GELİŞMEKTE OLAN ÜLKELER PERSEPTİFİNDEN TRIPS ANLAŞMASI

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ÖZET


Anahtar Kelimeler: TRIPS, Entelektüel Mülkiyet Hakları, Bilgi Ekonomisi.

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THE TRIPS AGREEMENT FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES

ABSTRACT

Economic development requires enhanced use of knowledge and the ability to create knowledge in all areas such as scientific and business. In modern economy, knowledge is at least as important an input as factor of production like labour, capital, and raw materials. Globalization has created productivity and competitiveness results becoming a function of knowledge creation and information processing. Intellectual property rights (IPRs) have got important effects on innovation and technology transfer for countries. The World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement has reformed intellectual property rights throughout the world. Following the growth of international trade and the spread of advanced technology, considerable progress has been made in IPRs. As a result, there is the need to protect intellectual property in the global level. Since it was signed in 1994, the TRIPS Agreement has led the trend toward the global harmonization of IPRs protection. The benefits of globalization on knowledge economies is not distributed equivalently between developed countries and developing countries. For this reason, the effects of the TRIPS Agreement on IPRs protection vary according to the degree of economic development of countries. The protection of IPRs is novel case for most developing countries. There are many studies on the intellectual property rights in the literature. However, none of these studies has focused in detail on the results of the TRIPS Agreement for countries which have the different development level. In this paper, we investigate whether the economic costs and benefits from stronger IPRs differ in developed and developing countries.

Key Words: TRIPS, Intellectual Property Rights, Knowledge Economy.

1. Introduction

Intellectual property rights (IPRs) are important their potential effects on innovation and technology transfer, which affect prospects for economic development. Globalization has altered the trade policies of countries. The TRIPS Agreement represents a milestone in the development of trade policies. Moreover, the TRIPS Agreement focuses on a particular non-trade issue for the first time. This Agreement imposes obligations on the protection of domestic IPRs by member countries (Cardwell and Ghazalian, 2012:20).

The TRIPS Agreement defines strong IPRs in countries with different levels of industrial and technological development. Subsequent to TRIPS, there has been much debate about the protection of IPRs in developing countries. While developed countries promote the effective protection of IPRs, most developing countries see little benefit from increased IPRs protection. The aim of this article is to critically investigate the effects of TRIPS on developed and developing countries. The economic costs and benefits of TRIPS differ for both groups of countries. We discuss TRIPS rather than the importance of IPRs.
Following this introduction, section 2 gives in the next section we provide the knowledge concept and the rational of IPRs systems. Section 3 presents the reasons behind the establishment of TRIPS and its effects on countries. In section 4, we analyze how countries position themselves against the TRIPS Agreement. In final section, we present our conclusions.

2. The Knowledge Concept and Intellectual Property Rights

Data, information and knowledge, although related, must be understood as distinct from one other. Data are raw numbers and facts. Information is processed data. Knowledge is authenticated information. Thus, data are the raw material of information, and information is the raw material of knowledge (Alavi and Leidner, 2001:109). The relationship among data, information, and knowledge might be expressed by saying that data are records, information is a message, and knowledge is a model (Willcocks and Whitley, 2004:192). Knowledge comprises the subject of this study.

We assert that scientific is distinct from myth, unstructured observation, intuition, belief, common knowledge, etc. because it is empirically verifiable, and not bound to uphold existing norms, transmissible from discoverer to learners, generalizable beyond its original objects, explanatory/predictive, and always susceptible to challenge and modification (Johnson and Joslyn, 1991:13-21; Isaak, 1985:106-107). These traits of scientific knowledge provide considerable economic value as a “public good” or a “global public good” because they have the following properties; non-rivalry, non-excludability, and externality (Simpson, 2003).

Knowledge economics relates two parties: knowledge producers/owners and knowledge consumers. For the knowledge producer, creating new knowledge can provide both social benefits (peer recognition, public prestige, a career, etc.) and financial benefits (compensation for products and services, license fees, access to facilities, etc.). Rights that secure these benefits to the knowledge producer are IPRs, which are codified by various laws such as copyrights, patents, trademarks, registered designs, license, and property technology (Eustace, 2003; Stewart: 1996).

IPRs can be divided into two groups: Industrial property, which includes patents, trademarks, industrial designs, and geographic indications of source; and Copyrights, which include literary and artistic works such as novels, poems and plays, films, musical works, and artistic works.

It is uncertain whether creative activities will produce something that generates economic value. Although Moore & Unsworth (2005:14) identified the origin of IPRs with England’s Statute of Monopolies (1624 AD) and the Statute of Anne (1709 AD), most of the development IPRs occurred during the twentieth century. During the 1990’s, IPRs expanded both horizontally and vertically. Horizontal expansion includes 1) Increasing the scope of the rights to the derivatives of protected works such as the plot, the characters, the sequels, and the design features, and 2) the development of process patents and trademarks. Vertical expansion occurred, for example, when the length of copyright terms was extended forward (Balkin, 2005: 310-311).

While IPRs are generally defined and protected by laws, most rationales for IPRs follow from John Stuart Mill’s utilitarian ethics that implies the necessity of IPRs to maximize social utility by protecting producers in their creative processes and by making the knowledge affordably available to consumers who will utilize it for the public welfare. For example, most nations’ patent laws acknowledge that a balance must be struck between the interests of the patent holder and the interests of society (Cullet, 2007: 404). Knowledge producers have economic incentives to develop new knowledge because IPRs exist. The development of new knowledge stimulates economic growth (e.g. technological advances that increase productivity and thereby decreases prices) and enhances social welfare (Sherwood, 1997: 492). Without the provided by IPRs, many inventions would remain unrealized which is socially undesirable. However, IPRs can’t protect tacit knowledge.
3. The TRIPS Agreement

The digital market, which emerged conceptually during the last decade of the 20th century, is now a primary means for the creation, the storage, and the dissemination of knowledge. Digital markets refer to knowledge banks that serve large numbers of people in different geographical locations via information systems. The rapid development of digital markets has increased ethical debates regarding the diffusion of knowledge. Balancing the IPRs of knowledge producers with the IPRs of knowledge consumers of knowledge has always been tricky, but information systems and their resultant knowledge economies have made the balance even more salient. In the past, conflicts between the interests of the producers and customers of knowledge was not widespread since the distribution of knowledge was relatively limited. However, the owners of IP have been affected by the use of information systems to produce and distribute knowledge to a much greater extent by digital copying and trademark infringement. An increasingly important form of IPRs involves the management of digital rights with technology that controls the accessing and copying of knowledge in digital markets (Balkin, 2005: 309, 311).

This progress is addressing National governments (the United States) and international agencies (the European Union, the North Atlantic Free Trade Association (NAFTA), the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO)) are addressing IPRs related to digital market. For example, by the early 1990s, the European Commission recognized the role of intellectual property law in institutional infrastructures for encouraging private investments in research and development (R&D) (Forrester, 2005: 2). The most relevant European regulations for software IPRs were established in the 2000s: Directive 91/250/EEC on legal protection of computer programs (Software Copyright Directive), Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (EUCD), and the proposal 2002/0047 for a directive on the patentability of computer-implemented inventions (Software Patents Directive) (Okanen and Välimäki, 2004: 1).

Some studies like on the measuring and the reporting of intellectual capital were undertaken by OECD (OECD, 1999). Since the early 1980s, the extent of IPRs has been strengthened and broadened in the US. 80

There are two main international organizations, WIPO and the WTO. WIPO has more long historical background rather than WTO. WIPO was founded by the United Nations in 1970. But it has not realized the significant contributions to the global protection of IPRs for countries. The WIPO has been criticized for its lack of economic perspective (Srinivasan, 2000).

The TRIPS Agreement, signed in 1994, has engendered controversy among corporations, individuals, and governments. The TRIPS Agreement conceived, planned, designed, and formulated by multinational companies and the G-7 countries (Chandiramani, 2002: 201). Those TRIPS-WTO members who signed the TRIPS Agreement are obliged to comply with respect to copyrights, patents, trademarks, and industrial designs. The intent of TRIPS was to ensure uniform strong IPRs in all member countries. However, IPRs varied internationally when nations formulated IPRs to meet the needs of their societies. With the TRIPS Agreement, there were minimum standards of protection in every country for the first time. The TRIPS Agreement is renowned for a number of reasons. First, TRIPS is the most important attempt to globally harmonize and protect the enforcement of IPRs by creating international standards (Archibugi and Filippetti, 2010: 137). Not one of the organizations discussed above have provided a global policy on IPRs. However, a global solution is crucial for countries. Protecting IPRs within a country will not suffice (Anderson and Razavi, 2010: 266). The target of TRIPS is to globally harmonize IPRs. Second, the TRIPS Agreement was motivated by the need to change the international legal framework for trade and economic relations among states (Cullet, 2007: 419). TRIPS established a functioning multilateral
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The legal framework (The WTO, 2005: 142). The TRIPS Agreement was based on the three basic principles of GATT as well as the standards expressed in international conventions such as the Paris Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (Finger, 2000:430). These three basic principles are: National Treatment, Most Favored Nation Treatment and Transparency. Article 4, Most Favoured Nation Treatment shows that TRIPS is a global policy.

TRIPS Agreement covers the seven main areas of IPRs: copyrights, patents, trademarks, geographical indications, industrial designs, layout-designs of integrated circuits, undisclosed information and contractual licensees. The minimum standards are similar for each of these seven areas such as other use without the authorization of the right holder, exceptions and the terms of protection. The TRIPS Agreement was amended at the 2001 WTO Ministerial Conference in Doha, and some of the articles of TRIPS were liberalized (The WTO: 43).

The deadline for developing countries to enact legislation in all areas except pharmaceuticals was 2013. After the declaration in Doha, the period for the implementation of TRIPS was extended to 2016 for the developing and the least developed countries (Dhar, 2001:43). Developing countries had a five-year transition period until 2000 to apply the provisions of the Agreement. An additional five-year transition period until 2005 was provided.

Since the Agreement was established, TRIPS was heavily debated by scientists and various organizations (Markus, 1998). The TRIPS Agreement has become a contentious subject in both academics and political organizations.

The structural power of the transnational capital increased pressures on developing countries during the 1980s. The increased structural power of the transnational capital was determined by two factors. First, the scope and the scale of the transnational finance capital increased. Second, there was the general profitability crisis of the capitalist production (Eren-Vural, 2007:120).

There are two different opinions on the impact of TRIPS on developing countries. The most essential criticisms states that TRIPS has negatively affected developing countries. According to this view, TRIPS benefits many rich developed countries and only a few poor countries (Srivinasan, 2000:3). Developing countries have scarcely benefitted from TRIPS, which may be inappropriate for their socio-economic and technological needs. Critics have denounced TRIPS as imposing the standard of the western IPRs system on developing countries. The interests of the United States and European countries required that other countries set stricter IPRs (Karayanidi, 2011:267). Arguments have focused on the equitable distribution of benefits between developed and developing countries and whether TRIPS causes losses in developing countries. These costs, called “deadweight losses”, result from reduced competition. According to another view, which is accepted by developed countries, TRIPS allows developing countries greater access to technology and innovation. The basis for this perspective is that IPRs strengthen the incentives for developing countries to pursue their own research and development and help promote direct foreign investments. Advocates of strengthened IPR protection counter that IPRs laws actually hinder access to investment and technology in the developing world because; the fear of losing their technologies motivates companies to avoid making investments there. Technology transfer takes place through various mechanisms. For example, in developing countries, the private sector prefers to devote their resources to the development of drugs against diseases that are typical in those countries (Duran and Michalopoulos, 1999:853, 857; Watson, 2011:253, 254).

Is this critique right or not? We answer this question by considering the actual significance of TRIPS for both developing and developed countries.
4. The Different Significance of TRIPS in Developed and Developing Countries

The significance of TRIPS differs for developing and developed countries. Before TRIPS was signed, debates focused on property rights rather than IPRs. Since TRIPS, the debate has shifted from property rights to IPRs especially for developing countries.

The TRIPS Agreement has placed more burden on developing countries

In some countries, the IPRS system is strong and provides strong protection for patent holders against infringements, but other countries (India, Spain, Peru, China, Turkey, Venezuela, Brazil) have much weaker IPRS systems. Because TRIPS obliges all member countries, regardless of their level of development, to apply the same standards except for transitional periods, a number of developing countries have introduced important changes in their IPRs systems to comply with TRIPS (Correa, 2001:1). TRIPS Agreement provides permanent and comprehensive IPRs in developing countries for the first time. For example, India and Brazil did not provide patents for drugs because their public policies focused on providing cheap drugs for their citizens. However, after the adoption of TRIPS, these member countries were required to provide patents for drugs (TRIPS: Impact on Developing Countries). Therefore, people in developing countries must buy more expensive foods and drugs than before TRIPS. Meanwhile, patent holders, usually located in developed countries, receive more profits from stronger protection of IPRs (Adolf, 2001:67).

The WTO established a council to monitor the compliance with the Agreement by member countries. Some claimed that TRIPS was planned and formulated by advanced countries and their multinational corporations. Developing countries devote virtually no resources to innovation and have little intellectual property to protect. Thus the majority of economic interests prefer weak protection of intellectual property (Lall, 2003:1658).

Technology transfer is different from imitation. The developing countries are associated with creative imitation. Without imitating, it is impossible to innovate. For example, during the 19th century, Germany and the United States used knowledge developed in the United Kingdom. There are many channels for technology and knowledge transfer by direct foreign investment, joint ventures and IPRs. Developing countries will have to demand technical assistance to build strong IPRs. They should provide sustainable high-quality public administration and effective judicial enforcement of intellectual property (Sheedwood, 1997:544). However, strengthening IPR can increase in direct foreign investment.

TRIPS has allowed developed countries to increase their bargaining power over IPRs

Developed countries regard TRIPS as a tool to strengthen IPRs protection standards (Anderson and Razavi, 2010: 270). According to Archibugi and Filippetti (2010), TRIPS is the key instrument of the silent revolution in IPRs beyond the West.

Drahos explains that there are four sources of this bargaining power (Drahos, 2003:82–4):

(1) A State’s market power,
(2) A State’s commercial intelligence networks,
(3) Enrolment power (the capacity of a State to enroll other actors in a coalition),
(4) A State’s domestic institutions.

Developed countries with these resources have the advantages of stronger bargaining power. It is suggested that developing countries form coalitions to obtain some concessions in negotiations with developed countries. Creating coalitions may balance the bargaining power between countries. However, multilateral trade negotiation can give opportunities for developed
countries to form coalitions. For example, in the past, the GATT regarded as a coalition between the United States and the European Union. That coalition cannot be considered in exactly the same way as coalitions between countries (Karayinidi, 2011:269).

Another proposition for developing countries is the paradox of weakness. Weakness is often strength, according to paradox of weakness. Developing countries can use weakness to achieve their interests. By defending itself against a perceived injustice, a weak state can gain an advantage over a strong state in a negotiation (Karayinidi, 2011:270).

**According to TRIPS, the term of patent protection of must not be less than 20 years.**

The TRIPS Agreement extends the term of protection of patents.

**The TRIPS Agreement increased the protection areas of IPRs**

TRIPS has expanded the protection area to include pharmaceutical and agricultural chemicals, which were not protected previously. Before TRIPS, countries had more options to exclude technology from IPRs protection.

Because most IPRs, especially patents, are held by developed countries, TRIPS shifted the global conditions in favor of those countries (Lall, 2003:1658), which could be means for exploitation and monopolization vis-a-vis developing countries (TRIPS: Impact on Developing Countries:7).

While Article 8.1 in the TRIPS Agreement permits the members to design the national patent laws to protect public health and promote the public interest in sectors that are important to their socio-economic and technological development, such measures should not violate the provisions of TRIPS.

Article 31 of TRIPS allows a government to use patented inventions without the authorization of the patent holders, provided that this use must comply with the requirements and the conditions given in this Article (Chandiramani, 2002: 203).

**TRIPS Agreement limits the compulsory licenses**

The TRIPS Agreement limits the scope of compulsory licenses (Chandiranabi, 2002: 201). Compulsory licenses are provided to governments. Since, developing countries do not have domestic manufacturing capacities; compulsory licenses in TRIPS would be meaningless for these countries. Such licenses are mechanisms used to promote competition and prevent the abuse of patent rights and monopolies (TRIPS: Impact on Developing Countries:7).

Compulsory licenses can be regarded as significant opportunities for local manufacturers in developing countries to bypass the exclusivities provided by patents (Eren-Vural, 2007:122). Developed countries did not make their patent laws compliant with compulsory licenses. Only Canada has taken some measures in its patent law.

When TRIPS was under negotiation, members required and promoted the “effective” and “adequate” protection of IPRs, which took into account the differences between national legal systems.

**In TRIPS, intellectual property protection should contribute to technical innovation and the transfer of technology**

Article 7, states that “the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.”
However, developing countries highlighted that while technology transfer has advanced since the signing of TRIPS, they must pay exorbitant prices use foreign technology (Duran and Michalopoulos, 1999:866).

Article 8 states that the member countries may take necessary measures to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided that these measures are consistent with the provisions of TRIPS.

This Article is not especially beneficial to developing countries for several reasons. First, the sectors of vital importance are not ismade. Second, there is no authoritative interpretation of this provision in the subsequent articles in the TRIPS Agreement. Developing countries are not free to take measures for public health and nutrition in their national laws (Adolf, 2001:61).

According to Schulz and Wu, Several factors contribute to problems in IPRs enforcement in developing countries, such a technological change. Changes in technology have made it easier to globalize production. Another factor is political will. Not every government is in their best interests to strengthen IPR.

5. Previous Empirical Studies on the Relationship between IPR and Technology Diffusion

There is very the empiricalliteratureabout whether TRIPS increases technology transfer to developing countries. In research, the effects of IPRs protection has been measured by the relationship between patents, licensing, direct foreign investment, research and development expenditure and IPRs protection. Economists have focused on patents and licenses, since data on patents and licenses are easily available. The study by Watson (2011) showed a positive empirical link between stronger IPR protection and higher levels of technology diffusion, with three caveats. First, the evidence was suggestive, but there were problems with the data, measurement, and the statistical methods. Second, the positive effect did not seem to hold for the least developed countries, and the correlation may be negative. Third, it always important to examine data disaggregated by industry since IPR protection has different effects on various sectors (Watson, 2011:254).

Maskus and Yang found that while the relationship between foreign direct investment flows and IPR protection was mixed, the empirical evidence showed a positive and statistically significant link between the strength of the intellectual property protection and the number of licenses granted. Also their findings showed that stronger patent protection in developing nations was likely to expand their exports of patent-sensitive goods to international markets. Braga and Fink (1998) conclude that IPRs affect decisions around the world. Chen and Puttitanun (2005) evaluated their empirical studies using data that included 64 developing countries over the 1975–2000 period. Their result showed finds both the positive impact of IPRson innovations in developing countries and the presence of a U-shaped relationship between IPRs and levels of economic development. In addition, Chen and Puttitanun (2005) found that IPRs protection and per capita GDP had a positive and statically significant impact on the number of patents filed. They indicated that IPRs law may increase innovation to a greater extent in richer countries.

Rao (2006) claimed that the TRIPS Agreement created insurmountable problems. For example, the least developed countries previously imported pharmaceuticals at low prices. But post-TRIPS, all countries provide a high level of patent protection, and prices may be high.

Adolf (2001) demonstrated that the application of intellectual property rights should depend on the different economic and other factors in member countries.
Shultz and Wu (2004) explained that many developing countries such as China were taking full advantage of the strengthened IPRs. However, in many developing countries, the administrative and judicial progresses were failing in their struggle with IPRs crimes. Several factors pertain to problems with IPRs enforcement in developing countries. First, technological development has made it easier to globalize production and to counterfeit goods. Governments not are convinced that strengthened IPRs are in their best interest. Another factor is the issue of resources. Many developing countries do not have enough funds to build a strong IPRs system.

The empirical analysis of Schneider (2005) was based on a panel data set of 47 developed and developing countries from 1970 to 1990. Their results suggested that IPRs affected the innovation rate, but this impact was more significant for developed countries. IPRs might even negatively impact innovation in developing countries. Cardwell and Ghazalian (2012) suggested that the TRIPS Agreement was successful in coercing WTO member countries to strengthen their domestic protection of IPRs. According to their empirical evidence, the effects of the TRIPS Agreement on IPR protection in Europe were positive but not significant. This result was expected because many European countries maintained IPRs protection systems near or at the level of TRIPS Agreement before 1995.

According to a World Bank report, there is limited empirical evidence for a positive link between IPRs protection and research and development (World Bank, 1998:34).

5. Conclusions

The TRIPS Agreement is an important agreement, and its implementation and results differ in developed and developing countries. Developed countries, have IPR protection systems that closely resemble their TRIPS Agreement obligations, while developing countries should establish tightening IPRs protection systems. Our article includes many results. Our analysis suggests that TRIPS leads to serious problems for many developing countries. In principle, the TRIPs Agreement promises discourse and representation off all members. In the TRIPS Agreement negotiations, there was a highly asymmetrical distribution of power between developed and developing countries. Our analysis indicates that TRIPS creates crucial problems for developing countries. First, the Agreement does not allow developing countries to have greater access to technology and innovation. Second, developing countries should be driven by technical and financial assistance for IPRs systems. The major issue about IPR in developing countries has adopted stronger laws protecting IPR. Developing countries can form coalitions to obtain some concessions against developed countries. But this would not be easy because developed countries are seeking coalitions among themselves, which would not be to the developing countries' advantage. Paradox of weakness suggested may help developing countries to get power what they want. However, this tactic is not valid all time. It is to get hard to perceive this agreement will benefit developing countries that the lack of special provisions for developing countries.

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