The Legitimacy and Purpose of Intellectual Property Chapters in FTAs

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This paper discusses the role and function of intellectual property in Free Trade Agreements (“FTAs”). The last few years have seen a surge of FTAs, while the multilateral trade negotiations are stalled. The United States of America alone has entered into at least sixteen FTAs since 2001, with varying degrees of heightened intellectual property protection. The pursuit of FTAs is not, however, limited to developed countries; developing countries also vigorously pursue FTAs, although these tend not to have increases in intellectual property standards. Many FTAs include intellectual property chapters. Some simply reaffirm the TRIPS Agreement standards and others seek to expand the coverage and scope of international intellectual property rights. While FTAs apparently flourish, negotiations of intellectual property at the TRIPS Council, like the rest of trade multilateral negotiations, are practically stalled. The topics on the TRIPS Council agenda include the expansion of geographical indications, a review of Article 27.3 of the TRIPS Agreement, which allows certain exclusions from patentability, and a review of the overlap between the Convention for Biological Diversity and the TRIPS Agreement. While these negotiations make little progress, and while other issues of intellectual property do not even make it to the agenda, it is little wonder that proponents both for and against increasing intellectual property rights seek to pursue their interests in other forums. For those who wish to increase intellectual property rights, the most effective way to achieve this goal is through FTAs. Part II discusses the relationship of intellectual property chapters with the WTO multilateral system that allows for FTAs. In particular, it explains the TRIPS most-favoured-nation (“MFN”) provision that affects the making of FTAs and compares them to MFN in GATT and GATS. Part III discusses the rational limits of intellectual property in the trade context, particularly with regard to the object and purpose of the TRIPS Agreement. Part IV gives illustrative examples of FTAs that have TRIPS-plus elements, and Part V discusses how such FTAs drive the TRIPS-plus agenda. Part VI discusses the impact of TRIPS-plus on small, developed countries with market economies. Although of different sizes, both New Zealand and Australia may fit this description when compared with, for example, the United States and the European Union. This chapter suggests that the current wave of TRIPS-plus in FTAs is not sustainable or desirable in the long term. The final part discusses some alternative approaches to the use of FTAs to negotiate TRIPS norms.