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Measuring Intellectual Property 'Strength'

A Comparative Analysis of the PRC's and Japan's IP Protection Regimes

Topic and Research Question

Despite international harmonisation in the field of intellectual property (IP) protection and the conclusion of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the extent of protection and enforcement of IP rights still varies widely around the world with different levels of protection granted even among the TRIPS member states. Against this background, determining the level of IP protection in a given jurisdiction as well as in cross-country comparison has become a lively area of research. In this vein, the present MA thesis seeks to answer the following research question:

What are the shortcomings of the IP protection regimes implemented in the People's Republic of China (PRC) and Japan from an IP owner's point of view, considering the legal situation as well as practical aspects?

The findings obtained from answering this research question may permit companies to assess the IP investment risk in the PRC and Japan and thus support their business decisions involving IP. Further, China as well as Japan have officially acknowledged the value of having a solid level of IP protection, giving it top priority for future policy making. Hence, knowing the answer to the research question outlined above would allow policy makers in both the PRC and Japan to take necessary measures for further enhancing their country's attractiveness to foreign companies and investment and for developing national indigenous technological capacity.

State of the Art

In the literature on the relative "strength" of IP protection, several contributions have been devoted to constructing indices, in an effort to quantify and depict differences in the level of book-law protection and/or enforcement offered by the IP systems of countries over certain periods of time. The most widely used and well-known index for measuring cross-national strength of patent protection is the one constructed by Ginarte and Park (1997).

Criteria the authors used to measure the strength of a country's patent regime are: (i) scope of patent protection; (ii) membership in international treaties; (iii) restrictions on patent rights; (iv) enforcement mechanisms; and (v) duration of patent protection. Subsequent studies in this field all make reference to this IP index, either following its proposed methodology or

further refining it. However, Ginarte and Park's approach suffers from a considerable weakness: Analysing solely the existing legal and institutional arrangements, it does not attempt to measure the level of effective IP protection as applied in practice on a daily basis, in particular the enforcement-related aspects.

Methodology and Approach

Based on Ginarte and Park's approach, I have developed my own IP index for gauging the level of IP protection of the countries under scrutiny, albeit with some modifications given the broader scope of this MA thesis: Firstly, following a more holistic approach, I have also analysed the legal situation regarding other forms of IP rights besides patents, namely copyright and trademarks. Accordingly, I have applied the criteria used by Ginarte and Park to these three forms of IP rights, thereby taking into account the minimum standard of IP protection stipulated by the TRIPS Agreement. Secondly, I have supplemented my analysis with further criteria evaluating the level of IP protection in practice, namely (i) cost of IP protection, (ii) quality of administration, and (iii) enforceability of IP rights. In this regard, too, I have used measures already developed in the relevant literature to proxy for these criteria.

Similar to Ginarte and Park's index, each category includes sub-categories, which may be assigned either the value of 0 (if the particular criterion does not exist in national law or the country's performance in this criterion is poor), 0.5 points (if the requirement is only partly fulfilled) or 1 (in case of full compliance). The cumulative score of my IP index ranges between 0 and 35.

Main Facts

When focusing on the law on the books, China performs quite well scoring 21.5 out of 25 points. The PRC's legal landscape is therefore largely compliant with the minimum requirements imposed by the TRIPS Agreement. Also Japan has, by and large, duly implemented the TRIPS obligations. Under the Analytical Framework, Nippon has been awarded 22 out of 25 points.

However, turning to IP protection in practice, the empirical part has revealed considerable shortcomings of the Chinese IP regime in terms of quality of administration and enforceability, which significantly undermine the legal position of IP owners, foreign as well as domestic. Thus, the PRC has received a mere 5.5 out of 10 points. By contrast, when assessing the level of IP

protection in practice, Japan performs even better, earning a score of 9.5 out of 10 points.

Overall, China achieves a total score of 27 out of 35 points, suggesting a solid level of IP protection that still requires improvement, though. Japan, in turn, scores 31.5 out of 35 points for its IP regime, which gives testimony to a strong and robust system. Still, also in the Japanese legal system there are some troublesome aspects worth noting.

	PRC	Japan
IP Protection on the Books (max. 25 points)	21.5	22
IP Protection in Practice (max. 10 points)	5.5	9.5
Overall Score (max. 35 points)	27	31.5

Results

As shown in the table above, IP protection pursuant to the law on the books is largely comparable in both countries. Indeed, both China and Japan have, more or less, duly implemented in their legal landscape the international obligations mandated by the TRIPS Agreement and further multilateral IP treaties. In this respect, however, it is noticeable that in both countries there are still strong working requirements, which make the IP regime less attractive from a (foreign) IP owner's point of view.

The main difference between both countries therefore lies in the practical application of the law. Even though IP rights can be obtained comparatively cheaply in both countries, they are worth many times less in China due to inadequate enforcement options. However, the empirical findings are based on particular indices, which naturally come with certain limitations. Thus, despite the good rating, also in the Japanese system there are arguably still aspects in need of improvement.

Under the criterion of "quality of administration", a comparison of the two countries demonstrates that due to the importance placed on interpersonal relationships and networks in their societies, there is also a propensity of civil servants towards corrupt behaviour. Further, as regards the predictable enforcement of IP rights, China's poor performance is mainly caused by inconsistent implementation of IP laws across the country and

unrestrained leeway of the administrative authorities. However, when practicing administrative guidance, Japanese authorities, too, enjoy broad discretion to the detriment of predictable law enforcement. Likewise, when it comes to government effectiveness, the PRC performs poorly. Concerning China's IP system, the unique "dual-track system" causes ineffectiveness in enforcing IP rights. In Japan, deficiencies in the governmental system in general can be identified, which are partly due to the bureaucratic structures.

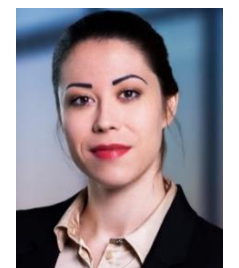
Turning to the enforceability of IP rights, the Chinese system shows again clear weaknesses, while the Japanese one performs far better. Concerning the criterion "rule of law", in both countries, judges seem to be influenced in their decision making by undue considerations. In China, though, these are more pronounced by being predominantly political and economic in nature. Moreover, in both the PRC and Japan, judges' independence is a facet of the judicial system that is in dire need of improvement. Lastly, when it comes to improving IP protection in general, there are striking parallels as to the measures taken. In both countries, the creation of specialized IP courts has enhanced the competent judges' expertise in IP cases. However, the Chinese specialized IP system still suffers from ambiguities given its experimental stage.

References

All references can be found in the full version of the MA thesis available at theses.univie.ac.at/detail/64659.

About the Author

Daniela Birnbauer, BA LL.M. holds a law degree from the Vienna University of Economics and Business and studied Japanese Studies at the University of Vienna. Since her student days, she has specialized in the field of IP/IT law. She currently works as an associate in a business law firm in Vienna.



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