Multi-Agency Support Team (MAST) Meeting on Non-Tariff Measures (NTMs) Classification

5-6 October 2016, UNCTAD

Working Group on Intellectual Property: Chapter N

Chair: Christoph Spennemann, UNCTAD
UNCTAD focal point: Denise Penello Rial

The highlights of the meeting of the WG on IP are:

1. The group has established preliminary categories for IP which is comprehensive of IP rights. Classification goes along the IP categories (patents, trademarks, copy rights, Geographical indication, Industrial designs).
2. Parallel imports should be a cross-cutting extra category.
3. The need for the private right holder to enforce IPR should not prevent its inclusion in the database.
4. Refer to registered rights rather than IP laws in general.
5. There is an unresolved problem for copyright & trade secrets, as in some countries there is no registration.
6. IPRs on parts of a final product pose a challenge, as HS code in trade data only refers to a final product without providing information on IPRs on parts of that product.
7. WIPO work exists to provide concordance between the Nice classification system of TMs and economic activity data (SITC and ISIC). It is still to be studied if the same can be achieved between Nice / patent registration etc, on the one hand, and the HS code on the other. A consultation between WIPO classification experts and HS experts (UNCTAD, WTO?) has to be organized to this effect. This is the next step.

Is this possible or desirable?

The discussion was rich. It was stated that it is hard to know if and when IP can affect trade in goods and so planning to collect data may be difficult. Moreover, is not certain if there is any impact on trade, and this is why planning to add a chapter on IP for NTM may not be advisable. Other members of the group thought that IP may influence trade and, thus, they should be included in the NTM database. Furthermore, a database should not pre judge impact on trade in any way, but instead offer all information to traders and analysts. It is the latter to study and determine any significant impact, being positive or negative, or null. It could be interesting to have the information together with other types of NTM without a pre-judgement.

Agreements

There were agreements in the group.

1. As a principle, it was judged more useful to register in the IP NTM database all the individual registration of rights with corresponding protected product, rather than registering the general IP protection laws
2. IPs as private rights are enforced by the right holder, even though there are cases of *ex officio* enforcement by state authorities. For a trader, it will in any case be important to be aware of the existence of an IPR, even if its enforcement depends on additional steps to be taken by the right holder. It would be risky to assume non-enforcement by the rights holder.

Approach concepts discussed

In particular, some of the conceptual areas discussed are:

1. It was questioned whether IP really are really NTM
2. It was mentioned that IP is not as any other NTM chapter, because they do not prevent trade
3. There could be too many rights on a product and so the database would look different from other chapters, and in this way, not being consistent with the existing database

The group answered these questions, preliminarily. IP rights protection does not prevent trade, the rights holder can export and import, and IP protects its investment in innovation. Alternatively, a company may pay and hold a licence, in which case the cost-increasing aspect of trade can well be considered an NTM. IP can affect trade when there is imitation or when there is reverse engineering, in patents for high tech, for example. Parallel imports are also an area of concern and regulation. Some countries allow them, and others do not. These are cross cutting across all types of IP rights. Including this in the IP classification is desirable, though it makes the taxonomy not though not mutually exclusive.

The approach taken in the area of IP was presented by the chair. Intellectual Property rights can be considered into the database of NTM if complying with the rights can be considered as a condition for the product to be accepted for trade. In that sense, IP rights can be compared to a supplementary requirement the product has to meet to be accepted for trade, the same way as any other products characteristic. For example, a technical certification does not prevent trade, but ensures that the product meets the requirement. (This is especially correct for patents. In the case of trademarks, product as such may be traded, but without the identifier).

At the same time, IP data are different to technical measures because a list of IP measures would not be a list off requirements to fulfill as would SPS requirements be, for example. Protected products under IP would need to 'meet' just one measure, which is that the trader holds the right, or has a licence.

This fact leads to the third point, which signals that one product may have too many trademarks or copyrights. In this respect, it was mentioned that for statistical purposes, just naming one IP right would be enough, while for information purposes for traders, full data can be disclosed. It was also mentioned that it would be interesting for traders to know the

name of the rights holder, in case someone would like to export the protected product, so as to facilitate the licencing agreements and reduce costs by increasing transparency.

Implementation challenges

The discussion went all along to address practicalities of data collection as well. In this area there are still challenges and questions to answer.

1. The identification of HS products affected is key for an NMT database.
    a. Patents. This is particularly challenging for patents, but less problematic for other types of IP rights. The main difficulty for patents is that very often they protect components, inputs, or processes which are not reflected in trade statistics. For example, a smart phone, which has a specific HS code, holds a number of patents for other products which will not be associated with the final product traded. He database would register a number of patents on input products (or processes) that would never be associated with the final product traded. At least, this is what the group can suggest for the moment. This seems a priori less of a problem in other types of IP, such as copyrights, but the same situation may apply for trademarks. Also, some patents may be dormant in practice, as there is no more commercial interest to defend the right
    b. Copyrights. On the other side, in some countries, copyrights are not required to be registered to be protected, and it could be a challenge to know them. They would go unnoticed in the database.
2. Source of data. The WIPO database was mentioned as a valuable source of information. This database collects information from national official sources (national IP registries) in a standardized and systematic way. It also encompasses different types of rights and detailed information for each inscription. If this data source proves correct and enough, and all the conceptual areas are resolved, then the data collection in IP is feasible.

Other matters

Research on IP and trade is a well-established area of research. If the main objective from and IP NTM database is statistical, it can be a good idea to consult and gather researchers that already tried to measure this in econometrics. Some of them used, not HS, but other product classification, which are closer to production data, such as ISIC, or NIC. These are closer

Conclusion

1. IP NTM categories could be:
    a. Copyright, Trademark, Geographical indication, Industrial designs, plus a generic category for Parallel Imports
    b. Parallel imports are cross cutting across all types of IP rights
2. Data can be collected from WIPO
3. HS product affected can be assigned
    a. mainly to Trademark, Patents, Geographical indication, Industrial designs, as long as they are in the WIPO database

b. Copyright when they are registered in national offices and then transferred also to WIPO database
c. Patents could be assigned to products, but they may not correspond to actual final goods traded, as appearing in trade statistics
d. Partial coverage on the product could be systematic so as to reflect the fact that only a particular type is protected
e. WIPO product classification system?