



The bilateral free trade agreements: the implementation challenges

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Topics

1. ***Preliminary observations***
2. ***The FTAs with developed countries***
3. ***The challenges of implementation: options***



1. *Preliminary observations*



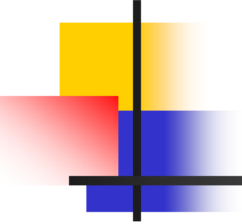
Intellectual property and trade

- ***Controversial issue in the 120 years-history of the international system***
- ***Changes in the USA and the link between intellectual property (IP) and international trade***



The transformation brought by TRIPS

- *IP as an integral part of the international trading system*
 - *National treatment and most-favoured-nation*
 - *Dispute settlement*
- *The minimum standards of protection in each of the IP disciplines*
- *Enforcement of IPRs*

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- ***Transformation particularly significant to developing countries***
 - ***The bottom up approach of the pre-TRIPS system***



2. The free trade agreements with developed countries namely with the USA



Agreements with the EU: main features

- *Ratification of multilateral agreements*
- *Wines and spirits: geographical indications*
- *“ensure adequate and effective protection to intellectual property rights in accordance with the highest international standards, including effective means of enforcing such rights provided for in international treaties”*



USA FTAs

- ***More expansive coverage***
- ***Promote adequate and effective protection of intellectual property rights, including through***
 - ***accelerated and full implementation of TRIPS***
 - ***ensuring that provisions reflect a standard of protection similar to that found in US law***
 - ***providing strong protection for new and emerging technologies keeping pace with technological developments, particularly to control use through the Internet***
 - ***providing strong enforcement of intellectual property rights***

Controversial TRIPS Plus

issues

Patent flexibilities	Copyright	Biotech/ traditional knowledge	Geographical indications	Enforcement and dispute settlement	Development component
<ul style="list-style-type: none"> •Expansion of protection in general including regulated products <ul style="list-style-type: none"> •Protection of test data •Non-voluntary licenses •Parallel imports •Patentability criteria (e.g. protection of business models) 	<ul style="list-style-type: none"> •Expansion of duration of rights •Application of effective technological measures •Exceptions and limitations 	<ul style="list-style-type: none"> •Protection of life forms •Protection of biodiversity and traditional knowledge 	<ul style="list-style-type: none"> •Expansion of protection beyond wines and spirits •Delusion of Gis via trademarks (USA) 	<ul style="list-style-type: none"> •Resources to face stronger enforcement mechanisms •Non-violation complaints 	<ul style="list-style-type: none"> •Doha Declaration on access to medicines •Access to Knowledge •Transfer of technology •WIPO Development Agenda



3. The implementation challenges



TRIPS: freedom of implementation

- ***“Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice” (Art. 1.1)***



Freedom of implementation in FTAs?

- ***US: FTAs implementation bills (case of CAFTA+DR)***
 - Conditions for Entry Into force of the Agreement
 - such time as the President determines that countries have taken measures necessary to comply with the provisions of the Agreement that are to take effect on the date on which the Agreement enters into force
 - Nothing in this Act shall be construed
 - to amend or modify any law of the United States, or
 - to limit any authority conferred under any law of the United States



***Dilemma for countries:
similar to that faced at the time of TRIPS***

- ***Regret it?***
- ***Make safe reforms to avoid future conflicts?***
- ***Adopt reforms in a creative form by assuming risks?***



Negotiations of the FTA end of the process?

- ***The complex implementation process***
 - ***Experience of countries***
- ***The subsequent monitoring process and the annual reviews of the USTR***
 - ***Case of countries that recently signed FTAs***



*Report of the Industry Trade Advisory Committee on
Intellectual Property Rights (ITAC-15), February 2006*

- ***“ITAC 15 urges the US not only to monitor very closely the implementation by Peru (and other FTA partners) of their FTA obligations but also to ensure that Peru and other FTA partners have in place, before the entry into force of the FTAs, national legislation that faithfully reflects their FTAs obligations. ...ITAC-15 commends the US for working with FTA partners to secure fully-compliant national legislation before each agreement enters into force. ITAC-15 considers it essential that, if need be, entry into force be postponed until full compliance is achieved.”***



A creative implementation?



A. General principles

1. ***IP reform should be placed in a broader framework going beyond trade policies: innovation system, promotion of creativity, FDI, competitiveness***
2. ***Parties are not obliged to implement higher protection and enforcement measures than those provided in the FTA (15.1, Cafta)***
3. ***Objectives and principles of TRIPS (7 y 8)***
4. ***Participative and coherent implementation (producers, competitors, consumers, inter-ministerial)***



B. Specific points

<u>1. Spaces of flexibilities</u>	<u>2. Use of instruments within the IP system</u>	<u>3. Related policies on</u>
<ul style="list-style-type: none"> ■ <i>General: Use of exceptions and limitations in the case of patents and copyright</i> ■ <i>Specific: case of data protection</i> <ul style="list-style-type: none"> ■ <i>Experience of Chile</i> 	<ul style="list-style-type: none"> ■ <i>Compulsory licenses (USA, Canada)</i> ■ <i>Exhaustion of rights</i> ■ <i>Measures to promote local innovation</i> <ul style="list-style-type: none"> ■ <i>Utility models</i> ■ <i>Liability regimes</i> ■ <i>Open source instruments</i> ■ <i>Protection of biodiversity and TK</i> ■ <i>GIs</i> 	<ul style="list-style-type: none"> ■ <i>Competition</i> ■ <i>Support system for innovation (Peru, Colombia)</i> ■ <i>FDI and R&D</i> ■ <i>In the case of medicines</i> <ul style="list-style-type: none"> ■ <i>Price controls</i> ■ <i>Public purchase</i>



Undisclosed information: Chile

- ***Protection will not be granted or continue in cases of:***
 - a) ***Anticompetitive behavior***
 - b) ***Public health, national security, non-commercial public use, national emergency***
 - c) ***Compulsory license***
 - d) ***Product has not been commercialized in Chile within 12 months from the date of registry or sanitary approval in the country***
 - e) ***The product has a registry or authorization in a foreign country or more than 12 months***



Final observations

- *FTAs in the case of IP represent the importation of systems of protection tried and experienced in more advanced and legally sophisticated countries with “checks and balances”*
- *Developing countries import the obligations but lack in general the “checks and balances”*



www.iprsonline.org/unctad.ictsd/description.htm



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