

Key Issues :

- Intellectual property rights (IPR) protection is critical to the governance of the 21st century trade system.
- The Trans-Pacific Partnership agreement contains an extensive intellectual property chapter that aims to promote robust IPR standards.
- Emerging Asian economies' adherence to an international agreement containing high-level commitments on IP protection could be seen as an effort to gain access to, or secure an established presence in, global value chains.

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TPP, IPR Protection, and Their Implications for Emerging Asian Economies

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Intellectual property rights (IPR) protection is essential for economic growth, innovation, and competitiveness. As the global economy is increasingly organised within global value chains, disciplining and enforcing IPR in a coherent manner internationally has become a critical issue in the 21st century trade system. The Trans-Pacific Partnership (TPP) agreement flags America's achievement in setting new standards on international IPR enforcement under a plurilateral framework that involves countries from Asia-Pacific. Yet such standards run the risk of becoming the new norm at the international level. Reaching agreement on the text of the TPP signals emerging Asian economies' heightened commitment to IPR enforcement. Some factors that policymakers may want to consider include the following:

- Efficient IPR protection at the domestic level is integral to efforts that facilitate technology adoption and stimulate incremental innovations.
- It is crucial to increase public awareness of intellectual property (IP) in general and its associated rights in particular.
- IP laws and regulations must at least meet the requirements of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and always aim for higher-level standards.
- IPR disciplines must be binding and practically enforceable.
- Asian countries should actively participate in global IPR rule-making.
- The abundance and quality of human capital will affect not only the level of invention and other innovative activities but also the efficiency of IPR enforcement.

IPR in the 21st Century Trade System

The second unbundling of globalisation has set itself apart from its early onset in the 19th century that elicited a widening of the spectrum of goods and services in international trade. This is associated with the international fragmentation, unbundling, and offshoring of production, leading to a finer division of labour and new patterns of international trade and investment. The emergence of Factory Asia mirrors the expansion of international trade in intermediate goods and services, particularly in a regional context. More generally, Factory Asia has been an integral part of global value chains (GVCs) and one of the main pillars of the world economy. Yet, what lies behind the goods and services supplied to the global market is essentially an international transfer of technology from advanced economies outside the region, particularly the United States (US).

Intellectual property protection is essential for economic growth, innovation, and competitiveness. It has been mathematically proven and empirically tested that technology-rich economies will gain in competitiveness by specialising in technology-intensive activities and production, whereas technology-scarce economies are expected to participate in the world trading system by first exporting labour-intensive products and then upgrading to higher valued-added activities. Both parties benefit from such cross-border exchange and so does the world's overall welfare.

Simply put, IPR protection can promote innovation by offering creators and inventors a

temporary monopoly market power as a reward for innovation. However, this is granted at some cost to local markets and society due to a lower level of dynamic competition and incremental innovations, and a reduction of consumer surplus in the short term.

As the global economy is increasingly organised within GVCs, IPR protection has become a critical issue not only for advanced economies but also for emerging markets. It tends to benefit the latter by providing incentive mechanisms that are necessary for knowledge generation and diffusion, thus, inducing technology transfer, innovation, and development. An efficient IPR protection system should be able to provide incentives to innovative activities with necessary compensation for the social cost associated with the trade-off between the short-term loss in competition and the long-term gains in innovation.

The US has been consistently promoting IPR enforcement at the international level, but predominantly in a bilateral setting. The TPP involves 12 member states¹, and is said to be a 21st century free trade agreement (FTA) aiming to set new standards of global governance on international trade and investment. It covers a wide range of rules and regulations that go beyond the commitments to the World Trade

¹ The 12 TPP member states are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Viet Nam. The origins of the TPP can be traced back to the Trans-Pacific Strategic Economic Partnership, also known as the 'Pacific 4' (P-4), concluded between Brunei Darussalam, Chile, New Zealand, and Singapore in June 2005. TPP negotiations were concluded in October 2015, and the agreement was signed in February 2016.

Organization (WTO) (so-called ‘WTO-plus’ and ‘WTO-extra’) and require not only ‘at-the-border’ liberalisation but also ‘beyond-the-border’ reforms.

The TPP agreement flags America’s achievement in setting new standards on international IPR protection under a mega-FTA framework that involves Asia-Pacific countries. It is evident that high IP standards coupled with effective enforcement mechanisms will be an essential component of the new global trade governance. Emerging Asian economies’ adherence to an international agreement containing high-level commitments on IPR protection could be seen as an effort to gain access to or to secure the established presence in GVCs.

International Standard Setting for IPR Protection at the Multilateral and Bilateral Levels

The TRIPS agreement was signed in 1994 and has since become a most important multilateral instrument for international trade-related IPR regulation. It is designed to ensure that both producers and consumers benefit from IP protection, while such protection subsequently contributes to technology transfers and innovation. It also requires universally enforceable national treatment and most-favoured-nation treatment, the violation of which may result in dispute settlement procedures before WTO’s Panels or Appellate Bodies. The agreement establishes a ‘minimum standard’ of IPR protection. It respects countries’ legal systems and provides each country with the freedom to determine her own

way to implement her disciplines, while encouraging member states to undertake a deeper level of commitment on IPR regulation to the extent that such agreements do not violate the letter of the TRIPS provisions.

In the past two decades, bilateral standard setting has flourished and acted as a complement to multilateral efforts to establish global IP norms. Since the late 1990s, the US has been carrying out a policy of extensive bilateral negotiations that frequently result in trade and investment agreements in an effort to promote ‘high-standard’ rules and regulations in global governance, especially in the field of IPR. The new-generation FTAs continue to focus on trade, strengthening IPR, and seeking to facilitate technology transfers, and go beyond the standard set in multilateral arenas.

The US interest in establishing a globalised IP regime mirroring its own is highly justifiable to its constituencies. The competitive edge of the US economy depends on the capacity to innovate, especially in the high-margin, knowledge-intensive businesses. Enforcing international IPR protection results in monumental gains for the US economy, millions of new job opportunities, and not least a sustained push for rapid pace innovation. The US is one of the biggest net suppliers of IP-laden goods and services, foreign direct investment, and licensing contracts in the world. It hosts one of the world’s most developed and strictest IPR regime that is accompanied by a system of exceptions to be enjoyed in times of demonstrated need or necessity. The combined effect of these two factors warrants America’s

sustained push for IP law consolidation worldwide.

The IPR Chapter in the TPP Agreement: Extensions and New Provisions

The TPP agreement contains a comprehensive IPR chapter that is composed of 36 articles. It covers most types of IPR that are frequently addressed such as patents, industrial designs, copyright and related rights, trademarks, trade secrets, and geographical indications. The IP chapter begins with an iteration of principles and objectives that are not distant from the ones evoked in the TRIPS agreement. It further reiterates the parties' commitment to implementing the Doha Declaration on TRIPS and Public Health, and explicates the extent of such commitment. It emphasises not only free competition and efficient markets, but also the principles of transparency and due process. It introduces a novel provision with regard to transparency requirements, in that the related laws, regulations, and administrative procedures must be made available online and open to the public. As did the TRIPS agreement, the TPP allows its signatories to surpass the scope of the obligations agreed upon; that is, member states are well within their rights to surpass TPP disciplines, both in terms of enforcement and protection. Simply put, the bar can be raised, but not lowered.

Substantively, the IP chapter expands the scope of the TRIPS definition of trademarks. It encourages member states to make best efforts in promoting the registration of scent mark in order to ensure that the owner of a trademark

is able to prevent third parties from using similar signs in the course of trade without his or her consent. The minimum length of the initial registration and each renewal is set to 10 years, rather than 7 years as required by the TRIPS agreement. It further requires member states to provide a publicly accessible online information system for the electronic application for and authorisation of trademarks.

As for geographical indications, the TPP agreement contains similar provisions to pre-existing regimes. Here, geographical indications can be protected through either a trademark system, a *sui generis* system, or other legal means. But the related administrative procedures could be fairly strict, and retrospective recognition of geographical indications is prohibited.

Regarding patents, the TPP further grants patent holders the rights to recoup lost protection time due to unreasonable or unnecessary delays related to the patent office's processes. Parties are free to exclude from patentability some methods for the treatment of humans and animals and the animals and biological processes themselves. Patents may also be revoked, nullified, or cancelled but only on grounds that would have initially invalidated their recognition. Extensively, the agreement includes provisions on patent linkages, data exclusivity, and patent term extensions, all of which are controversial.

As for industrial designs and improving industrial design systems, the TPP agreement further grants the author(s) higher rights of reproduction, distribution, and communication

to the public, which will in general apply the non-hierarchy principle.

With respect to copyright, the TPP article extends copyright and related rights terms to 'life of the author plus 70 years'. Moreover, it allows contractual transfers – right holder(s) can freely transfer his or her rights using contract(s). In addition, it contains provisions that are seeking for technological protection and measure the details about the rules accompanying a producer's right to legal protection and remedies.

The TPP also aims to enforce robust trade secret protection such as the protection against unauthorised disclosures to or by state-owned enterprises and the requirement on criminal penalties for trade secret theft.

As regards public health, the TPP has introduced, *inter alia*, the following series of measures that curtail a signatory member's access to medicines: the extension of patent terms, the granting of supplementary protection for delays in the issuing of patents, the possibility to subject a patent to 'evergreening'², the approval of data exclusivity for medicine and biologics alike, the introduction of patent linkages, and the inclusion of IP matters within the purview of investor-state dispute settlement. All these measures extend either temporally or substantively the protection granted to the right holder.

² The term 'ever-greening' normally refers to the cases that pharmaceutical companies patent as 'new inventions' but are really just slight modifications of old drugs.

Implications for Emerging Asian Economies

Many emerging Asian economies have made significant progress in developing, implementing, and consolidating their domestic IPR systems in recent years. The establishment of the TPP tends to accelerate their commitment to IPR enforcement. While TPP members are under pressure to fulfil the provisions of the TPP agreement, non-TPP members must run the risk of being excluded from GVCs if they cannot effectively implement IPR-related rules. In short, the new entry requirements to participate in GVCs tend to put external pressure on Asia to move forward with IPR enforcement. Moreover, many Asian countries are already middle- or high-income economies with increasing domestic innovation capacity. It is in their long-term economic interest to implement high-standard IPR regulation to stimulate domestic creative and innovative activities. IPR protection should be placed high on the agenda. However, this could result in a challenging process for many Asian economies, particularly for those still in the process of reforming their legal systems and still have relatively low levels of public awareness of IP and IPR protection. Below are some factors that policymakers may want to consider.

First, the ultimate criterion to judge an IPR system is to see whether it spurs local creation and invention, and effectively stimulates innovation. In principle, an efficient IPR system should be integral to efforts to facilitate technology adoption and stimulate incremental innovation domestically. Setting up a mechanism that will encourage more right holders to donate

or license patents either voluntarily or under mutually agreed terms and conditions is also desirable.

Second, it is crucial to increase public awareness of IP in general and its associated rights in particular. The governments' sanctioning of illegal infringements of IPR could be very inefficient without the public's own consciousness and support. This will in general require more efforts on education and closer public-private partnerships (PPP) as well.

Third, IP laws and regulations must at least meet the TRIPS' requirements and always aim for higher-level standards. Policymakers should, however, aim for a higher level of IPR protection as far as they take full cognisance of the constraints stemming from domestic social tolerance and the cost of transition resulting from net economic loss due to the reduction of consumer surplus in the short term. Again, this calls for PPP as well as the participation of academia, non-government organisations, international organisations and other stakeholders engaged in policymaking and rule setting.

Fourth, IPR disciplines must be binding and practically enforceable. It is essential to ensure both the transparency and the predictability of rule setting and implementation; and the language used to draft the rules must be less ambiguous and easy to understand. An effective dispute settlement mechanism seems to be a necessary but not a sufficient condition to sustain transfers of technology. Furthermore, a

region-wide approach to IPR protection in individual markets could be complementary and could result in mutual stimulation given the de facto strong economic interdependence within Factory Asia.

Fifth, Asian countries should actively participate in global IPR rule-making. It is better for them to have a voice even during the early stages when they may be able to negotiate for better conditions rather than later on, in a relatively passive way, accepting those requirements that others before them had set. Governments may need to act in a way that safeguards trade liberalisation in general, and IP protection in particular even where domestic market forces and sentiments are in disagreement. This notwithstanding, policymakers must always keep in mind that the protection of inventors' temporary monopoly rights should not harm the dynamic competition occurring in the market and the country's long-term innovation potential.

Last but not least, invention and other innovative activities essentially need an adequate supply of human capital, which is also a determinant of the efficiency of IPR protection. For instance, the US encourages the active participation of government officials in technical assistance and capacity building programmes. The education and training policies, as part of national innovation strategies, need to receive more attention in this regard. From a regional perspective, this also calls for free skilled labour mobility and deeper cooperation in the social dimension.■

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