Evaluating Flexibility in International Patent Law

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Patent law is territorial; each country grants rights that can only be enforced within its borders. However, since the late nineteenth century, when the Paris Convention became the first major international treaty to attempt a degree of harmonization of patent rights, the pendulum has been swinging towards greater harmonization and unification. Within developed countries, the movement towards stronger intellectual property rights has generally run parallel to greater domestic industrial development. However, even developed countries with strong protection for intellectual property may not always benefit from static and inflexible laws. One example is the development of a research exemption in various countries allowing companies to engage in certain acts that would otherwise constitute infringement. These exemptions are aimed at encouraging the development of and earlier market access to generic drugs. Moreover, aside from such legislative provisions, the protections afforded by a patent are only theoretically uniform within any given jurisdiction. Because of the heterogeneous nature of the inventions and technologies covered, perfect uniformity would be as difficult to assess as it would be to achieve. As a result, all patent systems contain laws that apply in a non-uniform way, by design or *de facto*, all of which may be termed flexibilities.

However, at the strong urging of the most developed countries, international and bilateral agreements have pursued international harmonization, cementing high minimum levels of patent rights in member countries of the WTO with few exceptions. In addition, existing exceptions allowed by TRIPS are based on current practice but do not allow for future variations. The international legal system is on a slow march to harmonize and entrench patent laws without a methodology for analyzing and evaluating existing and potential future flexibilities. This paper proposes a framework to analyze and evaluate the use of flexibilities in patent law from an international perspective. Such a framework has descriptive value for comparisons of patent protections in countries with varying levels of development. It also has prescriptive value, allowing for normative claims about what types of flexibility may be desirable departures from international standards. The proposed framework evaluates flexibilities according to the dimension of the right that it targets, the degree of flexibility, and the institutional implementation. These are lined up alongside the purpose of the flexibility and the problem being targeted, providing a methodology of assessment. This proposed framework suggests a way to evaluate the desirability—from a domestic or international perspective—of a given or proposed flexibility. It also allows for a more general assessment of deliberate and inherent flexibilities in the patent laws of countries with disparate levels of development. Lastly, it suggests some normative conclusions about the suitability of different institutions to implement patent law flexibilities.