Volume 10, May 2020 ISSN 2581-5504

"The International Intellectual Property Regime and Climate Change"

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Existing global rules and norms on intellectual property originated in the second half of the 19th century, namely in the Paris Convention for the Protection of Intellectual Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886.[1] All of these instruments still exist today. They have been regularly updated, and are managed by the World Organization for Intellectual Property (WIPO).[2] In their initial version they aimed essentially at limiting discrimination against holders of foreign rights. The substantive content of the two instruments was starting from a very different level. In relation to federal care, the Berne Convention specified protected subject matter in its original form, minimum rights, some exceptions to certain rights and the minimum term for copyright protection.

The Paris Convention, on the other hand, included only simple rules such as those on priority dates for foreign patent and trademark applications, and rules on art conferences (fairs). Although both instruments have been updated numerous times, the last substantial changes – with the exception of an appendix to the Berne Convention in 1971 – date back to the Paris Convention's Stockholm Act of nearly 45 years ago, of 1967. Notwithstanding the revisions, the Paris Convention still does not define the basic terminology underpinning its substantive obligations, including terms such as 'patent,' 'invention' and 'mark.' Nor would it specify the term of protection or even the minimum rights that a proprietor of a patent or trademark should have.

Although the Paris Convention's Stockholm Act of 1967 imposes minimum limitations on compulsory licensing, most notably by requiring a time after the patent is granted before a perpetual injunction can be given for failure to operate a patent, it effectively leaves the entire compliance area to each Member State. In the 1980s this state of affairs of international intellectual property shifted somewhat drastically. With the growing value of trade in intellectual property rights-protected products and services, multinational companies successfully pressured the U.S. government, and later the governments of Europe and Japan, to attach intellectual property security and trade restrictions.[3] What started as US domestic legislation – under the famous '301' review program operated by the United States Trade Representative in compliance with the Trade Act – seemed appropriate to multilateralism. [4]

[1] Paris Convention for the Protection of Industrial Property, 20 March 1883, as revised and amended, 21 U.S.T. 1583 , 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary anArtistic Works, 9 September 1886, as revised and amended, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 30 (without 1979 amendment) [hereinafter Berne Convention].
[2] Paris Convention (1967), art. 2; Berne Convention (1971), art. 5.
[3] Okediji, R.L. (2003-2004), 'Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection', U. Ottawa L. & Tech. J. 1, 125-147, at 134-5.
[4] Sell, Susan K. (2003), Private Power, Public Law: The Globalization of Intellectual Property Rights pp. 96-120, Cambridge, UK: Cambridge Univ. Press.

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It was one of the key justifications for both the adoption of the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO), negotiated during the Uruguay Round of Multilateral Trade Negotiations between 1986 and 1994.[5]

The TRIPS Agreement: emergence and overview

The WTO was set up at the end of the Uruguay Round in 1995 and describes itself as 'a trade liberalizing institution.' It administers the General Tariff and Trade Agreement (GATT), which dates back to 1948, amongst others. The WTO can be seen as the successor to the GATT and as such, a modern instrument of intellectual property of the size of TRIPS was not an obvious home for it.[6] In the GATT sense, intellectual property was generally treated as nothing more than a 'necessary barrier' to free trade under Article XX(d) of the GATT. Sure, trade in counterfeit (trademark) products had started to emerge as a serious problem during the previous Tokyo Round, held between 1973 and 1979.

Even so, pre-TRIPS efforts to reach consensus on a collection of specific rules within the GATT system to curb trade in counterfeit products continued until 1984, and they all failed in practice. Therefore, when the Uruguay Round was introduced in 1986, the somewhat narrow intellectual property bargaining mandate did not actually foreshadow a detailed outcome like TRIPS. The TRIPS Agreement text is based on drafts posted by the European Communities, Japan and the United States, with input from Australia and Switzerland as well as from a group of 14 developing nations. At this juncture, it is advisable to emphasize that few developing countries took an active part in the TRIPS discussions, and a number of those who may not have had the required level of expertise in intellectual property.[7]

Some developing countries assumed that TRIPS concessions (that is, embracing higher standards of security and enforcement of intellectual property) would be balanced by tariff cuts on goods such as tropical fruits and textiles – an idea that has now been largely debunked. Perhaps as a result of this belief, as it was being crafted, a number of countries pay fairly little attention to the text — and the obligations it contains-.

WTO dispute-settlement and climate change

1. ***The 'non-clinical isolation' doctrine***

The Appellate Body has consistently relied on the terms of the Vienna Convention on the Law of the Treaties as a primary source of interpretative guidelines when interpreting various

[5] Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round Vol. 31; 33 I.L.M. 1197.
[6] General Agreement on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27, entered into force 1 January 1948.
[7] Sykes, A.O. (2002), 'TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution"', Chicago J. Int'l L. 3, 47-68, at 62

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WTO agreements.[8] The Appellate Body also found that WTO agreements could 'not be read from public international law in clinical isolation.' This principle, which I refer to here as the 'non-clinical doctrine of isolation,'[9] was reflected in reports based on international tribunals' case law, namely the International Court of Justice, the European Court of Human Rights (ECHR) cases and the Inter-American Court of Human Rights. This does not lead to the inference that forum shopping to establish criteria outside the WTO would automatically result in them being enforced by conflict resolution proceedings in the WTO.

Until now, the Appellate Body's dependence on extrinsic (that is, non-WTO-negotiated) criteria has been limited to the application of well-accepted international law concepts. The suggestion that another treaty should be used as a blueprint to view the TRIPS Agreement with utmost care, or to effect a reduction in the scope of the obligations specified under it.[10] Nevertheless, as former WTO Director-General Pascal Lamy said at a conference on IP and global issues of public policy: the international framework of intellectual property can not function in isolation from wider public policy concerns such as how to meet human needs as basic health, food and a healthy environment.[11] It is conceivable that environmental standards embodied in an instrument adopted by a broad contingent of WTO representatives outside the WTO — and particularly if the parties to a WTO dispute have conformed to such an instrument — that validly be brought to the attention of a panel and/or the Appellate Body. This is not expressly provided for in TRIPS, but allows only for the possibility of incorporating criteria agreed by all WTO members in order to change the security level in Article 71.2 above.

That being said, if such external standards would guide the definition of TRIPS in compliance with the principle that untraded for concession is not part of the WTO standard-set — and if these external rules were to apply, to what extent — is a matter on which further clarification from the Appellate Body will undoubtedly be useful. In particular, what is the method or methodology for situating the boundary between, on the one hand, a legal understanding of a concession negotiated in the light of its meaning and, on the other hand, the nature and intent of the agreement of which it is a part and, on the other, a modification of the concession using interpretive instruments?

Such additional guidance on the role of non-WTO standards may emerge in a case (as of this writing) against Australia and a number of WTO members on trademark restrictions on cigarette packaging, involving several references to an instrument signed under the auspices of the World Health Organization (WHO), namely the Tobacco Control Framework

[8] Vienna Convention on the Law of the Treaties, adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.
[9] United States—Standards for Reformulated and Conventional Gasoline, doc. WT/DS2/AB/R, 29 April 1996, ¶ III:B.
[10] Eres, T. (2004), 'The Limits of GATT Article XX: A Back Door for Human Rights?, Geo. J. Int'l L. 35, 597-635, at 624-25.
[11] Pascal Lamy, Speech at the WIPO Conference on Intellectual Property and Public Policy Issues, Geneva, 14 July 2009, available at http://www.wipo.int/meetings/en/2009/ip_gc_ge/presentations/lamy.html, accessed 24 May 2020.

Convention (FCTC).[12] Consequently, the conclusions and approach of the tribunal and the Appellate Body (assuming the Australian case is being challenged, which seems likely) will be useful in understanding whether the UN Framework Convention on Climate Change (UNFCCC) might be affected. Without a doubt, however, the UNFCCC will possibly steer policy studies and debates at WIPO, WTO and elsewhere beyond dispute-settlement issues.

Application of substantive WTO rules

There are a variety of GATT / WTO guidelines which may influence climate change. In two previous cases, one under the GATT and the other under the WTO, a distinction was made between controlling the production process for a product and preventing the importation of a product manufactured using a disadvantaged process.[13] The first GATT case, known as Tuna/Dolphin, argued that restrictions on Mexico's importation of tuna that was not 'dolphin free' were in conflict with GATT obligations. The United States placed punitive quotas on Mexican fishermen that were unfair from an environmental point of view, since the cap was tied to U.S. fishermen 's killing rate rather than any particular quota tied to dolphin requirements.[14]

By comparison, in the second, more controversial ruling — the Shrimp / Turtle lawsuit, concerning two different cases and typically regarded more favorably by environmentalists — the regional regulatory strategy was upheld as it was found to be impermissibly discriminatory when applied before the amendment was initially implemented.[15] The WTO Appellate Body has legislatively approved amicus briefs as greater accountability 'enhances further the credibility and recognition of the WTO dispute settlement process.'[16] In substance, the case focused on 'product' through 'process' regulation, and the Appellate Body enabled the United States to maintain trade restrictions based on the shrimp harvesting method.[17]

This may refer to carbon emissions or to other climate change related environmental initiatives. However, there was a 'negotiation' during the litigation between the US and its WTO partners, and the measure ultimately found consistent was the result of the United States's 'serious, good faith efforts' to negotiate an international deal. That multilateralism can be the most important lesson for those seeking consistency of efforts to regulate the environment at the WTO. In the case of Beef / Hormones a variety of significant conclusions

[12] Frankel, S. and D. Gervais (2013), 'Plain Packaging and the Interpretation of the TRIPS Agreement', Vanderbilt. J. Transnat'l L. 46(5) 1149-1214.
[13] Report of the Panel, United States -- Restrictions on Imports of Tuna, doc. DS21/R, not adopted, circulated 3 September 1991, 39 BISD 155, ¶ 6.2.
[14] Wold, C. (2010), 'Taking Stock: Trade's Environmental Scorecard after Twenty Years of "Trade and Environment"', Wake Forest L. Rev. 45, 319-354, at 327.
[15] Appellate Body Report, United States--Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 186, doc. WT/DS58/AB/R, 12 October 1998.
[16] Cottier, Th. (1998), 'The WTO and Environmental Law: Three Points for Discussion', in Fijalkowski, Agata & James Cameron (eds), Trade and the Environment: Bridging the Gap, The Hague: T.M.C. Asser Instituut, pp. 58-59.
[17] Appellate Body Report, United States--Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia), ¶¶ 135-38, 153-54, WT/DS58/AB/RW, 22 October 2001.

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were made by the Appellate Body. Firstly, Article 5.7 of the WTO Agreement on the Implementation of Sanitary and Phytosanitary Steps considered a restricted precautionary principle (SPS Agreement).

Secondly, the group opposing a measure of precaution had the duty of arguing it was unjustified. Thirdly — and this seems directly relevant in the context of climate change discussions — since a measure should normally be based on the view of the majority of scientists as to potential risks in cases where consequences could be dramatic, a marginalized scientific view (in the case of food safety issues) could be taken into account. The Appellate Body also noted: 'Article 5.7 does not exhaust the scope of the precautionary principle and that a panel should 'consider that responsible, elected governments usually operate from prudence and precautionary perspectives where risks are irreversible.' Under Art. 2.2, 'Members shall ensure that every sanitary or phytosanitary measure shall only be applied to the degree appropriate to protect human, animal or plant life or health, shall be based on scientific principles and shall not be sustained without adequate scientific proof, except as provided for in Article 5, paragraph 7.'[18]

Conclusion

A variety of confluent powers will certainly be at play when a case involving a dispute between TRIPS and climate change initiatives is considered. The cases discussed in the previous section cause one first to suggest that any regulatory measures should be examined for their genuine character, as in Brazil-Tires. If climate change is a mere excuse for a disguised trade-protectionist measure, WTO will likely find it incoherent. How 'necessary' was that measure, put it differently? Also, a panel might decide whether the measure was the least trade-incoherent option. This can also look at existing scientific opinion, as it did in the SPS cases. A dispute resolution panel will certainly be aware that leadership in 'green tech' is both a climate change problem and a strategic business problem, and it will take a carefully crafted study to determine the validity of a TRIPS or other contradictory WTO measure.

Ultimately, a panel is often likely to decide that the proposal is the product of international (though not necessarily multilateral) agreements and a nascent consensus, as opposed to being a unilateral measure implemented by one WTO member. This illustrates the paradigmatic and seemingly inherent supremacy of the free trade agenda to be safeguarded by the WTO. When applied to climate change, the calibration narrative-based approach to implementing TRIPS mentioned above follows the view promoted by WIPO that patents and other types of intellectual property are important to promote or maximize private sector study, investment, and innovation in climate change technologies , e.g. in carbon-capture renewable energy production.

However, WIPO has also acknowledged that patents can impede the creation and access to environmental technology, a problem that can help to mitigate licensing, patent pools and

[18] *Id.* Art 2.2.

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other 'post-grant techniques.' WIPO also addresses 'pre-grant procedures' which are structured to ensure that only worthy (new , useful and non-obvious) inventions are patented. While new technologies need to be developed to combat climate change, their successful use and distribution is equally important. As a study published by WIPO noted, the importance of effective dissemination and use of environmentally sound technologies (ESTs) is becoming increasingly apparent due to the growing emphasis in global politics on the need to mitigate climate change and the expectations that global energy consumption will continue to rise dramatically in the coming decades. Yet another simple measure of intellectual property is to prioritize the examination of applications relating to technologies that can address the challenges of climate change. But a tailored method should also understand that not all policy problems can be solved. Climate change is a problem on a global scale but the world is divided among around 200 countries, with widely different levels of knowledge, capital, and governance quality.