our grading methodology. Using the measure of impact explained in more detail in the paper it is possible to show that developed countries, Australia and the United States as well as the European Union show a persistent pattern of being involved only in high-impact agreements in terms of IPRs. The grading also shows that developing countries do not seek the inclusion of high-impact IPR standards in trade agreements when negotiating with another developing country. This finding validates the notion that the pressure for including IPRs in trade agreements originates from developed countries.

What does the emergence of IPRs in trade agreements entail for Asia-Pacific developing countries? As the capacity to deal with IPRs is distributed unequally, the emergence of IPRs has lead to a situation where a handful of developed countries are all but unilaterally ratcheting up the IPR standards one trade agreement at a time. Developing countries have largely consented in exchange for trade normalization or increased market access. There is extensive evidence that the economic effects of IPRs vary greatly, depending on the environment in which they are applied. But in the case of developing countries, it appears that

the current globally upheld level of IPRs might not be the optimal solution for supporting their growth and that IPRs protection is not a significant factor for the economic growth of developing countries (World Bank, 2002).

The number of IPRs-inclusive trade agreements appears certain to continue to grow and the scope and significance of IPR provisions will increase further in the coming years. Introducing higher IPR protection standards can have long-lasting and unexpected consequences for the developing countries of Asia-Pacific. For such countries, committing to higher IPR standards in return for trade normalization or increased market access carries risks which should not be ignored.

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1. The arrival of intellectual property rights to a trade agenda

As all modern trade negotiators know well, trade agreements are no longer only about tariffs restricting market access. Today, trade negotiators more often than not have to be concerned with sanitary/phytosanitary (SPS) standards, customs cooperation and foreign investment rules. Since the signing of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in Morocco in 1994, more issues were added to already long negotiating mandates including very controversial intellectual property rights (IPRs). Over last 17 years, IPRs have seen a rise from a near obscurity to being an almost mandatory part of modern trade agreements. This rise has been fast, and with the growing importance of knowledge-based industries that momentum is only increasing. We are seeing the provisions introduced in trade agreements becoming effective global standards for IPRs protection (Grosse Ruse-Kahn, 2011).

The mere speed of these developments is making more difficult to properly assess the reasons why IPRs have been incorporated into trade agreements in the first place as well as what effects their sudden emergence is creating. The indecisiveness over what global IPRs standards should look like make the situation even more complex – particularly so for developing countries that have recently found themselves thrown into the deep waters of IPRs.

Many IPRs represent a somewhat intractable collection of different monopoly rights and the restrictions they impose on the use of creative and innovative outputs by many people. For those people the notion that IPRs are also deeply related to trade comes only as an afterthought – if at all. Several free trade proponents condemn the inclusion of IPRs in preferential trade agreements because they are seen as non-trade-related forms of foreign influence aimed at extending such influence over virgin territories through bilateral or plurilateral trade agreements. As provisions concerning non-trade issues such as labour and environment standards are also more frequent, the frustration of proponents over the "trade matter only" approach is understandable. However, decrying the inclusion of IPRs only because they do not directly regulate or affect trade flows means their potential to do so indirectly is being overlooked. The importance of IPR legislation for trade stems from the fact that virtually every industry relies on the use of IPRs to some extent, through trademarked logos or patented processes and the like. Influencing the IPR regime of a trading partner is a means to eliminate competition – i.e., piracy and somewhat more legitimate imitation – and

open new markets for domestic players. It is understandable that trading powers such as the European Union and the United States are eager to tie trade agreement partners down to IPR rules that give their own exporters the greatest possible advantage in foreign markets. Whether it is beneficial for the global trading community or individual trading partners that the hegemonies further these ambitions in the bilateral or plurilateral fora is a different question to that of whether IPRs should be considered as trade related or not.

With these controversies over the inclusion of IPRs in mind it is easy to understand the hesitance of some countries towards openly embracing IPRs. However, reservation or reluctance will do little more than buy time for countries to adjust to the fact that IPRs are here to stay. Instead of ignoring the IPR situation in the hope of not having to deal with IPRs at all, governments everywhere should make sure they are well-equipped to handle these newcomers at the trade negotiation table.

However, in regions such as Asia and the Pacific access to such capability is not equally distributed. The unequal distribution of the capacity to deal with IPRs is a sore spot in the body of the multilateral trade system, which, after the failings of the Doha Rounds, is only sustaining its liberalization momentum through bilateral and multilateral trade agreements. In the future, many Asia-Pacific economies will see significant developments in their creative- and knowledge-based economies; in fact, it is most likely that their share in the creation of national welfare will increase. Having these same countries enter into trade agreements that bind them to IPR rules, the long-term effects of which they are unable to foresee, can have surprisingly detrimental effects on their economic development.

Creating the necessary understanding of IPRs in the trade agreement context is not easy,