Negotiations toward a Free Trade Area: US Demands for greater IPR privileges

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Introduction

The Bush Administration is expected to launch negotiations for a free trade agreement (FTA) with many countries. In 2003 the US has signed FTAs with two developing countries, i.e. Singapore and Chile, and is pending bilateral trade negotiations with Australia, Morocco, thirty-four developing countries in the western hemisphere (the so-called Free Trade Agreement of the Americas or FTAA), and many others.

Thailand recently announced it is ready to move forward to enter into bilateral trade talks with the US. Negotiations for a bilateral agreement between the US and Thailand are expected to start in October 2003 when George W. Bush visits Bangkok for the summit of the Asia-Pacific Economic Cooperation (APEC) forum. The US-Thailand deal will drive talks for similar agreement with other Southeast Asian nations such as Malaysia, the Philippines and Indonesia.

While a number of trade issues are being negotiated on the multilateral level, i.e. the ongoing Doha trade negotiations of WTO, the past decade saw trade negotiations taking place on the bilateral and regional levels. Bilateral and regional trade deals have risen to prominence during a period in which the multilateral trade negotiations of WTO were the subject of great uncertainty and controversy. The US is aware that it is difficult to swiftly implement its entire trade agenda on the multilateral level. Under FTAs, the US negotiators can easily manage to set benchmarks with respect to all US trade objectives that will be difficult to achieve by WTO negotiations.

Bilateral and regional treaties will become the dominant international vehicle through which international trade and investment is regulated. Some developed countries, particularly the US, seem to change their negotiation strategies and have shifted the fora of negotiation from the multilateral to the bilateral and regional ones. The US Government offers certain developing countries opportunities to sign FTAs with the US, provided that those countries are committed to economic reforms and liberalisation of their market.

The US has seen bilateral and regional trade talks as a very important strategic opportunity to demand for greater trade commitments from its trade partners. The FTAs with the US are wide in scope covering various issues, including trade, service, investment, government procurement, environmental and labour rules, and intellectual property rights (IPRs). The US generally demands for the enlargement of access for US exports by reducing and eliminating duties and other non-tariff barriers in those countries. The bilateral and regional trade treaties that the US has signed with Singapore and Chile contain chapters with IPRs commitments, which the trade partners must give preferential treatment to the US right holders. The US intends to achieve higher level of IPRs protection, beyond the minimum standards under

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Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This strategy would undoubtedly help the US to produce the establishment of an acceptable framework within the multilateral trade negotiations.

This paper highlights important IPR issues under the FTAs that the US has entered into or proposes to sign with other countries.

1. TRIPS-plus obligations in exchange with market access

The obligations under the FTAs would impose IPRs standards that far exceed those obligations contained in the TRIPS provisions (the so-called TRIPS-plus). The countries concluding a bilateral or regional treaty with the US are required to provide more stringent IPRs regimes than any other countries, in exchange with greater access for their exports to the US market.

Although the proposed FTAs are in principle open to negotiation, the treaties concluded between the US and its trade partners are basically built on the provisions of the North American Free Trade Agreement (NAFTA) and the basic rules embodied in the US legislations. In fact, all FTAs signed by the US are quite similar to one another. While negotiation is possible on some issues, the US trade negotiators are committed to the basic structure of the model treaty and will only accept minor changes.

There has been increasing concern about the costs and benefits of FTAs to developing countries. It is contended, on the one hand, that increased economic cooperation between developed and developing nations can lead to increased volume of international trade and investment in the latter. It is argued, on the other hand, that the liberalised economic activities on the bilateral and regional levels will not suit the need of developing nations. Such trade deals will bring about the opposite results for those countries. The prospective social costs of the bilateral trade treaties include various problems relating to monopolisation, public health, education, food security, environment, labour rights, technology transfer, biodiversity management, etc.[1]

Given the fact that the US is the largest investor in many countries and the biggest export market for those countries, the developing countries see the FTAs as a gateway to penetrate the US market. Despite a large number of developing countries are full aware of the negative effects resulting from IPRs protection, these same countries are well prepared to sign such a bilateral trade agreement that incorporates obligations higher than the WTO. Indeed, all US FTAs will offer multinationals greater opportunities and even greater protection, at the expense of contracting countries, than the WTO's TRIPS and other multilateral agreements ever do.

The US proposals on IPRs under the FTAs are comprehensive. The FTAs that the US has entered into generally demand for the TRIPS-plus approach, higher degree of protection than in the TRIPS agreement. The salient provisions under US FTAs include the following:

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[1] Oxfam Canada "Let's Harness Trade for Development: Why Oxfam Opposes the FTAA", 2001. http://www.oxfam.ca/news/Peoples_Summit/intellectualProperty

- Greater patent protection for new subjects and restrictions on issuing of compulsory licences
- Patent-like protection for plant varieties
- Exclusivity over test data and relevant undisclosed information
- Protection of trademarks that are not visually perceptible
- Copyright protection for digital technologies
- Effective remedies for enforcement of IPRs.

2. Patent protection

In order to allow the patent holders to secure monopolisation and avoid competition, FTA provisions on IPRs generally focus on at least five key areas:

(1) The contracting party must include extension of coverage and restrict the grounds for exclusion of patentability.
(2) The trade partner must restrict issuing of compulsory licences.
(3) The trade partner would not provide provisions about "international exhaustion of rights" and thus prohibiting parallel imports.
(4) The country must accord extension of patent term for unreasonable delays in granting the patent or for unreasonable curtailment of the patent term as a result of the marketing approval process.
(5) The contracting party must ratify or accede to the Patent Co-operation Treaty.

2.1 Restricting the grounds for exclusion of patentability

Most US FTAs maintain principally that an effective and adequate protection must be given to inventions in all technological fields. The products currently excluded from patent protection in most countries, such as plants, animals, biological processes and products, genes, gene sequences, business methods and computer programs, must be protected under patent law of the contracting party. Legal protection must be in the forms of both product and process patents. The US always views the process patents as being inadequate, because in practice, it is not possible for the inventor to acquire patent protection over all possible ways of production and it is also very difficult to prove the infringement of a process patent.

In light of the current prohibition for patents on living organisms, mathematical algorithms and object code, the developing countries that enter into a bilateral or regional deal with the US will no longer take advantage from the exemption clause under TRIPS to prevent foreign interests from exerting monopolistic power over these essential subjects.

In addition, the FTAs attempt to make the provisions on compulsory licence difficult to apply. The implications of US FTAs on compulsory licence are now discussed in detail.

2.2 Limitations on the issuing of compulsory licences

The basic philosophy of patents is that the monopoly privileges should be provided towards facilitating increased access to new technology and know-how. The exclusive

rights should not be used as a privately controlled barrier to deny the consumers' right to essential products. The compulsory licence is envisaged as a mechanism to enforce the patent owner to act along this line.

In principle, the compulsory licence is granted on a non-voluntary basis. It authorises the third party to perform acts covered by the patent right against the will of the patent holder. Under TRIPS and the Paris Convention, countries are permitted to use the compulsory licence of patents, provided that certain conditions are fulfilled.[2]

Conditions for compulsory licence under the US FTAs are stricter than the international standards of TRIPS and the Paris Convention, in terms of more stringent conditions for issuing the non-voluntary licence. The US FTA with Singapore, for example, confines the circumstances under which compulsory licences may be issued to the following circumstances:

(1) to remedy a practice determined by a judicial or administrative body as anti-competitive according to competition law of the country;
(2) in the case of public non-commercial use or in the case of national emergency or other circumstances of extreme urgency.

In the case of public non-commercial use or national emergency or other circumstances of extreme urgency, a compulsory licence can be granted only in accordance with these conditions:

(1) A compulsory licence can be issued only to the public sector or third parties authorised by the government. The contracting party cannot apply the compulsory licence provisions to authorise private companies to manufacture or import cheaper drugs.
(2) Full compensation with reference to the TRIPS provisions in the event of compulsory licence must be provided to the patent owner.
(3) There must be no requirement for the transfer of undisclosed information or for the disclosure of know-how without the consent of the right holder

The FTAs provisions prevent the country from issuing compulsory licences in other circumstances than those mentioned above. Issuing a compulsory licence on the ground of non-working or insufficient working of patents is prohibited, despite the fact that the use of compulsory licence for local working of patents is the cornerstone of most countries' patent law. In addition, the export of compulsorily licenced drugs to the countries that have no or insufficient manufacturing capacity would not be feasible, denying the rights of those countries that reaffirmed by the Doha Declaration on TRIPS and Public Health.

When the patent owner charges excessive prices for the patented product, the country is not entitled to grant a compulsory licence to remedy such an abusive practice. Though the compulsory licence can be granted in case the patent owner found to be engaged in an anti-competitive practice, foreign right holders are still able to challenge directly sovereign conducts that injures them, through judiciary or administrative channel. As reflected in the case of Brazil, the assessment of a strong compulsory licence mechanism lies not so much in its actual use but in the threat of

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2 TRIPS Agreement, Art. 31; Paris Convention, Art. 5A.

its use.[3] When foreign pharmaceutical companies can bitterly contest the proceedings and grants of the licence in court, the compulsory licence system will not do much to safeguard the country's public health.

Unlike the Paris Convention and TRIPS that constitute forfeiture of rights, the US FTAs prohibit the trade partner from revoking patents. Compulsory licence therefore becomes only one mechanism that can be used to curtail the abusive practices of the right holder. The FTAs increase the monopolistic power of the large companies by demanding for harsh penalties, criminal enforcement for IPRs violations and imposing obstacles to compulsory licence, but restrict the lever that has helped the patent-granting country to bring the price of drugs down.

When patent protection for pharmaceuticals is widely available after 2005 when most WTO members have to fully comply with TRIPS obligations, generic competition will be limited. Prices of new medicines will inevitably shoot up, far beyond the reach of the poor population of developing countries. Since the TRIPS-plus commitments will define the scope, duration and coverage of compulsory licence provisions, developing nations will have little room to make adjustments in the law to suit their particular needs. The FTAs commitments on compulsory licence would no doubt severely restrict poor countries' ability to protect the livelihoods of their deprived population.

2.3 Limiting the scope of exhaustion of rights

The US proposal to the draft FTAA aims to strengthen IPRs beyond what is required in TRIPS by forbidding the adoption of the "international exhaustion doctrine", i.e. the first sale of an object embodying an IPR in a foreign country exhausts the right holder's exclusive rights.[4] Since there is no principle of international exhaustion, any import of the products under IPRs will be regarded as infringement. No parallel import is permitted including the import of the products put into the market by the right holder or with his consent. Prohibiting parallel import no doubt is an attempt to block the trade partner from importing cheap medicines, and will override social and economic requirements of the country. Experiences of many poor countries that led to adoption of the Doha Declaration on TRIPS and Public Health should guide developing countries into being cautious against entering any new commitments.

2.4 Extension of patent term

The twenty-year patent term under TRIPS is supposed to reward the inventor for his innovative efforts. Some products, such as pharmaceuticals and agrochemicals,

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3 Rich, J. "Roche Asks for Meeting With Brazil Health Minister", NY TIMES, Aug. 24, 2001.

4 According to Article 6 of TRIPS, countries may implement the exhaustion principle differently. Some may apply the principle when drugs are sold within the national border only (called national exhaustion), but other countries, notably the European Union, allow no restrictions on import when drugs are put on sale in members of the community (called regional exhaustion). There are many countries that currently incorporate the principle of international exhaustion of rights into their national legislation. Under the principle, the patent rights are exhausted after the first marketing of the patented article by the right holder or with his consent, regardless of the place of marketing.

require official authorisation before they can enter into the market, and the approval process normally take several years. The law of the US and some other developed countries now provides for the so-called patent term restoration, in order to provide compensation for the loss of patent term due to the approval process.

Based on its law, the US demands the trade partners to provide a *sui generis* patent-like protection to pharmaceuticals and agrochemicals for not more than five years, calculated by the time elapsing between the filing date of the patent and the date of the first marketing authorisation. Drugs and agrochemicals will then be obtained compensation, which is not available under multilateral agreements of TRIPS or the Paris Convention.

The contracting party is also required to extend the term of patent protection in case of unreasonable delays in the patent grant. Such delays occur when there is a delay in the issuance of the patent of more than five years from the filing date or three years after a request for examination of the application has been made, whichever is later.

The extension of the patent term will allow multinationals to monopolise the market longer than the conventional patent rule, despite the fact that those companies can utilise various marketing techniques, such as brand name advertisement and trade mark protection, to secure their monopoly position even after the expiration of the patent term.

Developing countries, which have already experienced hardship from patents on pharmaceuticals, will find the extension of a period of protection in these essential products risky to the well-being of their people. To minimise the social cost and to fulfill the social development of their low-income economies, monopoly privileges should be granted for the shortest period as possible. Any demand for such extension should be rejected right away.

2.5 Requirement for accession to the Patent Co-operation Treaty

The US policy on bilateral and regional trade agreements is based on the negotiation objective that the trade partners should ratify the Patent Co-operation Treaty (PCT) to facilitate the patent granting process.

Patent granting procedures in most countries are based on the “examination system”, which requires prior search and examination as to the validity of the claimed invention before a patent is granted. The application is scrutinised as to whether all conditions for patent granting are fulfilled. The examination also ensures the stability and reliability of the patent rights. However, due to the growing sophisticated nature of applicable inventions, full search and examination of the application have become more and more difficult and it has led to an overloading of many patent offices.

The PCT was signed in June 1970 in Washington and came into effect in June 1978. It was modified twice in 1984 and 2001. The Treaty provides for a system of international filing of patent applications in different countries. Its benefit is that the applicants who seek to secure their invention in several countries can obtain a single examination procedure which reduces the costs of application. Under the Treaty,

when the applicant files an application, his invention will be subject to a search for prior art and a preliminary examination concerning patentable requirements. After the examination process, the applicant can decide to proceed with his application in the countries where the protection is sought.

A functioning system of patent protection in developing countries is still far short of the level in developed countries. The PCT, it is claimed, can assist developing states by increasing efficiency and reducing costs, but this objective is still too far from achievement. Although developing countries will benefit from the system, a lot more benefit will go to multinationals as they can file a single patent application for patent protection in various countries. The US intends to use the negotiation opportunities demanding all its trade partners to participate in the single patent filing system of the PCT of 1984.

Joining the PCT means that developing countries must surrender its right to conduct and implement the patent law and this will make them dependent on the patent offices of the developed countries. Nothing can guarantee that those foreign offices will carry out the prior search and examination of patent applications to their benefits. The international preliminary examination system under the PCT may serve requirements of developed countries and multinationals to achieve world-wide protection, but will not fully operate to accommodate and protect the interests of the developing countries.

3. Patent-like protection for plant varieties

Article 27.3(b) of TRIPS gives signatory countries options to protect plant varieties by patents, an effective *sui generis* system, or both. The flexible provision was included because many countries had protected plant varieties under Plant Breeders' Rights (PRBs) of the UPOV Convention, instead of patents.

Patent protection is considered inappropriate for developing countries due to its legal requirements of novelty, inventive step, industrial application and a sufficient written disclosure. In addition, plants are vitally important for the agricultural and food industries. The absolute monopoly right provided by patents might create negative impacts by limiting the country's ability to produce food crops.

TRIPS does not define what is meant by the term "effective *sui generis* system". It does not even specify that a country's legislation must conform to the minimum standards of UPOV. Unlike the cases of Paris and Berne Conventions and Washington Treaty, TRIPS does not require WTO Contracting Parties to join UPOV. This creates a significant loophole in the US trade negotiators' point of view. Most FTAs proposed by the US attempt to fill the gap by demanding the contracting party to accede to UPOV and then adopt legislation for plant variety protection identical to, or consistent with, the patent-like protection of the UPOV Act 1991.

Agri-food and drug multinationals have searched for new products from genetic material, traditional remedies, and plant, animal and microorganism species. They have occasionally used IPRs to protect innovations resulting from such discoveries.

This has aggravated debates over the concept of "ownership", through IPRs, of such resources.

Due to the ambiguity of the TRIPS provision on plant varieties, some developing countries, such as Thailand and India, have flexibly implemented the *sui generis* system by including the Farmers' Rights into their legislation. The concept of Farmers' Rights adopted by the Food and Agriculture Organization (FAO) has an aim of compensating farmers who have been conserving plant genetic resources for the past centuries and thereby have contributed to the development of plant varieties. In addition, legal requirements such as prior informed consent and benefit sharing have been introduced into the law of some developing countries in order to prevent bio-piracy. By this means, the *sui generis* system can be applied to promote: (1) the creation of new varieties of plant, (2) the conservation and encouragement of the agricultural practices, and (3) the prevention of misappropriation of plant genetic resources.

Industrialised countries, particularly the US, are now seeking to get even better conditions for the realisation of far-reaching exclusive claims over living materials to safeguard the commercial interest of their biotechnology industry. The FTAs demand the trade partners with the US to conform their plant variety legislation to the UPOV standards. If this attempt is successful, the following consequences will arise.

- The country's system for plant variety protection has to fulfill certain conditions under UPOV, including the stringent requirements of distinctness, uniformity and stability (DUS).
- No condition of the declaration of origin can be incorporated as an additional requirement for PVP and patent protections, in order to verify whether the prior informed consent of the provider of breeding material has been obtained.
- The country would be left with no option regarding the scope of protection. In conformity with UPOV Act of 1991, the exclusive right must cover vegetative or reproductive propagating material, as well as harvested material. The rights of farmers to save, use, exchange, or sell farm-saved seeds will be constrained. The monopoly right will adversely affect food and agricultural industries, and cause adverse effects on the interest of poor farmers.
- The accession to UPOV will prohibit the inclusion of provision requiring the applicants to prove that the plant variety is safe and does not cause any harmful effects to environment.
- The UPOV model will prohibit the contracting country to develop legislation appropriate to its economy. The existing law, which some countries have adopted to promote prior informed consent and benefit sharing in line with the Convention on Biological Diversity, has to be brought to an end.

Without UPOV obligations, developing countries are free in taking a decision on these important factors and in adopting legislation that suits their own needs. Acceding to UPOV as required by US FTAs, developing countries will lose out all the rights to maintain the alternative right systems that offer rights for local community, restrict access to biological resources, and provide sharing of benefits derived from their valuable resources.

4. Exclusivity over test data with respect to pharmaceutical and chemical products

Laws of most nations require pharmaceutical and agrochemical products to be registered with the competent authority before they can be put on the market. The company that seeks registration must submit data relating the products' quality, safety and efficacy, the so-called test data, with the relevant regulatory authority. Although Article 39.3 of TRIPS stipulates that all member parties must protect the undisclosed data submitted for marketing approval, this legal protection is relatively limited as it is required only for new chemical entities. The protection must be available only to protect against "unfair commercial use" and "disclosure" of the data. No TRIPS provisions require member parties to provide exclusivity protection to the first person who submits the marketing approval data, generally the company that developed a new product.[5]

This has left the Contracting Parties with considerable room to determine rules for the protection of undisclosed test data. For example, a country's legislations may not prevent the third parties from using the test data, if that use does not constitute "unfair commercial use" or does not breach the "non-disclosure" obligation in the framework of unfair competition law. In addition, the regulatory authorities may rely on the data submitted by the originator company or on the evidence of a registration made in a foreign country to grant marketing approval for subsequent applications on a similar product.

Some developed countries, including the US, grant TRIPS-plus protection on the basis of data exclusivity in order to maintain technological and economic superiority of their multinationals.[6] The US Government intends to achieve higher level of data protection worldwide. All FTAs entered into by the US demand for the protection of the undisclosed test data by requiring that the trade partners must grant exclusive rights on these data for at least five years.

According to all US FTAs, the exclusivity over test data must be granted along this line:

- The country that signs a bilateral or regional trade agreement with the US must prohibit anyone from marketing the same or a similar product for a period of at least five years from the date of approval, unless that person has obtained consents from the originator of the marketing approval test data.
- The country that enters into a bilateral or regional trade treaty with the US must prohibit anyone not having the consent of the originator company from submitting evidence of foreign government marketing approval in support of an application to market in the contracting country for a period of at least five years counted from the date of marketing approval in the

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[5] Correa, C., Protection of Data Submitted for the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement, South Centre, Geneva, 2002.

[6] US laws adopt an absolute exclusivity regime for pharmaceuticals and a limited-exclusivity regime for pesticides. See Ibid. at p.8.

contracting country or the date of approval in the other country, whichever is later.

Note that the FTAs, unlike TRIPS, do not require protection be given to new chemical entities only. This means exclusivity must be provided to all kind of data submitted for marketing approval including pharmaceutical data with respect to formulations, dosage forms, new uses, or second indications. This commitment will limit the country's ability in flexibly implementing Article 39.3 of TRIPS.

In implementing the FTA obligation to grant exclusivity over test data, a country will have to confer unnecessarily monopolistic protection on the pharmaceutical and agrochemical companies, but at the same time create entry barriers for products of generic companies. This TRIPS-plus obligation on data exclusivity will generate negative effects in several ways:

(1) by reducing competition in the private sector and thus limiting access to essential products, as the generic manufacturers, most of which are small companies in developing countries, will have to enter into a long and costly testing process before the marketing approval of a generic drug can be obtained.
(2) by restraining the effectiveness of the compulsory licence system, as the relevant and essential data are not available due to the exclusivity protection. The person to whom a compulsory licence is granted will not be able to use the licenced invention efficiently and independently without the co-operation of the patent owner.
(3) by prohibiting the regulatory authorities of the contracting party from relying on marketing approvals in other countries, despite the fact that most developing countries currently do not have the capacity to review data for purposes of granting marketing approval.

5. Protection for new types of trade marks

Most FTAs with the US require trade partner's legislation to define trade marks in the broadest manner. According to the TRIPS-plus commitments, the parties have to protect not only marks related to phrases, combinations of colours, and shape and configurative elements of goods, but also the signs that are not visible to the eye. Thus the contracting party cannot require, as a condition for registration, that trade marks be visually perceptible. The new trade mark regime will allow anyone to register signs identifiable by their sound, texture and smell as trade marks. No doubt, this requirement is an attempt to bring other countries' trade mark law up to the level of US legislation.

FTAs also provide stronger protection for well-known marks. The term well-known mark must be interpreted as the mark that is well-known in the relevant section of the public who patronises the goods or service concerned. The contracting parties cannot require that the reputation of the trade mark must be known to the whole public.

The multinationals will benefit from the greater protection of trade marks. A firm can employ heavy advertisement by using intensive and sophisticated techniques to build up a brand loyalty for its products. The commercial and marketing strength of the

company created by the brand promotion will be indefinite. This is because the legal status of trade marks is different from other IPRs as it can exist forever. As there is no term of protection for trade marks, the company will continue to monopolise the market, even though their products no longer enjoy patents or other IPRs protection. A comprehensive study on drug prices carried out by Statman reveals that the prices of most patent drugs do not decline after patent expiry due to the brand loyalty built up by trade marks.[7]

6. Strong protection for digital technologies

The TRIPS Agreement does not incorporate minimum standards on specific IPR issues in cyberspace. However, in 1996 the World Intellectual Property Organisation (WIPO) has adopted two "internet treaties": the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These two treaties create an entirely new body of intellectual property law involved with the internet. The US objective on this issue is that the very dynamic digital agenda of the WIPO must be envisaged by all trade partners.

The US digital agenda, *inter alia*, have been the following:

- The country entering into FTA with the US must comply with the essential provisions of Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite (1974), the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996).
- The trade partner must provide longer term of protection than the TRIPS standard, i.e. the term of protection shall not be less than the life of the author and 70 years after the author's death.
- Unlike TRIPS which demands for the protection of rental right regarding to computer programs and cinematographic works, all US contracting partners must provide rental right with respect to all kinds of literary and artistic works.
- The trade partner must provide adequate protection against the decoding of encrypted program-carrying satellite signals, as well as any reception or further distribution of decoded signals, without the owner's authorisation. Again, this protection is not covered by TRIPS.
- While the TRIPS Agreement is absent on obligations concerning technological measures, all FTAs proposed by the US stipulate that parties must provide adequate legal protection and effective legal remedies against circumvention of effective technological measures that are used by the right holders to protect their works from unauthorised use. This means in effect that the US is now creating a new concept of copyright protection by extending the conventional economic rights of the author to the right to use and distribute circumventing devices.
- The TRIPS-plus commitment of "copyright management information" is imposed on the contracting parties. All US FTAs demand the trade partner to impose criminal and civil liability on anyone who provides false information, or removing or altering copyright management information.

[7] Statman, M. "The Effect of Patent Expiration on the Market Position of Drugs", in Helms, R.B. (ed.), Drugs and Health, AEI, Washington, 1981, pp.140-150.

- The FTAs provide greater protection than TRIPS to works in digital form. Temporary reproduction such as temporary storage in electronic form is considered copyright infringement under bilateral trade deals. This provision clearly extends the author's right over their works on the internet.
- The FTAs have gone further than TRIPS by permitting the right holder to take a legal action against the internet service provider for the copying of works by subscribers. Further, the trade partner must ensure that the owner of copyright can track every use made of digital copies and trace where each copy resides on the network and what is being done with it at any time. These two requirements will greatly affect the public right of fair use with respect to the digital works.

This new area of IPRs will no doubt allow content owners to enjoy greater protection than conventional copyright rules would afford. The provisions on prohibition of circumventing devices will enable the owners to extend control over access to and distribution of digital works even after the expiration of copyright term. The digital protection will enable the owners to condition access to works that copyright law expressly leaves unprotected in order to stimulate further creativity (i.e. works which have fallen into the public domain). The scope of fair use online will be narrowed down, as the content owners can require payment for any use or excerpting of a digital work, regardless of the user's purpose. The use of the internet and digital works for educational or private non-commercial purposes, or the use by educational and library organisation will not be possible because of this prohibition.[8]

The worst situation arises when temporary reproduction clause is incorporated into national law. Compared with the conventional copyright rules that no control of reading is given to the right owner, the prohibition of temporary reproduction will allow the copyright owner to control the use of the internet. This is because every use of internet browser, which requires few seconds storage in RAM, will constitute copying. While the use of conventional copyright works, such as reading a book, is not a copyright infringement, the browsing or using of the internet will be barred on the ground of violation of copyright.

In view of the severe effects on societal, cultural and educational development, it is logical to suggest all trade partners with the US to reject the proposal on this new regime of copyright law.

7. Enforcement of rights

Every US FTA requires the trade partner to adopt and implement measures to combat IPRs piracy and counterfeiting of IPRs within the country and at its borders. All trade partners with the US is obliged to strengthen law enforcement mechanisms in three areas: (1) improving IPRs law with relevant sanctions and speedier processes, (2) strengthening coordination to deter IPRs infringement, and (3) improving judiciary performance through training and orientation aimed at anti-piracy.

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[8] Cohen, J.E. "Lochner in Cyberspace: The New Economic Orthodoxy of "Right Management", 97 Mich. L. Rev. 462 (1998).

US FTAs require the trade partner's competent authorities to enforce IPRs. First, an injured party may lodge a complaint of infringement with the law enforcement agency. It also requires government agencies to have authority to initiate a criminal case against piracy and counterfeiting without waiting for a formal complaint by the right holder. The competent authority of the government agencies must include the authority to seize pirated goods, equipment used for counterfeiting, and any relevant evidence. The authority also has a duty to inform the right holder as to the name and address of the suspected and the quantity of the counterfeit goods.

While TRIPS regards IPRs as private rights, the requirements under bilateral and regional trade treaties obviously provide legal protection for IPRs much stronger than any other rights of the private party.

Conclusion

FTAs are signed by countries in pursuit of their economic self-interest but in the long term may undermine the multilateral trade liberalisation. Such a bilateral and regional trade policy aimed at providing reciprocal benefits amounts to a clear contradiction of the multilateralism as many nations advocate. In order to sustain the spirit of international cooperation, it is necessary for WTO's Contracting Parties to eliminate this practice, which is a major and fundamental departure from the multilateral trade system.

In light of the considerable and long term efforts by developing countries to minimise the impact of the TRIPS Agreement, one might conclude that most developing countries oppose the high degree of IPRs protection. That conclusion, however, is contradicted by widespread and enthusiastic support of many developing countries for entering into FTAs that demand for higher commitments on IPRs.

Given the fact that developing countries have often suffered from the weakening prices of raw materials, foods and semi-manufactured products, which are their main foreign exchange earners, any single developing country would have a strong incentive to sign an FTA with the US because such a treaty helps that country to secure access to the most lucrative market. However, by signing an FTA, the developing country agrees, in a binding treaty under international law, to respect any obligations contains in the agreement it has entered into. The treaty can be harmful to the country because it leads to a world in which TRIPS-plus obligations are imposed. In making decisions with respect to bilateral or regional deals, policy-makers will have to weigh the economic benefits of FTAs against the importance of protecting health and social interests of their population. We are of the view that the TRIPS-plus standards does not seem to benefit developing countries. Therefore, trade negotiators of the country that is offered the opportunity to enter into a treaty with the US should reject any proposal with such standards.

Although some sectors of the economy may gain benefits from the bilateral or regional trade deal, it should be recognised that the benefits are limited only for particular sectors and certain groups of interests. On the contrary, the long-term social and economic costs that result from IPRs commitment are significant, and should not

be underestimated as they affect the majority of the population. Strengthening protection of IPRs, regardless of specific needs and social priorities of each country, may sharply reduce the developing countries' industrial and technological competitiveness and will give rise to stronger dependencies on the more powerful countries. In conclusion, we believe that increased national protection of IPRs should be made on the ground of its assistance for the promotion of national technological and economic development, rather than in exchange for the uncertain benefits under the FTA.