The Future of IPR Issues in the Multilateral Trading System

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Symposium on the TRIPs Agreement for TRIPs Council Members and Observers
WTO, Geneva, 26th February 2015
Global Value Chains

The Stan Shih Smile Curve, 1992

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Case Law Relating to TRIPS

- Complainants:
  - US 18
  - EC 7
  - Brazil: 1
  - Canada: 1
  - Australia 1
- Defendant:
  - US: 4
  - EC: 9
  - LDCs: 7
  - Canada: 2
  - Japan 2
  - China 2
- Cases settled:
  - Panels and Appellate Body*:
  - 11 major cases decided (7 upon complaint EC)
    - India Patent: US/EC (2)*
    - Indonesia Automobiles* (US/EC/Japan)
    - Canada Patent (EC)*
    - US Copyright (EC)
    - Canada Patent Term (US/EC)*
    - US Section 211 Omnibus Act (EC)*
    - US - Copyright (EC) (Arbitration)
    - EC Trade Marks GI (US/Aus)
    - China IPR Enforcement
The Shift of Forum to PTAs

Figure B.2: Cumulative number of intra- and cross-regional PTAs in force, 1950-2010, notified and non-notified PTAs

Source: WTO Secretariat.
The Common Law of IPRs

- WTO TRIPs plus Paris and Berne provide the foundations for TRIPs plus obligations in Preferential Trade and Investment Agreements
- Trips plus standards are subject to MFN Art. 4 TRIPs: globally increasing levels of protection
- We see the emergence of an international common law
Post TRIPs Process

- TRIPs (Paris/Berne)
- Bilaterals
- CAF
- WIPO Treaties
- ACTA
- TP
- TTIP

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Likely Developments

- In diplomacy likely to see further increases of MFN based levels of protection
- Increased levels essentially driven by producer interests
- Uniform standards but benign neglect in enforcement and dispute settlement for developing countries and LLCs
- Risk of excessive protection and clogging of the system, reducing innovation and welfare?
Sectorial IP negotiations

- Doha Declaration on Public Health
  - Waiver
  - Amendment Article 31 TRIPs (CL)
- Climate change mitigation and adaption
  - Need for new rules on technology transfer to producer countries (renewable energy)
- Sectorial negotiations (Health, energy, internet) developing specific IPR rules
Why Nations Succeed


• Welfare and prosperity essentially induced by:
  – Inclusive v. extractive institutions
  – Creative destruction (Schumpeter)
  – Rule of Law
  – Protection of property and legal security
The contribution of IPRs

• The IPR system contributed to the Rule of Law
• The IPR system contributed to the protection of property
• Is the international IPR system sufficiently inclusive, or is it extractive, i.e. exploiting? What effects do have ever increasing levels of protection of IPRs?
• What role for imitation?
• How to take into account different levels of economic development?
The Future: Towards Coherence

• Past and present combine fragmentation and integration short of taking into account all pertinent elements in shaping IPRs in law-making and interpretation

• Need to develop an intellectual framework in academic research informing future developments

• Need to bring about inclusive processes
Relevant Context

• International trade regulation, in particular combatting economic protectionism and rent-seeking
• Anti-trust rules, unfair competition (TK and CSR)
• Investment protection
• Human rights and sustainable development
• General principles of law, constitutional law
• Linkage to real property protection
International Trade Regulation

• Equal conditions of competition and market access:
  • IPRs prerequisite of fair trade
    – Encouraging and rewarding of innovation
    – Exclusion of dangerous products (e.g. counterfeit pharmaceuticals)
  • Excessive protection amounts to non-tariff barrier
    – Produces market segmentation and extractive pricing
    – Impedes learning by imitation
• Need to factor in trade needs in IPRs
Competition Law

• Unfair competition rules (Art. 10bis Paris Convention) provide basis for new forms of protection:
  – Traditional Knowledge and TIP rights
  – Enforcing Corporate Social Responsibility

• Antitrust rules provide ex-post control of operation of exclusive rights
  – Lack of international disciplines

• Need for ex-ante ceilings in IPRs
Investment Protection

• Much of IPR protection essentially amounts to investment protection without being defined as such:
  – Gen patents, patents of chemicals as such
  – Trademarks (Investment in advertising)
  – Data collections
• Right to use? (e.g. plain packaging)
• Impact of regulatory taking in IPRs?
• Need to factor in investment protection in IPRs doctrine
Human Rights

- IPRs except for moral rights in copyright are based upon utilitarianism
- Human Rights impact on the scope and use of IPRs
  - Access to essential drugs
  - Access to education
  - Food security
- Relevance of procedural human rights: due process of law, transparency
- Need to take Human Rights concerns into account in shaping IPRs
Principles of Sustainability

• Balancing economic, social and environmental concerns
• New generation of international principles informing IPR policies, with a particular focus on poverty alleviation and inclusiveness
• https://sustainabledevelopment.un.org/owg.html
• Need to take sustainable development into account in shaping rights and obligations, in particular on transfer of technology to LDCs.
General Principles and Constitutional Law

- Principle of equity
- Protection of legitimate expectations (good faith)
- Necessity and proportionality
- Principle of non-retroactivity
- *Ne bis in idem*
- Principle of legality
- Domestic constitutional principles: Interstate commerce, free movement of goods, regulatory principles
Graduation

- Considering all the context, the IPR system will show:
  - Common principles and rules for law
  - Special rules applying to advanced economies only
  - Granting of policy space to developing countries in need of using imitation potential
- Comprehensive rules based upon graduation and kick-in criteria (e.g. GDP, HDI)
Conclusion

• The transition from fragmentation to coherence needs to consider all pertinent fields of law and economics

• Inclusive political processes representing all stake holders and interests in shaping future IPRs, informed by research results

• The quest for an appropriate balance never ends, fuelled by new technologies
Thank you for your attention!