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Recommended Citation

Sam F. Halabi, Does TRIPS Stop International IP Free-Riders, 2019 *JOTWELL* 1 (2019).

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Does TRIPS Stop International IP Free-Riders?

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Date : March 5, 2019

Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 **Yale L.J.** 544 (2019).

Innovation policy—a relatively new phrase for an old set of top-down competitiveness approaches (e.g. “industrial policy,” “science policy,” “research policy,” and “technology policy”)—is necessarily a combination of centralized investment, structure of private-sector incentives, and public policy priorities. This combination has always been unwieldy, multivariate, and politically charged. As a result, constituencies favoring one or other approaches (e.g. longer patent protection, more funding of public universities and research infrastructure, tariff or non-tariff import measures) have lacked a unifying framework through which to analyze shared problems.

In *Innovation Policy Pluralism*, [Daniel J. Hemel](#) and [Lisa Larrimore Ouellette](#) provide that framework. With a focus on intellectual property law, Hemel and Ouellette take the universe of innovation instruments—patents, prizes, grants, tax credits, purchase leverage, public licensing and other alternatives—and create a coherent method by which to assess and value them. Dissecting these options into “innovation incentives” and “allocation mechanisms,” Hemel and Ouellette urge policy-makers to consider alternatives under which these incentives and mechanisms may be matched, mixed, or layered.

Their contribution is one I like a lot, and it will certainly shape important debates among intellectual property scholars in the U.S.; for readers of JOTWELL International and Comparative, it is Hemel’s and Ouellette’s extension of their argument to international intellectual property law that may be of most interest. They argue the following: first, their framework may assist countries in better tailoring their innovation policies within prevailing international intellectual property instruments; and second, international intellectual property law itself plays a regulatory role, ensuring that some countries do not free-ride on the innovation of others.

According to them, the [WTO Agreement on Trade-Related Aspects of Intellectual Property Rights \(TRIPS\)](#)—often taken as the world’s international IP law—may be made more flexible more easily through the framework they construct. For example, “a country could provide incentives [to innovate] though grants and prizes conditioned on relinquishing IP rights...[o]r countries can both subsidize the domestic production of knowledge goods through grants and tax credits and purchase domestic patent rights from the producer, while still allowing the producer to collect overseas profits (with the state potentially collecting some of those profits through a tax on the domestic producer).” (P. 590.)

With respect to their second point, Hemel and Ouellette argue that international IP law (again, impliedly TRIPS) exists to ensure that there is a global set of incentives so that all countries either invest in innovation or compensate those who do. So far as it goes, Hemel and Ouellette are probably correct, but as they no doubt also know, the proliferation of so-called TRIPS-plus agreements, which [often invade deeply into the policy-setting prerogatives](#) of sovereign states, may limit the capacity of resource-poor countries to shape their innovation policies as freely as the authors imply.

To be sure, Hemel and Ouellette contemplate the possibility of cost-sharing outside of international IP law, and there are plenty of examples under way like the World Health Organization’s [Pandemic Influenza Preparedness Framework](#) and a contemplated biomedical research and innovation treaty committed to non-IP incentives for research into [Type II and Type III diseases](#). In a separate work, I have argued that such [cost-sharing vehicles](#) proliferate as international intellectual property law further constricts national-level regulatory prerogatives, especially those affecting basic human needs.

Innovation Policy Pluralism is a valuable contribution not only to the intellectual property literature, where it might naturally nest, but also to scholars of international law and international relations. The authors clearly have some “TRIPS flexibilities” in mind, and my expectation is that Hemel and Ouellette will use their framework to tackle some of the most important problems facing countries that feel whipsawed by the needs of their domestic populations and the strictures of international intellectual property law.

Cite as: Sam F. Halabi, *Does TRIPS Stop International IP Free-Riders?*, JOTWELL (March 5, 2019) (reviewing Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 **Yale L.J.** 544 (2019)), <https://intl.jotwell.com/does-trips-stop-international-ip-free-riders/>.