

19 FTA Policy-Making in the EU and Its Effects : Policies toward Intellectual Properties^(*)

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Each country has recently begun to shift the priority in external trade negotiations to bilateral or regional free trade or economic partnership agreements as multilateral trade liberalization talks have stagnated at the World Trade Organization. Even the European Union, which had given priority to multilateral systems, has become proactive concerning free trade agreement negotiations since the second half of the 2000s, negotiating FTAs with not only growing Asian markets such as South Korea and Singapore, but also major industrial countries like Canada, the United States and Japan. At the same time, the EU has toughened provisions on intellectual property rights protection in FTAs. The EU had adapted IPR protection provisions according to FTA partners' respective degrees of development in earlier FTAs, but has begun to expand the scope of protection for geographical indications, increase items subject to protection, extend protection periods for submitted drug data and enhance enforcement in a manner to go beyond protection standards under the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement. Why has the EU proactively enhanced international IPR protection through FTAs with industrial countries? The study analyzes changes in the EU's IPR protection policy in FTAs and political factors behind the changes.

I Objectives and Composition of This Study

Over the recent years, the number of bilateral or regional free trade agreements has increased in the Asia-Pacific region while multilateral trade liberalization talks at the World Trade Organizations have stagnated. Most of these FTAs are comprehensive agreements covering not only the elimination or reduction of tariffs on goods but also the elimination of nontariff trade barriers including unique national regulations and standards, individuals' freedom of movement, the deregulation of services and investment and the protection of intellectual property rights. In contrast to Asia-Pacific countries, the European Union had persistently given priority to multilateral trade liberalization talks and limited bilateral FTAs over those with neighbors and former European colony countries since the creation of the WTO. But the EU's European Commission released a new trade strategy titled "Global Europe" in 2006 and has since then proactively promoted negotiations on FTAs with growing Asian countries and industrial countries such as Canada, the United States and Japan. The EU's earlier FTAs had given priority to the reduction of tariffs on goods and remained negative regarding including IPR and investment

provisions into FTAs. Since 2006, however, the EU has incorporated very proactive IPR protection provisions into FTAs.

The study's objective is to analyze such changes over the recent years in the EU's IPR policy for FTAs from the viewpoint of international relations. Specifically, the study makes clear the EU's IPR strategy through FTAs and looks into factors behind the policy shift in consideration of international relations involving the EU.

II Recent EU Policy Shift and Changes in International IPR Protection

1 Increasing FTAs

The WTO Doha Round of trade negotiations started on a full-fledged basis in January 2002 but has stagnated due to emerging conflicts between industrial and developing countries and the ambitious premise of the single undertaking of the negotiated eight areas. In the meantime, the number of regional trade agreements including free trade agreements has increased rapidly since the 1990s. Spearheading FTA negotiations has been the United States. After putting its North American Free Trade Agreement with Canada and

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Mexico into effect in 1994, the U.S. government invigorated FTA negotiations on the strength of the Trade Promotion Authority Act enacted in July 2002. The range of the United States' FTA negotiation partners expanded to cover not only Latin America but also Australia, the Middle East, Africa and Asia. The United States has also proactively tackled negotiations on wide-area FTAs including the pending Trans-Pacific Partnership Agreement.

Many people have criticized a widening network of bilateral and regional FTAs in the Asia-Pacific region as complicating international trade relations. Clearly, however, industrial countries have shifted priority from multinational trade negotiations to bilateral and regional talks. Reaffirming the shift has been the Asia-Pacific Economic Cooperation forum's emerging move to build a free trade area covering all APEC economies as well as the Group of Eight major countries' policy of giving priority to FTAs as specified through their annual summit.

2 FTAs and IPRs

International IPR protection has been changing greatly due to the increasing number of bilateral and wider-area FTAs. Since the creation of the WTO in 1995, international IPR protection had centered on the implementation of the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement. Over the recent years, however, developing countries' strong opposition to the TRIPs Agreement has led WTO negotiations to deal mainly with traditional knowledge, genetic resources, folklore, public health and other problems involving developing countries and focus on the flexible implementation of the TRIPs Agreement.

As it has become difficult to realize comprehensive international IPR protection as envisaged upon the creation of the WTO, industrialized countries have grown eager to incorporate their IPR protection standards into FTAs. Taking the initiative to do so has been the United States. The Trade Act of 2002, including the Trade Promotion Authority Act that triggered U.S. government efforts to promote the FTA policy, provided that the U.S. government make international IPR protection levels similar to those under domestic U.S. law through trade negotiations. In fact, most of FTAs that the United States has concluded since then have included clauses calling for the same IPR protection as under domestic U.S. law. They go

beyond protection levels under the TRIPs Agreement and are called "TRIPs plus clauses." Representative "TRIPs Plus" clauses in U.S. FTAs provide for extending copyright protection periods, exceptions to lack of novelty of invention subject to patent protection, grace periods for patent applications, protecting patents on animals and plants, extending drug patent protection periods, clarifying protection periods for submitted data for drug approval applications, limiting conditions for exercising compulsory licenses, restricting parallel imports, expanding the scope of trademark protection and enhancing enforcement (by strengthening border measures and expanding the range of infringements subject to criminal procedures). Legal experts have already given objective analyses about the interpretation and classification of "TRIPs Plus" clauses and relevant problems, while many academicians and citizen groups have criticized IPR protection enhancement under U.S. FTAs for only expanding rents for multinationals at the cost of developing countries' interests.

3 Recent Revisions in EU FTA Policy and IPRs

The EU had retained its policy of giving priority to multilateral trade negotiations led by the WTO despite other countries' growing moves to conclude FTAs. It had reiterated concern that other countries' proactive efforts to conclude bilateral or regional FTAs had been an obstacle to promoting the Doha Round. Even since before the WTO's creation, the EU (or EC) had concluded many FTAs mainly to stabilize relations with neighboring countries in preparation for expanding the EU (or EC) or maintain historical relations with former European colony countries. The EU's earlier FTAs focused on tariff reductions and were negative in regard to provisions about other matters including IPRs. In contrast to the United States attempting to incorporate "TRIPs Plus" clauses into FTAs, the EU had been negative about IPR protection under FTAs. Unlike the U.S. FTAs providing for specific IPRs for protection by FTA partners, EU FTAs had only called for IPR protection under existing international treaties and indicated a flexible attitude of promising to settle any IPR conflicts through talks. The EU had then been eager to build a new multilateral system for geographical indications through WTO negotiations. But it had fallen short of taking up the geographical indication problem in FTA negotiations. The U.S.

policy then had been called “to-do list approach” or “narrow approach,” as opposed to a “generalist approach” for the EU policy.

Reversing the EU policy was a trade strategy titled “Global Europe: Competing in the World” as released by the European Commission in October 2006. The new strategy indicated a policy of promoting FTA negotiations with Asian and other foreign countries while proceeding with multilateral negotiations at the WTO. In fact, the EU has proactively promoted FTA negotiations since the release of the “Global Europe” strategy in 2006. It has already put into effect an FTA with South Korea and has been negotiating FTAs with such Asian countries as India, Malaysia, Thailand and Vietnam. Furthermore, the EU launched negotiations on FTAs with Japan and the United States in 2013. Particularly, the proposed U.S.-EU FTA, called the Transatlantic Trade and Investment Partnership, or TTIP, would cover about half global GDP. Along with the abovementioned Trans-Pacific Partnership Agreement, the TTIP has attracted global attention. Most of new EU FTAs are comprehensive agreements covering nontariff trade barriers, public procurement, services, investment, competition policy and other matters that had not been subject to earlier EU FTAs. New ones thus feature proactive provisions about IPR protection.

A representative comprehensive EU FTA is the agreement that the EU signed with South Korea in October 2010 and put into effect in July 2011. The agreement features clauses that go beyond the TRIPs pact by extending the copyright protection period to 70 years from 50 years under the TRIPs pact, prohibiting the circumvention of technical protection measures for copyrighted work and the provision of circumvention means (Article 10.12) and restricting service provider liability (Article 10.65-66). As for patents, drug patent periods are extended for up to five years (Article 10.35). While the TRIPs pact’s Article 39-3 protects drug approval application data as non-public information, the FTA specifies the period for the protection as at least five years from initial sales approval in order to make protection clearer. These provisions overlap those in the U.S.-South Korea FTA. Meanwhile, the EU-South Korea FTA features provisions concerning design rights, enhanced enforcement and geographical indications. As for design rights, the EU-South Korea FTA provides for a requirement for legal means to prevent unregistered designs from

being used (Article 10.29). No such provision exists in the TRIPs pact. While Article 51 of the TRIPs pact requires border measures to be introduced against goods infringing trademarks and copyrights, the EU-South Korea FTA’s Article 10.67 on enforcement expands the border measure coverage to include goods infringing patents, design rights, geographical indications and rights to grow new plant varieties. As for geographical indications for protection, the EU-South Korea FTA provides for expanding additional protection targets to agricultural and food products. As of the FTA’s effectuation, 162 EU and 64 South Korean geographical indications were subjected to protection. Protection targets are set to increase under future agreements. The EU-Singapore FTA on which final accord was reached in September 2013 also provides for protection standards going beyond those under the TRIPs pact. These provisions are almost similar to those in the EU-South Korea FTA. Details have yet to be released about the EU’s FTA with Canada for which broad accord came on October 18, 2013. A European Commission document indicated a policy of including proactive IPR protection provisions into the FTA and made clear the EU’s emphasis on expanding the scope of geographical indications for protection and on access to drugs. IPR protection has been at issue in the EU-India FTA negotiations that started in June 2007. The EU and India have agreed to refrain from extending drug patents and providing for the exclusiveness of drug approval application data under their FTA in line with Indian citizens’ strong opposition to the extension and exclusiveness. In the meantime, the EU has made no revision to its policy of expanding the scope of geographical indications for protection and enhancing enforcement. IPR protection is also one of major agenda items at the FTA negotiations the EU launched with Japan and the United States in 2013. Remarkably, the United States and EU, while vowing to maintain and improve comprehensive IPR protection levels including enforcement in their future TTIP talks, noted that they would limit discussions to problems subject to their respective national interests instead of discussing all relevant problems.

As made clear above, the EU has shifted from adjusting IPR protection standards under FTAs to the degrees of partner countries’ development to requiring partner countries to provide the same IPR protection as the EU. This means that the EU has been switching from the

“generalist approach” to the “to-do list approach” on IPR protection through FTAs. The European Commission in charge of EU trade policy has made the policy clear. The European Parliament has indicated its approval of the European Commission’s FTA innovation policy.

4 Analysis Based on International Institutional Theories

How has the structure of international IPR protection changed as a result of EU IPR policy revisions through FTAs? Among international relations theories, international political economics to analyze the relationship between international economics and international politics has developed with a focus on international institutional theories that attempt to clarify conditions for international cooperation in anarchic international political and economic relations in the absence of any central international government. Robert Keohane, a leading authority on international institutional theories, used the so-called Prisoners’ Dilemma game to explain how difficult international cooperation is. In anarchic international relations, Country A gives top priority to its interests and betrays Country B. Country A believes that even if Country A cooperates with Country B, it may suffer a loss on Country B’s betrayal and see a gain on the part of Country B. As a result, Countries A and B are unable to cooperate in fear of each other’s betrayal even though both countries are ready to benefit the most from their cooperation. According to the game theory, however, parties give considerations to their choices’ impacts on their later choices through repeated games and can easily build their cooperative relations by adopting a strategy of “eye to eye and teeth to teeth.” Keohane has thus concluded that countries may gradually build cooperative relations if they are allowed to repeat the same game through international institutions. But repeating any game alone cannot produce cooperation. If cooperation is to be established, countries must share the recognition that one country’s betrayal may invite others’ retaliation. To this end, they must agree on the definition of betrayal and cooperation. It may be difficult for any single country to monitor whether other countries really cooperate with or betray the country. Keohane argues that if countries are allowed to freely negotiate through international institutions, they may establish cooperation and get the most beneficial results.

The argument may fit the development of today’s international intellectual property systems. International cooperation in IPR protection is the most desirable outcome for any country. In the absence of a world government that would require each country to protect IPRs, however, each country may fear that even if it protects IPRs, others could become free riders on its protection without doing so. As each country is expected to give no protection to IPRs unless some measures are taken, some international institution may be created to maintain international cooperation. In the past, industrial countries agreed to realize international IPR protection through the WTO. In order to prevent developing and other countries from becoming free riders on others’ IPR protection and maintain cooperative relations for IPR protection, industrial countries tried to build an international institution where developing countries as well could participate. Such efforts represented the past international IPR protection framework. But the EU’s FTA policy shift has greatly changed the international IPR protection structure. In this respect, Arthur Stein has provided the most helpful argument. Stein argues that the simplified national interest structure used as the background for producing international institutions can be divided into two types -- the Prisoners’ Dilemma and Battle of Sexes." In the "Battle of Sexes" type, Countries A and B adopting Standards 1 and 2 try to make one of them an international standard. If these countries adopt the same standard, they will benefit more than at present. But Country A will benefit if Standard 1 becomes international. If Standard 2 is adopted as an international one, Country B will benefit. As the two countries fight over whether to make Standard 1 or 2 an international one, an international institution is required for their coordination. Recent international relations involving IPR protection, or industrial countries’ individual attempts to enhance IPR protection through FTAs, can be summarized as representing a conflict over whether to choose Standard 1 or 2. In the past, the EU had tried to adapt international institutions to the degrees of development for multilateral trade and FTA negotiation partners. In recent years, however, the EU has asked FTA negotiation partners to provide the same level of IPR protection as the EU’s. In this sense, the EU has adopted the same policy as the United States. In the future, a dispute having the United States and the EU as major players is expected to further intensify

over whether to adopt Standard 1 or 2.

III Objective of EU's FTA IPR Policy Shift

1 EU's Common Trade Policy

It may be needless to say that European countries developed their economic integration ahead of the rest of the world. The European Economic Community had attempted to achieve a customs union at first, a common market in a medium term and finally an economic union. The customs union was established in 1968 after the EEC and two other organizations were integrated in July 1967 for the unified, efficient operation of the community. The three were collectively called the European Communities to emphasize European unity. A basic setup for the present EU was developed then, consisting of the European Commission as the executive organ, the European Council and European Parliament as the legislature, and the European Court of Justice. In the 1970s, global economic stagnation bogged down European integration. In the 1980s, however, Jacques Delors of France, then president of the European Commission, took leadership in accelerating European integration with the adoption of the White Paper on the Internal Market seeking to realize market integration by 1992 for the free movement of people, goods, services and capital. In response to the end of the Cold War and the unification of East and West Germany, the EC expansion became a realistic challenge and European countries attempted to reform the institutional framework of the EC. In February 1992, they signed the Maastricht Treaty, or the Treaty on European Union. Then, the EEC was given jurisdiction over non-economic areas as well and renamed the European Community. Based on the EC, the EU was created under two pillars -- intergovernmental cooperation in common foreign and security policy and in judiciary and internal affairs.

After the creation of the EU, new institutional reforms were implemented through the Amsterdam, Nice and Lisbon treaties. Particularly, the Lisbon Treaty attracted attention as a fundamental reform. This treaty replaced the European Constitutional Treaty, which was drafted and failed to be enacted as a result of French and Dutch referendums, and retained the constitutional treaty's objective of setting up a new European integration framework, though

taking the form of a revision to the basic EU treaty. The greatest reform under the treaty repealed the three-pillar structure comprising the supranational body including the European Community, intergovernmental cooperation in common foreign and security policy, and judicial and police cooperation in criminal matters, and integrated the pillars under the EU. The Lisbon Treaty repealed the EC, authorized the EU to take over the EC's authorities and liabilities and gave the EU a single juridical personality. As a result, the EU was empowered to conclude international treaties with foreign countries and accede to international organizations.

In the largest revision in the common trade policy under the Lisbon Treaty and the preceding Nice Treaty, it was stipulated that the EU has exclusive authority over IPRs, services and investment as well as tariffs. This means that the EU has exclusive authority to negotiate and conclude trade agreements covering IPRs. Although the European Parliament's consent to these agreements is required, the European Council can decide whether to ratify them by specific majority vote. The revision can be interpreted as indicating that major EU countries can take leadership more easily in proceeding with trade policy.

2 EU Trade Strategy Revisions and Their Objectives

As explained above, the EU has established the formal base for its promotion of trade policy without being bound by interests of individual EU member countries. When releasing the "Global Europe" strategy as explained in the previous chapter, the EU shifted trade policy priority from the WTO to FTAs and adopted remarkably proactive IPR protection provisions in FTAs. How can the objectives of the policy shift be explained?

I would like to analyze the shift from three points. The first point is what specific trade relations the EU pursues in promoting FTAs. The second is what specific countries are subject to the EU's FTA promotion. The third is how the goal of IPR protection provisions in recent EU FTAs can be explained.

The first point can be explained from the viewpoint of how the EU positions the relationship between internal and external markets. In March 2000 following the EU's creation, the European Commission announced the Lisbon Strategy representing a

comprehensive economic and social plan. In five years, it released the New Lisbon Strategy that revised the original one. While attempting to enhance EU infrastructure through the Lisbon Strategy, the European Commission submitted "Global Europe" in October 2006. The "Global Europe" trade strategy first gives future trade policy priority to enhancing Europe's competitiveness. In this respect, it has the same goal as the Lisbon Strategy. But the strategy says the EU should not pursue growth in the EU market alone or protectionist policies as in the past but rather open the EU market to foreign companies and give European companies opportunities to compete with them while leading foreign countries to open their markets and expand opportunities for European companies to conduct production and provide services in overseas markets. It cites the globalization of the international economy and the rise of emerging countries as the reasons for doing so. In the global economy, multinational enterprises produce goods and provide services in low-cost countries, creating borderless supply chains where intermediate goods rather than finished goods for traditional transactions are traded. A trade framework where the United States and the EU play core roles has collapsed, while Asian and South American countries have been developing global networks rather than their respective regional networks. The EU strategy aims to increase opportunities for European companies to take advantage of the international economy's globalization and networking.

"Global Europe" and other EU trade strategies indicate that the EU is attempting to promote intra-industry trade rather than inter-industry trade with foreign countries through FTAs. The European Commission had initially expected that the establishment of the single EU market would increase horizontal intra-industry trade between EU member countries through the diversification of consumers' preferences and the division of labor between them and inter-industry trade through the division of labor. In fact, however, vertical intra-industry trade has increased rapidly within the EU, forcing low-income countries in the EU to specialize in labor-intensive areas and suffer economic stagnation greater than industrial countries over a long term with unemployment rates remaining unimproved. Meanwhile, intra-industry trade's share of global trade has expanded as trade in intermediate goods instead of final goods has grown more frequent. Under

the circumstances, the EU is attempting to expand intra-industry trade through progress in trade with foreign countries.

As for the second problem of what specific countries or regions are subject to the EU's FTA promotion, we can find some hints in FTA studies under theories of international relations theories. In general, "trade creation effects" and "trade diversion effects" are frequently cited as economic effects of FTAs. Empirical studies on how these effects lead to the expansion of economic well-being in countries concluding FTAs have been conducted with various methods. Meanwhile, a rising number of studies theoretically look into why countries choose to conclude FTAs. According to these earlier studies, key points for decisions to conclude FTAs include distance, economic size and production factor endowment. First, the shorter the distance between two countries is, the less the transportation costs are and the more the trade creation effects are. The farther the distance is, the less the trade diversion effects are. The larger the economic size is, the more the trade creation effects are. The smaller the economic size of a third country is, the less the trade diversion effects are. The larger the relative difference between the two countries in production factor endowment is, the more prosperous inter-industry trade is and the more the trade creation effects are. The smaller the difference is, the less the trade diversion effects are. As noted above, the EU is attempting to switch trade with foreign countries from inter-industry trade to intra-industry trade. Therefore, it is expected to proactively promote its conclusion of FTAs with countries with large economies and industrial structures similar to the EU's. As noted earlier, the larger and closer two countries' economies are in size, the more rapidly intra-industry trade develops. In fact, the Global Europe strategy had emphasized the significance of FTAs with growth market countries. But a trade strategy released in 2010 says the EU should choose FTA partners in consideration of their economic size, growth potential and impacts on the global economy and give priority to the United States, China, Russia, Japan, India and Brazil. In this way, the EU is gearing up for concluding FTAs with industrial countries with giant economies and large influence on the global economy for the purpose of promoting intra-industry trade with foreign countries. As a result, the EU has shifted from an approach of generalizing former European colony countries as

its traditional FTA partners to a new approach in which the EU reviews preferential relations with these countries and asks them to liberalize trade, investment and services and protect IPRs in line with their respective degrees of development.

Finally, the EU has begun to link IPR protection enhancement through FTAs to the promotion of European companies' overseas investment. This means that that the EU leads foreign countries to develop IPR systems in order to promote European companies' overseas expansion. The EU had given priority to harmonizing IPR systems within the region rather than enhancing and harmonizing international IPR systems. In fact, however, the harmonization process has remained difficult as EU members have stuck to their respective systems. In response, the EU has specified its policy as asking foreign countries to provide the same IPR protection as major EU countries in efforts to develop systems for globally expanding European companies to obtain profit, irrespective of whether the harmonization within the EU is achieved.

IV Conclusion and Future Challenges

This study explained changes in the EU's IPR policy for FTAs over the recent years from the viewpoint of international political economics. The study made the following two findings: First, the EU now requires FTA partners to provide the same IPR protection as in the EU, intensifying international disputes over international IPR protection systems. Second, the objective of the EU's FTA policy shift is to expand intra-industry trade with foreign countries (particularly major economic powers) and develop IPR protection systems particularly to promote European companies' overseas investment.

Based on the above argument, I can conclude that a factor behind the EU's enhancement of IPR protection through FTAs over the recent years is the union's attempt to develop trade relations with foreign countries using the globalization and networking of the international economy. But such international economic relations alone may not be the only factor behind the FTA-based IPR protection enhancement. As far as FTAs represent a policy, domestic or regional politics must be related to the FTA policy. On drug access rules and geographical indications for which the EU has set higher standards for FTAs than under the TRIPs Agreement, I in the future would like to look into what preferences regional relevant

players indicate and how these preferences are linked to the EU's FTA policy.