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国际贸易法

INTERNATIONAL TRADE LAW

王衡 主编

双语系列

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21 世纪法学规划教材

国际贸易法

International Trade Law

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§ 1 Foreword

Competition in the marketplace rewards those sellers of goods or services who are offering the best possible product at the lowest possible price. Since markets are dynamic and buyers make decisions every day about what to buy and from whom to buy, innovation is the key to future success and ultimately survival. Even in areas where markets fail and governments take over, such as environmental protection, constant innovation is crucial for our countries and societies to meet the challenges of our ever faster evolving and globalizing world. The quest for cheap and clean energy, clean water, nutritious, healthy and abundant food, affordable and efficient communication and transportation, and safety from crime, terror and war, are just some examples of areas where governments are constantly looking for innovative solutions for the benefit of their peoples and societies. The question how to promote and harness innovation for the greatest possible benefit has, therefore, become more important than ever.

Different political and economic systems have provided different answers to this question over time. Some answers have been more successful than others. The ever increasing importance of international political cooperation and international trade provides direct comparison and competition between different national systems. If one country promotes innovation more successfully, other countries may fall behind. At the same time, the instruments rewarding innovators in one country may not be recognized by other countries and their industries may be able to steal ideas for short term gain.

[1] © Dr. Frank Emmert 2011. The author is the John S. Grimes Professor of Law and Director of the Center for International & Comparative Law at Indiana University School of Law-Indianapolis (<http://indylaw.indiana.edu/people/profile.cfm?Id=166>), as well as an editor of the European Journal of Law Reform (<http://www.elevenjournals.com/Online/EJLR.aspx>).

Thus, the cross-border trade of goods and services, the fastest growing sector and most powerful motor of most economies today, challenges different countries to cooperate in the promotion of innovation. Mutual recognition and enforcement of intellectual property rights is at the heart of the challenge and there cannot be a world of free and fair trade without a system of mutually acceptable protection of intellectual property regardless of origin and ownership.

§ 2 The Nature of Intellectual Property Rights and the Connection to Trade

The most important intellectual property rights (IPRs) are *patents* for the protection of technical products or processes, and *copyrights* for the protection of books, photos, maps, musical compositions and other tangible expressions of human creativity, as well as intangible works such as movies, sound recordings, performances, and software. Other intellectual property includes *trademark rights* for the protection of the name and reputation of a business, as well as more specialized rights for the protection of geographical (origin) indications, industrial designs, plant varieties, etc.

Although commonly recognized as “property”, intellectual property differs from tangible mobile or real property in two important ways.^[2] First, while it may cost a similar amount of money to build a new house or factory and to invent a new device or pharmaceutical, the house can only be used by one family or company at a time and can only be sold once by the owner. By contrast, the *idea* for the device or the *formula* for the new drug, i. e. the *knowledge* behind the intellectual property, can be used by and can benefit many people at the same time. While an inventor or artist typically has to invest large amounts of money and time to come up with the innovation in the first place, once the knowledge has been created, it can be shared infinitely without

[2] The World Intellectual Property Organization (WIPO) defines IP as “creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce”; see <http://www.wipo.int/about-ip/en/>. WIPO then divides IP into *industrial property*, namely “patents for inventions, trademarks, industrial designs, and geographical indications”, as well as *copyright and related rights*, namely “literary and artistic expressions (e. g. books, films, music, architecture, art), and the rights of performing artists in their performances, producers of phonograms (as well as compact discs and MP3 files) in their recordings, and broadcasters in their radio and television broadcasts”; see *World Intellectual Property Organization-An Overview*, Geneva 2010, at p. 3.

additional cost to the owner. Once the owner has been compensated for the initial effort, she can either share the knowledge freely for the benefit of everyone, or decide to sell the knowledge many times, for potentially enormous benefits to herself.

Second, while owners of traditional property have a number of ways to protect themselves against thieves, an intellectual idea may be hard to protect and, once stolen, can be sold by the thieves easily in competition with the original owner. Moreover, while the original owner invested large amounts of time and money to make the invention, the thief may be able to understand the idea from just looking at a sample product and typically has little or no investment of time or money to obtain the idea. This means that thieves can produce goods or services based on stolen ideas much cheaper since they do not have to incur the investment for making the invention or creation in the first place. This, in turn, discourages scientists and artists and other innovators from investing their time and money, if they are not sure that they can later benefit from their inventions, recover the up-front investment, make enough profit to have a decent standard of living, and have money leftover for further research or creative activity. As a result, societies where intellectual activity is not somehow stimulated or protected by the government typically have less of this activity going on than societies which guarantee at least some return on investment and reward for the scientists, artists, and other innovators.⁽³⁾

There are three fundamentally different ways for governments and societies to stimulate innovation and creative activity, such as the research of scientists and the work of writers, musicians, and other artists. First, the government can itself order and pay for the innovative activity, either by employing the scientists or artists at government laboratories, state universities, state TV and media companies, and the like, or by entering into agreements with independent researchers, such as university professors, for specific projects and goals. The government becomes the owner of the intellectual property and decides how to make use of it, usually also via government-owned or licensed manufacturing and service industries. This was the most wide-spread model in planned economies before the market oriented reforms and is still the most widespread model for basic research in most if not all industrialized nations.

Second, the government can officially stay out of the business of stimulating

[3] For a more critical perspective see Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, Duke Law Journal, Vol. 57, 2008, pp. 1693 - 1724.

innovation and creative activity and leave it to the scientists and artists to exploit their ideas, however providing some protection for trade secrets via tort and criminal law. Examples are national laws against breaking into laboratories, stealing files and other documents, or against hiring the staff of a competitor to obtain the know-how of those people.^[4]

Third, the government can protect the privately owned intellectual property rights themselves by giving the scientists and artists exclusive rights to exploit their inventions and creations and prohibiting others from doing the same. The latter is the basic idea of patents, copyrights and other intellectual property rights.

All three models have strengths and weaknesses. In the planned economy, it is easy to set priorities and avoid duplication of research. However, the problem is that the planners are usually doing a mediocre job at identifying which research will be important in the future and who is most likely to achieve the desired results. Furthermore, the researchers or innovators themselves may be poorly motivated because they are essentially government employees and get paid to work 9 to 5 whether or not they achieve anything special.^[5]

By contrast, the model relying on trade secrecy is counting entirely on market rewards for innovators, who can make phenomenal profits from their products provided they can keep their methods and ideas secret and protect them against free riders trying to copy the products. Chances are that in many cases the protection does not work and ideas are easily uncovered and replicated, taking away the motivation for the innovators. Also, too much time and effort will be spent on secrecy rather than innovation. Furthermore, duplication of effort will be widespread, in particular in those areas that hold a certain promise of secrecy and reward.

Finally, the system of intellectual property rights guaranteed by the state tries to combine some of the benefits and avoid some of the pitfalls of the other two systems. Although the government does not dictate who should do what kind of research, it

[4] The following case can illustrate the point. In 1993, Volkswagen hired Jose Ignacio Lopez, who had been head of purchasing at General Motors. VW not only hoped to get Mr. Lopez' well known skills to drive a hard bargain with suppliers but also some information about the deals he had obtained for GM. After GM found out that Mr. Lopez had taken extensive computer files when leaving his office in Detroit, it sued VW, obtained financial compensation, and forced Mr. Lopez to resign from the position at VW. See <http://www.highbeam.com/doc/1G1-18899646.html>.

[5] One could say, they get paid to do something rather than to get something done.

reduces duplication of effort by requiring publicity in exchange for protection against imitation.^[6] This means that a patent will be granted in exchange for publication of the technical solution for all to see and understand. At the same time, the risk of abusive monopolization is reduced by the time limit put on some of the IPRs, in particular the limited life cycle of patents, as well as certain limits in antitrust or competition laws. Nevertheless, there will be duplication of effort, i. e. too much effort, in areas where large rewards can be realized, at least until the first inventor applies for and receives protection, while there will be too little effort in areas where there are few or no rewards to be expected.^[7] Another weakness is the uniform time frame for patents, regardless of how long it takes the innovator to recover her investment and realize a reasonable profit. In some cases, therefore, patent protection is too long, in other cases not long enough.^[8] Nevertheless, ever since intellectual property rights were invented more or less simultaneously in England and Italy in the 15th century, societies with intellectual property protection have consistently been more innovative – and successful, at least economically – than those without.^[9] It can also be said, however, that IPRs should not be a country's only strategy for the encouragement of innovation. Government funded research makes sense in areas where the markets don't promise sufficiently attractive rewards, for example in basic vs. product oriented

[6] Indeed, the very word “patent” derives from the Latin “to lay open” or to make public.

[7] This is one explanation why there is so little research and effort going on to find treatments for some of the most notorious tropical diseases. There are simply not enough potential customers who would be able to afford an expensive drug even if it could improve and extend their lives considerably. See, for example, Trouiller et al. , *Drug Development for Neglected Diseases: a Deficient Market and a Public-Health Policy Failure*, The Lancet 2002, Vol. 359, Issue 9324, pp.2188 –2194.

[8] Pharmaceuticals provide a good example. Patent protection has to be requested immediately when a team of researchers identifies a promising compound to treat a certain illness. Otherwise competing researchers may be quicker and obtain protection for themselves for the same compound. However, market introduction will typically take many years after patent protection is obtained because of the need to test the compound in a whole series of animal and human subject trials. This leaves often less than 10 years of patent protection when the actual drug is finally introduced in the markets and contributes significantly to the very high prices of pharmaceuticals which often cost only pennies in the production but also have to recover hundreds of millions of Euros or Dollars in research expenses.

[9] The Global Competitiveness Reports issued annually by the World Economic Forum demonstrate a strong correlation between IP protection and competitiveness. 21 of the 25 most competitive countries in the latest report were also characterized by advanced IP protection (see http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf) and this is consistent with earlier reports. A higher level of competitiveness indicates a higher level of productivity and thus a higher level of prosperity for the country as a whole and usually for the large majority of its people.

research. And if an inventor should opt for secrecy rather than disclosure, his or her normal rights to personal safety, private property, data security, etc., still deserve protection. That being said, the center piece of any modern strategy for the promotion of innovation and creativity must be the protection of intellectual property rights (IPRs).

In the absence of international agreements, all protection of IPRs depends on national law and is limited to the territory of the nation state that provides it. If an inventor or author wants to get protection beyond his home country, he will have to apply one-by-one in other countries, comply with the respective procedures, and pay the necessary fees. This is invariably going to be costly in terms of time and money. Furthermore, with over 200 sovereign countries around the World, protection will necessarily differ from one country to another, for example with regard to what can be patented, how long a patent will last, or what kind of "fair use" can be made of copyrighted material without the permission of and without compensation to the copyright owner.^[10] Some countries still today do not recognize, grant, or protect patents on certain pharmaceuticals. Other countries go as far as awarding compulsory licenses to domestic producers with minimal compensation to foreign patent owners. This makes it difficult, expensive and often frustrating for inventors and other innovators to obtain protection in all major markets where their goods or services could find customers willing and able to pay for them. However, if the inventors and innovators do not seek or do not obtain protection in all major countries, they may not only find it difficult to reap the rewards of their efforts in foreign markets. They may even have to face unlicensed goods or services from these foreign countries coming back to their home market(s) to compete with their own legitimate products.^[11]

Against this background, international cooperation seems highly desirable, at least for the innovators. Developed countries with highly educated populations and the financial and other resources to generate a large amount of intellectual property, therefore, have long pushed for universal minimum standards for IPRs and their mutual

[10] On the "fair use" doctrine see, for example, Abbott, Cottier & Gurry, *International Intellectual Property in an Integrated World Economy*, New York 2007, pp. 422 et seq.

[11] A typical example is the importation of counterfeit consumer goods like running shoes, watches, fashion accessories, music CDs and movies on DVD, from some countries into the United States or Europe either by tourists or by ruthless traders who accept the risk of detection at the border and confiscation of the merchandise because of the large price differences to the licensed originals.

recognition and enforcement.^[12] By contrast, less developed countries used to think that they could benefit more if they could get access to intellectual property generated elsewhere without paying for it. The latter approach is increasingly being questioned, however. First, it seems that decades of free riding have not helped the developing countries in catching up with the developed world. Quite to the contrary, those countries with the lowest levels of IP protection are also the least competitive countries who have essentially cut themselves off from foreign direct investment and other important transfers of know-how and technology. Second, the free riders are also inhibiting their own innovators and, thus, standing not once but twice in their own way toward development.^[13]

[12] See, for example, the 1883 *Paris Convention for the Protection of Industrial Property*, defined in Art. 1 (2) of that Convention as “patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin” (below, note 16), or the 1886 *Berne Convention for the Protection of Literary and Artistic Works* (below, note 18).

[13] Intellectual property in developing countries often takes other forms than IP in developed countries. For example, knowledge of traditional herbal medicines can be just as valuable for a pharmaceutical manufacturer as a laboratory-created chemical compound (for more on this subject see, inter alia, Bryan S. Bachner, *Intellectual Property Rights and China-The Modernization of Traditional Knowledge*, Utrecht 2009, as well as Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, *Cardozo Arts & Entertainment Law Journal*, Vol. 27, 2009, pp. 37 – 97). Since virtually all intellectual property laws and agreements were drafted by the developed countries, traditional knowledge, music, or culture from developing countries is less well protected for the time being. However, this does not mean that developing countries should simply reject the existing IP protection system. Instead, they should come up with additional or alternative rules to better protect their own IP and provide fertile ground for future innovation in their areas of comparative advantage. For some specific examples see Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, London 2000. Some good ideas can also be found in Joseph E. Stiglitz, *Making Globalization Work*, New York 2006, in particular in Chapter 4 on *Patents, Profits, and People*, pp. 103 – 132. Unfortunately, Stiglitz’ chapter also contains a few overly broad generalizations that are unworthy of the work of a Nobel Prize winner. For example, Stiglitz rants against the TRIPs agreement saying that “[i]ntellectual property does not really belong in a trade agreement. Trade agreements are supposed to liberalize the movement of goods and services across borders. TRIPs was concerned with a totally different issue—in some sense, it was concerned with *restricting* the movement of knowledge across borders” (on pp. 116 – 117, emphasis in the original). The core of this statement is simply wrong. Trade agreements are never about the liberalization of trade at any cost. In particular, they have never intended to promote the movement of goods or services that are potentially dangerous, actually harmful, or outright illegal. In reality, trade agreements are designed to *regulate* trade in such a way that beneficial and legitimate trade is facilitated while harmful and illegal trade is restricted. A good example for the balancing of the freedom to trade with the protection of the health and safety of people is the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures* (see http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm). And since counterfeited or pirated goods and services are not only based on stolen property but often also endangering the health and safety of the users of low quality devices or ineffective drugs, trade agreements certainly do not want to liberalize the movement of these goods and services across borders.

§ 3 Intellectual Property Protection Under WIPO

1. Introduction

Given the fact that intellectual property rights are normally granted by a particular country under their particular procedures and requirements and with protection limited to their territory, it has long been desirable to create a system of *international* protection of intellectual property beyond the occasional and mostly random cases of mutual recognition. An international system could and should address the following points: 1) universal filing priority; 2) universal recognition of a minimum set of exclusive rights of the innovator; and 3) universal enforceability of the exclusive rights. These issues shall first be discussed in turn. Subsequently, we shall examine to what extent the different international protection regimes meet the expectations.

1.1 *Universal Filing Priority*

Whether or not there is an actual application or filing requirement,^[14] all IPRs require disclosure in exchange for protection, the sole exception being trade secrets, which are discussed below. Disclosure, however, whether in the form of publication of a written work, broadcasting of a performance or movie or music, or entry of a technological solution in the patent register, brings about the risk of imitation. Therefore, if an author or inventor seeks and obtains protection for her work in one country, disclosure is universal while protection is merely national. This forces the author or inventor to quickly seek protection in all major countries where he or she may want to engage in subsequent exploitation of the work. This is inconvenient for the innovator *inter alia* because the author or inventor has just spent a large amount of time and money for the original creation of the work and often does not have the resources to seek protection in many countries. This is exacerbated by the fact that the author or inventor often does not know whether the work will be commercially successful at all and if so, which markets will be most promising for commercial exploitation. On the other hand, if the innovator seeks protection only in his or her

[14] Patents and trademarks typically have to be registered while copyrights are provided to the author of a literary or artistic work immediately upon publication or expression.

home country and maybe a small number of other countries, natural or legal persons in third countries can not only begin to imitate the work for their own profit, they can even register it for protection in their own name, unless there is some form of cooperation between the countries with recognition of the priority and the exclusive rights of the original innovator. At the very least, an international system should protect the priority rights of the original innovator for a reasonable time, until the author or inventor has a better idea of the commercial viability of the work and the markets where protection should be sought.

1.2 *Universal Recognition of Minimum Exclusive Rights*

While virtually all countries nowadays recognize some measure of exclusive rights for innovators, national laws differ on questions such as the term of patent or copyright protection, the most suitable protection for certain new technologies such as computer programs or laboratory created plants or animals, as well as certain limitations of exclusive rights for the benefit of society at large. Instead of trying to accomplish a complete harmonization of intellectual property protection around the world in some distant future, the international system should focus on the universal protection of certain core rights today. Once a set of minimum standards has been agreed upon, improvements can be made over time, as more countries join the ranks of producers of a significant volume and value of IPRs.

1.3 *Universal Enforceability*

Like all property rights, the value of intellectual property rights is directly connected to their enforceability in a given country or market. If a landlord cannot force a recalcitrant tenant to pay her rent and cannot, as a last resort, evict the tenant to find somebody else who will actually pay for the use of the apartment or house, the value of the real property can decline all the way to zero. Similarly, if a patent or copyright owner cannot prevent the use of the protected idea by an imitator, cannot collect agreed upon license fees from a licensee in default, and/or cannot, as a last resort, confiscate counterfeited or pirated goods to prevent their entry into national and international commerce in direct competition with the innovator's own or licensed goods, the value of the IPRs declines rapidly and potentially all the way to zero. The key to a successful international system, therefore, has to include not only substantive promises made by all major countries but also procedures and remedies for the enforcement of the promises.

This is where international law is generally weak because of the traditional notion of state sovereignty. In plain English, sovereignty means that a state cannot be made to do anything against its current will and wishes, even something as banal as adhering to promises made earlier.^[15] By definition there is no international authority *above* a sovereign state and the only entities who have some authority or power *at the same level* are the other sovereign states. Since the other states are not higher but merely equal and since the prohibition of the use of force by one state against another has been codified in the UN Charter and become recognized as *jus cogens*, legal enforcement mechanisms *among* sovereign states are thus limited to diplomatic sanctions and certain types of retorsions and reprisals. In practice, this often leaves the enforcement of international obligations of states in the hands of two time-honored mechanisms, *naming & shaming* and *tit-for-tat*. The former is based on the notion that states generally do care about their reputation and do not like to be named in breach of their international promises and obligations. The latter can be summarized as “if you don’t respect your obligations, I don’t respect mine either”, which really only works if at the end of the day both countries have strong interests in resuming rule-based relations.

2. The Earliest Multilateral Treaties and the Development of the International System Until WIPO

As mentioned earlier, the first milestones in international protection of IPRs can be traced back to the late 19th century. In 1880, negotiations were launched at a diplomatic conference in Paris, as a result of which the *1883 Paris Convention for the Protection of Industrial Property* (Paris Convention) was signed by 11 founding members.^[16] It covers “patents, utility models, industrial designs, trademarks, service marks, trade

[15] The principle of “*pacta sunt servanda*” has been recognized in international relations at least since Hugo Grotius compiled the first modern textbook of international law in the 17th century. Its modern expression can be found in Article 26 of the *1969 Vienna Convention on the Law of Treaties* (see http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). As a principle of law, it can be found much earlier, however, as Surah 5 (1) of the Qur’an attests, as well as Jesus Christ’s insistence that he had come not to abolish but to fulfill the covenant with the Israelites.

[16] These countries were Belgium, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain, and Switzerland. The Convention has been amended several times and is still in force. Today, it has 173 signatories. For the text of the Convention and the list of contracting parties see <http://www.wipo.int/treaties/en/ip/paris/>.

names, indications of source or appellations of origin, and the repression of unfair competition”^[17] but does not define these rights, nor provide minimum exclusive rights. Rather, the Convention focuses on non-discriminatory treatment of each other’s inventors (Article 2), priority rights for inventors in all signatory states (Article 4), and certain procedural issues and other safeguards. In essence, the Convention addresses the first of our expectations (universal filing priority) but leaves the other two largely to the respective national rules of the signatories, as long as national treatment is provided to the inventors of the other signatories as well. Therefore, the Paris Convention does not meet our expectations for effective international protection regimes.

Shortly after the Paris Convention, a similar effort was made for the protection of artistic works and resulted in the *1886 Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention).^[18] This Convention covers “ every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons [. . .]; dramatic or dramatico-musical works; choreographic works [. . .]; musical compositions with or without words; cinematographic works [. . .]; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works [. . .]; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. ”^[19] By contrast to industrial property, there is no registration requirement for copyright protection to begin, although countries can insist that the work has to be fixed in tangible form. Having thus overcome the universal priority expectation, the Convention continues by providing a number of minimum standards for the exclusive rights to be provided, including for the minimum term of protection,^[20] and certain “ moral rights ” to object to “ distortion, mutilation or other modification ”^[21] in addition to and independently from the author’s exclusive economic rights. Finally, the

[17] See Article 1 (2) of the Convention.

[18] See <http://www.wipo.int/treaties/en/ip/berne>, 164 ratifications.

[19] See Article 2 (1) of the Convention.

[20] Fifty years beyond the life of the author, see Article 7 (1) of the Convention. Based on Articles 7 (6) and 19, signatories can go beyond the term required by the Convention. The European Union, for example, provides for 70 years beyond the life of the author.

[21] See Article 6bis (1) of the Convention.

Convention provides for non-discrimination, national treatment, and certain other procedural issues and safeguards, including a specific article on “the right to enforce protected rights” (Article 15) and the possibility of seizure of infringing copies (Article 16). It can be said, therefore, that the Berne Convention meets our expectations for international protection regimes, at least on paper.

Both under the Paris and the Berne Convention, bureaus were set up to administer the rights and obligations of the members and to exchange information about protection provided under the various national legal regimes. In 1993, the two bureaus were merged to form the “United International Bureaux for the Protection of Intellectual Property”,^[22] the precursor of the World Intellectual Property Organization (WIPO).^[23]

3. Intellectual Property Protection by WIPO and Weaknesses of WIPO

WIPO was created in Geneva after the *1967 Convention Establishing the World Intellectual Property Organization*^[24] entered into force in 1970. Four years later, WIPO became a specialized agency of the United Nations. In its early decades, WIPO's accomplishments were twofold. First, WIPO gained the support of an overwhelming majority of the countries around the World.^[25] Second, WIPO broadened its responsibilities far beyond the Paris and Berne Conventions and became administrator of a wide range of IP-related conventions, including the *1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods*,^[26] the *1968 Locarno Agreement Establishing an International Classification for Industrial Designs*,^[27] the *1970 Patent Cooperation Treaty*,^[28] and the *2006 Singapore Treaty*

[22] This was generally better known under its French acronym BIRPI (Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle). Originally based in Berne, it moved to Geneva in 1960.

[23] WIPO replaced BIRPI in 1967. For comprehensive information see WIPO (ed.), *World Intellectual Property Organization-An Overview*, Geneva 2010 (available at <http://www.wipo.int/about-wipo/en/report.html>) as well as WIPO (ed.), *WIPO Intellectual Property Handbook: Policy, Law and Use*, Geneva 2004 (available at <http://www.wipo.int/about-ip/en/iprm/>).

[24] See <http://www.wipo.int/treaties/en/convention/>.

[25] As of 2011, WIPO has 184 members. However, to become a member, a state has to ratify only the WIPO Convention itself. Therefore, not all WIPO members have ratified all of the various substantive IP conventions administered by WIPO.

[26] See <http://www.wipo.int/treaties/en/ip/madrid/>, 35 ratifications.

[27] See <http://www.wipo.int/treaties/en/classification/locarno/>, 52 ratifications.

[28] See <http://www.wipo.int/treaties/en/registration/pct/>, 144 ratifications.

on the Law of Trademarks.^[29]

In spite of its generally acknowledged expertise in all things IP, however, WIPO also suffered from two weaknesses. First, in particular its more modern IP conventions were usually supported only by a minority of its members and sometimes only by a small group of countries, since there is no obligation for all WIPO members to ratify all WIPO conventions. Second, WIPO does not have any mechanisms to enforce compliance by its members even just with those conventions they did ratify. In practice, this means that some countries may have ratified the most important IP conventions and yet have done little or nothing in their domestic legal order to ensure compliance of their government agencies and courts, let alone their private sector. If IP violations are rampant in such a country, the owners of the IPRs in other countries have only two options, none of which are usually satisfactory: a) They can bring a case in the domestic courts of the country where the pirates and counterfeiters are domiciled. This will be futile, however, if the domestic legal order of that country either does not provide for the minimum level of IP protection in substantive terms or does not provide effective remedies to combat violations of substantive rules that may even be reasonably clear. And direct reliance on the international conventions, such as the Paris and Berne conventions, in front of those courts is typically not possible because of the dualist approach to national and international law adopted by the vast majority of countries around the world.^[30] b) The IP owners can lobby their own governments to take diplomatic measures or seek other remedies in international law against the government of the country where the pirates and counterfeiters are domiciled. This will also be futile if their own government, for political reasons, does not want to pick a fight with the other country. Even if international measures are being taken, they are often ineffective for the reasons outlined above.

Since WIPO is also dominated, at least in sheer number, by the developing countries, which makes real changes towards effective protection of IPRs under the umbrella of WIPO rather unlikely, the Western industrialized nations got increasingly frustrated with WIPO during the 1970s and 80s and eventually started to look for international protection of IPRs in other fora.

[29] See <http://www.wipo.int/treaties/en/ip/singapore/>, 24 ratifications.

[30] For more on this subject see Wikipedia, Monism and Dualism in International Law, available online at http://en.wikipedia.org/wiki/Monism_and_dualism_in_international_law.

§ 4 Bringing Intellectual Property Under the Umbrella of the WTO

In 1979, an Advisory Committee on Trade Policy and Negotiation (ACTN) was formed to lobby the U. S. President to include intellectual property rights as a subject in the next round of GATT negotiations. The Committee was chaired by the CEOs of Pfizer, the pharmaceutical giant, and IBM, the computer maker. Together with the music and film industries, those were the industries most concerned about the inadequate protection of IP in many non-OECD countries. The American multinationals quickly persuaded their counterparts in the EU and Japan to support their efforts by similar lobbying of their own respective governments. However, the Western efforts to bring IPRs into the fold of trade negotiations were immediately opposed by less developed countries like Brazil and India, who were afraid that better enforcement of predominantly Western IPRs would lead to diminished access to Western technology combined with increased financial transfers for knowledge the developing nations could not do without.^[31]

The patent-oriented ACTN was joined in 1984 by the copyright-focused International Intellectual Property Alliance, an association of some 1,500 U. S. companies, and jointly they persuaded the U. S. Government to include intellectual property right conditionality in trade preferences accorded under the Caribbean Basin Economic Recovery Act and the Generalized System of Preferences. Also, the United States Trade Representative (USTR) began to use Section 301 proceedings against imports into the U. S. from countries considered as denying even minimum protection to U. S. IPRs.^[32] With these precedents, it was relatively easy for the Western industrialized nations to get a statement into the *Punta del Este Ministerial Declaration* of 20 September 1986 launching the Uruguay Round negotiations pursuant to which the negotiations should “clarify” GATT provisions on “trade-related aspects” of intellectual

[31] For a critical account see Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, London 2002.

[32] One of the first proceedings was launched in November 1985 against South Korea, see http://www.copycense.com/2009/06/foreign_affairs_as_the_new_copyright_law_part_2_of_3.html.

property rights and “elaborate as appropriate new rules and disciplines.”^[33]

After lengthy and acrimonious negotiations, the Western industrialized countries made a number of promises to the developing and newly industrializing countries^[34] and in return the latter accepted in December 1991 what is essentially a combination of U. S. and EU drafts for the TRIPs Agreement.^[35] In Part I the TRIPs contains some “General Provisions and Basic Principles”, most importantly the requirements of “National Treatment” in Article 3 and “Most-Favored Nation Treatment” in Article 4. Part II contains substantive intellectual property standards. Although members can provide higher levels of IP protection, they cannot fall short of the standards required in this section of the TRIPs. For example, Article 12 of the TRIPs, in combination with Article 9(1) of the TRIPs and Article 7 of the Berne Convention, requires a “Term of Protection” for copyright of “no less than 50 years” beyond the life of the author, which did not prevent the EU from adopting a term of 70 years.

Section 1 with Articles 9 to 14 of the TRIPs is dedicated to “Copyright and Related Rights”. Section 2 with Articles 15 to 21 deals with “Trademarks”. Section 3 with Articles 22 to 24 provides the minimum standards for the protection of “Geographical Indications”. Section 4 with Articles 25 and 26 is about “Industrial Designs”. Section 5 with Articles 27 to 34 covers “Patents”. Section 6 with Articles 35

[33] The declaration is available at the website of the Organization of American States (OAS), see http://www.sice.oas.org/trade/Punta_e.asp.

[34] On the one hand, the developing countries were to obtain longer transitional periods as well as technical assistance for the implementation of their IP laws. On the basis of Articles 27 and 65 of the TRIPs, developing countries obtained an initial transition period until 2000, which was later extended until 2005 (see Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, para. 7. 27). With regard to least-developed countries, the initial transition period of 10 years was extended until 2016 by decision of the Council for TRIPS of 27 June 2002. On the other hand, the developed countries committed themselves to granting improved market access for goods from developing countries, in particular in the areas of agriculture and textiles. Finally, the developed countries were to be subject to the same dispute settlement discipline as everyone else. The latter is important because it is typically more effective for a rich and powerful country to impose unilateral trade sanctions on a small and poor country than the other way around. Therefore, the U. S. initially had little interest in the Dispute Settlement Understanding (DSU), since it generally had no difficulty enforcing its trading rights against other contracting parties of the GATT.

[35] The most comprehensive account of the Uruguay Round negotiations is by Terence Stewart, *The GATT Uruguay Round: A Negotiating History* (1986 – 1992), New York 1993, 2921 pp.; see in particular Vol. IV, pp. 463 – 576. See also Frank Emmert, *Intellectual Property in the Uruguay Round-Negotiating Strategies of the Western Industrialized Countries*, Michigan Journal of International Law, Vol. 11, No. 4, 1990, pp. 1317 – 1399.

to 38 deals with “Layout-designs (Topographies) of Integrated Circuits”, i. e. computer chips. Finally, Section 7 and its Article 39 are about “ Protection of Undisclosed Information”, in other words trade secrets. After these substantive rules follows a short Section 8 with Article 40 reminding the members that use of intellectual property rights can result in abuse of dominant position and granting permission to counter such abuse with rules on the “ Control of Anti-competitive Practices in Contractual Licenses”.

Importantly, the TRIPs does not limit itself to the provision of minimum standards for the substantive protection of IPRs.^[36] Arguably, this had already been accomplished by WIPO, albeit with patchy country coverage outside of the basic Paris and Berne Convention territory. Going beyond the accomplishments of WIPO, the minimum standards in Part II of the TRIPs became mandatory for all “contracting parties” or members of the GATT when the WTO was created with the completion of the Uruguay Round because all agreements coming out of that round of international negotiations were concluded as a package deal and there was no opting out of TRIPs or any of the other agreements. This means that since 2013 there are 159 WTO members and, therefore, 159 members bound by the *minimum substantive standards of IP protection* as embodied in the TRIPs.^[37] Furthermore, Part III of the TRIPs stipulates *minimum standards for domestic remedies for the enforcement of IPRs*, including civil, administrative, and criminal procedures. Part IV mandates “reasonable procedures and formalities” for the acquisition and maintenance of IPRs. Most importantly, Part V makes it clear beyond any doubt that violations of the TRIPs obligations can not only become the subject of *dispute settlement procedures under the GATT and DSU* but can result in the imposition of restrictions on trade in unrelated goods and services coming from or going to the IP infringing member.^[38] The TRIPs finishes with Parts VI and VII, containing “Transitional Arrangements”, in particular for the least-developed

[36] See, for example, Peter K. Yu, *The Objectives and Principles of the TRIPs Agreement*, Houston Law Review 2009, Vol. 46, pp. 979 – 1046. For comprehensive analysis see Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement*, Oxford 2007, 600 pp.

[37] For a complete and always updated list of WTO members see http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[38] For an excellent commentary on the first major case of enforcement against a developing country (China) see Peter K. Yu, *TRIPs Enforcement and Developing Countries*, American University International Law Review 2011, available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736030.

countries, as well as some “Institutional” and “Final Provisions”.

When checking how the TRIPs measures up to our three test criteria developed above, we conclude that via its reference to the Paris Convention in Article 2(1), the TRIPs provides universal filing priority in all members for inventors who have filed an application for a patent in one member. The same is true for the registration of a utility model, industrial design, or trademark, and therefore any of the IPRs that depend on a filing or registration procedure. By holding all members to the minimum substantive standards embodied in the TRIPs, whether or not those members also have ratified the Paris or Berne Conventions or any of the other substantive agreements, the TRIPs also fulfils our test for universal recognition of minimum substantive standards for all major intellectual property rights. Finally, by setting minimum procedural standards for domestic remedies and by providing an international dispute settlement procedure with subsequent enforcement mechanism, the TRIPs meets our test of universal enforceability.

§ 5 The TRIPS Agreement in Practice from 1994 to 2011

Since the TRIPs Agreement includes a broad range of substantial and procedural obligations, many of which have traditionally been differently understood in different members, it is not surprising that members have resorted on numerous occasions to the WTO dispute settlement mechanism to obtain clarification of their mutual obligations under the different articles of the TRIPs. A comprehensive article-by-article account of the case-law is provided by the “WTO Analytical Index” and available for free on the website of the WTO.^[39] It would exceed the scope of the present overview to try to present every decision taken to date. Instead, only a few highlights shall be mentioned.

(1) As part of its trade embargo against Cuba, the U. S. refused to recognize or enforce certain trademarks owned by Cuban nationals or any “successor in interest” to those Cuban nationals, regardless of the latter’s nationality. Since there are a number of European natural and legal persons who have acquired a title to or a legal interest in a (formerly) Cuban trade name or trademark, the EU saw a violation of the TRIPs

[39] See http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm#p.

Agreement by the U. S. and brought proceedings to the Dispute Settlement Body (DSB). In essence, the U. S. relied on Article 15(2) of the TRIPs which states that, in addition to the criterion of visual perceptibility mentioned in Article 15(1), members shall not be prevented “from denying registration of a trademark *on other grounds*, provided that they do not derogate from the provisions of the Paris Convention (1967)” (emphasis added). While the Panel and the Appellate Body agreed in principle with the position of the U. S., the AB then proceeded to interpret the Paris Convention itself,^[40] on the basis of Article 2(1) of the TRIPs, and set an important precedent, namely that the references in Article 2(1) (to the Paris Convention), Article 9(1) (to the Berne Convention), and Article 35(1) (to the *Washington Treaty on Intellectual Property in Respect of Integrated Circuits*), open the door for a substantive interpretation of those other agreements by the WTO Dispute Settlement Body. As a result, we are now not only getting case-law on the TRIPs but also case-law on the proper interpretation and application of those other IP conventions and agreements.

(2) U. S. copyright law included an exemption from copyright protection for certain “homestyle” performances and displays. Specifically, this was applied for the owners and operators of small shops or restaurants who were using “homestyle” equipment to play music in their commercial outfit. As a consequence of the exemption, these owners and operators did not need a license from the owners of the IPRs in the music and did not have to pay them royalties. The EU considered this a violation of Article 9(1) of the TRIPs, in combination with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention and brought proceedings to the DSB. The Panel first interpreted Article 11*bis* of the Berne Convention regarding “Broadcasting and Related Rights” to the effect that it precluded exceptions allowing “free of charge” use of another’s IPRs. However, the Panel then proceeded to interpret Article 13 of the TRIPs as part of a “subsequent agreement” in the sense of Article 31(2) of the *Vienna Convention on the Law of Treaties*,^[41] which now allows for “minor exceptions” to the legitimate interests of the IPR holder, overriding the stricter interpretation of the original text of the Berne Convention.^[42] This is an example of

[40] AB Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, 2 January 2002.

[41] See above, note 15.

[42] Panel Report, *United States – Section 110 (5) of the US Copyright Act*, WT/DS160/R, 15 June 2000.

the bi-directional influence between the WIPO agreements on the one side and the TRIPs on the other.

(3) Under Canadian law, generic manufacturers of pharmaceuticals could use “evidence of clinical safety and effectiveness” related to the original drug to prepare the approval of their generic copy prior to the expiry of the patent on the original drug. They could also build stockpiles of the generic drugs prior to the expiry of a patent to be ready to hit the market with sufficient supplies immediately after the expiry of the patent covering the original drug. In the absence of the Canadian exceptions, it is estimated that it will take a generic manufacturer about two years after the expiry of a pharmaceutical patent to be able to supply the markets with the generic copy, in effect giving additional monopoly time to the owner of the original IPR. The EU considered the Canadian rules in violation of Articles 28(1) and 33, as well as 27(1) of the TRIPs and brought proceedings to the DSB. Canada claimed that its rules were “limited exceptions” under Article 30 of the TRIPs since they did not prevent the normal exploitation of the patents and did not unreasonably prejudice the legitimate interests of the patent owners. The Panel found that the exception in Canadian law allowing the regulatory filing preparation prior to the expiry of the original patent fell under the “Limited Exceptions” permitted by Article 30 of the TRIPs, while the exception allowing production and stock-piling of the generic drug prior to expiry of the patent was inconsistent with the TRIPs.^[43]

The examples show first of all that the DSB takes a measured approach to the interpretation of the TRIPs and seeks to balance the interests of the different members. Specific national concerns and needs can certainly be accommodated, at least as long as they do not compromise the essence of the IPRs of others. However, the examples also show that it takes sophisticated legal arguments and thorough knowledge of the law to prevail in proceedings before the DSB, which tends to put developing countries at a disadvantage.

§ 6 Conclusions

The TRIPs is an agreement designed by Western industrialized countries for the

[43] Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, 17 March 2000.

protection of the most common or classic forms of intellectual property rights. And it has been very successful in doing what it was designed to do. In particular, the TRIPs has overcome several of the flaws or weaknesses that have been haunting the WIPO and the agreements administered by it, namely the lack of a universal commitment to substantive IP protection standards and the lack of universal enforceability. This is not to say that the TRIPs has not been criticized and cannot be improved. In particular, there is widespread dissatisfaction among developing countries with the insufficient recognition and protection of traditional knowledge in the TRIPs and with the “one size fits all” approach of the TRIPs to patent protection, which at times has led to the denial of access of poor people in developing nations to life-saving drugs and other important knowledge. To the extent the criticism is warranted – and not just the consequence of the developing countries’ inability to use the tools permitted under TRIPs, such as compulsory licenses for such life-saving drugs,^[44] and adequate anti-trust or anti-competitive procedures for cases of abuse – it does not, however, suggest that the TRIPs has failed or should be repealed. It only means that the TRIPs should be re-balanced to reflect not only the interests of the more developed countries and their inventors and artists but also the manifold forms of intellectual property that have always been part of the history and traditions of the developing nations and are being created on an ever increasing scale in these countries today.

Guiding Questions

1. What is the difference between intellectual property and other mobile or immobile property? Think about the answer to this question from different perspectives: a) the perspective of the owner or creator who made various efforts and investments to acquire the property; b) the perspective of sellers and buyers of the property; c) the perspective of third parties who might like to acquire the property.
2. What is the difference between exclusive rights to intellectual property and a mere non-exclusive license to use the same intellectual property? Are there equivalent rights to the use or ownership of other mobile or immobile property?

[44] To this effect, see also the *Declaration on the TRIPs Agreement and Public Health* adopted by the Fourth Session of the WTO Ministerial Conference at Doha on 14 November 2001, available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_04_e.htm#declaration.

3. Assume that Company C spent 10 years and 1 billion dollars to develop the Drug D, the first and only effective cure to a particular type of cancer.
 - a) How can C make sure that the recipe for the drug will not be used by other pharmaceutical companies without its permission and without payment of some form of compensation to C? Think about a purely domestic context but also about a situation where at least some of the (potential) competitors are seated in other countries.
 - b) Since the cancer can be found all around the world, including many countries with vastly different levels of wealth and income, C would like to charge different prices for different types of customers, depending on their ability to pay. In particular, C will need to charge a relatively high price for the drug in countries with well-developed health insurance systems or high levels of general wealth in order to recover the investment of 1 billion dollars for the development of the drug. At the same time, C wants to make the drug available also in poor countries, as long as the sales prices there at least cover the cost of production and make a small contribution to the recovery of the initial investment. (How) Can C have different prices for the drug in different countries? What happens if a trader buys the drug cheaply somewhere in Africa and then sells it in competition to C in high income countries?
 - c) What – if anything – can C do if it finds out that a particular enterprise E in country X is making the drug D without its permission, in particular if C has reasons to believe that E obtained the recipe either by reverse-engineering its drug D, or by relying on information published by C, for example in its patent application, or by hiring a former employee of C, rather than by independent and successful research of its own?
4. Certain diseases like malaria or river blindness (onchocerciasis) are common only in poor developing countries. Does the TRIPS encourage or discourage costly research into drugs and other remedies for these diseases? How might the global system for the protection of intellectual property be improved to provide better answers for such problems without weakening its positive features for high-tech research and development in affluent countries?

Suggested Further Reading

1. Frederick Abbott, Thomas Cottier and Francis Gurry, *International Intellectual Property Integrated World Economy*, 2nd edition, Aspen Press, 2011.
2. Daniel Chow and Edward Lee, *International Intellectual Property: Problems, Cases and Materials*, 2nd edition, West Publishing, 2012.

3. Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights-a Commentary on the TRIPS Agreement*, Oxford University Press, 2007.
4. Carlos M. Correa and Abdulqawi A. Yusuf (eds.), *Intellectual Property and International Trade-The TRIPS Agreement*, Kluwer Law International, 2008.
5. John Cross, Amy Landers, Michael Mireles and Peter Yu, *Global Issues in Intellectual Property Law*, West Publishing, 2010.
6. Graeme Dinwoodie, William Hennessey, Shira Perlmutter and Graeme Austin, *International Intellectual Property Law and Policy*, LexisNexis, 2008.
7. Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law*, Edward Elgar Publishing, 2008.
8. Peter Ganea and Thomas Pattloch, *Intellectual Property Law in China*, Kluwer Law International, 2005.
9. Daniel Gervais, *Intellectual Property, Trade and Development-Strategies to Optimize Economic Development in a TRIPS-Plus Era*, Oxford University Press, 2007.
10. Paul Goldstein, Marketa Trimble, *International Intellectual Property Law, Cases and Materials*, Foundation Press, 3rd edition, 2012.
11. Xue Hong, *Intellectual Property Law in China*, Kluwer Law International, 2010.
12. Duncan Matthews, *Globalising Intellectual Property Rights-the TRIPS Agreement*, Routledge, 2002.
13. Michael J. Moser (ed.), *Intellectual Property Law of China*, Juris Publishing, 2011.
14. Antony Taubman, *A Practical Guide to Working with TRIPS*, Oxford University Press, 2011.
15. Antony Taubman, Hannu Wager and Jayashree Watal (eds.), *A Handbook on the WTO TRIPS Agreement*, Cambridge University Press, 2012.
16. Neil Weinstock Netanel (ed.), *The Development Agenda-Global Intellectual Property and Developing Countries*, Oxford University Press, 2009.

Useful links

Additional information on intellectual property and trade, and in particular the TRIPS Agreement, can be found at

1. http://www.wto.org/english/tratop_e/trips_e/trips_e.htm
WTO TRIPS gateway page
2. <http://www.wipo.int/portal/index.html.en>
World Intellectual Property Organization

3. <http://www.who.int/intellectualproperty/en/>

Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH), World Health Organization

4. <http://unctad.org/en/Pages/DIAE/Intellectual%20Property/Development-Dimensions-of-Intellectual-Property-Rights.aspx>

Development dimensions of intellectual property rights webpage, United Nations Conference on Trade and Development

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