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► **To cite this version:**

Salam Alshareef. Patent Provisions in Chinese Trade Agreement. Annual international conference "The Evolution of International Trading System: Prospects and Challenges", Saint Petersburg State University, Oct 2015, Saint Petersburg, Russia. 7 p. halshs-03582933

**HAL Id: halshs-03582933**

**<https://shs.hal.science/halshs-03582933>**

Submitted on 21 Feb 2022

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## Patent Provisions in Chinese Trade Agreement

### Abstract

The paper examines the patent provisions in Chinese in six trade agreements with developing countries, whether they introduce TRIPS plus commitment or not. Results show a limited coverage of patent related issues and in some agreement no coverage at all. Importantly, they do not include any TRIPS plus commitment. Moreover, they show a systematic emphasis on Doha Declaration that emphasis some TRIPS flexibilities.

### Keywords:

Chinese trade agreement, Development, Patent.

Industrial policy has experienced a revival in recent years, both in terms of government practice and academic debate. One aspect of this revival is the growing interest in body of literature that has been developed since 80s, and that emphasizes the special role played by the acquisition of knowledge information and technological capabilities in development process (Stiglitz et al 2009; Cimoli et al, 2014). Another important aspect in today discussion on industrial policy is the changing international economic regime and, in consequence, the question of applicability of selective industrial policy. Accordingly, Development Economics has seen the emergence of the debate on *Policy Space for Development* that investigates, among other things, the availability of industrial policy tools, given the disciplines of the contemporary international financial, monetary, trade, investment, and IPR regimes (UNCTAD, 2006; Mayer 2009; Akyuz, 2009).

A major change was the incorporation of Intellectual Property Rights (IPR) in the international trade domain, culminating in the adoption of WTO agreement on Trade related Intellectual Property Rights (TRIPS). In historical term, TRIPS agreement represents a new impediment to policies aiming at the structural transformation of developing economies.

However, even if IPR homogenization reduces the spaces for policy maneuver, it did not end the “implementation game” at the national level (Deere, 2009). TRIPS agreement provides some flexibilities, although scant, that may be further exploited and

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adapted consistently with industrial policy framework. However, those flexibilities are getting eliminated by some trade agreements that incorporate TRIPS-plus commitments.

TRIPS-plus is a concept which refers to the adoption of multilateral, plurilateral, regional and/or national intellectual property rules and practices which have the effect of reducing the ability of developing countries to protect the public interest. It covers both those activities aimed at increasing the level of protection for right holders beyond that which is given in the TRIPS Agreement and those measures aimed at reducing the scope or effectiveness of limitations on rights and exceptions (Dutfiel and Musungu, 2003). TRIPS plus includes any new standards that would limit the ability of these countries to 1-) promote technological innovation and to facilitate the transfer and dissemination of technology; 2-) take necessary measures to protect public health, nutrition or, 3-) take appropriate measures to prevent the abuse of intellectual property rights by right holders or the resort by right holders to practices which affect the international transfer of technology.

Previous literature revealed systematic efforts of US to include TRIPS-plus in its free trade agreements (Shadlen, 2005, Correa, 2014). US FTAs broaden the scope of patentability both directly and indirectly, introduce cap on information disclosure, reinforce data exclusivity (clinical and test data), extends patent terms, restrict parallel imports, restrict the ability to revoke patent and finally limit ground upon which compulsory license could be granted.

Literature on EU approach revealed the existence of two generations of trade agreements with respect to patent provisions. The earlier version consisted of engaging other parties to accede or comply with other WIPO treaties, where some of TRIPS flexibilities were eliminated. The second generation joins US approach in most of aspects (Nadde-phlix, 2014; Aleman, 2014).

In fact, trade in capital goods has been historically considered to be an important channel through which countries build technological capabilities, through the coping and reverse engineering of imported products. According to UNCTAD (2012), South-South trade has increased significantly since mid-1990. As of 1995, 38% of imports of developing countries was sourced from other developing countries, and by 2010 this figure had exceeded 57%. In parallel there has been a consistent increase in imports of high technology intensive goods in the South. On average, over 53% of all high technology products imported by developing countries as a group were sourced from developing countries. A country level disaggregation shows that respectively 54% and 47% of both china's and India's high technology products were exported to other developing countries.

This paper investigates the state of the so-called “TRIPS flexibilities” under the Chinese trade agreements with developing countries, whether eliminated, kept or affirmed. The paper objective is to contribute to the literature examining the extent to which the international trade regime leaves nations the necessary policy space to deploy patent regime as a tool of long-run diversification and development. The tested hypothesis is: depending on the type of economic partnership of developing countries, there exist many policy spaces for government practices aimed at fostering local technological capabilities.

### **1- Limited coverage of IPR**

The paper covers six Chinese trade agreements with ASEAN (2007), Pakistan (2009), Chile (2010), Peru (2010), Costa Rica (2011), and South Korea (2015). Those agreements either do not cover IPR or provide for very limited coverage. The first agreement with developing country to introduce a separate chapter on intellectual property is China-Peru agreement to be followed by agreements with both Costa Rica and South Korea.

Common element in those chapters is the emphasis on the need to attain a balance between patentee rights and the legitimate interest of users and community with regard to protected invention. In addition, they include engagement, though without practical implication, to prevent any practice that constitute an abuse of IPR by patentee and have the effect of adversely affecting or limiting technology transfer<sup>2</sup>.

### **2- Genetic resource, traditional knowledge and folklore**

In fact many developing countries have complained of bio-piracy, in which multinational firms take their traditional knowledge and genetic resources and use it to produce patented product that could be very profitable. Consequently, Developing countries had been pushing in various international forums to make mandatory the disclosure of the source and/or country of origin of biological resources, of associated, if such resources and traditional knowledge are contained in an invention over which an applicant is seeking patent rights. Those efforts produced the Convention on Biological Diversity (CBD), which is not signed by US yet.

Chapters on IPR in China’s agreements include provisions on genetic resource, traditional knowledge and folklore. They affirm the principles and provisions established in the CBD, and encourage the effort to establish a mutually supportive relationship between the CBD and TRIPS Agreement. The agreement with Korea was signed after the

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<sup>2</sup> See Article 144 China-Peru trade agreement, Article 109 and 110 in China-Costa Rica trade agreement, Article 15.1 and Article 15.2China-South Korea trade agreement.

conclusion of Nagoya protocol, so Article 15.17.2 affirms the “respect” to its requirement, “especially those on prior informed consent and fair and equitable sharing of benefits “.

Importantly, they affirm each country right to adopt or maintain any measure which aim to promote the equitable sharing of benefits arising from the use of genetic resources and traditional knowledge. Finally, they leave opened the possibility to negotiate in the future on the question of resource disclosure and prior informed consent obligations in patent applications.<sup>3</sup>

The textual language in the provision therefore clearly indicates that the protection of genetic resources, traditional knowledge and traditional cultural expressions is merely optional, not mandatory. Moreover, the protection the provision calls for is consistent with the intellectual property laws and policies of China. Article 26 of the Chinese Patent Law requires patent applicants to disclose the traditional knowledge and genetic resources used in their inventions (Zhuang, 2013).

### **3- Plant varieties**

China-Korea trade agreement contains the most comprehensive chapter on IP and serves as example of extreme limit of provision on patent observed in studied agreement. In general, it restates commitments under TRIPS. Its definition of IPRs includes elements that were not contained in the TRIPS, at least separately e.g. plant varieties and utility model<sup>4</sup>. In contrast, the definition does not mention elements that were covered in the TRIPS, e.g. Geographical Indication and Layout-Designs (Topographies) of Integrated Circuits (See Footnote 52).

Article 15.18 on plant varieties restates some commitments under the *International Convention for the Protection of New Varieties of Plants 1978* (UPOV 1978), where the two countries are already members. Article 15.18.3 stipulate: “The Parties shall respect regulations on new plant varieties protection of the other Party and grant adequate and effective protection to breeders of new plant varieties”. And it establishes that the propagating material of the protected variety shall require the authorization of the breeder in case of: (a) production or reproduction (multiplication) for the purposes of commercial marketing; (b) conditioning for the purpose of commercial propagation; (c) offering for sale; (d) selling or other marketing; and importing or exporting.

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<sup>3</sup> Article 145 China-Peru trade agreement, Article 111 China-Costa Rica trade agreement, and Article 15.17.4 China-Korea trade agreement.

<sup>4</sup> Article on utility models is too brief and contains no engagement. It simply states “party agree to enhance cooperation at this level”.

Thus, farmers are free to save and re-sow propagating material from the previous year's harvest, as the permission of the breeder is only required for the production for "commercial marketing". Breeder's permission is not also required, either for utilization of the protected variety for the purpose of breeding additional new varieties or for the marketing of such varieties<sup>5</sup>. It should be noted that the Article 15.3 affirm also parties' commitments under UPOV 1978<sup>6</sup>. Given that Korea is a member of UPOV 1991, it seems that China does not accept engagement going beyond 1978. UPOV 1991 is criticized to favors breeders on framers, because it prevents all utilization of plant varieties by farmers without breeder consent. In fact, the accession to UPOV 1991 is recurrent obligation under US and EU trade agreement.

#### 4- Doha declaration

Finally, a characteristic of Chinese patent provisions is the inclusion of a separate article on the Intellectual Property and Public Health that recognize principals established in Doha declaration<sup>7</sup>.

This reference is of major importance, given that the existence of a number of flexibilities in the TRIPS Agreement has been confirmed by the WTO Ministerial Conference, the highest WTO body, through the Doha Declaration on the TRIPS Agreement and Public Health. The Declaration is the first WTO instrument to specifically use the concept of 'flexibility' with regard to the TRIPS Agreement (Correa, 2014).

Although the Doha Declaration focused on IPRs related to public health, it is relevant to IPRs in any field of technology. Paragraph 5 of the Doha Declaration<sup>8</sup> specifies some of the flexibilities available to facilitate access to pharmaceutical products. The wording of the chapeau of this paragraph makes it clear that it only enumerates some of the possible flexibilities. Sub-paragraph (a) confirms the relevance of article 7 of the TRIPS Agreement<sup>9</sup> for the interpretation of its provisions, thereby suggesting that the TRIPS

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<sup>5</sup> Article 5(3) of UPOV 1978.

<sup>6</sup> The two parties affirm their commitment in many treaties where they are already members, with no any additional obligation to comply with or accede to other agreements.

<sup>7</sup> China-South Korea Article 15.5, China-Peru Article 144.6, China-Costa Rica Article 112, China Chile Article 111.

<sup>8</sup> It states "while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted"

<sup>9</sup> This article provides that the protection and enforcement of intellectual property rights 'should contribute to the promotion of technological innovation and to the transfer and dissemination of technology'. The Agreement

Agreement must be interpreted in a manner that favors access by third parties to technology necessary to further innovation and domestic production. One important element of Doha declaration is the affirmation of members' liberty of to define the ground upon which they issue compulsory license. According to Correa (2014) Paragraph 5 is particularly relevant to the implementation of measures intended to expand domestic production with the use of protected technologies.

## 5- Conclusions

Patent related issues are either absent from Chinese trade agreements or covered limitedly. Its patent provisions are shallow, rhetoric and contain no additional commitments relative to parties' previous engagements. Consequently, they do not limit the ability of its partners to use TRIPS flexibilities in a framework of industrial policy aiming at fostering technological capabilities.

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should not be regarded as a charter of absolute rights to control the exploitation of protected technologies, but rather as an instrument that requires the use of such technologies 'to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare' (article 7).

Vol. 27, No. 4, pp. 373-395.

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