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THE INTERNATIONAL INTELLECTUAL PROPERTY AND ENFORCEMENT ACT OF 2008

Another shot across the bow for exporters from Priority Watch List countries

Abstract

This Commentary briefly discusses the new bill introduced by Senators Baucus and Hatch to provide better monitoring and enforcement of intellectual property protection in countries whose IP regimes are deemed to be especially lax and damaging to US economic interests. The new bill is the latest installment in a long saga of attempts by US industries who own and export intellectual property to better protect their interests in global markets.

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I. Introduction

Interesting developments are afoot in the United States Senate when it comes to international trade and the protection and enforcement of intellectual property rights. A new bill could make it tougher for developing countries to benefit from preferential access to the US market or even continue to enjoy access to federal government procurement markets if they are found to be lacking in the enforcement of intellectual property rights.

This Commentary briefly discusses the new bill introduced by Senators Baucus (D-MT) and Hatch (R-UT) to provide better monitoring and enforcement of intellectual property protection in countries whose IP regimes are deemed to be especially lax and damaging to US economic interests. The new bill is the latest installment in a long saga of attempts by US industries which own and export intellectual property to better protect their interests in global markets.

II. The New Bill

The new bill entitled "The International Intellectual Property and Enforcement Act of 2008"[1], is some ten pages long, and contains three sections, with Section 2 housing the bulk of the substantive provisions.

Section 1 limits itself to setting out what the act shall be called (see above) and Section 3 contains some institutional provisions which would see certain US diplomatic missions abroad, in countries where the President determines the US has a "commercially significant relationship" receiving additional personnel to monitor IP enforcement in-country (a so-called intellectual property attaché with the title of Minister-Counselor).

III. Substantive Provisions

Section 2, which contains an amendment to Section 182 of the Trade Act of 1974, starts by establishing special rules for countries on the United States Trade Representative (USTR) Priority Watch List[2]. The Priority Watch List is one of several administrative categories created by USTR in application of Section 301 of the Trade Act of 1974[3]. Section 301 was strengthened considerably by the 1988 Omnibus Trade and Competitiveness Act, which created so-called "Special 301", a set of provisions which require USTR to carry out an annual review of foreign countries' intellectual property regimes.[4]

Within thirty days of publishing its annual National Trade Estimate Report on Foreign Trade Barriers[5], USTR is required to make a determination on which of the countries named therein are to be designated "Priority Foreign Countries", on the basis of their failure to extend IP protection in a manner and to a degree which has market access implications for US economic interests. The IPR practices of any countries so identified by USTR must then be investigated.[6]

Under existing legislation, USTR may move to suspend trade concessions and impose import restrictions or duties, as well as entering into binding agreements with priority countries the intent of which is to remove policies, actions, practices and the like which are currently undermining the effective protection and enforcement of intellectual property rights.[7]

[1] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3464is.txt.pdf (unless otherwise mentioned, all URLs indicated in this paper were last visited on 1 October 2008).
[2] http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file558_14870.pdf
[3] http://www.osec.doc.gov/ogc/occic/301.html.
[4] See: CRS Report for Congress *Intellectual Property Rights and International Trade* (updated July 23, 2008), at p. 36; hereinafter cited as "CRS Report 2008", available for download at: http://fpc.state.gov/documents/organization/109543.pdf.
[5] http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_NTE_Report/Section_Index.html.
[6] CRS Report 2008, at p. 36.
[7] Ibid.

IV. The Limits of Unilateral Action

Of course, the US' WTO commitments put strictly prescribed limits on the kind of unilateral action it may take, at least against other WTO Members. Article 23 of the Understanding on Rules and Procedures governing the Settlement of Disputes (the Dispute Settlement Understanding or DSU), entitled "Strengthening the Multilateral System" requires that, when a WTO Member (like the US) has a trade-related grievance against another Member, it has to settle it before the WTO's Dispute Settlement Body and in accordance with its dispute settlement rules and procedures.

V. Special Rules giving the President New Sanctions

The special rules that the new bill, if enacted, would usher into law, provide that USTR take specific action with regard to those countries that have been identified by it for inclusion on the Section 301 Priority Watch List and which have remained there for at least one year. Such specific action would entail the development of an action plan, containing benchmarks by means of which the country in question would be assisted in achieving "adequate and effective protection of intellectual property rights" as well as "fair and equitable market access" for US economic interests which rely on IP protection in order to penetrate and operate on the market of the country in question. The benchmarks described in Section 2 of the act would constitute legislative, institutional or enforcement measures, "or other actions as the Trade Representative determines to be necessary".

VI. Curtailing Access to US Government Procurement Markets

Section 2 (2) entitled "Failure to Meet Action Plan Benchmarks" contains a number of discretionary actions that the US President, in consultation with USTR, can take against those countries which fail to substantially comply with the benchmarks developed for it.

The first such action is to suspend, restrict or prohibit new or renewed government procurement contracts from the foreign country in question, at least where the agency engaged in such procurement is a US federal government body. This could effectively shut out foreign providers of goods and services based in offending countries from participating in federal government tenders in the US.

However, in light of the US' commitments under the WTO Government Procurement Agreement (GPA), the US would not be able to take this action against other countries which are also signatories of the GPA. Thus this would not be possible for GPA signatories[8] who also happen to have been identified by USTR as Priority Watch List countries. At the time of writing, this only includes Israel, whereby a number of other GPA signatories do have IP regimes which have been deemed problematic enough to merit inclusion in the Special 301 Report Watch List (different from the "Priority Watch List"), namely Canada, the Czech Republic (not a GPA signatory directly but a party thereto by virtue of its membership of the European Communities), Greece (another EC Member State), Hungary (also an EC Member State), Italy (EC Member State), Norway, Poland (EC Member State), Romania (EC Member State), and Spain (EC Member State).

VII. Curtailing Access to Investment Financing

Another measure the US President could take against the offending country is to suspend, restrict or prohibit the approval of new financing by the Overseas Private Investment Corporation (OPIC) for any investment project located in the foreign country in question.

The OPIC 2007 Annual Report[9] lists a great number of countries currently benefiting from OPIC programs. In fact, the report lists some 38 countries in which it is directly acting as a financial intermediary or investing directly, and states that through its services, it encourages US private investment in some 150 countries. Of

[8] http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties.
[9] http://www.opic.gov/pdf/annualreport_2007.pdf.

the countries mentioned in the OPIC 2007annual report, and which are therefore beneficiaries of OPIC assistance, Russia, India, Israel, Pakistan and Thailand are all Priority Watch List Countries. Thus it is these programs, in these countries, which could be the first to suffer if the bill were to become law.

VIII. Curtailing Access to Export Financing

Yet another discretionary measure which the US President could take under the new bill is to suspend, restrict or prohibit the approval of Export-Import Bank financing for US exports of goods and services to that country. Because it is US exporters and thus US economic interests (including jobs in export sectors) that benefit most from this kind of assistance, it is hard to envisage the President actually availing himself of his powers under these provisions, particularly when other more palatable and effective levers are available under the new act.

IX. Limiting Financing by Multilateral Development Banks

Another, potentially powerful measure the President could take against the offending country is in the area of funding from multilateral development banks, such as the World Bank, or the regional development banks such as the Asian Development Bank, the African Development Bank, or the Inter-American Development Bank. The new act would allow the US President, in the event of a country's failure, after one year, to comply with its IP action plan, to instruct US Executive Directors at any of the above mentioned or other multilateral development banks, to oppose the approval of any new financial assistance to the offending country or to any project located therein or in which it participates.

X. Curtailing Assistance by the USTDA

The new act also provides that the President could suspend restrict or prohibit any assistance the offending country might be receiving or receive in future from the United States Trade and Development Agency (USTDA). The Agency's 2007 Annual Report lists some 66 countries that it is providing assistance to, including China, Chile, India and Pakistan all of which figure on the 2008 Priority Watch List. It would be these programs, in these countries, which would be the most threatened if the bill were to become law in its current form.

XI. Curtailing Preferential Market Access for Developing Countries

Finally, and perhaps most importantly, the new act would authorize the President to suspend, limit or withdraw any preferential treatment for which the offending country might qualify under the General System of Preferences, the Caribbean Basin Economic Recovery Act, the Andean Trade Preferences Act, or the African Growth and Opportunity Act (AGOA).

XII. The GSP and Special 301

This is perhaps the most significant part of the new act for developing countries already benefitting from such preferential access under one of the above mentioned schemes, but which are either on the Priority Watch List or the Special 301 Watch List. These countries would certainly include Russia and Peru (both of which enjoy access to the US GSP scheme through their membership in APEC) and Pakistan, all of which are on the Priority Watch List, as well as Algeria, Indonesia, Tajikistan, Turkmenistan, Uzbekistan, all of which are on the Special 301 Watch List.

XIII. Implications for Sub-Saharan Africa

Although none of the countries benefiting from preferential access to the US market under AGOA have been explicitly singled out in the Special 301 Report, the National Trade Barriers Estimate Report regularly mentions the fact that legislative frameworks and enforcement of intellectual property rights are weak in many of the sub-Saharan African countries. In the case of the 2008 Report, this was certainly the case for Angola,

Cameroon, Cote d'Ivoire, Kenya, Nigeria, although not for Ethiopia and Ghana, whose intellectual property regimes were not criticized in the 2008 Report[10] .

Market access to the United States for Sub-Saharan Africa was worth almost USD 59 million in 2006, of which just over USD 44 million (i.e. more than two-thirds) entered the market thanks to either AGOA or the GSP.[11] Thus the financial implications of any potential loss of or reduction in market access under these schemes due to lax IP protection or enforcement could be very serious indeed.

What this potentially means for exporters in these countries is that depending on both developments in the domestic US political context, as well as their own economic size and the financial scale of any losses caused to US economic interests by lax protection and enforcement of intellectual property rights, export volumes from these countries to the US could start shrinking due to a loss of the preferential access they have enjoyed under AGOA. Although this will not happen without warning, and without the offending country being offered ample opportunity to avoid such penalties, it is nevertheless a contingency risk that exporters in these countries would need to factor into their medium and long-term commercial and business decisions should the bill ever become law.

XIV. Implications for ASEAN Countries

Of the ten ASEAN Members, only Thailand was on the Priority Watch List for 2008, although a number of other Members were mentioned on the Special 301 Watch List, namely Indonesia, Malaysia, The Philippines, and Vietnam. Thus half of ASEAN's Member States have intellectual property regimes that are so poor that they have been singled out for special attention under Special 301.

If one considers the findings made by USTR in its 2008 Trade Barriers Estimate Report concerning the other ASEAN Members' IP protection and enforcement regimes, one finds that Cambodia and Laos also came in for specific criticism, whereas Singapore is praised as having "one of the strongest IPR regimes in Asia"[12]. Although not subject to review under the USTR processes, Burma has, in the past, been described by the International Intellectual Property Alliance (IIPA) as a "haven" for intellectual property piracy[13]. Moreover, given the fact that its IP laws date back to the British colonial era, its IP protection and enforcement regime would certainly fall short of the high standards exacted by the US.

ASEAN exports to the US were estimated at some USD 96'943.5 million for 2006[14]. Many of ASEAN's exporters benefit from some kind preferential access to the US market, including Cambodia, Indonesia Philippines and Thailand (all under the GSP).[15] Like exports in Sub-Saharan Africa, exporters in ASEAN will need to start taking into account contingency scenarios of a potential loss or reduction of their market access under preferential schemes if the US were to start punishing those countries with lax IP protection and enforcement under the act, if it were to effectively become law.

XV. Compliance Issues with WTO Law and Possible Impact of the Bill

If one examines the legal nature and scope of the kinds of unilateral action the act provides against countries with lax IP protection and enforcement, it becomes immediately apparent that the bill has been carefully drafted in order to avoid infringing the US' WTO obligations.

[10] http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_NTE_Report/Section_Index.html.
[11] http://reportweb.usitc.gov/africa/total_gsp_agoa_import_suppliers.jsp.
[12] http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_NTE_Report/asset_upload_file547_14666.pdf.
[13] http://www.iipa.com/rbc/2006/2006SPEC301BURMA.pdf.
[14] http://www.aseansec.org/Stat/Table19.pdf.
[15] http://www.ustr.gov/assets/Trade_Development/Preference_Programs/GSP/General_GSP_Program_Information/asset_upload_file5_14711.pdf.

As mentioned above, curtailing access to federal government procurement markets is only something the act envisages against countries which are not signatories to the WTO Government Procurement Agreement. The GPA is a plurilateral agreement within the WTO treaty architecture which has been signed primarily by developed countries. As a rule, federal government agencies are not allowed under the Trade Agreements Act of 1979 to procure goods and services from suppliers in countries that are not signatories to the GPA or other trade agreements whose scope include public procurement.[16] Comprehensive data on US Federal public procurement transactions is available under the US Government's Federal Procurement Data System.[17] For 2005 (the latest year for which comprehensive data was available) some USD 424.2 billion worth of government procurement contracts were awarded. Close to 95 percent of the contracts awarded in terms of both value and the number of actions involved, go to companies located in the United States. Of the small percentage of public procurement contracts that are awarded to non US suppliers, most go to a small group of developed countries, the majority of which are also signatories of the WTO GPA.

Thus the impact of the new act in terms of any contingency curtailment in public procurement spending would be minimal.

The other punitive measures the act envisages generally tend to be beyond the scope of WTO obligations, like those affecting the activities of the OPIC or the Export-Import Bank or even the USTDA. Even the preferential access schemes targeted by the act, such as the GSP and AGOA, contain benefits that are unilaterally extended by the US without reciprocity and are therefore prone to unilateral withdrawal at a time and to the extent of the US' choosing: what the US giveth, the US can taketh away.

Nevertheless it is arguably the threat of withdrawal of these preferences that would give the act the biggest bite as well as giving USTR the loudest bark. It is this threat - if anything - that would provide the greatest leverage in forcing developing countries which benefit from such schemes and which have lax IP enforcement to remedy any weakness in this area. The only good news is that it is a relatively small handful of countries that both benefit from some kind of preferential access to the US market AND which have been named on the 2008 Priority Watch List. The countries which have the most to fear are Russia, India, Pakistan, Thailand and Venezuela. These are luckily all relatively robust economies with a fairly broad export base, whose economic existence would not be directly or imminently threatened by any diminishment or loss of preferential access to the US market. As we have seen above, the implications for Sub-Saharan Africa would potentially be much more serious.

XVI. Where to Now?

Given that the there is only so much legislation that can be passed in the current legislative session, and that the bill will also have to pass through the House of Representatives before it becomes law (and even then might be subject to Presidential veto), it will probably be a while until this bill, or another version of it actually enters into force.

Moreover, Congress is currently pre-occupied with a slew of other legislative priorities, including (at the time of writing), a bill to bailout the country's worst-hit financial institutions from the on-going credit crisis, the reauthorization of the Trade Adjustment Assistance Program, in addition to ratifying a number of pending free trade agreements the US has recently concluded. Nevertheless, the new bill, which currently has no counterpart in the House of Representatives, certainly represents another shot across the bow for exporters in countries with lax IP protection and enforcement.

[16] See 2008 Trade Policy Review of the United States, Report by the Secretariat (WT/TPR/S/200/Rev.1), at p. 70. Available for download at: http://docsonline.wto.org.
[17] https://www.fpds.gov.

XVII. The Upside

The good news is that, even if it becomes law, countries will have the opportunity to avoid the sanctions contained in the act by engaging actively and meaningfully to show that they are trying to tackle the shortcomings outlined in any eventual action plan drawn up under this legislation.

The new act also could represent an opportunity for Priority Watch List countries, as it appropriates funding to USTR for the provision of assistance to any developing country struggling to comply with an action plan. Thus the process could be harnessed by developing countries on the Priority Watch List to help them (1) identify what their IP protection and enforcement weaknesses are, (2) draw up concrete and specific legislative, institutional and other measures to tackle these weaknesses; and (3) obtain funding for implementing these steps.

XVIII. Concluding Remarks

With the relative importance of IP owners and exporters to the US legislative and trade-policy formulation processes, it is no surprise that strong intellectual property protection has long been something the US has tried to export, by stick and carrot, to countries and regions where its economic interests warrant it. With the computer, pharmaceutical, motion-picture, publishing, software and apparel industries all big and powerfully positioned owners and exporters of US intellectual property, and with the US trade deficit continuing to widen, increased pressure for the most obvious, significant and systematic IP offenders is really only to be expected. The question, particularly for developing countries on the receiving end of this sort of negative attention, is really how to manage it actively, constructively and effectively to preserve and even further their own development and market access interests.

Further Reading

For those who wish to obtain further information on the issued raised in this Commentary or do further reading on some of the subjects raised therein (intellectual property rights, international trade, the World Trade Organization, trade policy formulation in the United States, the General Schemes of Preferences, government procurement), the table below provides a non-exhaustive list of further sources.

Author(s)	Title	Place	Publisher / Source	Year
Stephen D. Cohen	*The Making of United States International Economic Policy* (5th edition)	Westport, CT	Praeger Publishers	2000
Carlos Correa	*Trade Related Aspects of Intellectual Property Rights*	Oxford, UK	Oxford University Press	2007
Kenneth W. Dam	*The Rules of the Global Game*	Chicago, IL	University of Chicago Press	2001
Simon J. Evenett and Bernard Hoekman	*Government Procurement: Market Access, Transparency, and Multilateral Trade Rules*	Washington, DC	World Bank Policy Research Working Paper No. 3195	2004
Brian Hocking and Steven McGuire	Trade Politics, International Domestic and Regional Perspectives	London, UK	Routledge	1999
Shayerah Ilias and Ian Fergusson	*Intellectual Property Rights and International Trade*	Washington, DC	Congressional Research Service	2008
Margaret Liang	*Government Procurement at GATT/WTO: 25 Years of Plurilateral Framework,* published in: Asian Journal of WTO & International Health Law and Policy, *Vol. 1, No. 2, pp. 277-290,*	Taipei	Asian Center for WTO & International Health Law and Policy	2006 (Sept)
Ernest H. Preeg	*Traders in a Brave New World*	Chicago, IL	University of Chicago Press	1995
John Revesz	*Trade-Related Aspects of Intellectual Property Rights*	Canberra, ACT	Productivity Commission	1999
Gregory Schaffer and Yvonne Apea	*Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights*, published in: Journal of World Trade Vol. 39, No. 6, pp. 977- 1008,	Alphen aan den Rijn. NL	Kluwer Law International	2005
Peter van den Bossche	*The Law and Policy of the World Trade Organization* (2nd edition)	Cambridge, UK	Cambridge University Press	2008