

Patent term extension and test data protection obligations: identifying the gap in policy, research, and practice of implementing free trade agreements

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ABSTRACT

Much of the academic literature criticizes the inclusion of patent term extensions (PTE) and test data protection into the pharmaceutical provisions and/or intellectual property (IP) chapters of free trade agreements (FTAs), with many arguing that such provisions will increase the cost of pharmaceuticals for the implementing government. Such arguments are often backed by studies conducted prior to the conclusion of the relevant FTA. This is problematic for several reasons, most notably that the studies make assumptions that subsequently turn out not to be false and that the claims are not revisited and supported with empirical data following implementation. This article reviews the experience of two jurisdictions – Canada and Australia – in order to provide an analysis of legislative and judicial practices with a focus on implications and the cost of FTAs. The article examines how Canada and Australia have implemented their FTA obligations domestically and on the hereto ignored but important role of courts. One key finding is how courts in both countries are vigilant in narrowing the scope of obligations under FTAs to accommodate the need of the domestic market. The article ultimately concludes by calling on governments to conduct a detailed analysis of PTE and test data protection

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