



The Intersection of IP and Global Trade

Chaos has raged in the world of global trade agreements since Donald Trump killed the Trans-Pacific Partnership last year. **Johnny Chan** speaks to IP experts about the relationship between IP and trade agreements.

IP plays an increasingly important role in promoting the value and competitiveness of enterprises. “The knowledge and technology contained in the goods and the good fame

carried on the goods can often raise the price of goods,” says Jing Qiu, a trademark attorney at CCPIT Patent & Trademark Law Office in Beijing.

//



In modern times, intellectual properties, in particular patents and copyright, are crucial to innovative products. Without full IP protection, various counterfeit products will dramatically blunt the competitive edge of innovative products and **influence the good fame of the enterprise.**

- Jing Qiu, trademark attorney,
CCPIT Patent & Trademark Law Office, Beijing

“In modern times, intellectual properties, in particular patents and copyright, are crucial to innovative products. Without full IP protection, various counterfeit products will dramatically blunt the competitive edge of innovative products and influence the good fame of the enterprise.”

In view of the importance of IP to enterprises and the regional characteristics of IP protection, specific IP chapters or provisions are needed in trade agreements to clarify various IP issues, Qiu says. “Despite the existence of international conventions such as TRIPS, more and more diversified trade demands more specific protection for IP. The incorporation of IP into trade agreements is conducive to the unification of standards of protection, the distribution of rights, the division of responsibilities, and clear solutions for possible disputes.”

//

In trade agreements, while

governments are those setting the rules of the game, the ultimate drivers for globalization are indeed the individuals/corporations in relevant markets, says Tran Manh Hung, managing partner at BMVN International, a member firm of Baker McKenzie in Hanoi. "The objectives of any trade agreement are, at the end of the day, eliminating barriers to trade across countries, whereby maximizes welfare, develops a more dynamic business climate, creates more jobs and business opportunities, etc."

In the process of lifting trade barriers for better access to other markets, it is crucial to maintain in place at least a basic set of common rules for a level playing field, whereby preventing abuses, eliminating trade-disruptive factors and harmonizing the vast disparities in terms of local legal regimes, says Tran.

//



In addition to IP protection, it is often necessary for the government of a developing country to provide incentives, such as R&D funding, to encourage and support the creation of inventions and other IP assets. In time, this enables a more **level playing field with developed countries** in which IP protection is well established.

- Sue Gilchrist, partner,

Herbert Smith Freehills, Sydney

Together with the increasing movement of goods and services cross-border, knowledge emerged as one of the most valuable tradable assets, especially from the perspectives of major countries. "The IP industries made up the largest category of US exports. For example, 57.7 percent of US exports in 2012 were from IP-intensive industries. IP accordingly has been a burning issue, especially in the context of fast-developing global economy and internet explosion, which poses a serious threat of copyright infringement," Tran says. "Considering their explosive intersection with international trade, the inclusion of IP to international trade agreements, consequently, is inevitable."

From a legal stand point, IP provisions are aimed at building a unified regime and framework for IP protection within the country members of the trade agreement. "This is going to be a global game with a global set of rules, rather than one player with one level of protection which allows countries to learn from one another, and at the same time adjust and complete their own legal system in accordance with the international standards. No one wants to be left behind, and adaptation to advances is the inevitable trend. IP provisions also play a very important role in the war against piracy and counterfeit and thereby combating safety and health risks that many such products present by

providing a wider scope of protection for IP right holders," he says. "Furthermore, inclusion of IP in trade agreements supports the enforcement process, especially vis-à-vis developing countries, which often regard IP as the bargaining chip for more favourable concessions on larger trade priorities such as reductions of customs duties or wider access of their goods to the international markets."

In addition, by incorporating IP clauses into trade agreements, not only the member states receive economical gains but their citizens can also greatly benefit from them. "The wider protection and better enforcement will ensure and encourage foreign investors to further their venture in the country, creating more jobs and contributing more taxes to the state," he adds.

"For developing countries, this will somewhat diminish the problem of free-riding, providing them with accesses to developed IP advances, especially in healthcare and technology, paving the way to creativity and promoting innovation."

The IP Economy

It is well-recognized that developing countries increase economic opportunities for their own people and economic growth, by introducing IP laws to protect their own inventions and other IP assets, says Sue Gilchrist, a partner and head of intellectual property at Herbert Smith Freehills in Sydney. "In addition to IP protection, it is often necessary for the government of a developing country to provide incentives, such as R&D funding, to encourage and support the creation of inventions and other IP assets. In time, this enables a more level playing field with developed countries in which IP protection is well-established."

//

The grant of intellectual property protection across industries has different effects on countries at different stages of economic development, and is an indicator which has been acknowledged in forums and jurisprudence worldwide. "Several empirical studies conducted across sectors have yielded positive results indicating a close nexus between higher levels of IP protection translating into stronger economic growth of the country," says Pravin Anand, managing partner at Anand and Anand in Noida. "With the advent of globalization and trans-border exchanges of information, goods and services, many countries are investing in restructuring their markets and aligning them with the varying trends in IP, such as the creation of a balance between R&D capital investments and fostering economic growth. An incentive to invest with returns, when offered to innovators, increases the rate of innovation, while reducing imitation."

While there are instances where robust countries have flourished by strengthening their IP regime, on the flip side there are economies which are in the centre of the debate, a tussle between securing the domestic interests vis-à-vis flexible frontiers, Anand says. "Similarly, there are countries such as India and China which are rising on the development index yet facing wrath from developed countries for their rigid IP regimes. Despite different claims, various studies have confirmed that

strong IP rights are beneficial for the economy.”

India's National IPR Policy, launched in 2015, is an example of the ongoing process of improving the economic and political regime. The policy revolves around various objectives which are intertwined with awareness creation, balancing strengths and weaknesses while pursuing growth of stakeholders and targeting prosperity. It aims towards the following:

//



There are countries such as India and China which are rising on the development index yet facing wrath from developed countries for their rigid IP regimes. Despite different claims, various studies have **confirmed that strong IP rights are beneficial for the economy.**

- Pravin Anand, managing partner,
Anand and Anand, Noida

(1) Encouraging individual researchers, start-ups, corporations and universities by providing them various incentives for filing for IP protection.

(2) Ensuring strong and effective IP laws balancing the stakes of the rights owners with the larger public interest.

(3) Creating other policy initiatives such as Make in India, Start-up India and Digital India, which have played a pivotal role in creating a conducive environment for innovation.

Despite various policies and regulations, the debate about these issues is still often garnered with two perspectives, such as the desire to maximize the domestic interest vis-à-vis enhancing and encouraging innovations and increasing IP protection. “The challenge is to balance these contradictory perspectives and progressing towards marking your growth on the world community,” Anand says. “While mapping development on one regime is difficult, the bottom line indicates that multiple studies and researches have demonstrated that a strict IP structure leads to economic prosperity. Various factors are to be considered such as skill acquisition, technology transfer, employment generation and foreign direct investment, all of which, when added together, reflects the growth of the economy.”

//



Without proper IP protection, any innovation under Thailand 4.0 will likely to be copied and that will no longer encourage any new innovations. It will adversely affect the economic growth of the country **definitely.**

- Panisa Suwanmatajarn, managing partner,
The Legal Co., Bangkok

//

The debate whether economic activity and protection of domestic interests precedes the knowledge creation and innovation across countries, cannot reach equilibrium. “With the reality of constant change and globalization at its prime, stronger economic growth intersecting with strengthening IP protection will determine the ultimate balance of innovation and growth. While economics can assist in analysis where it is possible, one shouldn't lose sight of probabilities,” he adds. “Just like there are no absolutes in economics, similarly stronger IP protection does not necessarily translate into stronger economic growth, as all these factors are prone to seasonal changes with various external factors.”

Nowadays, it is undeniable that IP is an important asset of most businesses if not all, says Panisa Suwanmatajarn, managing partner at The Legal Co. in Bangkok. “The US has been exporting its IP assets in the forms of software, entertainment, IT, etc., for years. At the country level, as appeared in the 2018 Special 301 Report, many countries, including Thailand, have been moved from the priority watch list to the watch list. This indicates that many countries have stepped up their IP protection, which is one the biggest US concerns.”

For Thailand, the government has implemented the policy of Thailand 4.0 riding on the wave of IT technology which will depend pretty much on IP protection, Suwanmatajarn says. “Hopefully, under this policy, Thailand will have stronger economic growth. Without proper IP protection, any innovation under Thailand 4.0 will likely to be copied and that

will no longer encourage any new innovations. It will adversely affect the economic growth of the country definitely.”

The Biggest IP Exporter

With the intersection of international trade and agreements

such as TRIPS, GATT, NAFTA and APEC, along with the increase in goods and services, there have been significant changes in the realm of IP law. "This leads to a growing need to protect interest of entities which are situated in one country but make their goods and services available in another. Factors such as loss of home turf, lack of know-how of foreign IP laws, balancing innovators needs, make their IP vulnerable to attack," Anand says. "The question of which part of the world is doing better in exporting their IP goods is a debate requiring various factors in consideration."

According to WIPO's Global Innovation Index 2017, India, Kenya and Vietnam have been outperforming their development level peers, namely, Switzerland, Sweden, Netherlands, the US and the UK, and are often regarded as the "world's most-innovative countries." Research indicates that there is a continued gap in innovative capacity between developing and developed nations, while on one side there is growth amongst certain indicators, the others are reflecting a downfall.

With many countries now progressing towards investing in

the R&D sector, the 2017 Index theme "Innovation Feeding the World" is an apt subject for consideration. The focus towards innovating in agriculture and food systems leading to progressive enormous rise in global demand and increased competition for natural resource will aid in sustaining growth. "Taking India for instance, the country ranks 60th globally and is one of the top ranked economies in Central and Southern Asia for outperforming on innovation related to its GDP per capita growth for seven consecutive years with improvement in infrastructure, business, technology and knowledge outputs," Anand says. "Moreover, Western countries, when exporting their goods to Asia, consider it a successful transaction, especially in the online marketplace, due to the high rate of consumers in countries such as China and India."

But with the diversified rates of growth amongst the Western and Asian countries, the regions are often prone to economic conflict and disparity. "This is due to differences in their expectations, growth trajectories, histories, sociocultural economics and political systems. Connecting these factors makes it difficult to

WIPO v. WTO

Should IP matters really be treated within the framework of the World Trade Organization, instead of within the customary body for such matters, the World Intellectual Property Organization? Stanley Lai, partner and head of IP at Allen & Gledhill in Singapore, has the answer, along with a bit of history about the WTO.

//



The WTO does not displace WIPO in any way, the latter organization being customarily the international thought leader and standard setter for IP development worldwide. WIPO **has initiated significant treaties** in the internet age, and these are important instruments which continue to govern the IP world.

- Stanley Lai, partner,
Allen & Gledhill, Singapore

//

The conclusion of the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade in the 1990s, which sought to reduce barriers to free trade and expand international

trade, gave rise to the World Trade Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

TRIPS came into force on January 1, 1996, and was a significant treaty of the time because it sets out a minimum level of IP protection for WTO member countries, sets out procedures and remedies for the enforcement of IP and imposes an effective dispute settlement procedure to compel compliance

with TRIPS obligations on a government-to-government basis. Through the framework of TRIPS, member states of the WTO have been able to hold each other to account over the implementation of *de minimis* global standards of IP protection as provided by the treaty.

As long as international trade and norms are followed and remain relevant to the major trading nations of the world, the WTO will continue to exercise some control and influence over the protection and enforcement of IP, he says. "In my view, the WTO does not displace WIPO in any way, the latter organization being customarily the international thought leader and standard setter for IP development worldwide. WIPO has initiated significant treaties such as the Patent Cooperation Treaty, Berne Convention, Madrid Protocol as well as the Diplomatic Treaties of 1996 for Copyright and Related Rights in the internet age, and these are important instruments which continue to govern the IP world."

- Johnny Chan

reach equilibrium. Many factors are often in consideration such as GDP, the presence of state-owned enterprises, dynamics of the population, healthcare, etc., while understanding which region is doing better,” Anand says. “A popular notion suggests that Western countries prefer consumption, while the Asian countries are inclined to save. Often, these two parts of the world have various common areas of interest such as environmental protection, population growth, etc., but due to the disparities in their economic and infrastructural regimes, it is not clear what can be agreed upon while assessing which one performs better. With multinational corporations of the West adjusting to the economic conditions of the Asian market, and respectively Asian markets strengthening their IP regimes to ensure higher levels of exports to the West, there always lies the situation of see-saw changes

//



Other Asian countries have not been able to emulate the Japanese model as yet. Even from an IP consumption standpoint, growth from IP commercialization activities such as licensing has not been fully exploited in Asia because of the distrust that the West has in IP enforcement and protection in Asia.

- Samridh Bhardwaj, managing associate,
Remfry & Sagar, Gurgaon

//

between the countries. Asian markets are definitely a big market for these Western countries, and with the rapid approach in locating their R&D facilities and employing the local workforce, it is certainly accelerating the trend of increasing production and thereby exporting the IP goods to Western markets as well.”

The only way in which such uncertainties can be resolved is through strengthening of IP regimes in foreign territories and conferring equal treatment to IP, regardless of the source of its origin, he adds. “This gives rise to principles such as national treatment and most favoured nation in all FTAs, as well as in specific IP instruments such as TRIPS. Thus, stating that Asian countries are lagging behind the West might be a prejudicial approach, as they could be behind in statistics but they are making great progress!”

How's Asia Doing?

Economic growth depends on various contributing factors, though population invariably plays a very big part in it.

Due to the constant strain on national/regional resources, historically, a majority of Asian countries have been IP consumers rather than propellers. “This translates into domestic industry often construing IP as stifling and counter-productive to growth,” says Samridh Bhardwaj, managing associate at Remfry & Sagar

in Gurgaon. “This notion is also reflected in the protection regimes of developing countries such as India and China, which have often been classified as soft, especially when viewed from a Western standpoint.”

Of course, in the last two decades, with manufacturing activities being outsourced to Asian countries such as China, India and Thailand, there has been a gradual shift wherein Asian countries have not only consumed IP goods but partnered with IP developers and supplied finished goods to the world in turn seeing inward remittances and job creation, Bhardwaj says. “This has led to indirect contribution to the GDP of many Asian countries.”

However, for IP to be a major economic driver, domestic players from Asia will have to transform from manufacturing on job work basis and being large IP consumers to IP developers. “A case in point can be Japan, which is a largely IP-driven economy whose IP goods are consumed across the world. That said, other Asian countries have not been able to emulate the Japanese model as yet,” he says. “Even from an IP consumption standpoint, growth from IP commercialization activities such as licensing has not been fully exploited in the Asian territory because of the distrust that the West has in IP enforcement and protection in Asia.”

Having stricter enforcement and timely resolution of disputes is certainly the way forward. “Even though Asia is one of the largest consumers of IP goods, its contribution to the supply chain is not apropos to potential and, thus, economically most Asian countries (other than Japan) have not experienced significant growth on account of IP,” he adds. “But this trend is likely to change over the next decade.”

IP Protection Haters

There are always two sides to a coin, and it would be unfair to only analyze the downsides of incorporating IP into trade agreements, Bhardwaj says. “Most IP-driven jurisdictions insist on having IP provisions when trading with partner states to extend comfort to their own domestic industries. This is also a direct means of ensuring parity between enforcement mechanisms followed by and between contracting states.”

The US has been championing this cause for as long as it is one of the largest global exporters of IP in the world. “As IP exports are a significant contributor to US GDP, from their standpoint, it makes sense to ensure that strong IP protection mechanisms are followed by their partners. Many believe that improved IP protection invariably becomes a propeller for economic growth. We have even pointed that out when assessing Asia’s economic growth linkage to IP goods,” he says. “Thus, are there really any downsides to incorporating IP protection mechanisms in trade agreements? Or are they perceived fears?”

The answer to this lies in the inherent philosophy of the other trading partner insofar as the question is not merely limited to whether IP should be a part of trade agreements or not but largely depends on whether the trading partner is pro-IP protection or if it believes that IP hinders domestic growth, he says. “So, the

conceptual debate of whether IP fosters competition or inhibits fair play (and therefore growth) is at the root of this question.”

Pro-IP states will continue to insist on inclusion of IP protection in trade agreements, and developing nations that look forward to IP spills from Western states will express displeasure at IP inclusions in trade agreements, cite ‘arm twisting’ and will continue to feel sceptical about muscle flexing from IP giants, he says.

Thus, per se, there are no downsides or upsides to IP inclusion in trade agreements; it all depends on which side of the seesaw you are on, he says. “From a neutral standpoint, clarity of expectations always helps the cause of business. Therefore, inclusion of IP in trade agreements has many advantages as against the perceived downsides. Of course, the nature of expectations/inclusions must be in line with capabilities of the partner state.”

//



IP protection provisions in trade agreements are normally drafted upon the higher standards of developed countries, applicable irrespective of the differences in terms of social and economic developments of member countries.

- Tran Manh Hung, managing partner,
BMVN International, Hanoi

Indeed, the inclusion of IP into trade agreements has always been a controversial topic. “As a matter of fact, the issue is actually about IP protection per se. The hostility of IP protection to public domain is truly in existence, even before they are included in trade agreements. Yet, when coming to multilateral deals, the impacts scale-wise are undeniable. This is because IP protection provisions in trade agreements are normally drafted upon the higher standards of developed countries, applicable irrespective of the differences in terms of social and economic developments of member countries. In fact, IP matters had first been introduced to the WTO framework via an initiative taken by the US, one of the largest IP exporters of the world,” Tran says. “Being claimed as the modern tools for enclosing the commons, such intensive protection provisions may result in extended terms of monopolies over patents, seeds, medicines, innovation, etc. and grant developing countries zero access to such IP products.”

From the perspectives of developing countries or least-developed countries, inclusion of IP protections into trade agreements would reduce the number of technologies to be transferred across borders (mainly from industrialized countries such as the US and Switzerland). “Moving up to higher and more value-added links in the production chain becomes more challenging to these countries as a consequence. In addition, when considering such IP protection provisions as bargaining

chips or larger customs duties, countries with lower IP protection standards will need to deal with various challenges trying to bridge the gaps of laws and resources. A great deal of time, costs and efforts will be exerted not just to adjust and localize the national laws in harmonizing with the agreed standards, but also to ensure that firms and individuals in the country are well understood and able to meet with such standards,” he says. “This forces those state members to take cautious consideration with particular regards to the country context, level of development, current protection level and national resources, which will likely extend and may even delay the negotiation process.”

Take the Trans-Pacific Partnership, which was reworked into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership after the US withdrew from the original agreement. The IP chapter had been the most difficult and controversial matter of negotiation. “The reason for this was

said to be due to a significant difference between countries’ expectations and conflict of interests. The protection level required in TPP was considered TRIPS-plus, meaning it was way higher than that in TRIPS, as developed countries would like to keep the high protection to ensure their citizens’ benefits. Meanwhile, TRIPS standards alone are already a tremendous enforcement challenges for developing countries. Moreover, when it comes to interests, countries with an IP export tendency (like the US) wish to keep longer and broader coverage of IPRs, while IP importing-oriented countries (i.e., most of the other countries in the TPP) expect affordable access to advances in technology when entering into trade agreements,” Tran says. “Consequently, this leads to a prolonged negotiation process, until countries agree to compromise and trade off some of their own gains.”

//

Despite the controversy of the matter, one cannot deny the benefits that IP protections would bring. “Activists opposing IP protection may use its downsides to support his or her skepticism against its inclusion in trade agreements. Yet, fact-based analyses clearly demonstrate great contributions that IP protections have both upon the IP exporting countries and those importing it,” Tran adds. “The question at stake right now should be how countries may design such IP protection mechanics that turn out to be beneficial to all.”

As far as opposition to IP protection is concerned, Yvonne Tang, director of the intellectual property department at Drew & Napier in Singapore, says that most such opposition comes from developing countries.

“Fundamentally, a robust IP legislative framework usually favours rights owners, who tend to be from the developed countries, over the users of those rights, who tend to be from the less-developed countries, and/or who are typically smaller or medium-sized enterprises,” she says. “It should therefore be unsurprising when concern and opposition is expressed by this latter group.”

The situation is compounded by the fact that there exists generally a level of scepticism that it is the larger and more aggressive multinational corporate entities, such as large pharmaceutical groups which wield strong bargaining power,

that are behind the push for the inclusion of IP terms that are weighted in their favour, and that will correspondingly benefit from the eventual implementation of the same, she says.

Opposition may also arise from other groups that may not be directly involved in the exploitation of such IPRs, but yet find their day-to-day operations adversely affected by the implementation of particular IP laws. "The tension between the interests of

to interpret, for the first time, the border enforcement provisions of the Singapore Trade Marks Act, which were implemented in Singapore in 2004 as a result of the United States-Singapore Free Trade Agreement of May 6, 2003. The case concerned a transshipment of counterfeit goods through Singapore and bound for Indonesia, and the issue was whether the local consignee in Singapore was liable for trademark infringement in Singapore, Tang says.

"In his opening and concluding remarks, the learned Judge recognized that such border enforcement provisions, while introduced to strengthen the IP owners' position, would have a practical effect and onerous impact on numerous other parties such as freight forwarders, port authorities, customs authorities and possibly also other regulatory authorities concerned with health, safety and enforcement of laws and procedures concerned with dangerous and prohibited goods."

Finally, opposition may be expected from purists or idealists which hold the firm view that trade agreements are, to start, weighted heavily in favour of the "haves" of IP rights (countries with mostly rights holders), and that the "have nots" (countries with mostly rights users) are frequently pressurised to implement a fixed set of provisions in their jurisdiction, where the harmonization

and enforceability of such provisions may be accorded less importance than the existence of a legislative framework and semblance of compliance, she says. [AIP](#)

//



A robust IP legislative framework usually favours rights owners, who tend to be from the developed countries, over the users of those rights, who tend to be from the less-developed countries, and/or who are typically smaller or medium-sized enterprises.

- Yvonne Tang, director, IP department,
Drew & Napier, Singapore

//

this group and those of IP owners was illustrated in the recent Singapore High Court decision of *Louis Vuitton Malletier v. Megastar Shipping (PT Alvenindo Sukses Ekspres, third party) and other suits [2017] SGHC 305*, where the court had

