

Intellectual Property Law and EU's Trade Policy

Prof. A. Kamperman Sanders



EU Bilaterals

- CARICOM
- South Korea
- Columbia/Peru
- Canada (negotiating)
- India (negotiating)
- Singapore (negotiating)

'Global Europe' Strategy

- Broad-based Trade and Investment
 - Areas covered: trade in goods, services, investment, competition policy, IPR, government procurement
 - Negotiations with India started in June 2007
 - EU is India's largest trading partner for 25% of its exports

EU-India IP Chapter

- 33 articles and four annexes
- Areas covered:
 - Copyright and related rights
 - Trade marks and design rights
 - Geographical indications
 - Protection of genetic resources and TK
 - Patents and data exclusivity
 - Enforcement provisions

Development and innovation

- WIPO:
 - Patent statistics are increasingly recognized as useful indicators of inventive activity and of technology flows. Patents are a unique information resource because they contain very detailed, publicly available information about inventions which can be matched with other indicators to provide insight into the evolution of technology... [T]he use of the patent system remains highly concentrated with only five patent offices (United States of America, Japan, Republic of Korea, China and the European Patent Office) accounting for 75% of all patent applications and 74% of all patents granted

Council on Foreign Relations

- “This increase in patents, however, does not necessarily correspond to an increase in innovation. Available evidence does not support the view that enhanced patent protection necessarily stimulates more innovation. For example, surveys of technology officers reveal that, except in pharmaceuticals, biotechnology, and some forms of machinery, inventing firms do not view patents as significant reasons to invest in technology”.
- **Caveat - Patent applications do not equate innovation**
 - The market rules - Marketable product and consumer demand?
 - Return on investment - Is there an IP regime?

World Bank Study

Total FDI Flows, Selected Countries (US\$ million)

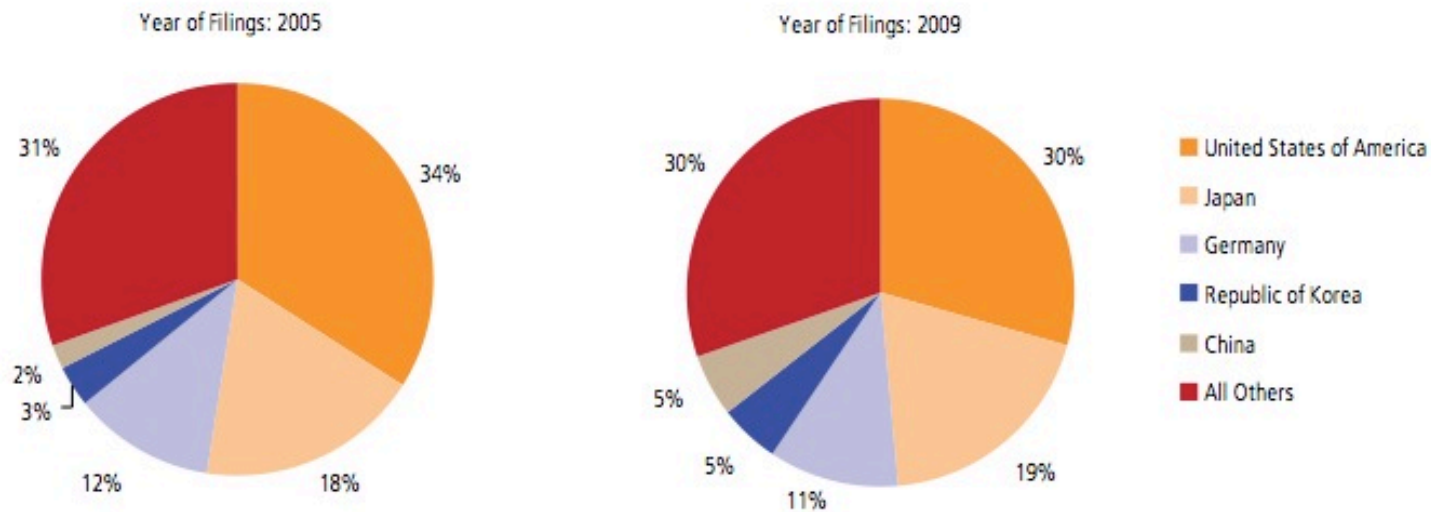
Country	1987		1990		1995	
	Inward	Outward	Inward	Outward	Inward	Outward
Industrial						
Canada	8,040	8,540	7,855	4,725	10,786	5,761
Germany	1,820	9,760	2,530	24,210	8,940	34,890
Japan	1,170	19,520	1,760	48,050	60	22,660
Spain	4,571	745	13,987	3,522	6,250	3,574
United Kingdom	15,696	31,335	32,430	19,320	32,210	40,330
United States	58,220	28,360	47,920	29,950	60,230	95,530
Developing						
Argentina	-19	—	1,836	—	1,319	155
Brazil	1,169	138	989	665	4,859	1,384
Chile	891	6	590	8	1,695	687
China	2,314	645	3,487	830	35,849	2,000
Egypt, Arab Rep. of	948	19	734	12	598	93
Indonesia	385	—	1,093	—	4,348	603
Kenya	39	31	57	—	33	—
Korea, Rep. of	616	540	788	1,056	1,776	3,529
Malaysia	423	—	2,332	—	4,348	—
Mexico	2,621	—	2,634	—	6,963	—
Poland	12	8	89	—	3,659	42
Singapore	2,836	206	5,575	2,034	6,912	3,906
Thailand	352	170	2,444	140	2,068	886
Turkey	115	9	684	16	885	113

— = not available.

Source: IMF Balance of Payment Statistics (1987, 1990, and 1995).

Neither strong IPR, nor bilateral investment or free trade agreements (FTAs) automatically yield an increase in technology transfer and foreign direct investment (FDI).

International patent applications

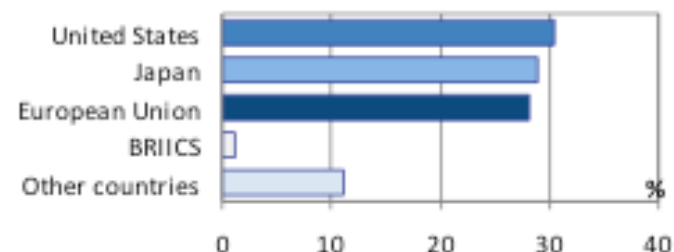


Source: WIPO Statistics Database

Intellectual property transactions - royalties and licence fees - 2008

Country	Exports	Imports	Net
Austria	912.5865	1612.773	-700.187
Belgium	1185.044	2137.181	-952.137
Canada	3415.055	8774.741	-5359.69
Czech Republic	55.41019	727.0577	-671.648
Denmark	2641.557	1718.718	922.8384
Finland	1481.671	2026.88	-545.355
France	10265.5	4911.561	5353.939
Germany	8829.97	11948.58	-3118.61
Greece	43.94478	709.5617	-665.617
Hungary	802.2521	2019.16	-1216.91
Ireland	1334.456	30172.48	-28838
Italy	823.2321	1790.017	-966.785
Luxembourg	336.324	541.8391	-205.515
Netherlands	19636.14	14310.76	5325.521
Norway	670.3901	718.7943	-48.4043
Poland	226.438	1756.354	-1529.62
Portugal	80.12598	496.4295	-416.45
Slovak Republic	163.9081	182.7868	-18.8787
Spain	789.5411	3229.941	-2440.4
Sweden	4884.385	2021.396	2862.988
Switzerland	12292.89	11601.07	691.8252
United Kingdom	13536.5	10114.23	3422.272
European Union 27	68552.66	93596.6	-25043.8
United States	93920	25781	68139
Japan	25687.17	18291.59	7395.582

Share of countries in triadic patent families



Calculations and compilation by Dr. M. Pugatch, based on OECD Statistics on International Trade in Service

US activity surrounding TRIPS (1995)

Year of Agreement	Agreement	Number of pages in IP Chapter	Number of words in IP Chapter
1985	US – Israel FTA	1/3 page	81
1992	North American FTA	7.5 pages	3,605
October 2000	US-Jordan FTA	8 pages, plus a Memorandum of Understanding (approx. 1 page)	2,438
May 2003	US-Singapore FTA	23 pages plus 2 side letters (12 pages)	8,737 (plus side letters)
June 2003	US-Chile FTA	32 pages (no relevant side letters)	11,105
February 2004	US-Australia FTA	30 pages plus 3 side letters (5 pages). ⁹	11,581 (plus side letters)
June 2004	US-Morocco FTA	37 pages plus 3 side letters (4 pages)	10,536 (plus side letters)
August 2004	US-Central American FTA	32.5 pages plus 1 common side letter (1/2 page) ¹⁰	12,251 (plus side letter)
September 2004	US-Bahrain FTA	23.5 pages plus 3 side letters (5.5 pages)	10,729 (plus side letters)

Negotiation strategy

- US negotiates FTAs from a central FTA 'template'
 - Reduces costs
 - Ensures FTAs pass Congress
 - USTR is required to ensure 'that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection **similar** to that found in United States law'
 - (§ 2102(4)(A)(II), Trade Act of 2002)

Types of FTA provisions

- 'General' matters
 - international agreements to which each party must accede;
 - the entitlement of the parties to provide more extensive protection, the requirement to apply the principle of national treatment;
 - the way in which the provisions apply to existing subject matter; and
 - the requirement of transparency in national laws and enforcement procedures

Types of FTA provisions

- Individual IP regimes
 - trade marks and geographical indications;
 - copyright and neighbouring rights, designs, and patents;
- Regimes which interface with IP regimes
 - domain names on the internet;
 - the regulation of marketing of pharmaceutical products (data exclusivity)
- Enforcement of IP rights

Strength of FTA provisions

- Treaty (TRIPS) repetition
- Treaty-elaborated
 - Elaborate on the particular means of implementation
- Treaty-plus
 - Level of protection that exceeds the protection mandated by the relevant Treaty provision
- Latter two remove some of the flexibility of interpretation permitted in the relevant Treaty and may be 'viral'

EU Bilaterals after Global Europe policy

- Broad-based Trade and Investment Agreement
 - Copyright and related rights;
 - Trade mark and design rights;
 - Geographical indications;
 - Protection of genetic resources and TK;
 - Patents and data exclusivity;
 - Enforcement provisions

Geographical indications

- Recognition of GIs
 - Applies to GIs on wines/spirits and foodstuffs
 - CARIFORUM, SK, Canada, Colombia/Peru
 - Prior examination of GIs by parties
 - Completed internal objection procedure
 - SK, Canada, Colombia/Peru

Geographical indications

- Three levels of protection for all GIs
 - Protection against commercial use
 - Protection against misleading use
 - Protection against referential use
 - Beyond the TRIPS standard
 - Identical to *EC Regulation 510/2006* on GI protection for agricultural products and foodstuffs
 - New standard: **CARIFORUM, SK, Canada, Colombia/Peru**

Geographical Indications

Protection against commercial use

- **Art. 9.4.1 (a) India-EU BTIA:**
 - ‘any direct or indirect commercial use of a protected name:
 - for comparable products not compliant with the product specification of the protected name, or
 - in so far as use exploits the **reputation** of a geographical indication’
- **Art. 22.2(a) TRIPS:**
 - ‘The use of [...] a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which **misleads the public**’

Geographical Indications

Protection against misleading use

- **Art. 9.4.1 (c) India-EU BTIA:**
- `any other false or misleading indication as to the province, origin, nature or essential qualities of the product, [...] packaging, advertising material [...] liable to convey a false impression as to its origin`
- **Art. 22.2(b) TRIPS:**
- `any use which constitutes an act of unfair competition within the meaning of article 10bis of the Paris Convention`

Geographical indications

- Protection against referential use
 - all GIs listed are protected against misuse, imitation or evocation, even if the true origin of the product is indicated, translated or accompanied by '**style**', '**type**', '**method**', '**imitation**', '**flavour**', '**like**' or similar
- Similar to TRIPS standard: extension to agricultural products and foodstuffs

Geographical indications

- Exceptions

- no exception for generic terms for registered GIs

- CARIFORUM, SK, Canada, Colombia/Peru

- new exception for GIs identical to a plant variety or animal breed and misleading the consumer

- CARIFORUM, SK, Canada, Colombia/Peru

- In line with *EC Regulation 510/2006*

Traditional Knowledge and Plant Genetic Resources (TK & PGR)

- New FTA feature
- India has drafted detailed provisions
- Conflict between patent rules and the protection of genetic material and TK
- Most far reaching rules in bilateral with the EU
 - Further than CARIFORUM
 - No international agreement (at WIPO level)
- EU has not yet agreed

TK & PGR

- Definition of TK
 - Categories of knowledge: cultural expressions and medicinal and agricultural forms of knowledge
 - known and used for generations
- broad definition with elements similar to the WIPO definition
- Not present in **CARIFORUM, SK, Peru/Columbia**

TK & PGR

- Mandatory disclosure of origin
- Prior informed consent: evidence of benefit sharing arrangement
- Penalties: non-compliance results in refusal or revocation of patent registration
- EU's response: acknowledgement of usefulness
- New: **CARIFORUM, SK, Peru/Columbia**

TK & PGR

- Administrative action
 - Against misappropriation and assurance that TKDL is accessed and utilized
 - EU's response: acknowledgement of usefulness
- EU to review or revoke all patents based on Indian medicine (TK) that have wrongfully been granted due to incomplete examination of prior art
 - New: **CARIFORUM, SK, Peru/Columbia**

Patent protection and data exclusivity

- New: **CARIFORUM**, **SK**, **Canada**, **Peru/Columbia**
- Text proposed by the EU, but considerably amended by India
 - Extension of the patent term
 - Data exclusivity
- Based on European legislation

Patent protection and data exclusivity

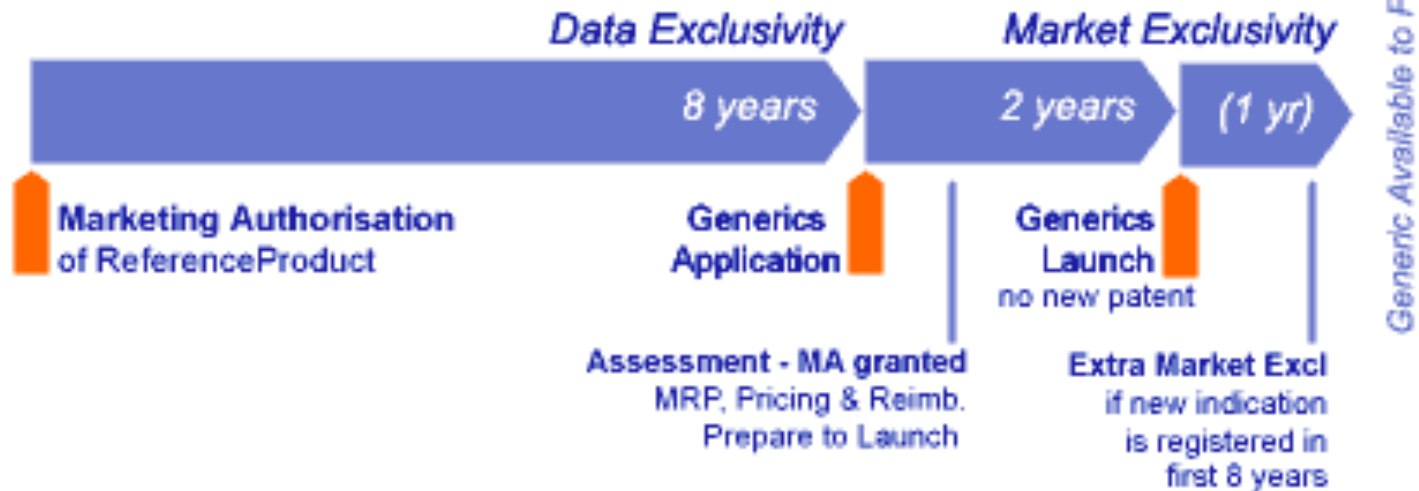
- Term extension for patents
 - Effective term of protection for products where regulatory marketing approval is required: extension to a maximum of five years
 - SK, Canada, Peru/Columbia
- Based on EC Regulation 1768/92
 - supplementary protection certificate for medicinal products
 - Abandoned by the EU in the latest draft

Patent protection and data exclusivity

- Data exclusivity
 - EU's proposal to be further discussed
 - Protection of undisclosed information: generic producers cannot rely on originator's data to receive marketing authorisation for bio equivalent products
 - Based on *EC Regulation 726/2004* on medicinal products and *EC Regulation 1107/2009* on plant protection products
 - India unlikely to agree

Data exclusivity

How the new
Data Exclusivity
affects the application of a Generic Medicine



8 + 2 (+1) Data Exclusivity Formula
for all Marketing Authorisation Procedures

© EGA 2004

Patent protection and data exclusivity

- For pharmaceuticals:
 - Exclusive period for authorisation - 8 years
 - Exclusive period for marketing - 10 years
 - Possible extension to a maximum of 11 years in case of a new therapeutic indication
 - SK, Canada, Peru/Columbia
- For plant protection products:
 - Exclusive period of 10 years
 - SK, Canada, Peru/Columbia

Conclusions

- EU's proposals are based on internal EU legislation
- Recent bilaterals build upon each other
- Differences in FTA's reflect partner's priorities and ability to suggest language
- India is a strong partner



Advanced master programmes

An international faculty comprising practitioners, academics, practicing lawyers, judges, patent agents, officials from international organisations, and economists offering advanced Masters:

- **LLM in International and European Economic Law**
Preparing for a career in international organizations, national administrations and private law firms
- **LLM/MSc in Intellectual Property and Knowledge Management**
Accredited by the European Patent Office (EPO)
Preparing for a career in innovative industries, IP administrations and private law firms
- **LLM in Euro-Asian Law and Business Studies**
Preparing for a career at the interface between Europe and Asia

For information about these and other master programmes visit our website.



www.maastrichtuniversity.nl/law

Faculty of Law - For an international career