

Intellectual Property as a Trade Policy Tool

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Abstract

Intellectual Property in its dimension of rights protection and rights enforcement represents for governments a valuable trade policy tool that is used for protection of domestic markets from foreign competition as well as for promotion of intellectual property right owners in their expansion on foreign markets. Use of regulation for intellectual property protection and enforcement is, however, limited by international systems and agreements that should be respected and implemented into the national legislations. While respecting these limits, the governments developed a whole range of IPRs activities in order to pursue their interests. The European Union is a good example, how the intellectual property has been converted into a strong instrument for support of the EU Trade Policy goals and of European intellectual property owners in global business.

Key words: trade policy, intellectual property rights, international systems

Introduction

Trade policy belongs to governmental policies through which governments influence their economies in line with their interest in all range of fields, not only economic, but also social, environmental, cultural, etc. areas. Within trade policy, two main goals are generally recognized: protection of domestic markets and promotion of expansion of domestic subject on foreign markets. Historically, decisions on trade policy regulation belonged to autonomous decisions of governments, but nowadays, since the General Agreement on Trade and Tariffs was signed in 1947 and the multilateral trading system developed under the World Trade Organization, prevailing role in this regulation is reserved to contractual outcomes and international systems that should be respected as governments are part of them or/and signed respective agreements. In order to reflect governmental interests, different regulatory trade measures are used, but only within the internationally agreed systems. The international framework thus limits use of trade policy tools, as traditional custom tariffs and quotas, but also antidumping and countervailing duties, export subsidies, technical and sanitary restrictions and other nontrade barriers. Intellectual property belongs to areas where links to the trade policy are not evident at the first glance. IPRs have, however, a huge potential and business impacts and become an important part of the trade policy namely in developing countries. The goal of the article is to

overview what is international framework for using intellectual property as autonomous and contractual trade policy tool and to overview the fields in which the EU deals with IPRs.

1. International Systems on Intellectual Property Rights

The international community recognizes an importance of intellectual property rights (IPRs) since the Paris Convention for the Protection of Intellectual Property has been signed in 1883. Since then, the international system of protection of IPRs has been mainly concentrated under the umbrella of the International Bureau and lately under World Intellectual Property Organization (WIPO). In 1994, by signing the World Trade Organization (WTO) agreements that included the agreement on Trade Related Intellectual Property Rights Aspects (TRIPS), the IPRs have been internationally recognized as trade policy tools. IPRs are widely exploited by governments in order to pursue their interests within globalized business environment at autonomous and contractual basis. Trade related aspects consist in following main features of intellectual property rights (IPRs): the owner of IPRs can request a payment for use of his right that compensate his investment; IPRs have competition aspects, as they allow the owner to step out of the range of other producers while providing a very strong distant mark; IPRs are also a part of marketing and if correctly protected, they do not allow others to use the same or similar ideas in promotion; an owner of protected IPR has a possibility to prevent unauthorized use of outcomes of his creative activities, IPRs are valuable assets when financing is considered that is important namely for small and medium sized enterprises, start-ups, spin-offs; IPRs represent a certain guarantee for consumers as for the quality and safety of products.

IPRs protection and enforcement are also a crucial incentive for innovations, technological development and foreign direct investment; it opens market for various modes of market entrance for business operators and, as a consequence, it strengthens competitiveness of the country.

Trade related aspects of IPRs are to be recognized through legal impacts within two levels. The level that is already regulated quite in depth by international agreements concerns protection of IPRs and harmonization of procedures that lead to the protection; the level that is of vital importance for business, has been included into the international systems only in the end of the twentieth century and concerns enforcement of IPRs.

International systems that deal with IPRs are based on different types of agreements among or between governments. The multilateral framework is established by the World Intellectual Property Organization agreements and by the TRIPS agreement of the World Trade Organization. While the WIPO multilateral agreements deal exclusively with protection of IPRs, the WTO TRIPS agreement has brought for the first time at the international level also the issue of IPRs enforcement and confirmed the need not only for a protection, but also for an effective enforcement of IPRs, as a prerequisite for a fair and free trade (Stoll, Schorkopf 2006).

The WIPO agreements are created in the international environment a basis of certain standards of protection of copyright and related rights and of industrial property rights. They aim also at harmonization of procedures of IPRs registration and include agreements that allow registration of IPRs through international applications of inventions, trademarks and geographical indications.

The WTO TRIPS agreement refers to selected parts and articles of the WIPO agreements and sets minimum standards for protection of following IPRs categories: copyright and neighboring right, patents, utility models, trademarks, geographical indications, lay-out design of integrated circuits, undisclosed information, secrets and know how. It provides also minimum standards for administrative and criminal procedures of IPRs enforcement.

Except of the WIPO and WTO, other international organizations, intergovernmental as well as nongovernmental, are involved into the IPRs area and they contribute to the establishment and fine tuning of the international environment of IPRs protection and enforcement, namely through opening discussions on various IPR issues and their impacts. The Organization for Economic Cooperation and Development (OECD), for example, discusses IPRs within various bodies, in relation to trade, industry, environment, consumer protection and others. The World Health Organization touches IPRs when discussing public health issues. IPRs are also a part of activities of the World Customs Organization as the IPRs enforcement on the borders is included into the customs and administrative procedures related to the good exportation and importation. United Nations Conference on Trade and Development analysis IPRs protection and enforcement national systems in order to lead developing countries to an effective implementation of the TRIPS agreement and to assist them to overcome obstacles of it. The nongovernmental organization International Chamber of Commerce identifies weakness in IPRs regulation in various national legislations and practices that negatively influence business, and publish its analyses.

Within the international IPRs systems, some countries¹ negotiated in a period of 2006 – 2010 a plurilateral agreement on stronger enforcement of copyright –the Anti-Counterfeiting Trade Agreement (ACTA). The agreement, even if signed, did not come in force, as it awoke concerns of the civil society, various non-governmental associations and business and has been rejected by the European Parliament namely for unclear impacts on the society (EP 2011). The goal of the Agreement was to set up a basis for an effective combat against proliferation of IPRs infringement in individual countries and also in extension on exportation, re-export and transfer of goods through the territories of the signatories (EC 2010a, Štěrbová 2010b). ACTA should have ensured a high level of enforcement by participating countries, limited the market for counterfeit goods and strengthened

¹Australia, Canada, EU, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, USA

protection for copyright and trademarked goods and products with geographical indications (WTO 2011c).

2. Bilateral agreements on IPRs protection

International systems on IPRs are composed also by bilateral agreements. Bilateral agreements could deal with the IPRs protection as such, but the scope of these agreements is usually limited only to one category of IPRs: geographical indications.

These agreements are extended namely in Europe. The Czech Republic, for example, protects – based on the bilateral agreement – geographical indications from Switzerland, Spain, Portugal and France. In return, these countries protect the Czech geographical indications that are listed in the annexes of the agreement. In 2014, the bilateral agreement about protection of geographical indications has been concluded between the European Union and China. The project is known as 10+10 project: it is a basis for the protection of Chinese geographical indications - names as Pinggu Da Tao for peaches, Yancheng Long Xia for crayfishes, Zhenjiang Xiang Cu for rice vinegar, Dongshan Bai Lu Sun for asparagus, Jinxiang Da Suan for garlic, Longjing cha for tea, Guanxi Mi You for honey pomelo, Shaanxi ping guo for apples, Lixian Ma Shan Yao for yam and Longkou Fen Si for vermicelli/noodles. These Chinese geographical indications are included into the EU register for agricultural geographical indications. On the other hand, EU geographical indications are protected from copying or other non-legitimate use in China mainland. The selected EU names are cheeses Compté (France), Grana Padano (Italy), Roquefort (France), West Country Farmhouse Cheddar (UK), White Stilton Cheese/Blue Stilton Cheese, followed by ham Prosciutto di Parma (Italy), olive oil Priego de Córdoba and Sierra Mágina (both Spain), dried fruit Prunneaux d'Ageb micuits (France) and salmon Scottish Farmed Salmon (UK).

IPRs represent very often also a part of preferential trade agreements. Namely developed countries have an interest to protect IPRs also through this manner, even if sometimes the articles concerned confirm only the international commitments of both parties that issue from their membership in international organizations and agreements (namely the WTO – TRIPS agreement and the WIPO agreements). Such a confirmation brings certain level of certainty into mutual (trade) relations, but it does not provide any mutual preferences within protection or enforcement of IPRs, as it is the case of merchandise or services trade in such kind of agreements. Reason is to be found in the set of WTO provisions: if the good and service trade is exempt from the Most Favored Nation clause for the preferential trade agreements, such an exception is not applicable for IPRs as it is not included into the TRIPS agreement. It means that any commitment from the preferential trade agreement on IPRs that goes beyond the TRIPS agreement should be extended to all other WTO members.

3. Protection of European IPRs in third countries

The enhanced IPRs protection and namely the effective enforcement of this protection establish at the third markets more stable, reliable, transparent and secure business environment that is a condition for extended market access for goods, services and investment. The parts devoted to the IPRs enforcement reflect the pressure from business for achieving higher predictability, transparency and security at target markets, as the business is threatened by losses caused by IPRs infringement and counterfeiting, by loss of exclusivity, by loss of markets and by loss of the credibility in consumers' eyes. Non-existence of IPRs protection and enforcement could become an obstacle for market entry that undermines development of investment and business activities. The effective enforcement, on the other hand, stimulates positive impacts of market openness in areas of economic growth, advantages for consumers and new jobs establishment. By the same, it strengthens competitiveness of business subjects in knowledge economies.

Preferential trade agreements represent an opportunity to strengthen the EU IPRs protection and enforcement abroad and at the same, they are establishing another international system. These agreements deal not only with goods and services exchange, but often with investment rules, regulatory issues, etc. A part of these agreements are devoted to IPRs, however, it does not usually provide anything more than a list of geographical indications for mutual protection, sometimes a commitment to protect undisclosed information in a specific way² and sometimes also a supplementary protection beyond 20 years for pharmaceutical patents. For all other categories, contracting parties limit themselves to referring to the provisions of the TRIPS agreement. Namely developing countries are quite reluctant to accept any new obligation beyond TRIPS for IPRs protection and enforcement. The reason is the application of the Most Favored Nation clause, as the TRIPS agreement, on the contrary from the GATT and GATS agreements, does not provide any exception from it. It would mean that if two countries agree in the bilateral agreement about longer or stronger IPRs protection, such protection should be devoted to all other third countries. In the free trade agreements it is thus feasible to list geographical names that the partner will protect from non-legitimate use at his territory, but it is not possible to extend, for example, the registration period for trademarks from the partner country only – such protection should be extended to all other WTO members under the Most Favored Nation clause. Supplementary protection for pharmaceutical products is usually agreed between two partners who already such an extended protection implemented, other partners refuse and it is not probable that any of them would agree on implementation of such TRIPS+ provision. As for the undisclosed information, it is quite rare that a developing country on pressure except any concrete commitment as such commitment could limit access of generic pharmaceutical producers to this information and block the generic production for several years.

²Although the TRIPS agreement provides for an obligation to protect undisclosed information, it does not state the period of protection (information that the IIPR owner compulsory provide for the state in order to receive a marketing approval for pharmaceuticals or for chemical productions for agriculture).

The EU started to carry intellectual property rights through bilateral preferential trade agreements that are negotiated within the EU agenda Global Europe as a new generation of agreements. New generation comprises - outside of customs tariffs - also other areas, for example non-tariff and administrative barriers for goods, services and investment, governmental procurement, protection of innovation, sustainable development, labor standards, protection of environment, etc., including IPRs protection and enforcement (Manger, 2009). The goal is to harmonize IPRs protection and enforcement at markets of the important EU's trade partners at the level that is ensured in the EU.

As examples of the EU Free Trade Agreements two of them follows: one with country that supports a strong protection and enforcement of IPRs, as its industry is also research oriented, the other without such an interest. EU- South Korea preferential trade agreement has been approved by the European Parliament as the first trade agreement under the Lisbon Treaty, is in force since 2012 being provisionally applied since July 2011. It contains strong IPRs provisions (Štěrbová 2010a). Both partners were interested in strengthening the criminal sanctions on IPRs infringement, namely on internet. The agreement encompasses reciprocal protection of copyrights and neighboring rights, trademarks for good and services, design, topography of integrated circuits, GIs, protection of plant varieties and boarder measures (Ermert 2011)

The most important provisions are the extension of the patent protection period for pharmaceuticals and protection of so called non disclosed information, what reflects the EU main interests. The mentioned protection, Supplementary Protection Certificate that extends the 20 years of general patent protection for another 5 or 5 and half, is a part of the EU legislation and it compensates owners of pharmaceuticals patents for the long time needed to obtain marketing approval for their product. It extends the patent monopoly and enhances a profitability of finances invested into the research. In addition, also in accordance with the EU legislation, protection of 10 years is introduced for non-disclosed information (data exclusivity, usually results of clinical trials) that is requested by governmental institutions as a basis for the marketing approval –in the period of protection, these data cannot be used by generic pharmaceutical industries. The agreement comprehends also the same provisions that were embedded into the ACTA agreement, as EU and South Korea were negotiators of it. It deals with criminal prosecution for IPRs infringement at internet and also with such delinquency as crime of “aiding and abetting” copyright and trademark infringement on a commercial scale, covers broadcasters right to prohibit further dissemination to the public for free and includes searches and seizures of goods at boarders upon request of right holders. From the perspective of IPRs the agreement on free trade opens the Korean market and established more favorable conditions for European exportation and investment. As explained above, Korea - based on the

The second example provides IPRs protection and enforcement as a subject to the negotiations on free trade agreement between the EU and India. These negotiations were launched in 2006 as a part of the

strategy Global Europe. According to several analyses, the benefits for the EU would reach in short run €4,4bn and for India €4.9bn (EC 2009). The difference will be balanced by a more stable business environment in India, including the IPRs. The IPRs importance is stressed in the chapter of the EU-India Report: Intellectual Property and Geographical Indications. The reference of GIs witnesses how important they are for European exporters – it is specifically also recognized that “geographical indications constituted a potentially important part in bilateral trade and should be covered in any possible bilateral agreement. Both the EU and India are committed to the reinforcement of GI protection as part of the DDA negotiations. Bilaterally, the protection of GIs on others' each markets would be enhanced by the negotiation of an agreement on GIs.” (EC 2006). In the Report, IPRs enforcement is mentioned only generally, even if it is one of the weakest points of the Indian IPRs legislation. India, accordingly with other developing countries is reluctant to negotiations on it within the bilateral trade agreement. These countries prefer not to continue in negotiations if the commitment on stronger IPRs enforcement is a part of it, despite the possible impact that lies in preservation of the current market access under the General System of Preferences that is unilaterally decided and less advantageous than reciprocal preferences. It is probable that IPRs enforcement will not be a part of the free trade agreement. The above mentioned conclusion is a function of the EU and India positions within the multilateral trading system and their trade policies. The EU and India share same interests and perspectives as for the enhancement of the level of GIs protection for all products. Both partners are members of the WTO GIs Friends Group – an informal group of countries that has been initiated by Switzerland and Czech Republic in 1997 and that pursues „equality“ for all GIs into the mandate for negotiations. Until now these initiative was not successful and prospects for it are not optimistic. It is why the enhanced GIs protection would enable to protect Indian GIs as Basmati or Darjeeling at the EU market, and European GIs for cheeses (for example Roquefort) or beers (for example Budweiser beer) would find similar protection at Indian market. The importance of the enhanced GIs protection lies not only in the protection from misuse by EU or Indian producers, but namely from importation to the EU and India from third countries where these GIs are used (for example, Basmati rice or beer Budweiser, both produced in the USA, are exported to the EU and Indian markets).

Despite same interests of the EU and India in GIs protection and in biodiversity, other IPRs fields in the negotiations reveal to be a problem, namely data exclusivity and extension of the patent protection for pharmaceuticals. If non-disclosed information is not protected, it opens space for production of generic medicines sooner than the costs of research and testing are redeemed to the originator. Data exclusivity issue is supported by the research oriented European pharmaceutical industry and by the Indian association of pharmaceutical producers (Gasiorek, Holmes, Robinson 2007). It is promoted also by the European generic industry that has to respect a 10 year protection of non-disclosed information, while its competitor, Indian generic industry, does not face such a condition. Indian government is not willing to accept the data exclusivity requirements, as it would influence negatively

production and namely exportation of generic medicines. As a consequence of the MFN clause, data exclusivity should be extended all WTO members, including the USA and Switzerland. Officially the Indian governments argues that such a step would have severe impacts on access of poor people from developing countries to affordable medicines and that the EU interest is in contradiction to the resolution of the European Parliament on TRIPS agreement and access to (EP 2007). The patent term extension mechanism, referred as Supplementary Protection Certificate, has been also negotiated with India. As India rejected the mentioned requirement, the EU does not further pursue the supplementary protection. IPRs issues are not closed. Except of GIs, biodiversity, patents and data exclusivity there exist some signals that India could request protection of traditional knowledge in relation to some products. Traditional knowledge is a IPRs category that is not yet fully identified and mechanism for the protection does not exist, even if it is discussed in the WIPO.

4. IPRs in the EU

The EU is considered to be one of the most active initiators of IPRs protection and enforcement at all markets (EC 2010b). A legal basis for it is provided by the Lisbon Treaty that further confirmed its importance and considers intellectual property trade aspects as exclusive competences of the EU Common Commercial Policy (Štěrbová 2013). This amendment, together with the changes in institutional framework of commercial policy reinforced the position of the European Commission in the IPR field and submitted the area to the active supervision of the European Parliament. Common principles of the EU trade policy also for trade related aspects of intellectual property are set in Article 207 of the Lisbon Treaty. The Lisbon Treaty limited number of competency issues and shifted the IPRs to the areas submitted to the qualified majority decisions. External competences have been complemented by internal ones (Woolcock 2008). By using IPRs regulation, the EU protects authorized IPRs owners according to the national treatment principle, it means in the same way without distinguishing IPRs according to their country of origin. Through effective IPRs enforcement protects the EU internal market from unfair competition. IPRs are used also in expansion support through international negotiations on IPRs and through respective trade disputes. Related to IPRs are also the EU activities in eliminations of barriers in third countries and effective enforcement of European IPRs abroad.

The enhanced level of IPRs protection and enforcement, as one of the EU's main goals within the common commercial policy, is embedded into the European Strategy 2020 (in the part Trade, Growth and World Affairs) as the key component, It is reflected namely in EU initiatives at multilateral basis, as multilateral changes and new provisions on IPRs would ensure the highest level of transparency and are the most stable groundwork for bilateral negotiations.

IPRs are part of the whole range of other EU strategic documents that are for example represented-except of the mentioned European Strategy 2020 - by documents: Global Europe, Digital Agenda, Single Market Act I and II, Single Market for Intellectual Property Rights, Trade, Growth and Development, European Anti-Counterfeiting and Antipiracy plan, Strategy for the Enforcement of Intellectual Property Rights in Third Countries, Industrial property rights strategy for Europe, Lisbon strategy for growth and jobs.

If we overview activities of the European Commission and its Directorates, we recognize IPRs related activities within very many bodies: TRADE (Common Commercial Policy), AGRI (Agriculture Policy), MARKT (Internal Market), RTD (Research and Development), ENTR(Industry and Enterprises), DEVCO (Development and Cooperation) TAXUD (Tax and Customs Union). All these bodies have to deal with IPRs from respective perspectives in using IPRs for achieving their goals.

In the EU, IPRs could be protected by different ways and with a different territorial impact. Each IPR finds its protection through national legislation of individual EU Member States. In this case, the IPR concerned is protected and thus could be enforced only in the country where the registration has been declared. The IPR owners have also a possibility to register their rights within all EU Member States, through community procedures. Community protection is applicable for trademarks (Community Trademark), design (Community Registered Design), plant varieties and geographical indications. Such a protection is under final procedural steps also for patents – European patent with unitary effect. Community protection is more complex than the national ones, on the other hand, the IPR receives protection in all 28 EU countries by one application. Since the EU became a legal person (Lisbon treaty), it became also a member of international registration systems administered by WIPO and applications for IPR registration in the EU could be tabled also through the international procedure, together with application for protection in other countries.

Effective enforcement of European IPRs is consisting of boarder measures legislation that should not allow any entry of goods with copied IPRs into the European internal market and the internal markets measures within which involved institutions cooperate in order to recognize and block any activity leading to IPR infringement.

The consideration of IPRs with emphasis on enforcement has been underlined in the Strategy for the Enforcement of IPRs in Third Countries of 2005. The Strategy has been reviewed in 2011 based on comments from stakeholders (EC 2010c) and it is also a subject to the EU regulation (JO 2005). European Commission also monitors infringement of European IPRs at foreign markets within the Market Access Strategy - concrete cases listed according to category are at public disposal in Market Access Database (EC 2013).

In order to pursue its trade policy interests in third countries, it means to protect and enforced European IPRs at third markets, the EU monitors very closely all cases of IPRs infringement of European IPRs and identifies countries with problems in protection of IPRs³ (priority countries) and maintains with them a dialog about them. In order to support the mentioned initiative, the EU launched similar projects together with like-minded countries.

From the EU perspective, it is very important that the existing international agreements are correctly implemented in all countries, which have signed them and that the commitments are reliable. As the developing countries very often do not have capacities for such implementation, the EU established a program of capacity building that would contribute to it. At the same, the EU is very active in multilateral negotiations on IPRs and initiated negotiations on strengthening the IPRs enforcement in the WTO and negotiations on a new international agreement on IPRs enforcement in WIPO.

Conclusion

Intellectual property rights protection and enforcement are very important trade policy tools that has been recognized also through the WTO/TRIPS agreement. Governments use this tool in order to pursue their trade policy goals – to protect their domestic markets, to increase competition, to promote exportation, to promote incoming and outgoing foreign direct investment, etc. In using IPRs as trade policy tools, the international rules and limits established by international agreements have to be respected. The international systems of IPRs protection and enforcement are composed of the WTO and WIPO agreements, by activities of these and other international organizations, by bilateral agreements on IPRs and preferential trade agreements if they are composed of the IPRs field. Among the countries that use the IPRs in establishing business environment in a very effective way belongs the European Union. Its preferential trade agreements are examples of the extent of IPRs protection and enforcement that could be embedded into these agreements based on negotiation position of the partner country and on its own system of IPRs protection and enforcement. The EU implements IPRs also into the protection of the internal market through boarder measures and through activities of relevant institutions. It also monitor the European IPRs protection and enforcement in third countries, entering into negotiations with those who have problems in this area, or helping those less developed to establish and implement effective IPRs system.

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