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Observations on the Intellectual Property Component of the European Commission's New Trade Policy

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I describe and analyse the Intellectual Property Rights (IPR) elements in the recently announced EU new trade policy, which seeks to be more assertive in global trade. The policy's focus on IPR covers pushing for greater global harmonisation, the implementation of stronger standards in bilateral FTAs, and enhanced enforcement efforts in key developing countries. This policy is largely similar to the IPR emphasis in US global and bilateral trade policy, which has had a record of mixed success. I draw lessons from that record to illuminate the potential gains and problems that might arise in the new EU trade policy.

Keywords: Intellectual Property Rights (IPR), European Commission,
Trade Policy

JEL-Codes: F13, F14, F42

1 Introduction

In what it claims will constitute a significant contribution to the competitiveness of member states of the European Union (EU), the European Commission (EC) recently issued a working paper that heralded the introduction of a substantially more aggressive international trade policy (EUROPEAN COMMISSION 2006, Annex p. 567). Much of this new policy would be focused on liberalising or reforming so-called "behind the border" restrictions in other countries on inward investment, services provision, government procurement and competition policy. This seems a natural extension of long-standing priorities in European trade policy, for these items were at the heart of the "Singapore Issues" earlier championed by the EU.

One important component would be an enhanced emphasis on the need to harmonise substantive rules and procedures in key areas of intellectual property rights (IPR) and to strengthen the laws governing IPR in potential partner countries in FTAs. Even more important would be a greater insistence that key trading partners such as China be held to account for enforcing their obligations in this area. As the report noted, in most major developing countries the legal system of IPR is sufficiently advanced that they do not constitute a problem for patent, copyright, and trademark holders. The greater problem by far is the inability or unwillingness of local governments to invest sufficient resources to reduce infringement and piracy to accept-

able levels. It is true that in many key nations, such as China, Russia, Turkey, and Vietnam, there are endemic and growing problems for EU firms that wish to sell products, technologies and services under protection of IPR but find these intellectual assets readily diluted by local infringement.

In articulating this strategy the EC intends to follow, in most dimensions, the aggressive stance taken by the United States in its bilateral FTAs and in global negotiations on harmonisation. It is instructive, therefore, to consider the US record in linking trade policy to extensive requirements in IPR. Specifically, US negotiating priorities have included a strong demand that trade partners must adopt patent and copyright standards that significantly exceed those mandated by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The record on achieving these "TRIPS-plus" rules can best be described initially as mixed, with some legislative wins combined with considerable controversy over the appropriateness of such policies for developing countries. As for enforcement, the United States has engaged in considerable jawboning with little to show for it.

In this article I review the prospects for success in this new EC endeavor. In the next section I describe the main IPR components of the new trade policy, including their potential linkages with related priorities. I follow that with a consideration of the US record in pushing stronger global IPR, trying to draw lessons for the evolution of the EU policy. In the last section I offer brief thoughts on how to implement the new IPR trade policy in order to maximise its effectiveness.

2 The New EC Approach to Global IPR

Intellectual property rights incorporate patents, copyrights, trademarks, Geographical Indications (GIs), plant variety rights, various *sui generis* rights for computer chips, databases and other elements, protection of confidential test data and rules governing unfair competition in learning trade secrets. Within these areas are important sub-components. For example, copyrights are accompanied by certain neighbouring rights, including benefits for performers, producers, broadcasts, and satellite transmissions. Trademarks are supplemented by service marks, collective marks and trade names. There are various means of protecting GIs, an item of considerable export interest for the EU. The TRIPS Agreement sets out minimum standards that must be legislated and, in principle, enforced in each of these areas.

Countries are free to adopt regulations that exceed those of TRIPS, which means there are significant variations across regions. For example, the United States offers patents to all software programs and business methods that meet standards of novelty and non-obviousness, while the EU only patents software that makes operational a tangible device. Relatively few other countries patent software or business methods. Countries vary widely in their definition of copyrights regarding what might be downloaded from the internet and what constitutes fair use of copyrighted materials. The EU has the most extensive protection for GIs, while most of the world simply protects geographical names with collective marks, a substantially weaker policy.

This variation in IPR systems, even post-TRIPS, is part of what gives rise to the new EU approach to trade policy, though a more significant factor is that available rights are enforced weakly or not at all in major developing countries. Because EU exporters of intellectual property in such items as wines, foodstuff, fashion, cosmetics, software and recorded entertainment stand to gain considerably from effective enforcement of stronger global standards, IPR are a centerpiece of the assertive new regime.

The IPR platform in the new trade policy consists of three interrelated planks. First is to pursue international harmonisation of substantive patent standards through negotiations at the World Intellectual Property Organization (WIPO) and to achieve greater coordination on patent procedures among developed countries. Such harmonisation could reduce costs of acquiring patents in multiple jurisdictions and diminish uncertainty about patentability across borders (BARTON 2005). As noted in the next section, the attempt to achieve a WIPO treaty on patent law harmonisation has stalled. There is some scope for cost-reducing coordination among the EU, United States, Japan and other developed countries, however (MASKUS 2006a).

The second initiative will be to demand considerably higher IPR standards in future bilateral FTAs with target nations. The EC has for some time engaged in negotiations with neighbourhood developing and transition economies in the Middle East and North Africa and Eastern and Central Europe. For those countries intending to accede to the EU, IPR standards need to be broadly consistent with Community standards, which generally exceed those of TRIPS. For other developing economies, however, the EU traditionally has simply asked negotiating partners to implement TRIPS standards and to join particular international conventions covering intellectual property.

Because the working paper is vague on this point, it is difficult to ascertain which demands will constitute the “TRIPS-plus” agenda the EC has in mind. A reasonable guess is that it will involve central EU preferences in IPR, including GIs protection consistent with the strong European system, a law rendering illegal the unauthorised downloading of digital products except (perhaps) for personal use, and significantly more rigorous patent standards in pharmaceuticals and biotechnological products, as explained in the next section on the United States. However, the EC communication states that its policy will “take careful account of the potential links between IPR and public health and sustainable development”. In that regard the policy would attempt to strike a balance between the EU’s export interests and local development needs – a difficult task.

The third and most central plank is to promote better enforcement of IPR in major developing countries, singling out China, Russia and Turkey in particular. This approach would offer more technical and financial assistance for customs, the judiciary and police. It would also fund programs to raise awareness of citizens in those countries and EU companies operating there of the need for better enforcement. The policy would also push for better coordination with the United States and other major IPR exporters to increase resources for enforcement. Finally, there are intriguing statements about expecting developing countries to meet their obligations to enforce IPR, as required (in vague terms) by TRIPS. Presumably this idea could involve a coordinated complaint at the WTO about the unwillingness of, say, China to invest sufficiently in enforcement activity, an approach recommended by other analysts for US policy (MASKUS 2006a, BERGSTEN et al. 2006). The EC working paper would calibrate the expected levels of enforcement to be consistent with those in the Enforcement Directive (EUROPEAN COMMISSION 2004). As discussed below, such an expectation would require significant and controversial changes in both laws and enforcement policies in targeted nations.

A further comment is that while the working paper does not draw a linkage between IPR and competition policy, the two are closely related. The EC’s primary concern in the competition area is to limit state aids to local companies and restrictions on mergers and acquisitions, policies that disadvantage EU corporations. However, governments in many developing countries remain concerned that dominant international firms may act anti-competitively in technology and production licensing practices as IPR are strengthened. Thus, an insistence on a more open competition regime could

usefully be complemented by additional technical assistance to help local authorities cope with such problems.

3 Lessons from US Experience

Although it has distinctive elements, the new EC trade policy on IPR resembles the aggressive approach taken by the United States during the BUSH administration. The United States Trade Representative (USTR) has also pursued three priorities: patent and copyright harmonisation, technical assistance and “jawboning” to raise the pressure for better enforcement abroad, and “TRIPS-plus” demands in bilateral FTAs with small developing countries (MASKUS 2006a). This agenda has borne important fruit on behalf of IPR developers in the United States. Further, because stronger IPR treatment negotiated in FTAs must be provided to all WTO members on the most-favoured nation basis, it has had spillover impacts for innovative EU firms. Nevertheless, the record is mixed, which should flavour enthusiasm about the new EC policy with a dose of realism.

First, as noted above, the United States and the EU jointly have led efforts at WIPO to negotiate a global Substantive Patent Law Treaty, which would sharply strengthen and harmonise most central patent eligibility standards and examination procedures among major developed and developing countries. This attempt has floundered and is currently in abeyance as negotiators have discovered that achieving agreement on harmonising even the most basic standards is difficult when patent regimes arise from different philosophies and legal systems and strike different balances between inventors' rights and user access. Even within the EU it has proven difficult to achieve region-wide standards on patents, while, for example, the United States and the EU vary widely in such basic issues as post-grant opposition procedures. Even more problematic, major emerging countries, led by Brazil and India, have introduced at WIPO a demand for a “development agenda” that would make global IPR policies pay more attention to the needs of development. Thus, the best that can be hoped for is for the EU, the United States, Japan and other developed economies to achieve cost reductions for their firms by coordinating basic procedures without significant harmonisation.

Somewhat greater success has been achieved through the negotiations in the late 1990s of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These agreements seek to

establish protection for copyrighted digital products and services, particularly as they are placed on the internet, an area ignored by TRIPS. The WCT clarifies rights of authors to control the communication of their works through wire or wireless networks. Under the WPPT, performers and producers are given similar rights to the electronic distribution of their works and additional rights as well.

The most controversial aspect of the WCT and WPPT is that both obligate signatories to provide legal protection from, and remedies against, unauthorised circumvention of technical measures used to safeguard digital materials. Thus, members must support electronic management of digital rights by content developers. The issue is controversial for it provides the legal basis for making illegal not only the downloading and distribution of digital products for commercial gains but also copying such materials for personal use, an activity that had generally been protected under prior fair-use doctrines. For example, the United States has implemented the treaties through its Digital Millennium Copyright Act (DMCA), which sets out rigorous civil and criminal penalties for unauthorised downloading and acts of circumvention. For its part, the EU's Enforcement Directive provides language that would achieve similarly strong protection of copyright holders, a policy that has encountered great resistance among information users in the region. At present 60 countries have implemented the WCT (and 58 the WPPT), including the United States. Only Belgium, Cyprus and Czech Republic among EU member states have put them into force. The European Community and individual members have signed the treaties but not yet put them into force, because of this controversy over how to implement anti-circumvention laws and penalties and concerns over privacy.

The United States has pushed its harmonisation agenda strongly into recent bilateral FTAs with small countries such as Bahrain, Singapore, Jordan, Morocco, Peru, and Colombia. This is the second major plank of its IPR-based trade policy. The IPR focus in such agreements has been to achieve a major strengthening of certain legal standards collectively referred to as "TRIPS-plus". This approach is central to US negotiating priorities, including requirements that IPR provisions of FTAs "reflect a standard of protection similar to that found in US law" and that standards strongly protect new technologies and embodied intellectual property.

Primary items of "TRIPS-plus" include the following: First is to narrow exclusions from patentability and, in particular, to make eligible for protection life forms, including genetic sequences. Other areas in which patents could

be provided are plant varieties, software, and business methods. Second is to require patent-term extensions for drugs in cases where health authorities issued patents with undue delay. A further demand is for second-use patents in pharmaceuticals, which effectively extend patent protection beyond original terms. Yet another is to limit experimental use of patented materials and also to restrict their use by potential generic firms in preparation for entry as patents expire. Perhaps most significant is the demand that health authorities ban the registration of any generic drugs during the lifetime of a patent, effectively ending access to compulsory licensing except in rare circumstances.

Another central demand is the exclusive use of rights for confidential clinical and field trial test data on behalf of original applicants for a period of at least five years for pharmaceutical products and ten for agricultural chemicals. Recent FTAs go beyond that and effectively permit ten-year exclusivity before data may be used. This is a strong restriction on competition, even in medicines where no patent is issued. Finally, the United States asks partner nations to join the WCT and WPPT and to implement strong provisions restricting fair-use limitations and preventing anti-circumvention activities in internet copyrights.

Several observations may be made about this strategy. First, the emphasis on strengthening IPR through bilateral agreements reflects US dissatisfaction with the stalled multilateral (WTO) approach to further trade liberalisation. The bilateral route gives the United States considerable leverage to raise IPR standards in partner countries. Second, "TRIPS-plus" requirements are highly controversial among health authorities in developing countries because they place strict limits on the ability of governments to encourage generic entry or issue compulsory licenses in pharmaceutical products.¹ They are also resisted by information and education ministries for their restraints on fair use in copyrights.

Third, it is important to recognize that bilateral FTAs are not likely to go beyond agreements with relatively small economies, for larger and middle-income countries have domestic interests that would resist substantially more restrictive IPR standards. Brazil, for example, has resisted negotiating an FTA with the United States, with concerns about IPR being a central reason. China also sees little need for an agreement that would force up its

1 These agreements generally contain a side letter that affirms the ability of partner countries to take actions to protect public health in the event of a health emergency.

patent standards in public health, which have been calibrated to achieve significant generic competition.

Thus, the EC policy may need to be tempered with realism. To the extent that it will demand similarly restrictive patent rules and fair-use limitations, EU negotiators are likely only to achieve FTAs with smaller developing economies. This problem lies in conflict with the working paper's stated goals of choosing potential FTA partners based on market size. However, to focus, as does the United States, on ratcheting up standards in smaller and poorer developing countries runs afoul of the working paper's commitment to take account of development and public-health needs in trading partners.

A significant difference in priorities is that the EC would place emphasis in its FTAs on negotiating stronger protection in geographical indications, an area that does not appear in the US IPR chapters. There are mixed views among developing countries about the potential gains from protecting GIs, with some (e.g. India) believing that it would accelerate the development of local crafts and foodstuffs, and others (e.g. Chile) believing that it would raise global marketing costs relative to relying on trademarks and collective marks. In this regard, a targeted approach toward selecting bilateral FTA partners and convincing them of the gains from cooperation on GIs may raise greater potential gains for the EU in larger developing countries.

The third major plank of recent US international policy has been to encourage stronger enforcement of patents, copyrights, and trademarks in key developing countries, such as China, Thailand, Korea, Turkey, Russia, and Argentina. The approach has combined financial and technical assistance with high-level diplomatic representations, extensive field-level administrative support, and raising awareness through publishing complaints about IPR in USTR's annual trade report. There have also been implicit threats of more formal action through placing countries on "priority watch lists" that could lead to bilateral consultations and even retaliation under Section 301.

Most observers would argue that this thrust has achieved moderate success. It has raised awareness among US businesses about specific problems in various countries and has increased pressure on governments in developing countries to undertake periodic enforcement actions. This has especially been evident in a series of enforcement agreements struck between the United States and China over the last ten years (MASKUS 2006b). Indeed,

many emerging countries have invested more resources in enforcing IPR, in part because their own innovative firms have a growing interest in being protected. Technical assistance from the United States, the EU, and WIPO have been particularly useful in improving training of judges, police, and customs. An increased EC emphasis through its new trade policy on improving such processes should generate payoffs for European innovative firms over time.

Nevertheless, problems with trademark counterfeiting, copyright piracy, patent infringement, and theft of trade secrets remain endemic problems in many key markets. To some degree this is inevitable: gaps between prices of legitimate IPR goods and copies provide incentives for infringement that will not moderate for some time to come. Here the EC could work with its international companies on their own pricing and legal strategies to overcome the problem. However, where governments in major countries fail to take the enforcement problem seriously they undermine the gains from access to international trade and technology. Such governments ultimately need to be held to account in meeting their obligations under TRIPS and other agreements. Thus, the EC may be faced with the choice of undertaking, preferably in consultation with the United States and Japan, more formal complaints about enforcement problems through the WTO.

4 A Final Assessment

The brief analysis offered here supports concluding remarks about the potential gains from a more aggressive EC trade policy in IPR. First, enthusiasm needs to be tempered with realism about the difficulty of achieving many gains in the medium term. Harmonisation efforts are not likely to achieve more than simple coordination among developed economies. Shifting more toward a "TRIPS-plus" approach in pharmaceuticals and internet goods may encounter strong opposition in the larger countries (China, Korea, ASEAN and Turkey) of greatest interest for bilateral FTAs, though there may be broader scope for negotiating disciplines in GIs. Thus, a strong stance as a *demandeur* of "TRIPS-plus" rules would likely limit the EU to achieving agreements with smaller markets and raise questions about commitments to supporting development needs.

Much of the EC's working paper language on IPR focuses on the need to improve enforcement procedures and resources in critical trading partners, an approach that makes sense for generating greater market access and pro-

fits for innovative firms in the medium term. However, there are significant coordination problems involved in raising the resources for assistance, targeting them effectively, working with other developed country trade authorities, and collaborating with international firms to raise awareness. Thus, a more broad-ranging, multilateral approach to raising global priorities for effective enforcement should be a component of the EC's approach. Ultimately, this process needs to be backed up with procedures for holding major developing countries to account for improving their enforcement activities and reducing infringement. In this context, reliance on multilateral cooperation should be more effective than shifting toward a more aggressive unilateral stance.

Overall, the EC's preference to combine IPR with other regulatory issues into a comprehensive trade strategy seems sensible, if difficult to manage effectively. In terms of its basic motivation – to improve competitiveness and create jobs – the IPR emphasis taken by itself may prove illusory until stronger enforcement efforts really take hold. As a component of the broader policy, however, the strong complementarities among investment liberalisation, services provision, competition policy, and IPR should enhance the gains to innovative European companies and high-skilled workers.

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