

## INTELLECTUAL PROPERTY PROTECTION STRATEGIES IN HIGH-DEVELOPED COUNTRIES

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**Purpose:** There has always been an international dimension to debates on intellectual property rights protection. High-developed countries implemented own protection standards which became common but not globally respected. Nowadays they experience problems connected with their violation.

**Design/methodology/approach:** The subject matter and main aims of the paper require detailed literature studies and deep analysis and comparison of opinions presented by scholars representing both sides of the TRIPS negotiation process. It is necessary to present the opinions of well-known worldwide organizations and researchers from developed and developing countries.

**Findings:** The paper presents the international legal consensus related to the protection of intellectual property rights and signals the main problems which haven't been solved. It also presents the main tools used by developed countries to promote their global strategy of intellectual property rights protection.

**Originality/value:** The paper shows and explains the main problems faced by high-developed countries and discusses the different opinions.

**Keywords:** intellectual property rights protection, TRIPS Agreement, high-developed countries, developed countries.

**Category of the paper:** General review.

### 1. Introduction

International policies connected with intellectual property rights (IPRs) protection have seen profound changes over the past decades. The World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated during the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time. This Agreement is a legal recognition of the significance of existing links between intellectual property and international trade. Rules on how to protect

different forms of intellectual property rights have become a standard component of international trade agreements. TRIPS sets out minimum standards of protection that most of the world's economies have to respect. Additional international rules which protect intellectual property have been created in various bilateral and regional trade agreements and in a number of intergovernmental treaties negotiated under the umbrella of the World Intellectual Property Organization (WIPO). The TRIPS Agreement is nowadays perceived as a consensus between the interests of developed and developing countries. The main aim of this paper is to explain and discuss the asymmetry in negotiation power between countries which influences (mainly slows down) the development processes in developing countries. The paper also tries to compare the role of the lack of intellectual property rights protection in the process of development of all countries.

## **2. Methods**

The subject matter and main aims of the paper require detailed literature studies and deep analysis and comparison of opinions presented by scholars representing both sides of the TRIPS negotiation process. It is necessary to present the opinions of well-known worldwide organizations and researchers from developed and developing countries.

## **3. Results**

At the beginning of the paper it is worth to present and compare the level of development of nowadays well developed countries during the time they created and developed the system of intellectual property protection and in parallel present and discuss their attitude to protection and behaviour. The intellectual property system has historically been neither necessary nor sufficient for either economic or technological process (Grandstarnd, 2000). The more scrupulous analysis of history of intellectual property protection shows that highly developed countries exploited the free access to information and the lack of intellectual property right protection to reach the contemporary standard of development. During the early stages of their industrial development majority of these countries experienced lack or weak intellectual property rights protection and tolerated many infringements on intellectual property rights in their home countries. On the other hand they forced on international markets their economic power through protectionist policy of high tariffs, huge subsidies and spreading the idea of free trade with poorer and economically weaker countries. The idea behind this ideology was to capture possible high market share on markets of poorer countries and therefore to eliminate

possible national and foreign competitors (Abdelgawad, 2015, p.7). Some scholars point out that the level of development of these highly developed countries would be lower nowadays if they had to adopt, in the past, to the modern high standards of intellectual property rights protection (Lai, and Qiu, 2003).

It is worth noticing that in the past the intellectual property protection was created mainly at national levels and different countries implemented different solutions which were the best for protection of their home markets and for export promotion. The history shows that law protected usually sellers, not the founders. The history of copyright law started with early privileges and monopolies granted to printers of books, not to the authors. Initially copyright law only applied to the copying of books. The copyright legislation remained uncoordinated at an international level until the 19th century. In 1886, the Berne Convention was introduced to provide mutual recognition of copyright between nation states, and to promote the development of international standards for copyright protection. It was adopted by almost all the nations of the world (over 140 of approximately 190 nation states of the world). But some high-developed countries, for example United States, adopted it very late. The United States finally signed onto Berne and passed the Berne Convention Implementation Act in 1988, making the U.S. a party to the Berne Convention in 1989. The United States had refused to join the Berne Convention for 102 years (Cohen, 2010, p. 35) because they viewed international harmonization suspiciously (Rickerton, and Ginsburg, 2005). There are many reasons for that behaviour. Barbara Ringer (1968), the former Register of Copyrights, claimed that in the early years of international copyright harmonization, “with few exceptions, [the United States’] role in international copyright law was marked by intellectual short-sightedness, political isolationism, and narrow economic self-interest”. For many decades, the United States did not protect foreign authors at all and violated or ignored many other Berne provisions. In that years the United States’ influence on international standards of copyright protection was minimal, as was international influence on the U.S. domestic copyright regime. While other countries were protecting foreign authors and loosening formalities, the United States respected only own standards (Claggett, 2017, p. 346). K. Claggett (2017) explained this behaviour claiming that the main reason was that United States did not have a seat at the table in Berne’s initial development and Americans were observers – not participants in the negotiations. So they felt ignored and left without any influence on the process of law formulation. The second reason was that adoption of Berne Convention required numerous fundamental changes to United States law. As a result, the United States spent, to quote Barbara Ringer (1968) again, “a century as an outlaw, a half century as an outsider, and fifteen years as a stranger at the feast”. The country which didn’t want to implement the international agreements for a very long time nowadays creates the standards of intellectual property protection for the whole world. And still, parallel to international law, conduct their own policy of intellectual property protection taking advantage of its role and significance in the international trade. The most controversial tool is "Special 301 report" from the US Trade Representative. This program takes

its name from, and is based on the administrative structure of, Section 301 of the Trade Act of 1974 and has been published annually since 1984. That Act was passed at a time of large and increasing trade problems, growing deficits, arising problems with manufacturing activities abroad, skyrocketing foreign debt and persistent economic crises caused mainly by huge dependency on foreign oil imports. Therefore it is very protective. For over two decades the report has functioned as one of the primary sticks for the U.S.'s "carrot and stick" approach to international intellectual property policy. The report evaluates other countries' compliance with intellectual property standards and enforcement efforts, either those embedded in existing treaties or those the United States would like to see adopted. It evaluates countries via inclusion on or delisting from its annual "Watch List" and "Priority Watch List". It also gives the power to implement unilateral trade sanctions when the demands and obligations are not met. The construction of the report requires the administration to take decisions on which countries it views as having "adequate" intellectual property protection. The report is therefore a key expression of the trade policy of the U.S. in intellectual property matters and influences the decision of many United States trade partners.

The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement is nowadays the most comprehensive multilateral agreement on intellectual property rights. It incorporates the main provisions of World Intellectual Property Office (WIPO) and some former agreements: the Berne Convention and the Paris Convention, as well as a number of other obligations in areas where there were previous agreements on intellectual property rights. The TRIPS Agreement establishes minimum standards of intellectual property rights protection in the area of patents, copyrights, trademarks, geographic indications, industrial designs and integrated circuits layout design.

The significance and importance of this Agreement is multiple (METI, 2012, p. 510). It covers the full range of protection measures. It also raises the levels of protection from those in existing treaties (the Paris Convention and Berne Convention) and obligates countries that have not joined these conventions to adhere to them. It is the first treaty on intellectual property rights to explicitly mandate most-favoured-nation treatment. It specifies substantial levels of protection and rights that WTO Members are obligated to guarantee in their domestic laws and it contains detailed provisions on the procedures for enforcing rights should they be infringed. Additionally it contains dispute-settlement procedures.

The TRIPS Agreement is perceived as a common consensus and there are many advantages of this agreement. But of all the agreements administered by the WTO, the TRIPS Agreement is undoubtedly the most controversial with respect to its development-related impacts. The analysis of it and its results reveal the double standards approach between WTO Members regarding intellectual property rights protection and demonstrate the misuse of the TRIPS Agreement as a tool of discrimination against developing countries by forcing them to accept standards which are irrelevant to their development needs.

Among the main important characteristics of this Agreement which influence the creation of asymmetry in treatment and double-standards of TRIPS are (Abdelgawad, 2015): different bargaining power between countries, pressure on partners in negotiations and limitation of competition rules.

At the beginning of the 80's majority of developing countries were opposed to the United States attempts to introduce intellectual property rights into the Uruguay multilateral negotiations Round. In general, developing countries were afraid of restricted access to technology, a rise of products prices, especially drugs on their markets, and the loss of control of their genetic resources and traditional knowledge which are not recognized nor fully protected by western international property rights legal standards. (Abdelgawad, 2015, p. 5). They viewed the GATT-WTO intellectual property negotiations as an attempt by the developed countries to maintain a protectionist policy in order to strengthen their dominant position on the world market. Opponents of creating strong IPRs protection in developing countries have argued that developing countries need maximum access to Western technology to increase development (Giunta, and Shang, 1993, p. 331). During that time also many economists from developed countries claimed that Third World development was in the interest of all nations and technological information should be provided with minimal possible restriction (Chang, 2001, pp. 288-930). Some of them pointed out that most developed countries formerly enjoyed unprecedented freedom to exploit intellectual property for their own economic development during the 18<sup>th</sup> and 19<sup>th</sup> centuries (Bronckers, 1994). Other also argued that stronger intellectual property rights protection would hamper economic development by forcing developing countries to pay for the use of intellectual property, which is held predominantly by corporations in developed countries (Giunta, and Shang, 1993, p. 332).

Many doubts were connected with the role of big corporations in the process of the Agreement creation. Abdelgawad (2015, p. 3) claimed that "the TRIPS agreement's first draft was written by a coalition of thirteen American multinational corporations coming from several sectors (in particular biotechnology, pharmaceutical, seed, chemistry and data processing industry) gathered in an ad hoc committee called the 'Intellectual Property Committee'. Among those American firms were the following: Bristol-Mayer, Dupont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IMB, International Rockwell, Johnson & Johnson, Monsanto, Pfizer and Warner Communications. Additionally other coalitions such as the "Business Software Alliance" or "Advisory for Trade Negotiations" influenced U.S. policy advocating the incorporation of issue of intellectual property rights protection into the WTO framework (Drahos, and Braithwaite, 2000; Sell, 2003; Matthews, 2002; Drahos, 2002). It means that interests of the biggest firms having majority of patents globally were considered and protected. Considering that patents are in a large amount owned worldwide by major corporations originating from developed countries, developing countries argued that offering the monopoly of intellectual property rights in their markets necessarily favoured economic interests of these foreign corporations over national interests (Watal, 2001; Deere-Birkbeck,

2010). It means that idea of free trade and lack of barriers in international trade is impossible to implement and behind the “nice words” there are interest of strong industrial groups creating monopolies. TRIPS Agreement did not really pursue the goal of free market but, quite the opposite, meant to protect and consolidate exclusive rights of intellectual property rights holders, mainly those from developed countries, and at the same time to transfer rents from poor, developing countries to the rich ones (World Bank, 2002; Srinivasan, 2002).

Another important tool implemented by the United States which influenced the developing countries behaviour during TRIPS negotiations was the above-mentioned “Special 301 report”. Abdelgawad (2015, p. 4) claimed that the U.S. threatened to refer to the Section 301 which limits or prohibits access to the United States market of products from developing countries, in particular those having what U.S. considered an ‘insufficient protection’ of intellectual property rights. This powerful tool could influence the negotiation position of developing countries and induced them to accept the Agreement. The behaviour and tools shown above indicate that trade agreements can be used by developed countries as very useful strategy to promote their intellectual property rights.

#### **4. Discussion**

In theory the intellectual property rights protection system is established to provide the institutional framework to promote two main economic goals. It grants certain exclusive (monopolistic) rights to the creators of intellectual property. These rights are created to encourage intellectual creative activities and promote the effective use of resources and therefore guarantee the creation of innovations and thereby enhance the intellectual infrastructure for economic development. Intellectual property rights protection system enables businesses to maintain public trust and promote fair competition. It means that intellectual property rights protection facilitates economic development. It is a theory. In practice, as it is shown above, when the economic power of some parties of agreements are too strong, the monopoly which is the natural result of intellectual protection can harm the weaker parties. Intellectual property rights protection allows the monopoly creation, and therefore it restrains competition, and reduces the social benefits to consumers by limiting the industrial application of technology and knowledge by weaker, developing countries which are forced to import expensive foreign technologies. There aren't enough financial means and possibilities to create them in their domestic markets. To balance these competing interests, intellectual property rights systems need to be instituted carefully so as not to prevent fair and free competition. They shouldn't only protect the interests of developed countries but encourage developing countries to create own innovations and also to protect their traditional knowledge.

## 5. Summary

There has always been an international dimension of debates on intellectual property rights protection. Mainly because modern worldwide standards of intellectual property right protection are established by trade agreements. Unfortunately trade partners usually do not have the same negotiation power. High-developed countries implemented own protection standards which became common but not globally respected. Nowadays they experience problems connected with their violations. Additionally the proper role of intellectual property rights protection in light of a globalizing economy is nowadays contested. Different legal principles exist from country to country, stemming from the particular social, political and ideological experiences of each. Prior to the TRIPS Agreement, intellectual property rights protection ranged from totally open regimes that did not protect private intellectual property rights to highly protectionist regimes in which both products and processes could be protected. So the protection experience as well as the understanding of necessity of intellectual property protection differ between countries. There is also little concrete evidence that intellectual property protection is the only incentive for innovation or that it leads to social, economic and technological development (Su, 2010).

The paper presents the international legal consensus related to the protection of intellectual property rights and signals the main problems which haven't been solved or are not solved in right way. It also presents the main tools used by developed countries to promote their global strategy of intellectual property rights protection.

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