Does the TRIPs Agreement

Make the Appropriate Balance?

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The TRIPs Agreement of the WTO has imposed a regulatory scheme for most forms of intellectual property, especially for patents. Countries have little flexibility to implement their own system of patent registration and enforcement. Issues such as patent length, set at 20 years by Article 33, and patentable technology, mandated in Article 27, are core matters that previously varied between countries. I argue that by fixing the terms of patentability, the TRIPs Agreement has wiped away the debate on balancing the interests of various parts of society and different societies but has address the problem of non-uniform patent systems between nations.

The primary rational for having patents is to compensate innovators. A scheme with longer patent protection would allow for greater compensation to the inventor. On the other hand, consumers of the patented product generally pay a higher price during the period of patent protection. This balance between the inventor's compensation and lower prices for consumers has been fixed at 20 years in the Agreement. I suggest that patents in different industries should not necessarily have the same duration to allow for the balance between these groups. For example, in the pharmaceutical industry, the large testing and failure rates might suggest a longer patent term to allow the companies to recoup their costs. On the other hand, in the high-tech field, the innovation costs might be paid off within a few months of putting the product to market, so a shorter period of protection might be a better balance. I admit that, while determining the appropriate length for a patent in a given field might be very difficult, mandating a uniform length for all fields is unlikely to be the best solution. One solution might be to specify a variety of patent lengths for different technology fields in the TRIPs document. Another solution, that would likely be more contentious, would allow individual countries to set appropriate lengths for patents but require them to face the burden of explaining why their regime has shorter patents than a 20 year standard. The current regime set by the TRIPs agreement ignores the different economic situations in the range of fields that produce patents.

A related balancing that could be incorporated into the TRIPs Agreement is the negative affect of patents on innovation. Patents can block innovation when a patented product is needed as an input for further research. For example, the Harvard mouse is a helpful, some would say required, ingredient in cancer research but license fees make research more costly for institutions working on cancer drugs. A balancing is required between the original innovator's compensation and the cost for next generation of innovation. While this balancing could perhaps be better addressed through selective government mandatory licensing schemes, targeted at patents that are significantly adding to the cost of research, the cross-the-board 20 year patent length is not sensitive to the range of research practices in various industries.

The previous arguments targeted the mandatory 20 year patent length for all patents within a domestic regime. Other arguments target the uniform application of the TRIPs regime to all nations. The main argument against a uniform patent regime is it would eliminate the relative comparative advantages of 'innovator' compared to 'imitator' nations. With the increasing globalization of world trade, arising out of trade liberalization, this argument against a uniform patent regime is weakening. Recognizing the apparent hypocrisy of now arguing for a uniform world wide regime on patents, while early suggesting a more flexible system, I think this goes to different aspects of the problem.

A uniform system on patents such as the current TRIPs agreement that applies similarly to most countries is necessary with the increasing movement of goods and ideas around the world. A technical innovation arising in one country can be implemented in another country by a different organization almost immediately. The technical and financial resources needed to implement a given idea can be found in many countries. Global trade means that a company on the other side of the world that takes advantage of a patented idea, will likely be competing with the patent holder either directly in a domestic market or more likely in a 3rd party country. This competition frustrates the compensation

rational of the patent scheme. Before the days of such global trade, the innovator and the imitator might have lasted out the term of the patent without directly competing by sticking more closely to their home markets. With a single global market and an immediate transfer of ideas, the value of a patent in a non-uniform patent regime decreases. The current TRIPs Agreement appears to address this concern by applying most countries of the world. This type of uniformity, contrasts with that argued earlier which applies to the equal application across all industries within a single country.

Non-uniform patent protection appears to be an inherently unstable situation. As was seen before the TRIPs Agreement, and in some cases since, nations with stronger protection will unilaterally attempt to protect themselves from the imitation imports by imposing tariffs or bans on the offending imports. This unilateral action goes against the ideas of the WTO which espouses less restrictions on trade and a structured framework for resolving disputes. If a uniform patent scheme is not imposed, a solution might be to move this unilateral action within the WTO in an analogous fashion as the anti-dumping regime. This would have the problematic aspect of suggesting that the less restrictive patent regime is somehow an unfair comparative advantage. A minimum standard would need to be articulated to determine when a patent regime had become unfair, leading to a WTO imposed world wide patent scheme, contracting the premise of this argument. This suggests that some sort of uniform patent scheme is inevitable.

While recognizing that a uniform patent scheme is likely needed to keep the global trading system functioning, I believe the rigidity of the current implementation does not adequately balance the needs of various industries or participants in society. The single patent length requirement, especially, fails to recognize the differences in business models and research conditions for types of patents. For these reasons, I advocate that a more flexible approach is needed to address these shortcomings.