# TRIPs art. 7 and 8, FTAs and Trademarks

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Denis Borges Barbosa (2006) [1]

The TRIPs agreement, as a portion of the WTO treaties of 1994, was received in Brazil with mixed apprehension. TRIPs has led Brazil and most of its Latin American sister countries to reinforce and bring to constant action the Intellectual Property system. New laws and new enforcement structures were introduced, sometimes in detriment of other more stringent societal needs.

In fact, many of those overextended rights were due to overzealous parliamentarians, trying to convey their perceptions of TRIPs as induced by lobbies and international pressure groups. Much of the distortions felt in the IP system in Brazil, when contrasted with the requirements of public interest, are a creation of Brazilian Congress and courts.

Contrary to what this author thought when participating of the TRIPS negotiations as a Brazilian delegate, such treaty, as actually in force, came to be an almost middle-of-the road instrument in face of some national laws and TRIPs-plus agreements[2].

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1 This article borrows some material from our article Counting ten for TRIPs: Author rights and access to information – a cockroach's view of encroachment, found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=842564.

2 For this change of perspective, see O comércio internacional, o desenvolvimento econômico e social e seus reflexos na ordem internacional da propriedade intelectual, found at http://www.denisbarbosa.addr.com/basso.doc , published in Propriedade

In fact, TRIPs has objectively changed. Under its "Principle of progressive interpretation", which the international scholars indicate as one essential aspect of the treaty [3], the Doha decisions had impacted favorably Brazilian public policy, especially in regard to public access to essential medicines.

The Brazilian Government has for three times manifested its intent to issue compulsory licenses for antiviral medicines, and in each occasion the exercise was successful to a significant extent[4]. This fact, which does not fulfill our theme here, certainly creates a vigorous inducement to use TRIPs to the full limit of its allowances and functionalities.

## Trips and the multilateral promise

Brazil and some other developing countries spent the first years of the Uruguay Round voicing her objections to the inclusion of Intellectual Property theme into the GATT environment.

The textual balancing of interests finally achieved under TRIPs art. 7 and 8, although directed to the technological aspects of the Intellectual Property field, was promising enough to correspond to most of those requests.

But the most impressing promise of the multilateral exercise was that the era of unilateral sanctions was over.

> Understanding leaves no doubt that it is intended to strengthen the multilateral trading system. In an article clearly signaling this intent, entitled "Strengthening of the Multilateral System," the ministers impose upon the member states a requirement to seek "recourse to, and abide by, the rules and procedures of this Understanding," when seeking redress of a "violation of obligations or other nullification or impairment of benefits under the covered agreements. Article 23 goes on to specify that the members "shall . . . not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding. . . ." In short, the Understanding leaves no doubt that freelance, unilateral, or even unauthorized bilateral dispute resolution is not acceptable[5].

Therefore, adhering to the TRIPs agreement meant that developing countries would have no more U.S. Section 301 sanctions to be dealt with[6]. To the developing countries, which had been granted a the 5-year suspended application of IP requirements and received a bonus 5-year moratorium

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Intelectual, Estudos em honra à Prof. Maristela Basso, and A experiência brasileira de TRIPs (Palestra no Simpósio Franco Brasileiro sobre Saúde e Propriedade Intelectual, Itamarati, 23 de junho de 2004), found at http://denisbarbosa.addr.com/trips2004.doc . The summary of this article is the following: "No matter how hard TRIPs has been demonized during the last decade, we Brazilians were responsible for all the excesses, all the dysfunctions, all the oppressions that result of the legislation in vigor. The Brazilian legislators and judges had unbalanced the interests of the society and the investors, against the national interest. In the specific case of Brazil, our present insanity has of being cured by the vigorous administration of two remedies: by the application of the constitutional scrutiny, to clean the excesses of unreasonableness and offence to substantive due process of law. And also by the application of TRIPs, as it was consensually applicable".

3 Maristela Basso,.Os fundamentos atuais do Direito Internacional da Propriedade Intelectual , manuscript. The same content is also found in her book Direito Internacional Da Propriedade Intelectual, Livraria Do Advogado, 2000

4 This author has been engaged as a pro bono consultant in the last two initiatives. The changes in the Brazilian legislation subsequent to the TRIPs Assembly decision of August 31, 2003 are analyzed in A nova regulamentação da licença compulsória por interesse público, published at Revista da ABPI no. 67, nov/2003, found at http://www.denisbarbosa.addr.com/dohamirim.doc.

5 Michael Young, Dispute Resolution in the Uruguayan Round – Lawyers triumph over diplomats, 29 Int'l. Lawyer. 389 (1995). To be in what would seem a prudent conclusion, my former professor of Japanese Law in Columbia Law School remarked: "However, the Understanding does not forbid the parties from resolving a dispute by means other than a panel decision. Negotiations and consultations are still allowed, indeed encouraged. The Understanding specifically invites the parties to resolve disputes through mutual agreement. It also adopts, virtually intact, the provisions of the Improvements of 1989 regarding negotiation, consultation, good offices, conciliation, and mediation".

6 Section 337 of the Trade Act had been challenged in a GATT National Treatment panel in 1989 and found infringing of the 1947 rules.

against non-violation complaints[7], the assurance that international pressure would be mediated through WTO composed a reasonable bargain to composite the short term losses resulting from higher level IP laws. The compromises made were to be respected.

Professor Reichman was not so enraptured by such DSU achievements, but even so, pointed out that the abandonment of strong arm tactics as an important, if not crucial element of the bargain:

> A. COMPENSATION AS THE KEY TO FUTURE CONCESSIONS
>
> The process of integrating intellectual property law into international economic law necessarily imposes short and medium-term social costs on the developing countries. These costs are, to varying degrees, offset by the prospects of enhanced market access, of technical cooperation to implement the TRIPS Agreement, **and of relief from unilateral trade sanctions in future discussions of intellectual property protection**. (…)
>
> Meanwhile, the developed countries are unlikely to relax their efforts to elevate international minimum standards of intellectual property protection even after the TRIPS Agreement takes effect. In particular, they will press the developing countries with regard to scope of protection issues not expressly covered in the TRIPS Agreement, under the theory that both nonviolatory state actions and changing circumstances can nullify and impair benefits otherwise conferred. Moreover, higher international minimum standards that developed countries espouse in the course of harmonization exercises in other forums will add to the pressure on developing countries, on the grounds that emerging new standards make it necessary further to reduce trade-distorting intellectual property practices.

What both Professor Reichmann and Young did not foresee was the demise of the multilateral system. The elevation of post-TRIPs standards was a matter for a muscle-style, dark alley, and mobster art.

The new active role for governments

Some authors notice that TRIPs requires a very specific action from Governments, as compared with other WTO treaties. And it is really so. Whereas the 1947 GATT and most of the new multilateral agreements imposed a hands-off policy or restraint from a more active role, TRIPs in most cases supposes an interventive behavior, establishing new or enhanced exclusive rights, which have at first an undeniable restraint in domestic trade.

Momentarily or locally, some amount of the prior free access to the market is to be constrained by new patterns of exclusivity. The initial benefits would favor players that not necessarily will bring jobs and finance to the Government's territory at same level .as those provided through the prior unrestrained ambiance, and most possibly the whole exercise will result in higher prices for consumers[8].

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7 Tuan N Samahon, TRIPS copyright dispute settlement after the transition and moratorium: Nonviolation and situation complaints against developing countries, Law and Policy in International Business, Spring 2000., "In contrast to a violation case, a nonviolation complaint does not require any literal breach of a TRIPS provision. Article 23 (1) (b) defines nonviolation as that which nullifies or impairs TRIPS objectives resulting from the "application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement."40 Thus, conduct that does not violate any rule of any WTO agreement may still be deemed to nullify trade benefits that members reasonably expected to obtain."

8 Tuan N Samahon, , TRIPS copyright dispute…, op. cit., "Unlike goods trade, trade in intellectual property requires governments to regulate in order to protect trade rights. For instance, in the copyright context, TRIPS commands states to actively regulate in order to secure authors the limited monopoly that is inherent in copyright. These affirmative TRIPS obligations require state action, unlike GATT's passive obligations to not regulate or tariff goods. Consequently, TRIPS intellectual property protection cuts deeper into national sovereignty because TRIPS obligations involve affirmative commands to governments to act to protect and enforce. Whereas trade barriers to goods typically involve active prevention or delay of entry into a market, trade barriers for copyrighted goods involve a lack of government action, namely inadequate copyright enforcement, which permits the free or below-cost exploitation of foreign goods".

There is usually a delay in the benefits that could issue to local economy from the new regime, what may lead to political unbalances and perceived loss of sovereignty. The renewal of the same problems when post-TRIPs bilateral agreements are negotiated was usually dealt by closed door negotiations, as happened with a series of 16 BIT agreements negotiated in Brazil and eventually thrown away in 2002 before Congressional approval[9].

Enforcement

Enforcement of IP rights remained a central aspect of TRIPs[10], and at some aspects a needed one[11]. The pertinent chapter imposes some procedural and even substantive due process requirements that could be quite level for U.S. or European standards but rather invasive to other jurisdictions[12]; it is probably a first hint of an International Procedural Code, if any is indeed possible in the centuries to come.

The central aspect of the section is the provision in art. 41:

> It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

Therefore, TRIPs does not suppose an inordinate public investment and effort to keep protection of IP holders in a paramount position as compared to other basic societal needs.

## The quasi-constitutional role of TRIPs Art. 7 and 8

Crucial for the developing countries was also the perceived role of the quasi-constitutional provisions of art. 7 and 8 of TRIPs. As it would be developed below, those provisions may have an important role in limiting the scope of post-TRIPS FTAs.

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9 See our Direito de Acesso do Capital Estrangeiro (Após as Emendas Constitucionais de 1995), Direito do Desenvolvimento Industrial, Vol. I, Lumen Juris 1996. "In March of 1992, an Inter-ministerial Group for the elaboration of the Brazilian model of BITs was created, which was gradually modified to be adjusted to the OECD parameter. From 1993, the Brazilian Foreign Office (Itamaraty) negotiated a BIT series, concluding agreements, to this moment under appreciation of the National Congress, with Chile, Portugal, United Kingdom and Switzerland. Moreover, it carried negotiations with Germany, Italy, France, Korea, China, the Netherlands and the Norway. A further quadripartite agreement was signed in the scope of the MERCOSUL. The Brazilian agreements so far submitted the Congress, in contrast of that it occurs normally in the BIT signed firmed among others countries, do not contain sectorial restrictions of access of foreign investment. In contrast, as they provide for an unrestricted adoption of the national treatment and the MFN, without the criterion of sectorial national lists, it exceeds very of the cautious negotiations the multilateral scope of the OMC, and provoke serious concerns how much to the serenity and wisdom of the Federal Government. Such adhesion à outrance to the joys of internationalism, in this context, mimesis the enchantment that some members of the then governing class fall with regimes of the Axle, or of parcel of the left with the internationalism of the COMINTERN".

10 See Isabella Pimentel, A Observância aos Diretos de Propriedade Intelectual nos Tratados Internacionais Administrados pela OMPI e no Acordo Trips, in Patricia Luciane de Carvalho. Org., Propriedade Intelectual, Estudos em honra à Prof. Maristela Basso, Juruá, 2005, p. 115; Carlos Correa, Acuerdo, op. cit., p. 191.

11 Tuan N Samahon, op. cit., "Although the Berne Convention is the international standard for substantive copyright law, no international copyright law as such exists. Convention signatories agree to offer copyright protection under domestic law, but Berne itself provides no effective remedies except litigation before the International Court of Justice-for copy right infringement. TRIPS fulfills this need by mandating the creation of enforcement mechanisms in domestic law and by adding the teeth of WTO's dispute settlement machinery".

12 J.H. Reichman Enforcing the Enforcement Procedures of the TRIPS Agreement, 37 Va. J. Int'l L. 335 (1997); "To appreciate how great these risks are, we must imagine how the U.S. Congress would react if other countries told the United States when injunctions had to be made available, what the scope of U.S. discovery and appellate review procedures should be, what actions to criminalize, and how U.S. Customs agents should treat cultural and manufactured goods at the point of entry to this country. Yet, that is precisely what the TRIPS Agreement does in considerable detail".

The aspects to be taken into account, to this author's perspective, are the legitimacy of negotiation, if divertive from the balanced approach that TRIPs can be a model; the eventual contestability of over the balance FTAs provisions as compared to TRIPs model; and the eventual bias that unbalanced FTAs may cause towards future multilateral negotiations. A second set of issues is the effects that unbalanced FTAs may have in the internal law of the major negotiating agents (USA and EU), especially through the MFN clauses of the WTO ambiance; and the intrinsic inequality of the agreements where the major party has in fact lesser Intellectual Property obligations than the other party.

Art. 7 and 8 are, beyond any doubt, an *interpretative* tool of the meaning of the TRIPs agreement[13], and were thus used in the WTO case law especially in connection with the exceptions provided for its Art. 30 [14].

On a distinct analysis, Professor Margaret Chon [15] also expresses the view that TRIPs Art. 7 and 8 incorporates an affirmation of the equal protection values present in most or all Constitutional laws; our analysis of the non-discrimination rule of WTO body of law addresses this consideration.

Art 7 balancing device

Article 7 (Objectives) Article 7 of TRIPS provides:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

According to the UNCTAD Resource Book on TRIPs [16],

> "IPRs have been designed to benefit society by providing incentives to introduce new inventions and creations. Article 7 makes it clear that IPRS are not an end in themselves. It sets out the objectives that member countries should be able to reach through the protection and enforcement of such tights. The wording of Article 7 ("The protection... should contribute... ") suggests that such a protection does not automatically lead to the effects described therein. In introducing IPR protection, countries should frame the applicable rules so as to promote technological innovation and the transfer and dissemination of technology "in a manner conducive to social and economic welfare.

The article should therefore be read as an *interpretative* tool before everything [17], in a way conducive to the technology transfer; but it stresses especially the *balanced* nature [18] of the overall agreement [19].

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[13] Andrés Moncayo von Hase, La protección de las invenciones en América Latina durante los años 2001-2002. Incidencia del ADPIC en las legislaciones latinoamericanas, found at http://www.ml.ua.es/webprom/Jornadas/documentos/Moncayo-Invenciones.pdf, visited on 26/2/06. "Sus artículos 7 y 8 ponen de relieve los objetivos y principios básicos que inspiran al Acuerdo y que han de guiar su interpretación. En ellos se pone énfasis en la necesidad de lograr un equilibrio entre la protección de los derechos de propiedad intelectual y la necesidad de difundir y transferir tecnología y la posibilidad de adopción por parte de los Estados parte de medidas destinadas a proteger el medio ambiente y la salud pública y prevenir el abuso de los derechos de propiedad intelectual por sus titulares".

[14] See the Canadá decision as analyzed by Adrés Moncayo, in www.eclac.cl/.../capacidadescomerciales/CD%20Seminario%2011%20nov%2005/DOCUMENTOS/AMoncayo%20OMPI-CEPAL.pdf

[15] Presentation to the to the Workshop on IP, FTAs, and Sustainable Development, American University Washington College of Law, 27 - 28 February 2006.

[16] UNCTAD-ICTSID Resource Book on TRIPs and Development, Cambridge, 2005.

It should be noticed that Art. 7 does not limits itself to technological IPRs, as the final clause (The protection and enforcement of intellectual property rights should contribute (…) to *a balance of rights and obligations*) encompasses a much broader extent.

The idea of balancing is obviously a Constitutional device. The necessary balancing to the constitutionality of the IPRs as it is developed in the Constitutional discourse in many relevant countries appears in TRIPs, preventing the exclusive protection of the interests of the IPRs owners.

Art. 8 teleology device

Concluding the general principles (art. 8), the Agreement foresees that each country can legislate, within the scope of TRIPs, to protect the public health and nutrition and to promote the public interest in sectors of vital importance for its economic and technological development:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Incidentally, the provision is, by allowing the national law to *promote the public interest in sectors of vital importance to their socio-economic and technological development,* almost a *littera ad litteram* reproduction of the wording of art. 5. XXIX of the Brazilian Constitution of 1988.

***The conformation to the Agreement***

Important consideration, however, is how the article concludes: provided that these measures are compatible with the provisions of the Agreement. Similar provision can be found at the 1947 GATT art XX (b) [20]. However, whereas GATT 1947 allows for such measures as nonviolative provided that they are *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*, Article 8.1, provides that necessary measures must be "consistent with" the Agreement.

The UNCTAD Resource book notes:

> Since language of a treaty is presumed not to be surplus, it would appear that Article 8.1 is to be read as a statement of TRIPS interpretative principle: it advises that Members were expected to have the discretion to adopt internal measures they consider necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development. The constraint is that the measures they

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[17] Id. Eadem, "Article 7 provides guidance for the interpreter of the Agreement, emphasizing that it is designed to strike a balance among desirable objectives. It provides support for efforts to encourage technology transfer, with reference also to Articles 66 and 67".

[18] Certain authors emphasize, however, that this balancing would prevent and exclude the constitutional re-balance at the moment of the internment of the norms of TRIPs. He has, there, however, an underlying certainty of a dualism, with prevalence of the international norm.

[19] Id. Ead. "In litigation concerning intellectual property rights, courts commonly seek the underlying objectives of the national legislator, asking the purpose behind es¬tablishing a particular right. Article 7 makes clear that TRIPS negotiators did not mean to abandon a balanced perspective on the role of intellectual property in society. TRIPS is not intended only to protect the interests of right holders. It is in¬tended to strike a balance that more widely promotes social and economic welfare".

[20] Article XX - General Exceptions - Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health;

> adopt should not violate the terms of the agreement. This suggests that measures adopted by Members to address public health, nutrition and matters of vital socio-economic importance should be presumed to be consistent with TRIPS, and that any Member' seeking to challenge the exercise of discretion should bear the burden of proving inconsistency. Discretion to adopt measures is built into the agreement. Challengers should bear the burden of establishing that discretion has been abused.

**Art. 8 read in conformity with WTO law**

Our contention is that Art. 8 must be read as a non-discrimination rule by the application of Art. XX of GATT 1947 [21]. The issue of non-discrimination turns therefore to be relevant, if we were to interpret TRIPs art. 8 in harmony with the whole body of the WTO normative system.

The GATT, in its basic body, contains two rules relative central offices to the discrimination: of Article I, relative to the Most favored nation (MFN), and of Art. III, that it regulates the call "national treatment". John Jackson Says:

> ""The national treatment, like the MFN obligation, is a rule of 'nondiscrimination'. In the case of MFN, however, the obligation prohibits discrimination between goods from different exporting countries. The national treatment clause, on the other hand, attempts to impose the principle of nondiscrimination as between goods which are domestically produced, and goods which are imported. It is, needless to say, a central feature of international trade rules and policy." [22]

Thus, the basic principles of non-discrimination are that no member of the WTO can treat other members differently, nor to establish inequality between national and foreign. On other side, reasons exist that justify the discrimination.

The first hypothesis where this can occur is the foreseen one in Art. XXI, relative to the national security, which are of an unconditional effect [23]. A thing quite similar occurs with the general norms of public order of art. XX, as indicated.

Among such norms they are the measures necessary to assure the application of the laws and regulations that are not incompatible with the provisions of TRIPs, such as, for example, the defense to the public health through limitations to the patents of remedies against the AIDS, or the protection of the patents, trademarks and rights of authorship and reproduction, and the measures proper to hinder passing off [24].

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[21] See our article O Princípio de Não-Discriminação em Propriedade Intelectual, found at http://denisbarbosa.addr.com/discriminatio.doc, included in our Usucapião de Patentes e outros Temas de Propriedade Intelectual, Lumen Juris, 2006.

[22] Op. cit., p. 483.

[23] See as to this aspect of the continuance of GATT 1947 exceptions our article A Proteção da Segurança Nacional no GATT (1993) , in our book Licitações, Subsídios e Patentes, Lumen Juris, 1997 (Direito do Desenvolvimento Industrial, vol. 2), republished in the Brazilian Defenese Legal Review of Oct. 2005, found at http://denisbarbosa.addr.com/60.doc

[24] The case law prior to WTO had alredy accepted that Art. XX (b) of GATT applied to IPRs According to the GATT Law and Practice, 1994, in the 1983 Panel Report on "United States - Imports of Certain Automotive Spring Assemblies", "the Panel noted that, as far as it had been able to ascertain, this was the first time a specific case of patent infringement involving Article XX(d) had been brought before the CONTRACTING PARTIES".. "The Panel noted that the GATT recognized, by the very existence of Article XX(d), the need to provide that certain measures taken by a contracting party to secure compliance with its national laves or regulations which otherwise would not be in conformity with the GATT obligations of that contracting party would, through the application of this provision under the conditions stipulated therein, be in conformity with the GATT provided that the national laws or regulations concerned were not inconsistent with the General Agreement. In this connection the Panel noted in particular that the protection of patents was one of the few areas of national laws and regulations expressly mentioned in Article XX(d). "' In the Panel Report on "United States - Section 337 of the Tariff Act of 1930", "The Panel noted that in the dispute before it the `laws or regulations' with which Section 337 secures compliance are the substantive patent laves of the

The exception, in this hypothesis, is not unconditional, as in the case of the national security. It is necessary that if it demonstrates that the pertinent measures do not constitute arbitrary or unjustified discrimination, between the countries where the same conditions exist. Or either, that all the foreign countries are treated without discrimination or, having such thing, that the same one is justified. She is necessary also that the measure in question is not a disguised restriction to the international trade. Or either, that the measure, still that has for effect the restriction to the commerce, if does not come back specifically to such end.

The case law after WTO has affirmed the continuance of Art. XX and XXI exceptions:

> (…) a member State may treat imported products less favorably, and even ban such products, if it is pursuing one of the legitimate goals set forth in the Article XX exceptions, and such unfavorable treatment does not amount to an "unjustifiable" or "arbitrary" discrimination, or a "disguised restriction on trade. [25]:

However, under current WTO case law, also the measures implementing national interest should be subject to a standard of minimum impact on the overall purposes of WTO law:

> The WTO could, for example, conclude that the defendant State should raise additional taxes to provide its population with treatment without suspending patent rights. While this argument would be hard to make with respect to a State with very limited resources, it would have some strength with respect to a country such as Brazil, which was a defendant in the proceedings filed in the WTO by the United States relating to the suspension of patent rights for AIDS drugs. The defendant State may also seek cooperation with the foreign drug companies to lower the price of drugs [26].

**TRIPs Art. 8 read as a non discrimination rule**

There is no doubt that there is a normative context common with the basic body of the GATT-1947 and the new TRIPs Agreement. The basic 1994 text so states:

> 1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
>
> (a)the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

The TRIPs text also is identified clearly as part of the normative system of the OMC.

> *Recognizing*, to this end, the need for new rules and disciplines concerning:
>
> (a)the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

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United States and that the conformity of these laves with the General Agreement is not being challenged"." In relation to the criterion of "necessary" in terms of Article XX(d), "The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent lave or its desired level of enforcement of that lave, provided that such lave and such level of enforcement are the same for imported and domestically-produced. products. However, it does mean that if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with ~ GATT provisions, it would be required to do so".

25 Ari Afilalo, Sheila Foster The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, And Environmental Health In The Balance, 15 Geo. Int'l Envtl. L. Rev. 633, Summer, 2003. O autor agradece a Prof. Sheila Foster, da Fordham University Law School, pelo seu auxílio neste contexto.

**26** Op. Cit.

Moreover, the Agreement enters in vigor after that to the validity of the Treated one instituting the OMC (TRIPS 65, 1) and is used as essential element of the system of solutions of controversies of Articles XXII and XXIII of the General Agreement (TRIPS 64).

**WTO Case law and the non discrimination role of TRIPs art. 7 and 8**

The Resource Book notes, refering to the *Canada – Generics* case [27] :

> When it analyzed the relationship between Article 27.1 and Article 30 of he TRIPS Agreement, the panel employed Articles 7 and 8.1 in its analysis, tating:
>
> "7.92... Beyond that, it is not truie that Article 27 requires all Article 30 exceptions to be applied to all products. Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a h-ustl-ation of purpose. It is quite plausible, as the EC argued, that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminarely manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers." [emphasis added]
>
> The panel suggests that Articles 7 and 8.1, and the policies reflected in those articles, are bounded by the principle of non-discrimination in Article 27.1 with respect to patents. Presumably the panel is invoking the specific non-discrimination requirement of Article 27.1 as a control on the more general policies stated in Articles 7 and 8.1, and also invoking the consistency requirement of Article 8. t. It is not clear how far this idea of giving precedence to specific obligations over more general policies should be extended '

Therefore, however misguided in this context [28], the role of non-discrimination principle of WTO law seems inevitable consideration wherever dealing with TRIPs art. 7 and 8.

The purposes leading to TRIPs art. 7 and 8

Achieving a standard of balancing of interests was clearly a stated target of the developing countries engaged in the negotiation of TRIPs [29].

> Written submissions of a more general nature presenting views on questions of standards and principles concerning the scope, availability and use of trade-related intellectual property rights have also been circulated by Thailand, Mexico and Brazil. The Thai statement (MTN.GNG/NG11/W/27) inter alia emphasises that the two fundamental goals pursued by governments when granting intellectual property protection are the stimulation or encouragement of intellectual property creation and the accord of proper and legitimate protection of the public interest; **the former must not put an undue burden on or adversely affect the latter.** The statement by Mexico (MTN.GNG/NG11/W/28) inter alia says that the negotiating objective regarding the improvement of intellectual property rights should not become a barrier to access by developing countries to technologies produced in developed countries. Any results obtained in the Group would therefore necessarily have to include more flexible elements for the use of such technology by developing countries, since countries with different levels of development cannot respond in the same way to each of the trade and intellectual property aspects. Mexico also advocates examination of Articles IX,

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[27] Canada - Patent Protection of Pharmaceutical Products**,** Report of the Panel. **WT/DSI14/k.** March 17, **2000**

[28] This author has extensively analyzed the problem of the so-called non dicrimination status of TRIPs art. 27.3 in O Princípio de Não-Discriminação em Propriedade Intelectual, op. cit. Here, again, non-discrimination should be read under the lights of general WTO law, and not only withinh the sole context of TRIPs.

[29] TRIPs negotiating document MTN.GNG/NG11/W/32/Rev.1, 29 September 1989

XX and XXIII of the General Agreement and says that the provisions of the General Agreement should not be used to modify legal regimes governing intellectual property rights, but should aim, in the best of cases, at recommendations to reduce distortions in international trade and barriers to that trade which may derive from the application and protection of intellectual property rights.

Particularly relevant in this context was the Brazilian position:

The Brazilian paper (MTN.GNG/NG11/W/30) says that the originality of the Group's work lies in the need to keep in view both the trade-related and developmental aspects of intellectual property rights, distinguishing it from more legal discussion being held in other fora. It advocates priority attention in the Group to:

i) The extent to which rigid and excessive protection of intellectual property rights impedes access to the latest technological developments, restricting therefore the participation of developing countries in international trade. In this context, it emphasises the importance of specific exclusions from the protection of intellectual property rights.

ii) The extent to which abusive use of intellectual property rights gives rise to restrictions and distortions in international trade. Practices which have this effect should be subject to adequate multilateral discipline. (….)

iii) The risks that a rigid system of protection of intellectual property rights implies for international trade. Attentive consideration should be given to cases where the protection and enforcement of intellectual property rights become a barrier or harassment to legitimate trade, including where it is used as an excuse to implement protectionist and discriminatory measures.

## The treatment of art. 7 and 8 by Case law

The notion of the balancing role of art. 7 and 8 has not, apparently, received to the moment full support in the WTO case law

In the first few years after the adoption of TRIPs, the WTOs Dispute Settlement Body (DSB) considered two complaints regarding domestic standards of patent protection that were alleged to violate international trade law obligations. Their resolution has proved illuminating. Both decisions proceed from the assumption that TRIPs is primarily concerned with protecting intellectual property even though the Agreement plainly recognises the objective of protecting and enforcing exclusive rights in IP for the purpose of contributing to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

In *India Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the DSBs Appellate Body had to consider whether India had complied with its obligations under TRIPs in respect of a means for the filing of patent applications for pharmaceutical and agricultural chemical products.72 It was common cause that India's obligations to provide minimum standards of patent protection would become effective only ten years after the adoption of TRIPs (i.e., in 2005).

India unsuccessfully defended the original complaint lodged by the US (and largely supported by the European Union) before a DSB panel. It was largely unsuccessful in its attempt to overturn the panel decision on appeal. The Appellate Body decision tempered some of the more disagreeable aspects of the panel's findings. But its reasoning views the main object and purpose of TRIPs as the need to promote effective and adequate protection of intellectual property rights.74. In its view, TRIPs is simply about the protection of IP.

The principle of balance suffered a similar fate in *Canada Patent Protection of Pharmaceutical Products*. In that case, a DSB panel had to deal with three issues. First, does TRIPs permit the production and stockpiling of pharmaceutical products prior to patent expiry? Second, does the agreement allow for generic manufacturers to start and complete the

> drug regulatory process prior to patent expiry? Third, can pharmaceutical products be treated differently from inventions in other fields of technology?
>
> Importantly, not one of the provisions of Canadian patent law under attack would have allowed for the introduction of generic competition during the life of a pharmaceutical patent. Collectively, they merely sought to eliminate delays in bringing generic medicines to market upon patent expiry. In other words, the provisions would have allowed for generic competition immediately upon patent expiry, because drugs would have already been registered and produced in advance.
>
> In its decision, the WTO panel declared the stockpiling provision to be in violation of TRIPs. It upheld the early registration of pharmaceutical products. And it sidestepped the differential treatment question. On the surface, the outcome appeared almost acceptable. The direct consequences for Canada were fairly minimal. This was because the loss of the right to stockpile meant little more than that generic drugs produced in Canada reached the market about three weeks later.
>
> Yet the position was critically different for countries with weaker generic manufacturing capacity. And it would be shortsighted to view the decision solely from the point of view of its impact on Canada. The panel's interpretation of the general exceptions clause (whose existence signifies the need for a mechanism to resolve legitimate, competing policy interests) provides cause for general concern. Seemingly heedless of the principle of balance that lies at the core of patent protection, the panel considered the TRIPs provision Canada invoked to justify its statute solely in the light of how much the rights holder might lose, not in how much society might gain, from a given exception. It never asked what scope the exception might require to achieve the social purposes at issue [30].

However, it must be noticed the very important note of the Appellate Body in the Canada case:

> 101.Also, we note that our findings in this appeal do not in any way prejudge the applicability of Article 7 or Article 8 of the TRIPS Agreement in possible future cases with respect to measures to promote the policy objectives of the WTO Members that are set out in those Articles. Those Articles still await appropriate interpretation [31].

The normative environment set by art. 7 and 8

But a somewhat more vigorous hand is felt in the normative exercises, both as a inspiration and grounds for the Group of 77's proposals and actual Doha implementation. The issue here is to employ a constructive device under what the Brazilian International Law jurist Maristela Basso calls the Principle of Evoluctive Interpretation which results from the combination of art. 7 and 8 plus 71.1 of TRIPs, which led to the Doha improvements and in particular the recent enactment of Par. 6 into non-soft norm [32].

The Doha Declaration states that work in the TRIPS Council on these reviews or any other implementation issue should also look at the relationship between the TRIPS Agreement and the UN Convention on Biodiversity; the protection of traditional knowledge and folklore; and other relevant new developments that member governments raise in the review of the TRIPS Agreement. It adds that the TRIPS Councils work on these topics is to be guided by the TRIPS Agreements objectives (Article 7) and principles (Article 8), and must take development fully into account.

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[30] Edwin Cameron (Supreme Court of Appeal, Bloemfontein, South Africa), Patents And Public Health: Principle, Politics And Paradox, Inaugural British Academy Law Lecture held at the University of Edinburgh, Tuesday 19 October 2004

[31] Doc. WT/DS170/AB/R 18 September 2000

[32] See South Centre Analytical Note of March 2004, doc. SC/TADP/AN/IP/1

In the Brazilian/Argentinean proposal for a Development Agenda the balancing approach is also central [33]

> "Intellectual property enforcement should also be approached in the context of broader societal interests and development related concerns, in accordance with Article 7 of TRIPS"

and:

> A consideration of the development dimension of intellectual property must be quickly brought to bear on discussions in the SCP. If discussions on the SPLT are to proceed, these should be based on the draft treaty as a whole, including all of the amendments that have been tabled by developing countries. Moreover, Members should strive for an outcome that unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of Member States. Provisions on objectives and principles, reflecting the content of Articles 7 and 8 of the TRIPS Agreement, should be included in the SPLT and other treaties under discussion in WIPO [34].

The same inspiration permeates the position of non-governmental actors of the FTAs negotiating environment:

> FTAA should create mechanisms devoted to the promotion of effective technological transfer for the developing countries (TRIPs Article 7) through the elimination of existing constrains, as well as to drive public and private actions for improvement of R&D capacities in such countries, with mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations [35].
>
> Hemispherical financial institutions, as Inter-American Development Bank, should create special financing lines to promote technical invention and technological transfer among countries into FTAA. Such financial lines should materialize in FTAA the compromise assumed by developed countries through TRIPs Article 7. The local counterpart could be considered public or private source available in members countries of FTAA.

A rule of reason approach to competitive rules

Other relevant effect of art. 7 and 8 of TRIPs occurs in their joint interpretation with art. 40 of TRIPs, as notes J.H. Reichmann [36]:

> (…) article 40 of the TRIPs Agreement reiterates the legitimacy of controlling anticompetitive practices in contractual licenses affecting intellectual property rights generally.[37] However, article 40 (1) acknowledges the lack of consensus in the area [38] by conceding that states agree only "that some licensing practices or pertaining to intellectual

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33 Doc. WO/GA/31/11 of Aug. 27, 2004

34 This sensibility is very active in Brazil, as can be perceived in the statement by Pedro de Paranaguá Moniz, on behalf of the Centre for Technology and Society - CTS,of Fundação Getúlio Vargas (FGV) School of Law, Rio de Janeiro, Brazil, yo the WIPO Provisional Committee on a Development Agenda - PCDA, 1st Session 20-24 February 2006 “In order to implement the development dimension within WIPO, as agreed by consensus, and in order to prevent the undesired costs above-mentioned, we recommend that the language of articles 7 and 8 of the TRIPs Agreement be present in every current and future WIPO Treaty”.

35 The Brazilian Fine Chemicals And Biotechnology Business Association (ABIFINA) proposal for FTAA:

36 The International Lawyer, Summer 1995, Volume 29, Number 2

37 [ Original footnote] See TRIPS Agreement, supra note 4, art. 40 and title do Part II, Section 8 ("Control of Anti-Competitive Practices in Contractual License")

38 [Original footnote] See supra notes 63-73 and accompanying text; Matsushita, supra note 197, at 92-93; Spencer Weber Waller & Noel J. Byrne, Changing View of Intellectual property and Competition Law in the European Community and the United States of America, 20 Brook J. Int'l L. 1 (1993); see also Reichman, Competition Law, Intellectual Property Rights and Trade, supra note 3, at 87-94 ("Pressures on the Doctrine of Misuse").

> property rights... restrain competition" and "may have adverse effects on trade and may impede the transfer and dissemination of technology. " [39] (…) Evidently, this provision attempts to address the kinds of abuse sounding in antitrust principles that developed counties normally recognize, [40] *without necessarily impeding the developing counties from proceeding on other grounds* either under the formulation of article 8 or under broader principles inherent in the objectives set out in article 7 and in the public interest exception set out in article 8(1). [41] "

As Professor Reichman notes, as a more general measure, TRIPs also provides for the adequate balance between competition and Intellectual Property interests [42]. This TRIPs experience is, so this author believes, a very important precedent for the negotiation of competition themes within WTO[43]. For, as it is remarked in the legal literature, Intellectual property rights are essential, but not sufficient, conditions for competition. Both the excessiveness of scope and misuse need to be balanced by way of the regulation of competition. Even considering that some balance is inherent to TRIPS art. 8, it could be certainly helped by the establishment of some further discipline on private party conduct and competition in the WTO[44].

Carlos Correa [45] also stresses that effect of the balancing provisions to art.. 40.2 of TRIPs:

> La Sección 8 del Acuerdo TRIPs contiene una serie de normas destinadas a controlar las "prácticas anticompetitivas" en licencias voluntarias. Estas normas pueden considerarse como una aplicación concreta del principio general establecido en el artículo 8.2 del mismo Acuerdo, según el cual "podrá ser necesario aplicar medidas apropiadas, siempre que sean compatibles con lo dispuesto en el presente Acuerdo, para prevenir el abuso de los derechos de propiedad intelectual por sus titulares o el recurso a prácticas que limiten de manera injustificable el comercio o redunden en detrimento de la transferencia internacional de tecnología"[46].

## The constitutional promise

Balancing of contrasting interests is a crucial issue in IP law:

> The efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions. (...) From their inception, **the federal patent laws have embodied a careful balance** between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy. Bonito Boats, Inc. V. Thunder Craft Boats, Inc., 489 U.S. 141 (1989).

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39 [Original footnote] See TRIPS Agreement, supra note 4, art. 40 (I).

40 [Original footnote] See supra notes 64, 72-73 and accompanying text.

41 [Original footnote] See TRIPS Agreement, supra note 4 arts. 7, 8(1); supra text accompanying notes 65-71 77-80;

42 See our article The World Competition Agency as a necessary International Institution (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=436685)

43 Not all writers would agree. Swaine remarks (op. cit) "First, however unsophisticated many countries were with respect to intellectual property, and however ideologically divisive those issues may potentially be, TRIPS profited considerably from the drafters' ability to incorporate norms and members from the World Intellectual Property Organization (WIPO). See Leebron, supra note 118, at 19-20. Antitrust has no such precedent. Second, an indispensable issue for cross-issue trades – the trust of the parties – may have been partly exhausted in the aftermath of TRIPS, as developing countries came to recognize the potential costs of recognizing intellectual property rights and to doubt the market access commitments by the developed countries. This is reflected in the emphasis on implementation issues at Doha.

44 Cottier and Maitinger, The TRIPs Agreement without a Competition Agreement?, found at www.feem.it/NR/rdonlyres/364E97CC-2C8D-42E2-BE36-D87542C3A67C/ 299/6599.pdf , visited 17/8/2003

45 [Nota do Original] Acuerdo TRIPs, op. Cit.

46 [Nota do Original] Outra aplicación importante de este principio es el artículo 31k), antes citado, referente a las licencias obligatorias para corregir prácticas anticompetitivas.

This balancing was held in Bonito Boats as a constritictive limitation to the state power to go beyond the Federal standard. Balancing, whenever achieved, is a positive legal border no to be violated by well meant however misguided exercises in strengthening IP protection.

This author thinks that TRIPs, even though being a minimum standards treaty, also imposes a balancing of interest standard, indicating which interests are relevant. A FTA provision that unreasonably exceeds the levels provided by TRIPs would thrive in one-sidedness. It might be held therefore, following the reasoning of Bonito Boats, as violative of TRIPs.

It neither is nor advanced the idea that TRIPs would prevent protection beyond its minimum level:

> The basic observation is very straightforward: TRIPS does not prohibit WTO Members to conclude among themselves treaties containing obligations that go beyond the standards of TRIPS. Although there is no clear provision specifically dealing with the relationship with other agreements, several TRIPS provisions indicate TRIPS conformity of TRIPS-plus standards in agreements among individual WTO members [47]

But this may happen in some instances. TRIPs also includes *maximum* protection levels and exceeding them may result in violation of such agreement [48]. Our understanding, however, is that even in areas not covered by those ceiling standards, unbalancing of interests in a unreasonable manner is violative of TRIPs [49].

## The unrequited promises

And this happened both under the blessings and over the condemnation by the DSU system. In three consecutive cases, the unscuttled unilateral panoply of the United States trade system was brought to court under DSU rules. In the two first cases, unilateralism was acquitted. In the 2003 case, the Section 201 affair, the U.S. loss did not prevent the American trade system to threaten their partners with the full power of unilateral sanctions, with or without WTO support:

> "the U.S. President emphasized and vowed," We will continue to pursue [our] economic policies", as well as "our commitment to enforcing our trade laws", right after the U.S. had lost in the "Section 201" Disputes and was forced to temporarily terminate the abused U.S. "safeguard measures" of unilateralism. Similar to the USTR's declaration right after the end of "Section 301" Disputes in December 1999, the U.S. President's proclamation right after the end of "Section 201" Disputes in December 2003 actually announced to the world: We, the U.S.A., will continue to pursue our policies of economic hegemony, and continue to conduct such activities still under the camouflage of defending U.S. "sovereignty",

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47 Josef Drexl, op. cit.

48 Id., ead. "Nevertheless, existing TRIPS standards may conflict with TRIPS-plus standards in bilateral agreements in cases in which the former do not only define minimum, but also maximum standards. Although it seems, according to Art. 1.1 TRIPS, that such maximum standards are inherently foreign to the concept of the TRIPS, the Agreement nevertheless prohibits "more intensive protection" in its provisions on enforcement of Part III to the extent that it fixes general procedural provisions to the benefit of any party to an IP litigation. In some instances, the Agreement even explicitly provides for procedural rights of the defendant, like with regard to the level of legal certainty as a requirement for provisional measures (Art. 50.3 TRIPS) and the rights of the alleged infringer to be informed and to be heard within a reasonable time after provisional measures have been adopted inaudita altera parte (Art. 50.4 TRIPS). Most strikingly Art. 48 TRIPS provides for a right to indemnification of the defendant in case of an abuse of enforcement procedures."

49 A relevant aspect of raising such issue in a context of FTAs is the standing to argue such violation; unbalance is a subjective or objective standard? The TRIPs minimum standards were construed as generally applicable, as under the "universal minimum standards" entry level of the old era of International Law. Many States, after having negotiated FTAs, would probably maintain at a public level that the negotiations were fair and balanced considering their specific *subjective* context, even if under a *objective* consideration of art. 7 and 8 they would be possibly lacking.

safeguarding U.S. interests, and enforcing U.S. laws. Therefore, even though the U.S. lost in the recent "Section 201"Disputes, its hegemonic chronic continue to recur at any time. [50]

The post-TRIPs era started therefore under such grim prospective for developing countries [51]

## The demise of multilateralism

TRIPs promises of multilateral conviviality frustrated, the international discussion regarding Intellectual Property has followed at least five main trends in the post-TRIPs era: reciprocization, diversification, bilateralism, non-nationalization, and abandonment[52].

Reciprocity is a natural state of equal parties, theoretically out of fashion after Paris and Berne conventions had substituted it in favor of the national treatment rule. Berne, however, allows for both national treatment as a principle, and reciprocity as a limited exception in some important cases. Reciprocity collides with the MFN rule imposed under WTO treaties, what did no prevent the EU and the U.S. to use reciprocity provisions in the Semiconductor and the nonoriginal databases protection laws.

Diversity was the natural environment of the Paris Convention: except for very limited aspects, the 1883 system left member countries to fit Intellectual Property into their peculiar needs. Harmonization exercises and minimum standard systems, like TRIPs, restrain diversity, and it is notable that those trends only appear in the Historical context in which the central issues were already harmonized among the main players – when diversity stays as more a right than a fact.

TRIPs allows for some diversity, albeit no par to the 1883 system. Within the scope of this study, it maintains the admissibility of reverse engineering for computer programs, allows for recognition or denial of moral rights under copyright, and (provided that the three-step test is satisfied) makes some space for exceptions to exclusive rights.

Developing and LDC countries had some diversity embedded into TRIPs, and assimilated their traditional diversity discourse to the new habitat. But in the real issue of public health and in the (to me) delusional theme of traditional knowledge some further diversification was demanded and obtained. The Doha public health, compulsory license system [53] was certainly a major countercurrent milestone, and the perfect example of successful diversification.

Diversity is an argument, and used as such by some important actors, like Brazil and Argentina, to evolve in the IP discussions. A direct and inverse notion of diversification is the bilateralism practiced in a series of Free Trade, Investment or IP Agreements, which diverge from TRIPs

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50 An Chen, The Three Big Rounds Of U.S. Unilateralism Versus WTO Multilateralism During The Last Decade, found at http://www.southcentre.org/publications/workingpapers/paper22/wp22.pdf

51 For such prospects, see Shira Perlmutter, Future Directions in International Copyright, 16 Cardozo Arts & Ent. L.J. 369 (1998); Jane C. Ginsburg, International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?, 47 J. Copyright Soc'y U.S.A. 265 (2000); J.H. Reichman, The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries, 32 Case W. Res. J. Int'l L. 441 (2000), Frederick M. Abbott, The Future of the Multilateral Trading System in the Context of TRIPS, 20 Hastings Int'l & Comp. L. Rev. 661 (1997); J.H. Reichman & David Lange, Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions, 9 Duke J. Comp. & Int'l L. 11 (1998); Peter K. Yu, The Copyright Divide and Convenient Excuses: A Comparative Inquiry into the Causes of Massive Copyright Piracy (unpublished manuscript)

52 Yu, Peter K., "Currents and Crosscurrents in the International Intellectual Property Regime", Loyola of Los Angeles Law Review, Vol. 38, 2004

53 Abbott, Kenneth W., "Development Policy in the New Millennium and the Doha 'Development Round'". Abbott, Asian Development Bank, May 2003 http://ssrn.com/abstract=431921; Shanker, Daya, "Access to Medicines, Article 30 of TRIPS in the Doha Declaration and an Anthropological Critique of International Treaty Negotiations". http://ssrn.com/abstract=391540; Shanker, Daya, "Access to Medicines, Article 30 of TRIPS in the Doha Declaration and an Anthropological Critique of International Treaty Negotiations". http://ssrn.com/abstract=391540.

minimum standards, not necessarily to fit IP into both parties' peculiar interests. This will be dealt with below.

De-nationalization is a by-product of information ubiquity [54] and comes in to flavors: the Uniform Domain Name Dispute Resolution Policy supranational type[55], and the *in re ipsa* style of computer code, which transcends state-issued laws entirely[56].

Abandonment is the expressive term used by Peter Yu to cover the non-use of IP laws, or to use them in such a way to negate their more conspicuous effects (I would rather refer this trend as a side-stepping of the IP rule of law). It would be so described as abandonment the Brazilian policy concerning Author Rights, as mentioned in the first page of this study and shall be analyzed below.

## FTAs, BITs and other close encounters

As recalls Professor Basso[57], pre-TRIPs American uni or bilateralism was built upon the Section 301 of the Omnibus Trade and Competitiveness Act of 1984, which authorizes the United State Trade Representative - USTR to initiate procedures when a policy or practice of a foreign country affects the trade interest of the United States, or established unjustifiably hinders or restricts the U.S. trade. At that time as still now, Section 301 pressures "many countries to agree to international agreements and to accept commitments coveted with sights not to prevent the possible American commercial sanctions"[58].

The number of recent FTAs have been growing , as shows the table below:

| Countries | Date of signing |
|---|---|
| Colombia | 28 February 2006 |

54 See our Crimes cometidos no exterior por meio da Internet contra ente público (1998) (Revista Electrónica de Derecho Informático, Vol. 4, November de 1998 – found at http://derecho.org/redi/)( and Laurence R. Helfer & Graeme B. Dinwoodie, Designing Non-national Systems: The Case of the Uniform Domain Name Dispute Resolution Policy, 43 Wm. & Mary L. Rev. 141, 148 (2001).

55 Available at http://www.icann.org/dndr/udrp/policy.htm

56 P. Bernt Hugenholtz, Code as Code (...). op. cit.; "Computer code has many advantages over the law of intellectual property and other legal instruments. What is especially appealing to the technocrat is its capability of fully automated enforcement, not ex post but immediate and automatic. The code leaves the user no alternative but to comply: (cheap and fast) 'self-enforcement' in stead of (expensive and slow) enforcement by the law. As Professor Lessig has observed: "In the well implemented system, there is no civil disobedience. Law as code is a start to the perfect technology of justice"

57 Maristela Basso, Propriedade Intelectual na Era pós-OMC, Livraria do Advogado, 2005.

58 It is to be noted that the EU also had its equivalent instrument. Reports Michael J. Trebilcock and Robert Howse, The Regulation of International Trade, Routledge, 1995, p. 261: "In 1984, the Union created what is called `the new trade policy instrument'. The instrument allows the Union to engage in trade retaliation against `illicit commercial practices' of non-Union countries that affect EU economic interests. `Illicit commercial practices' are defined as violations of `international law or generally accepted rules" According to the European Commission Green Paper on copyright, `in the field of intellectual property, and copyright in particular, the instrument could conceivably play a significant role in the future, particularly as regards countries which practise a policy of more or less active connivance in the pirating of goods and services developed elsewhere'. In the intellectual property area, the instrument would be used primarily against countries in violation of existing treaty obligations, under both the Paris and the Berne Conventions. However, Brueckmann notes that pursuant to Article 113 of the Treaty of Rome, which gives the Union jurisdiction over a common commercial policy, bilateral action has also been taken (in particular against Korea) along the lines of the US Tariff Act - i.e. suspension of GSP concessions. The background of this action was however rather unusual. Korea had agreed, as part of a negotiated settlement of action under s. 301 of the Tariff Act, to provide intellectual property protection for US innovations but did not extend such protection to other countries".

| | |
|---|---|
| Bahrain[59] | 14 September 2004 |
| CAFTA countries + Dominican Republic[60] | 5 August 2004 |
| Marocco[61] | 15 June 2004 |
| Australia[62] | 18 May 2004 |
| Chile[63] | 6 June 2003 |
| Singapore[64] | 6 May 2003 |
| Jordan[65] | 24 October 2000 |

Prof. Drexl remarks [66]:

> Whereas these provisions contain detailed provisions on IPRs going beyond the standards of TRIPS (TRIPS-plus), the older free trade agreement concluded with Israel dating of 1985[67] in its Art. 14 only confirms existing obligations of the parties under bilateral and multilateral agreements and adds a general clause on national and most-favoured-nation treatment. Currently, the U.S. is negotiating FTAs similar to those concluded recently with a number of countries. These countries include Oman, the United Arab Emirates (UAE), Panama, the four Andean Community Countries Bolivia, Ecuador, Peru and Columbia[68] as well as the five countries of the South African Customs Union (SACU), namely Botswana, Lesotho, Namibia, South Africa and Swaziland .

***The post-TRIPs unilateralism***

Professor Basso sees the "new, post-TRIPs bilateralism" as an abandonment of apparent democratic atmosphere of the multilateralism. Either under threat of *Special 301* sanctions or by means of bilateral and regional FTAs or BITs agreements, USTR exacts from lesser countries the acceptance of "extra-TRIPS" or "TRIPS-plus" standards. The "old bilateralism" did not operate within the promised multilateralism of TRIPS, just to extinguish its flexibilities and to search the benefits of forum shifting, as the new version of the same plague does.

Some authors blame Brazilian and other developing country diversionism for the recent increase of American and European bilateralism:

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59 See http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html.

60 Members of the Central American Free Trade Association are Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. See "CAFTA – Dominican Republic – United States Free Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

61 See http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html.

62 See http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html.

63 See http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

64 See http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html.

65 See http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.

66 Josef Drexl, The Evolution of TRIPS: Toward Flexible Multilateralism, paper submitted to the conference Ten Years of TRIPs, Buenos Aires, Nov. 2005.

67 See Israel Free Trade Agreement, entered into force 19 August 1985, http://www.ustr.gov/Trade_Agreements/Bilateral/Israel/Section_Index.html.

68 Thereby excluding Venezuela as remaining 5th Andean Community member.

> In response to the increased demands for diversification from less developed countries, the European Union and the United States have begun to use bilateral and plurilateral treaties to enhance their bargaining positions and avoid stalemates in the international intellectual property arena. The need for such a change of strategy became apparent when the WTO Ministerial Conference ended prematurely in Cancun in September 2003. Since the Cancun Ministerial, the United States has initiated a divide-and-conquer policy that seeks to reward those who are willing to work with the country while undermining the efforts by Brazil, India, and the Group of 21 to establish a united negotiating front for less developed countries. As United States Trade Representative Robert Zoellick wrote in the Financial Times, the United States will separate the can-do countries from the won't-do, and it "will move towards free trade with [only] can-do countries." By October 2004, the United States has concluded free trade agreements with Jordan, Chile, Singapore, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and Australia. [69]

Even though, the song of unrequited promises seems an adequate background:

> However, the bilateral or plurilateral negotiation strategy remains disturbing to countries that reluctantly joined the TRIPs Agreement to avoid unilateral trade sanctions, as the bargain narrative has suggested. Because most of the items negotiated under the bilateral and plurilateral agreements were considered outside the scope of the TRIPs Agreement, the Agreement would not shield less developed countries from trade sanctions. Thus, less developed countries were in no better position, as far as unilateral sanctions are concerned, than they were had they not signed the TRIPs Agreement. [70]

## FTAA and the Washington regionalism

A special case of regional manhandling of IP matters is the proposed Free Trade Area of the Americas – FTAA. Supported initially by 34 countries, with exception of Cuba, the project of the FTAA was created through a proposal of December 11, 1994, purporting to be implemented by 2005. The regional agreement would provide for a TRIPs-plus IP Chapter[71], what was one of the reasons the negotiation are presently stalled...

Brazil has taken a very active role in the FTAA negotiations, but stressing at all times that IP matters should be conducted under TRIPs umbrella. The President of the Brazilian PTO so stated the official view:

> My opinion, however, is of that the three-part agreement was already a great advance. We argued almost during eight years -- the Uruguay Round lasted eight years --, and found, through this negotiation, a fine, delicate balance, which took in consideration the interests and the positions of great and small countries, rich and poor. In this direction, I understand that a proposal in the direction to modify this agreement could be problematic for us. The three-part agreement was an international legal landmark, and all the countries had fit -- or they are in ways to make it -- its laws to that normative standard.[72]

This author's proposal as Brazilian position for FTAA[73], which was by the way in agreement with the Brazilian IP Association[74], was adopted by a number of trade associations, and basically suggests that there would be no IP chapter in FTAA.

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69 Peter K. Yu, TRIPs and Its Discontents, 9 Marq. Intell. Prop. L. Rev .

70 Op.cit., loc. Cit.

71 See http://www.sice.oas.org/FTAADraft/Eng/ngipe_1.asp .

72 Statement of the Brazilian PTO President.

73 http://denisbarbosa.addr.com/info1.htm. Our proposal suggested, without discussing IPR substantive in the scope of the FTAA, the recognition of the reach of the Declaration of Doha in the regional scope, as an authentic interpretation of an already established in the multilateral sphere, and not as an alteration or addition to the text of TRIPs.

74 Resolution of the ABPI nº 21 Receiving the recommendation formulated for its Commission of Patents, in 17 of January of 2002 below Executive the Committee and the Managing Advice of the ABPI had approved the Resolution transcribing. The ABPI -

***Brazilian Position towards FTAA***

According the uniform Brazilian perspective, supported even by the Brazilian IP Association, the negotiations of the FTAA were since their inception a stage for much unbalance and asymmetries, both those structural to the region, as those specific to the negotiating process itself. The comments of this section try to reflect closely the official answer to a letter from this author regarding the Brazilian Department of State [75].

The pressure from US targeted a set of rules stricter than the WTO standard in areas as services, investments and IPRs. The compensating interests in areas of interest of the MERCOSUL, like as antidumping and agriculture were, however not felt as acceptable by the United States. The raise of US protectionist barriers for agricultural products and some manufactured as footwear, textiles and steel aggravated the gap. As notes the Brazilian State Department, there are seven thousand brackets (indicating unsolved positions) in the draft agreement.

Brazil felt that the Miami ministerial meeting of November of 2003 was an important opportunity to balance the setting of negotiations, by incorporating a more flexible approach. Instead of a hard line FTAA on IPRs and other sensible areas, and empty-handed in the field where Brazil felt as crucial, it was agreed that countries were free to assume the commitments that seemed adequate to them.

The Declaration of Miami, in its paragraph 7, recognizes that "the countries will be able to assume different levels of commitments" and establish that will have to be created "a set common and balanced of rights and applicable obligations to all the countries". At the same time, it allows that "the countries, that thus decide it, can, in the scope of the FTAA, to agree on such benefits and obligations they deem appropriate ".

The same perspective is extended to IPRs. Here, I quote:

> Brazil considers that IPRs constitute a "systemic subject," that will have to be discussed in the multilateral context, in the scope of the negotiations of the OMC, not in the context of the hemispherical negotiations. The MERCOSUL, however, would be available use, in the scope of the negotiations of the ALCA, to accept the creation of mechanism of consultations in questions related to IPS, but it does not consider desirable the creation of mechanism of "enforcement," as considered by the North American party.
>
> Brazil considers that all the countries are liable the eventual imperfections in its IPRs system of protection. It is open to develop the cooperation in the area, but it does not consider desirable the creation of mechanism of "enforcement" in the matter, on a hemispheric scope, as it considers that such mechanism could result in abuses and crossed retaliations in the case of eventual misunderstandings in the area IPRs [76].

***FTAs, Trademarks and geographicals***

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Brazilian association of the Copyright recommends, with relation to the IPRs, that the Brazilian government rejects the proposal to separately argue the IPRs in the scope of the ALCA, keeping the issue within OMC and waiting the developments on the substance in the OMPI, coherence with the North American and Canadian position in the questions of the antidumping legislation and of agricultural subsidies.

[75] Correspondence of Feb. 6, 2006.

[76] O Brasil considera que propriedade intelectual constitui “tema sistêmico,” que deverá ser discutido no contexto multilateral, no âmbito das negociações da OMC, não no contexto das negociações hemisféricas. O MERCOSUL, no entanto, estaria disposto, no âmbito das negociações da ALCA, a aceitar a criação de mecanismo de consultas em questões relativas a propriedade intelectual, mas não considera desejável a criação de mecanismo de “enforcement,” conforme proposto pelo lado norte-americano. O Brasil considera que todos os países estão sujeitos a eventuais falhas em seus sistemas de proteção à propriedade intelectual. Está disposto a incrementar a cooperação na área, mas não considera desejável a criação de mecanismo de “enforcement” na matéria, no âmbito hemisférico, pois considera que tal mecanismo poderia resultar em abusos e em retaliações cruzadas no caso de eventuais desentendimentos na área de propriedade intelectual

Trademarks and geographical are not a central issue in FTA Agreements either negotiated by US or Europe. Their scope is essentially adding TRIPS-plus standards with regard to rights covered by the TRIPS Agreement. This is the case trademarks and geographical indications.

The US negotiating position requests include, as reasonable issues:

1. The establishment of a system designed to resolve disputes about trademarks used in Internet domain names, which is held to be important to prevent "cyber-squatting" with respect to high-value domain names, the
2. The creation of the principle of "first-in-time, first-in-right" to trademarks and geographical indications, so that the first person who acquires a right to a trademark or geographical indication is the person who has the right to use it.
3. The establishment of an on-line system for the registration and maintenance of trademarks, as well as a searchable database.
4. Requires transparent procedures for the registration of trademarks, including geographical indications.

The main relevant aspect of those proposed or agreed FTAs is their enforcement rules, which significantly exceed TRIPs levels.. On one specific example, the TRIPs agreement demands the imposition compensation of IPRs violations, according to the Civil Law concept of full compensation. All FTAs require – for copyright piracy and trademark counterfeiting the imposition of payment irrespective of the injury suffered by IPRs holders. TRIPS requires criminal procedures whenever occurs a deliberate trademark counterfeiting or copyright piracy on a commercial scale.

Some of the issues, however, are more complex and difficult. Taking as example the US position for FTAA:

> For trademarks, the U.S. proposes that FTAA countries abide by WIPO's 1999 "Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks." The joint recommendation elaborates on the trademark rules prescribed by the 1967 Paris Convention for the Protection of Intellectual Property and the TRIPS Agreement. The U.S. also proposes FTAA countries join the 1989 protocol to the Madrid Agreement Concerning the International Registration of Marks. The protocol streamlines the trademark filing process by allowing applicants to use national offices as gateways for filing applications in other countries. In addition, it is proposed that FTAA countries not require trademark owners to register their trademark licenses as a precondition for establishing their validity or for asserting trademark rights.
>
> The U.S. proposal also clarifies the relationship between trademarks and geographical indications by confirming that geographical indications made up of words, letters, numbers, figurative elements, or even combinations of colors, must be considered to be trademarks. Because a trademark that is confusingly similar to an existing trademark cannot be registered, the owner of an existing trademark would be able to prevent a newly established geographical indication from being registered or used if that registration or use is likely to cause consumer confusion in relation to the existing trademark [77].

The first requirement can have noticeable practical impact in the legal system of many countries; WIPO rules are no mandatory and its incorporation by mention causes complex problems of

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[77] FTAA Negotiating Group On Intellectual Property, Public summary of U.S. Position, found at http://www.sice.oas.org/geograph/north/uspoip_e.asp, visited 24/2/06

international and constitutional law [78]. Carlos Correa indicates also a matter of principle, which is, the erosion of the territoriality principle found in the Paris Convention [79].

Curiously, the implementation of this request has, apparently, had detrimental effects on the US System itself, according Josef Drexl analysis [80]:

> The practical effects of the MFN clause seem minor in the U.S., since U.S. FTAs are basically meant to export U.S. standards of protection. However, the *Grupo Gigante* case, recently decided by the U.S. Court of Appeals for the Ninth Circuit[81] illustrates that such bilateral agreements may also turn out as a trap for the U.S. themselves. In the case, the grocery chain *Gigante*, that had been active in the whole of Mexico for some decades, tried to explore whether it would be able to expand to Southern California. This expansion, however, would have collided with the operation of two grocery stores in the region under the name "Gigante Markets" by the Dallo brothers. By relying on concepts of U.S. trademark law and the national treatment clause of the Paris Convention only, the Court of Appeals rejected the Grupo Gigante's argument of a priority right,. According to U.S. law, Grupo Gigante can only rely on prior use abroad if the use of the mark has attained so-called "secondary meaning" in the U.S. According to this concept, use of the mark must "trigger in consumer's minds a link between a product or service and the source of that product or service". Most interestingly, and in substance in conformity with the national treatment clause of the Paris Convention, the Court compared the situation presented by the case with the situation in which Grupo Gigante had already operated in Arizona before the starting of the Dallos' "Gigante Markets" in California. Even in this latter situation, Grupo Gigante would not be able to invoke a priority right for the use of its mark that is only famous in Mexico and Arizona. According to the court, the concept of secondary meaning has the function to define the geographic scope of the priority of a famous mark even within the United States. The Court further relied on the concept of territoriality to explain that a mark that is only famous in Mexico has to be treated just like a mark that is also famous in Arizona when it comes to its protection in California. The Court, however, did not consider the relevance of bilateral agreements. In this context, most strikingly, it is the Singapore-U.S. FTA that might come into play. Art. 16.1(1)(b)(1) of this FTA obliges both parties to give effect to Articles 1 through 6 of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks. According to Art. 2 of the Recommendation the geographical scope of the use of a mark is only one among a number of criteria to be considered for whether a mark is well-known or not. Therefore, it is quite doubtful whether U.S. law as interpreted by the Court in *Grupo Gigante* is in line with the Recommendation. Although the above-mentioned FTA only creates immediate rights of Singapore, such rights are extended to all WTO members including Mexico via the most-favoured-nation principle of Art. 4 TRIPS. Therefore, Mexico is entitled to claim respect of the Recommendation in the U.S. with regard to its nationals in the U.S. As part of international law, the provisions of the FTA on IPRs may lack direct effect in the legal order of the U.S. Nevertheless, a possible conflict between the standards of U.S. trademark law with the standards of the WIPO Recommendation could give rise to a WTO complaint, possibly by Mexico, against the U.S. In the framework of such a complaint

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78 Joint Recommendation Concerning Provisions on the Protection of Well Known Marks adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization (WIPO) at the Thirty Fourth Series of Meetings of the Assemblies of the Member States of WIPO September 20 to 29, 1999.

79 Carlos M. Correa, Bilateral investment agreements: Agents of new global standards for the protection of intellectual property rights? Found at http://bilaterals.org/article.php3?id_article=331, visited 24/2/06. "Since IPRs are granted on a territorial basis, subject matter that is not protected in a given country belongs to the public domain there. It cannot be deemed an asset owned or controlled by a juridical or natural person. There is one exception, though, in the case of *well known* trademarks which receive protection without prior registration (article 16.2 of the TRIPS Agreement). Recent FTAs have not only confirmed this exception but expanded it beyond the TRIPS standard, by incorporation of WIPO's Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999).

80 Josef Drexl, The Evolution of TRIPS: Toward Flexible Multilateralism, paper submitted to the TRIPs tenth year Conference held in Buenos Aires in November 2005.

81 [Footnote from citation] *Grupo Gigante SA v. Dallo & Co*., 391 F.3d 1088 (9th Cir. 2004).

> based on Art. 4 TRIPS, WTO dispute settlement bodies would be authorised to interpret the rules of the WIPO Recommendation.

The second proposal is very disturbing for such jurisdictions, as Brazil, where the Madrid Agreement and protocol is a very controversial issue. Brazil was an original member of such treaty and has denounced it in 1931 after the general request of local industry.

The dispense with recording of licenses may appear as being a red tape problem; in some countries, however, recordation is a tax administration device to control tax evasion and exchange control deviation.

The complex relationship between trademarks and geographicals, although somewhat clarified by the WTO case where USA and Europe pitched their contrasting interests, may also raise difficult problems in some countries [82].

Another important aspect is the FTA standard requirement that all kinds of trademark, including those non-visual, should be registered:

> (1.) In the field of trademark registration, the FTAs prohibit to require that the mark be visually perceptible, nor to reject the registration solely on the ground that the sign is a sound or a scent, whereas Art. 15.1 TRIPS explicitly allows WTO Members to require, as a condition of registration, that signs be visually perceptible. The provision implements recent expansionist approaches to trademark registration in the U.S. In contrast, the European Community trademark office in Alicante and the European courts confirmed a requirement of visual perceptibility, not least because of a concern that trademarks would otherwise loose their fundamental function of distinguishing products [83]:.

Forum shifting and regime shifting

Professor Drahos has noticed that the USA used a "forum-shifting" tactic to probe for a more advantageous instance in copyright issues, raising its TRIPs-plus interests in different international fora (e.g. WIPO, WTO, and UNESCO). The idea is to enlist the help of some "progressive" developing countries to act as allies:

> Professor Drahos asserted that industry groups in the USA initially favoured the bilateral mode of intellectual property standard setting as this was seen as more effective. However, they later came to see benefit in the wider reach of harmonized international intellectual property standards in a multilateral agreement under the WTO (with its strong enforcement procedures under the Dispute Settlement Body). This was particularly true for the USA's copyright industries, which were concerned about IPR infringement in much broader range of countries than the USA was feasibly able to negotiate bilateral agreements with. This was the context to the negotiation of the WTO TRIPS Agreement. [84]

The bilateralism therefore is not the only the only post-TRIPs negotiating tool. Neither is it a privilege of developed countries. Much to the contrary, some authors seem to feel that forum and regime shifting is a somewhat devious invention of developing countries to prevent sound Intellectual Property policies of IPR holder countries:

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82 See Baeumer, Ludwig, "Protection of geographical indications under WIPO treaties and questions concerning the relationship between those treaties and the TRIPS Agreement", in "Symposium on the Protection of Geographical Indications in the Worldwide Context", Eger, Hungary, October 24 and 25, 1997, p. 12. WIPO publication Nr. 760(E), Geneva, 1999.and Baeumer, Ludwig, "Various Forms of Protection of Geographical Indications and Possible Consequences for an International Threaty", included in the Symposium of the International protection for geographical indications, Funchal, Portugal, 1993, WIPO publication.

83 Josef Drexl, op. cit. .

84 Commission on Intellectual Property Rights, Workshop 8: Process and Constitutional Issues in International Rule Making on Intellectual Property, 19th February 2002, found at www.iprcommission.org/ papers/word/workshops/workshop8.doc

> Regime shifting has been a pervasive feature of international intellectual property lawmaking at least since the shift from WIPO to GATT to TRIPs. But its recent use by developing countries has not been fully explored. This Article remedies that omission. It shows how developing nations, aided by NGOs and officials of intergovernmental organizations, have used regime shifting to serve different normative and strategic goals. These include moving to regimes whose institutions, actors, and decision-making procedures are more conducive to achieving desired policy outcomes, relieving pressure by domestic interest groups for lawmaking in other regimes, generating counterregime intellectual property norms in tension with TRIPs, and developing concrete proposals to be integrated into the WTO and WIPO. [85]

Forum shifting back to WIPO

On August 27, 2004, Brazil and Argentina submitted to WIPO the proposal incorporated in document WO/GA/31/11, that became to be known as the WIPO's Development Agenda. The proposal was considered at the 3rd. session of the General Assembly the organization, and adopted under the following wording:

> Bearing in mind the internationally agreed development goals, including those in the United Nations Millennium Declaration, the Programme of Action will be the Least Developed Countries will be the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society and the Sao Pablo Consensus adopted at UNCTAD XI; (1) General The Assembly welcomes the initiative will be development agenda and notices the proposals contained in document WO/GA/31/11.

In the subtleties of the style proper to international organizations, the decision says that it is impossible not to receive the proposal, in sight of the myriad of cited precedents, and especially of the (not cited) exercises of Doha, but only takes note of the proposal. The discussion of the Agenda were deferred to 2005, to be entertained with the participation of the UNCTAD, the WHO, UNIDO, OMC, and all the interested parties, including NGOs, the civil society and the academy.

The key aspects of the agenda were the two principles of the Argentine-Brazilian note: the protection of the IPRs cannot be seen as an end in itself, nor can the harmonization of IP laws impose standards of protection in each country, without taking in account its levels of development.

The proposal included:

1. the adoption of a declaration of the General meeting of the WIPO on IP and Development,
2. modifications in the WIPO Convention to include the notion of development into the objectives and functions of articles 3 and 4, c)
3. to do the same in the treaties under negotiation, especially in the Substantive Patent Law Treaty
4. To include in this and other Treaties provisions on the transfer of technology, on anticompetitive practices as well as on the safeguarding of public interest flexibilities.
5. to establish a plurianual program of technical assistance for developing countries
6. to create a permanent commission on technology transfer
7. to promote the seminary already convened,
8. to invite the participation of the civil society in the WIPO discussions
9. To create a Working Group for furthering the Development Agenda.

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85 Laurence R. Helfer†, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking, found at http://law.vanderbilt.edu/faculty/helfer.html .

The ensuing debates raised some issues within the scope of this study, as rules on experimental or fair use, exhaustion, and copyright misuse defences[86], open access technical training of developing countries, and especially, the proposed Treaty on Access to Knowledge (A2K)[87].

After three sessions during 2005, without any substantive conclusions, WIPO Assembly decided on October 5, 2005 to convene a provisional committee to pursue two additional week-long meetings in Geneva in 2006 to examine the Member State proposals, including the original proposal submitted by Brazil and Argentina.

## *Conclusions*

By June 2005, it was disclosed in the Brazilian Congress that the Foreign Office would be contemplating the use of cross-sanctions against the United States, by withholding IPRs from American holders [88] Brazil has won a WTO case against the United States and EU in cotton subsidies, and the U.S. Government had refused to budge. There was a precedent; Equator had actually granted cross-sanction rights, opposing banana import restrictions with IPRs suspension, but never actually carried out such power.

Why choosing such area for retaliation? "Punch'em where it hurts". In fact, it would be a surprise if a developing country ever asserted an IP retaliation against an OECD country, even though duly authorized by WTO[89]. The stakes are too high, and the prospect of counter measures too dangerous.

In this author's view of the TRIPs future, contemporaneous to the first negotiation spree[90], the aim of all exercise was to eliminate national diversity in the IP field. Diversity here is essentially the power to set the pace of IPR impact in each specific economy and culture.

The uniformization of IP norms would result in crystallizing and keeping a situation of absolute inequality in the division of the informational wealth of the world. The monopoly of the scientific, technological and commercial information, added to the predominance of OECD countries in the vehicles of cultural diffusion, would assure them control on international economic flows and on the capacity of development of each country. But the main loss would be the notion of national diversity.

Ten years from the inception of TRIPs as a legal instrument, such fear was not dispelled. Much to the contrary, TRIPs seems to be an old-fashioned and well-meant instrument, allowing a balanced perspective upon IP mechanisms applicable to developed and developing countries alike.

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86 Doc. IIM/1/4, of April 6, 20.

87 NGO submission to the Development Agenda : "El acceso al conocimiento y el intercambio de información son fundamentales para la educación e investigación y para fomentar la innovación y creatividad. Un tratado que establezca libertades para los usuarios contemplará "la necesidad de mantener un equilibrio entre los derechos de los autores y los intereses del público en general, en particular en la educación, la investigación y el acceso a la información, como se refleja en el Convenio de Berna", tal como lo establece el Preámbulo del Tratado de la OMPI sobre Derecho de Autor. Un tratado sobre acceso al conocimiento y la tecnología sería un componente clave de las políticas para aliviar la situación de países en desventaja y beneficioso para el desarrollo integral socioeconómico y político de un país.", found at http://www.ipjustice.org/WIPO/IIM3/NGO.Stmt.IIM3.Dev.Agenda.sp.pdf . The draft Treaty is found at http://www.cptech.org/a2k/consolidatedtext-may9.pdf .

88 Sergio Leo, País estuda usar direitos de propriedade intelectual como retaliação, Valor Econômico, 14/06/2005: "After wining a case in WTO against agricultural subsidies of U.S.A. and EU, but verifying that the panel decisions are disregarded for the losers, the Brazilian government can apply retaliações where the rich countries can really suffer damages: in Intellectual Property rights and in goods llike of remedies and entertainment products".

89 Peter K. Yu, TRIPs and Its Discontents, 9 Marq. Intell. Prop. L. Rev.

90 Denis Borges Barbosa, Porque somos piratas, op. cit. (1988)

The problem is much worse as the anti-diversity exercise did not stop ten years ago. The fact that in some limited areas, especially in the public health sector, TRIPs has actually been used to achieve balance and poise do not change the overall issue, particularly in which regards the theme of our study.

The unilateral (or, in a polite way of speech, bilateral) thrust which TRIPS was meant to end just increased; the carrot and stick approach was imposed in a much broader range of countries, and the size of the stick grew to a Rooseveltian measure. It is reasonable to guess whether, in absence of TRIPs, the situation would be the same.

In 1988, my point was that all nations had a fundamental right to a certain time of free access to knowledge. "Thus, the problem for the Brazilian technological development is not the fame of pirates that we had perhaps earned in the last times. The risk is that we were not allowed to be pirates the same time Sir Francis Drake and its followers, American, Japanese or Swiss enjoyed. The question is of time".

Professor Yu seems to echo this same view now:

> Copyright piracy is not primarily a cultural problem or a development issue. Nor is it a necessary byproduct of authoritarian rule. Rather, it is a battle between the stakeholders and nonstakeholders over the change and retention of the status quo. It is as relevant today as it was two centuries ago, when the United States was one of the biggest pirating nations in the world. [91]

The right to a self-timed growth of IP restraints is epitomized in the Italian Constitutional Court decision that, in 1978, decided that the non patenting of remedies, as provided by the 1859 Lombardian Law inherited by Italy and still in force, which was constitutional according to a prior decision, was rendered unconstitutional by the historical changes that eventually included the country in the developed world:

> In truth, in the last years our conscience of supervening lack of every rational ground to this exception [to patentability] has grown step by step with the assertion of the value of the scientific-technical research and the duty of the Republic to promote it; with the more and more elevated capacity of the Italian pharmaceutical industry to organize the research, also in connection with the conditions of competitivity with the other countries; and finally with the more intense relations with the foreign markets, particularly with the states pertaining to the organization of the Council of Europe and to that one of the European Economic Comunity (as it is attested from the conventions stipulated from the Italian government, all oriented to restrain or to eliminate radically the possibility to prohibit the patenting of singular fields). [Corte Constitucional de Itália, 1978, Sentenza 20/1978]

TRIPs occurred at a time where all core OECD countries had effected authonomously the same Constitutional equation. The same was not necessarily true for all countries.

It is not suprising therefore that diversity continued to be a constant, even uniform, argument of developing countries to resist post-TRIPs encroachment. Also it is not surprising that unilaterism justified itself, on a wolf-and-sheep style of reasoning, on the diversity discourse practised by such countries.

A very important aspect of this post-TRIPs era, by the way, is the denial of the multilateral promise. We were assured that unilateralism was over. All of us were members of the club, after paying the steep entrance fee. It was not so. Members or non-members, the bullying continued and grew to a remarkable extent.

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91 Peter K. Yu, Four Common Misconceptions About Copyright Piracy, 26 Loyola LA International &Comparative Law Review 127 (2003)