

Trade Policy

May 12, 2020

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European Union and Vietnam Free Trade Agreement: Intellectual Property

1. The objectives of this Chapter are to:

(a) facilitate the creation, production and commercialisation of innovative and creative products between the Parties, contributing to a more sustainable and inclusive economy in each Party; and

(b) achieve an adequate and effective level of protection and enforcement of intellectual property rights.

1. The Parties affirm their rights and obligations under the international treaties dealing with intellectual property to which they are party, including the TRIPS Agreement. The Parties shall ensure an adequate and effective implementation of those treaties. This Chapter shall complement and further specify those rights and obligations between the Parties with an aim at ensuring adequate and effective implementation of those treaties, as well as the balance between the rights of intellectual property holders and the interest of the public.

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ARTICLE 12.3

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Party to the nationals of any third country shall be accorded immediately and unconditionally to the nationals of the other Party, subject to the exceptions provided for in Articles 4 and 5 of the TRIPS Agreement.

2. The Parties shall accede to the following international treaties within three years from the date of entry into force of this Agreement:

(a) the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996; and

(b) the WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996.

Benefitting from Intellectual Property Protection

Intellectual property rights can significantly encourage the acquisition and dissemination of technical information. There are three channels through which technology is transferred across borders: international trade in goods, foreign direct investment, and licensing of technologies and trademarks to unaffiliated firms, subsidiaries and joint ventures.

Why Does Intellectual Property Protection Matter especially to Emerging Markets?

- Empirical work shows that the strength of IPRs and the ability to enforce contracts have important effects on decisions by multinational firms on where to invest and whether to transfer advanced FDI
- Developing countries have established IPR systems that favor information diffusion through low cost imitation of foreign products and technologies in the belief that domestic invention and innovation were insufficiently developed to warrant protection.
- In the overwhelming majority of cases, invention in developing nations involves minor adaptation of existing technologies

Why Does Intellectual Property Protection Matter especially to Emerging Markets?

- IPR promotes a commitment to education, training, and skills development needed to innovate
- Raises pressures for structural adjustment in economies driving out thing like counterfeit production and low quality to production to higher return goods and services
- Incentives for commercializing the results of public research and encouraging collaborative research ventures among private firms and between public and private enterprises for the development of new technologies and products
- Economies that are more open to trade and FDI experience a growth premium relative to closed economies from strengthening their IPR

Intellectual Property and Pharmaceuticals

What is the Problem With Intellectual Property in Pharmaceuticals?

Most prominent among the unresolved issues is a more definitive understanding of *the limits to increasing intellectual property (IP) protection beyond the minimum standards* set out in the TRIPS Agreement and correspondingly the limits to reducing the explicit flexibilities contained in the Agreement. Other issues, such as how transiting goods fit within the territorial nature of intellectual property rights (IPRs) and what effect increased IPRs have on third country markets are also left unanswered. More generally, a formal decision discussing (or at least recognizing) the *inherent tension between liberalized trade and IPRs* would have been a welcome addition to the burgeoning literature in the area of international IP law

Where Do Strong IP Rights Come From in Trade Law?

...the United States (US), European Community (EC), Japan, Switzerland and other proponents of strong IPRs overcame initial developing-country resistance to incorporating IPRs directly into the international trading regime by trading off access to their potentially lucrative textile and agricultural markets

What is the Problem With Intellectual Property in Pharmaceuticals?

- The TRIPS Agreement is comprehensive in coverage and includes seven sectors of IPRs: copyright and related rights; trademarks; geographical indications; industrial designs; patents; layout-designs of integrated circuits; and protection of undisclosed information.
- The detention/seizure of generic pharmaceuticals in transit touches not only upon the principles of free trade and the rights of IP owners, but is also an important public health issue

What is are the Violations At Play?

Both complainants claimed a violation of Article 41, which requires Members to ‘avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse’ and that procedures concerning the enforcement of IPRs ‘shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays’. The complainants would likely have argued that the EU measures—that is, the detentions/seizures—created ‘barriers’ to ‘legitimate trade’ in generic pharmaceutical products. The EU would have likely defended its measures by attempting to demonstrate that barriers’ are only ‘created’ against goods suspected of infringing IPRs as opposed to legitimate goods.

What is are the Violations At Play?

Perhaps the most important claim the complainants raised is Article 51.62 The first sentence of Article 51 requires Members to adopt procedures allowing trademark and copyright owners to apply for the suspension by the customs authorities of release of counterfeit or pirated goods into circulation into the commerce of the country/territory. Footnote 13 to Article 51 further provides that there is 'no obligation to apply such procedures to goods in transit'. Article 51, second sentence, then permits Members to extend border measures to: 'goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met.' Thus, Members may—but are not obliged to—adopt procedures allowing patent owners to apply for the suspension by the customs authorities of release of infringing goods into circulation into the commerce of the country/territory.

What is are the Violations At Play?

Article 52 then requires rights holders initiating the procedures under Article 51 to provide 'adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is prima facie an infringement of the right holder's intellectual property right' (emphasis added) and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities

What is are the Violations At Play?

In order to be consistent with Article 51 (footnote 13), the complainants would argue that the EU must demonstrate a *prima facie* infringement of the right holder's IPRs in the country of final importation. Support for this interpretation of Articles 51 and 52 is based not only on the territoriality principle of IPRs (based on Article 4 of the Paris Convention) but also on a contextually based reading of the provisions—including footnote 13, which distinguishes between imports and goods in transit (implying that the terms have different meanings) and footnote 14 to Article 51. As the EU is using its own laws to determine the basis of the seizures, the complainants would assert its measures are inconsistent with Article 51.

What is are the Violations At Play?

...the Doha Declaration states that the TRIPS Agreement 'can' and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and to promote access to medicines ...for all'. The complainants have used this clearly unambiguous statement in support of their position against the detentions of generic pharmaceuticals in transit. For instance, Brazil asserts that '[e]xtraterritorial enforcement of patent rights cannot be reconciled with the terms of the Doha Declaration'. The complainants also point to the Implementation Decision negotiated between Members in 2003 as further context to the dispute and as evidence of both the need to balance IPRs with public health and the legitimacy of trade in generic pharmaceuticals.

What is are the Violations At Play?

Given the emphasis on balancing rights and obligations as well as explicitly allowing Members to 'adopt measures necessary to protect public health' it is appropriate to read Article 52 within the context of Article 7 and 8 and the greater dispute at issue. In this regard, Brazil accurately recalled that protection of public health and the promotion of the public interest are still 'part of TRIPS fundamental principles.'

What is are the Arguments Being Made?

Brazil also claimed a violation of Article 58 of the TRIPS Agreement, which requires officials when acting ex officio to acquire 'prima facie evidence that an 'intellectual property right is being infringed'. The interesting aspect to Article 58 is that it does not explicitly state or even hint at the jurisdiction of the infringing IPR. Thus, in order for Brazil's claim to succeed, it would have had to prove that the evidence of IPR being infringed must be of the 'country of 'importation', and in line with its arguments under Article 51 and 52, that the country of importation' must be interpreted to be the country of final 'destination.'

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