

## **Politics of Intellectual Property Rights: The Case of Malaysia-US Free Trade Agreement**

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**Abstract:** Bilateral Free Trade Agreement (FTA) has been an increasing trend over the past decades. Highly developed countries are getting into FTA with the emerging economies in order for maintaining competitive advantage. A particular area of such agreement is Intellectual Property Rights (IPRs) in superior technology and research. The bone contention of the ongoing Malaysia-US free trade negotiation has been the IPRs. This study looks at the central issues of the negotiation process. It contends that both Malaysia and USA are concerned with their political priorities conditioned by their domestic necessities that influence the negotiation and signing of an agreement. The United States resorts to bilateral and multilateral means to impose its priorities while Malaysia asserts its national interests with domestic economic and political priorities.

**Key words:** Free trade agreement, united states, malaysia, intellectual property rights, political economy

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### **INTRODUCTION**

While, the world has been moving towards a global free trade arena, a counter-trend known as regionalism has simultaneously been active over the past few decades. Added to the trends is bilateral free trade agreement during the past one and a half decades. Like many economies, the United States has signed Free Trade Agreement (FTA) with 14 countries around the world (USTR, 2014). As one of the strongest and leading economies it induced other equal or smaller economies to get into FTA with the USA for obvious economic and trade benefits. In this circumstances, Malaysia as a prospering economy in Southeast Asia has been in the process of striking an FTA deal with the USA. The prospect of US-Malaysia FTA is triggered by the successful US-Singapore FTA in 2003.

Obviously, FTAs are signed to advance national economic interest propelled by the prospects of comparative advantage. However, beneath economic interests lie political and even military interests of the global economic giants. Part of pursuing American national interest would potentially be to establish and consolidate its hegemonic presence in the Asia-Pacific region which is being promoted by the initiative called Asia Pivot. This in part is achieved through its economic activities which simultaneously serve geopolitical goals as well. Such objectives are achieved through trade liberalization. It is the hegemonic presence that the USA wants to maintain in the region which is why the country has continued efforts in negotiating terms of the Trans-Pacific Partnership (TPP). The most important area

of intense negotiation has been the issue of Intellectual Property Rights (IPRs). Invariably, the issue of IPRs remained inseparable from all the FTAs that the USA has signed so far.

Malaysia as a developing country depends much on the US market but at the same time its IPR concerns remain pivotal to any FTA with the USA. Due to huge economic disparities between the two countries Malaysia has remained more cautious in dealing with the issue realizing perfectly that the USA would obviously take the advantage of its economic strength and superior technological feat. Furthermore, FTAs require further amendments to domestic intellectual property rights laws going beyond the standard of the World Trade Organization (WTO). Thus, Malaysian concerns are dictated by the prospects of relative gains that the country might accrue from the FTA signed with the USA.

This study looks at the politics of IPR in the prospective Malaysia-US free trade agreement. In so doing the study considers how both parties frame their policy references with regard to IPRs focusing, especially on the pharmaceutical industry. The basic questions that the study attempts to answer are what are the main IPR concerns for Malaysia and how has the government responded? What are the potential impacts of IPR on Malaysia? And what are the geopolitical factors that influence the overall FTA negotiations?

### **THEORETICAL APPROACH**

The general mode of the post-war economy has been the free market economy based on the theory of

neoclassical thought. The central tenets of the thought are that the market is a place where free and equal competition is ensured to every economic player. Secondly, the role of state in such a perfect market mechanism is minimal. However, this economic thought has come under serious challenge over the past few decades. Depending on technological progress and globalized competition a number of theories under free market economic line of thought have advanced new ways of competition for players in the market. Those theories include theory of endogenous growth (Scott, 1989; Romer, 1986; Lucas Jr., 1988), new endogenous growth theory (Romer, 1990; Helpman, 1992), the new economic geography (Krugman, 1991) and strategic trade theory (Grossman, 1992; Krugman, 1986). Among these, Strategic Trade Theory (STT) stands out to be the most attractive with persuasive arguments and rationales. The economic trends of regionalism and FTA are molded with the principles and arguments of the STT.

The strategic trade theory has modified the conventional trade theory challenging the previously held theoretical foundations and unfettered commitment to free trade (Krugman, 1986). The most fundamental belief of the theory is in the imperfectness rather than perfectness of competition in the market (Grossman, 1992). In an environment of perfect competition small firms cannot enjoy advantage through strategic behavior nor can they change the rules of the game. In such a situation economies of scale where natural the market support only a few large firms dominate and create an oligopolistic environment (Brander and Spencer, 1983). In today's world usually high tech and biotechnology industries enjoy such oligopolistic advantage. And secondly, the theory also holds that the role of governments in market competition is very fundamental. So "the central idea of the new Strategic Trade Theory (STT) is that firms and governments can behave strategically in imperfect global markets and thereby improve a country's balance of trade and national welfare" (Gilpin, 2001).

Another aspect of the STT is it beliefs in certain economic sectors that are strategically more important than others and therefore, these sectors require government protection and support. For the highly developed countries such sectors include aerospace, semiconductor, computer, defence, biochemical and such. For developing countries the sector would include manufacturing, agriculture and information technology and such. So, the governments and firms of these countries would adopt strategic policies so as to maximize the protection of their national interest through trade negotiation. The Malaysia-US FTA can be analyzed in the framework of the strategic trade theory where both countries try to maximize their respective interests through bargain and negotiations.

## **IPRS UNDER THE WTO**

The WTO has established a benchmark for global intellectual property standards under the banner of Trade Related Intellectual Property Rights (TRIPs). The cornerstones of the standards are the minimum protection of copyrights and related rights, trademarks, geographical indications, industrial designs and patents. However, bilateral FTA usually goes beyond these general standards and requires further modification of domestic laws to adjust with the preferences of the negotiating partners. Such approach is known as "TRIPs-plus" which the USA puts emphasize most. However, the problem precisely lies in the issue because additional amendments often cause ripple effects that spill over other areas of negotiations. Since, the issues are complex and interrelated, impacts of such provisions can result in significant advantages and disadvantages depending on the relative strength of a negotiating party. It is precisely, this concern that generates trade frictions between the industrial North and the developing South. It is generally, argued that the developing countries produce little IP of their own which means stronger patent rights in favor of highly industrial countries could lead to suppressing the growth of IP in the Southern countries and increased outflow of royalties from there. Malaysia being a developing country in the South with potential technological advancement, its concern on IPRs remains paramount.

## **IPRS POLICY OF MALAYSIA**

The development of IPRs policy in Malaysia dates back to 1972. The Trade Description Act of 1972 provided general guidelines on intellectual property issues which were later developed further in 2002. In 1983, the ministry of Domestic Trade and Consumerism created a body involving IP related provisions which was later in 2003 corporatized under the name Intellectual Property Corporation of Malaysia. With technological advancement in the recent years Malaysia furnished the policy further and established MyIPO in 2005. Finally, in 2007, the government announced its IP policy allocating RM5 billion over the subsequent several years to be spent on scientific innovation. The National Intellectual Property Policy (NIPP) outlined all strategies and goals relating to strengthening IP related issues in Malaysia. Its basic objective is to preserve an IP based knowledge economy in a competitive world. Other objectives of NIPP included ensuring that IP became an integral part of the national economic policy, promoting effective IP management and establishing an IP culture (Antons, 2006). The initiative of Malaysia was appreciated by the International Intellectual Property Alliance (IIPA, 2011).

In line with the NIPP the government established IP court in 2007 in order to ensure proper enforcement of the laws and mitigation of IP related conflicts. This provided an avenue for sharing the burden of cases with other courts. Even though, the measure if appropriate as required by the global standard, the effectiveness of the court remained questionable (Antons, 2009). The IIPA report of 2008 suggested a satisfactory report of IP enforcement in Malaysia but only in the areas of combating piracy and the illegal selling of optical disks. The tight enforcement in these areas is accompanied by heavy fines or imprisonment. However, the USTR report suggests a decline in rates of enforcement from 2007-2008.

Despite shortcomings the IP legislation in Malaysia is largely in compliance with TRIPs requirements. The issue is slightly more complex when framed within the framework of an FTA be it bilateral or multilateral. This is because such FTA negotiations usually involve stronger IP regulations beyond the required ones by the TRIPs. Nevertheless, apart from this issue there are still areas of weaknesses in Malaysian IPRs and their enforcement.

#### **EVOLUTION AND POLITICS OF THE MALAYSIA-US FTA**

In 2003, the US-Singapore FTA was signed after 2 years of negotiation. This successful endeavor encouraged the US to propose a similar agreement with Malaysia in 2006. The primary provisions of the proposal included removing of tariff and non-tariff barriers and make trade easier between the two countries. The proposal had similar features of the US-Singapore FTA such as providing greater freedom for Americans to invest in Malaysia's rapidly developing economy and industrialization.

Since, the USTR intent in beginning an FTA talk with Malaysia in 2006, several rounds of talk continued until July 2008. There were several rationales why an FTA with Malaysia was initially pursued and appealing to the USA. One of the most appealing was the basis of Most Favored Nation (MFN). For the US, the average tariff rate was 8.1% whereas on MFN basis the rate would be 4.9% almost half of the US rate. Therefore, under an FTA between Malaysia and USA exporters from both countries would be under the obligation of the same standard rate enjoying all exporting parties an equal opportunity. In addition, Malaysia was of interest to the US in its potential to reduce barriers in the export of US products such as automobiles and agricultural products as well as broadening government procurement of US products. All these would eventually oblige Malaysia to be stricter on enforcement of IPRs.

In particular, there were two main areas of interest to the US pertaining to issues to be looked at in an FTA with Malaysia. These areas are stricter IPRs protection and government procurement provisions. The IPRs protection was a big concern for the USA. In October 2001, the USTR placed Malaysia on the 301 Special Watch List indicating the Malaysia is a violator or potential violator of the US IPRs. This listing was done with a goal to for the USTR to monitor Malaysia's development in IPR protection. In its 2006 Special 301 Report, the USTR observed that despite some perceived improvements and developments in Malaysia's IP laws and enforcement such as combating piracy, there remained many deficiencies. The US concern was almost exclusively narrowed down to the pharmaceutical products. The US wanted to maintain its IPRs and upper hand ensured in line with its rules regarding data exclusivity, the commercial use of undisclosed data test results by pharmaceutical companies as well as seeing market approval for the tests (Chakrabarti, 2014). These were the factors which made USA put Malaysia on the 'watch list' in order to force the latter to improve its IP laws and enforcement. Indeed, patent linkage and data exclusivity are the two most important issues that have been included in all FTA negotiations of the USA with other countries and the USTR maintained its firm determination in not acquiescing to any change to its provisions. This implied that the counterparts must come to agree to change theirs (Galantucci, 2007). Malaysia shifted its position and eventually was removed from the list in 2011.

The most contentious issue in this regard has been the pharmaceutical industry. The opponents argued in relation to AIDS medication and the impact any agreement is likely to have on patient and pricing. The issue is clearly a matter of data exclusivity and patent linkages. Linkages refer to the expansion of the role of the drug regulatory authority. Under normal circumstances, when a drug applies for market approval, the regulatory authority under the ministry of health only looks at whether the drug fulfils the safety requirements. The issue of patent does count. The authority does not possess jurisdiction on the patent and thus market approval is given to third parties even before a patent term has expired. Therefore, patent linkage became an issue of contention in Malaysia-US FTA negotiation (TWN, 2007). This is based on the understanding that if the originator still has a patent in effect no generic manufacture can be approved for market approval, unless the patent holder is notified and consent given (Lopert and Gleeson, 2013).

The impact of such contention of the Malaysia-US free trade is considered to be huge on Malaysia. Firstly, the patent holders would maintain upper hand and by

default would enjoy a monopoly over 20 years which would suppress growth of Malaysia's pharmaceutical industry. Secondly, patent linkages would inadvertently delay the entry of generic medicines into the market even after a patent term has ended harming healthcare in Malaysia. And finally, compulsory licensing mechanisms may not be available and effective (Galantucci, 2007).

The second issue of political contention is in terms of government procurement. For Malaysia, the political sensitivity is high due to two factors. First that Malaysia is not a signatory to the WTO Government Procurement Agreement. And second, the infringement of the notion of impartiality by the Malaysian policy of preferential Bumiputera policy which grants ethnic Malays special treatment. According to this policy, the government procurement reserves a certain share solely for the ethnic Malays, foreign companies are required to take on a local Malay partner before their bids are taken into consideration and the selection and awarding procedures in Malaysia lack transparency. The position of the US negotiators against these points has been that they go against fair competition reducing the opportunity for other partners (CRS, 2006).

There were other political factors that made an obvious count in the FTA negotiation process. One such factor was the coincidence of Israeli military invasion of Gaza at the end of 2008 in addition to the ongoing Israeli blockade on Gaza since 2006. Domestic opposition towards Israel in Malaysia led to a call for the boycotting of the US products in the first place making any progress on FTA talk impossible. This was reflected in the comment of the then International Trade and Industry Minister that FTA negotiations with the US would not be rushed in light of Israel's Palestine policy (Martin, 2009). Besides, national elections politics of the two negotiating countries also had slowing effects on the negotiation process.

#### **MULTILATERALISM AS A POLITICAL MEANS**

Trade is equally political as it is economic. While, the US has been trying to woo several Southeast Asian countries into bilateral FTA, it is also equally active in using multilateral channels to achieve its objectives. Trans-Pacific Partnership (TPP) is an on going multilateral forum that encompasses greater areas and bigger partnership. Many aspects of the TPP negotiations are apparently dealt with a high degree of confidentiality. However, if the recent leaked document on negotiations regarding intellectual property is any indication, then it is suggestive that the US aims to enforce stringent IP protection and

enforcement standards on the TPP countries. The 2011 IRP proposals relating to pharmaceuticals known as the Trade Enhancing Access to Medicines (TEAM) initiative, aims to facilitate innovation through the adoption of stronger patent term extension, data exclusivity and patent linkage systems available for companies that apply for market approval for their products using a TPP access window. This is indicative of US maintenance of comparative advantage in its favor.

The same issues that hindered bilateral FTA between USA and Malaysia are now apparent in TPP negotiations. They revolve around the issues of pharmaceuticals and the issue of government procurement (Rinehart, 2014). This means as the leaked document suggests, the impact of the TPP intellectual property chapter can be far more extensive than FTA. Stipulations under the "transparency and procedural fairness for healthcare technologies" illustrate a scenario in which parties to the negotiation would be compelled to conform to obligations relating to not only pharmaceutical pricing but reimbursement schemes as well. This in turn is suggestive that every country's control over policy space to adopt and enforce therapeutic formularies, reimbursement policies and other price-moderating mechanism in their respective healthcare systems would be significantly limited. Despite the fact that there are still a number of developing countries that have yet to adopt pharmaceutical reimbursement schemes, the leaked provision suggest that the type of scheme would be prescribed onto them as opposed to allowing the governments to choose or design a system that is more suitable to their specific national priorities, goals and interests. Moreover, this means that the provisions not only imposes obligations on regulations alone but also affect how domestic health policy-making is being shaped (Manaf *et al.*, 2014). This is quite a significant provision as it technically goes beyond the score of IP in terms of 'transparency' and controlling price-moderating mechanisms. In addition, this is not only confined to medicines but includes medical devices as well (Lopert and Gleeson, 2013).

So, assessing the impact of TPP it seems that its scope is much wide for the negotiating parties as opposed to bilateral FTA. From the US standpoint, it seems much more beneficial and logical why it has shifted its agenda and focused more towards a regional approach instead of prolonged bilateral approach. The greater advantage for USA is that if TPP agreement takes place then there is a potential that global standard would be imposed later. In such contexts, the developing countries will have little leverage in negotiation implying that they will have to align their IPRs in line with the imposed standards.

This makes the FTA prospect between USA and Malaysia more problematic. This is because Malaysia looks at any FTA from not only economic but also from political perspective. The issues of contention are the government's Bumiputera policy and the policy of government procurement. Since, regionalism and bilateralism are strong trends it is likely that Malaysia-US negotiation will continue both at bilateral and TPP levels. However, it is likely that Malaysia will stick to its Bumiputera and government procurement policies (Moniruzzaman, 2013a). Because judging its domestic politics it is highly unlikely that the preferential treatment given to the Malay ethnic group will change anytime soon (Moniruzzaman, 2013b). Secondly, government procurement policies are unlikely to change anytime soon which means the process will continue to be relatively non-transparent. This is as long Malaysia chooses to remain a non-signatory to the WTO Government Procurement Agreement.

It is difficult to say whether pursuing bilateral FTA would be more appealing for Malaysia than negotiation at TPP level. But what is clear is that the USA irrespective of entering negotiation bilaterally or multilaterally will continue to pursue high levels of IP protections. In the case of bilateralism, Malaysia's position is weaker whereas the USA gains more due to its strategic strengths. On the other hand, the environment surrounding the current TPP negotiations under the IP provisions also are not so promising. Despite the logic that high level of IP protection fosters an environment of innovation and attracts foreign investment, the fact remains that the countries or international firms that maintain monopoly in Research and Development (R&D) always reap much higher benefits. The developing countries with weak infrastructure and less competitive capabilities prefer a sort of 'safety net' for their healthcare systems with relatively easier access to medicine.

The US's TRIPS-plus provisions in FTA are nothing new and this is especially the case in the sector of pharmaceuticals and medicine industry. Though, both FTA and TPP run on the basis of free trade and liberalism, the new economic theories provide justifications for resorting to protectionist measures in an environment of imperfect market competition. As such both Malaysia and USA will behave similarly in order to protect their respective national interest while pursuing the counterpart to agree to its own terms.

### **CONCLUSION**

Malaysia's goal in becoming a developed country by the year 2020 indicates that it is steadily transforming

into a knowledge-based economy that promotes research and development based investment. Nevertheless, it appears that the levels of IP provisions present in both US-Malaysia bilateral talks and the TPP surpass far more than what is necessary to accomplish the goals (Galantucci, 2007). However, what is more troubling is the potential impact for Malaysia of IP provision under TPP. Bilaterally, Malaysia may withstand US as a single economy on IP issue for an extended period of time but multilaterally Malaysia's position is likely to be very vulnerable if an IP related agreement is reached at the TPP level with many regional economies consenting. Malaysia's position will have to be changed at the cost of domestic political compromise in that situation.

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