



Article scientifique

Article

1990

Published version

Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

---

## Trade-Related Aspects of Intellectual Property Rights (TRIPs): Objectives, Approaches and Basic Principles of the GATT and of the Intellectual Property Conventions

---

Boisson de Chazournes, Laurence; Dhanjee, Rajan

### How to cite

BOISSON DE CHAZOURNES, Laurence, DHANJEE, Rajan. Trade-Related Aspects of Intellectual Property Rights (TRIPs): Objectives, Approaches and Basic Principles of the GATT and of the Intellectual Property Conventions. In: Journal of world trade, 1990, n° 5, p. 5–15. doi: 10.54648/trad1990029

This publication URL: <https://archive-ouverte.unige.ch/unige:42015>

Publication DOI: [10.54648/trad1990029](https://doi.org/10.54648/trad1990029)

# Trade Related Aspects of Intellectual Property Rights (TRIPS): Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions

Rajan DHANJEE\* and Laurence BOISSON DE CHAZOURNES\*\*

## INTRODUCTION

By the end of this year, the countries participating in the Uruguay Round negotiations on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are committed to reaching an agreement on this controversial subject. So far, their positions still appear far apart—the main differences are between the positions of developed and developing countries although there are some significant differences within each group of countries. One main basis upon which the negotiations are proceeding is a decision taken by the GATT Trade Negotiating Committee (TNC) on 8 April 1989. This decision sets out a list of what the negotiations should encompass, one item on the list being “the applicability of the basic principles of the GATT and of relevant intellectual property agreements or conventions.” By common consent, the main international intellectual property conventions of importance in this context are the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works (particularly the former), although a large number of other intellectual property (IP) agreements are also relevant to the negotiations. One main bone of contention in the negotiations has indeed been the applicability, and the practical consequences, of the application of the basic principles of the GATT and the IP conventions to the subject of TRIPS; there is indeed no agreement on the complete list of the basic principles of the IP conventions. Underlying these controversies is a fundamental disagreement over how much freedom the multilateral IP system should leave to countries to shape their national IP systems as they see fit. An attempt is being made to bring the multilateral trading and IP systems closer together, so as to reduce the “room for manoeuvre” of national IP systems despite the fact that there are substantial differences between the approaches of the two multilateral systems. The review of these differences, which is undertaken below, particularly takes into account the viewpoint of developing countries.

---

\* Staff member of the UNCTAD Secretariat, Geneva, Switzerland. The views expressed in this article are his personal views and do not necessarily represent the views of the Secretariat.

\*\* Teaching Assistant at the Law Faculty, University of Geneva, Switzerland.

## OBJECTIVES AND APPROACHES OF GATT AND IP CONVENTIONS

The objective of the GATT is to establish a multilateral trading regime among its Member States in order to achieve trade liberalization. To attain this, it was necessary for the GATT to adopt a prescriptive approach, i.e. it lays down fairly rigorous standards by which its Contracting Parties have to abide. Presumably, the Contracting Parties have agreed to abide by such norms because of a consensus that it would be in their mutual interests to do so. Exceptionally, however, where GATT touches upon intellectual property protection, it adopts a permissive rather than prescriptive approach, in that it allows governments to adopt IP-related measures or legislation provided such measures are not inconsistent with GATT, and are not applied in a discriminatory or arbitrary manner (see Article XX (d)). Such a difference in approach was adopted because the GATT implicitly recognizes that intellectual property rights (IPRs) can be used to constitute barriers to trade. It should be noted, however, that the GATT's concern with intellectual property is marginal.

By contrast with GATT, the IP conventions have much less ambitious objectives. They make little attempt to establish strong multilateral norms for the protection of IP, but rather seek to minimize conflicts among countries over the differences in their national IP systems; i.e. the IP conventions adopt a comity approach. The conventions thus recognize the freedom of Member Countries to adopt the regime they think fit. Such a permissive attitude was adopted by the IP conventions because there was no consensus<sup>1</sup> among their Member States as to the appropriate protection regime which should be prescribed at the multilateral level,<sup>2</sup> and Member States were therefore considered the best qualified to decide for themselves which regime it would be in their interest to adopt. The IP conventions, particularly the Berne Convention, do require their Member Countries to observe certain minimum standards of protection, but their main prescription is that each Member Country should provide national treatment to nationals of other Member Countries.

From a broader perspective, both the functioning of the GATT and the IP Conventions constitute specific applications of two fundamental principles of international law, namely the right of States to choose their political, economic, social and cultural systems (underlined in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXXV)), and the principle of non-discrimination. The first principle would necessarily follow from the principle of State sovereignty, while the latter principle could be considered to constitute a limitation on State sovereignty. Of course, the voluntary assumption of

<sup>1</sup> See on this question J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection* in *Vanderbilt Journal of International Law*, Vol. 22, No. 4 (1989), p. 747, at pp. 844 and 845.

<sup>2</sup> "Although these common rules regarding the protection of industrial property given in the (Paris) Convention are of great importance, it should be noted, nevertheless, that their scope is limited and they leave considerable freedom to Member States to legislate on questions of industrial property according to their interests or preferences." *Guide to the Application of the Paris Convention for the Protection of Industrial Property*, p. 15, by Professor Bodenhausen, Director of WIPO. See also *General Information*, WIPO, 1989, p. 22.

international economic obligations by States would itself constitute an exercise of the right to choose their economic systems. However, taking this into account, the GATT places more emphasis on non-discrimination, and the IP conventions on the right of States to choose their economic systems.

Some other obvious differences in approach between the GATT and the IP conventions may be noted. GATT is concerned with tangible goods, while the subject-matter of the IP conventions is intangible rights which can extend over both products and processes. The GATT is concerned with the “dynamic” flow of goods, while the IP conventions only deal with the “static” question of the protection of IPRs, rather than their use or exercise.<sup>3</sup>

These different objectives and approaches naturally have a direct impact upon some of the basic principles upon which both the GATT and the IP conventions are founded. This would need to be borne in mind when considering the applicability of the basic principles of the GATT and the IP conventions to the TRIPS negotiations. The principles that will be considered below are freedom on scope and level of protection, independence of protection, non-reciprocity, balance of rights and obligations, national treatment, most-favored-nation treatment (MFN) and special and differential treatment. The principles mentioned do not purport to constitute a complete list of the basic principles of the GATT and the IP conventions, but are probably the most important “substantive” principles (such “procedural” principles as dispute settlement or transparency will not be considered here).

#### FREEDOM ON SCOPE AND LEVEL OF PROTECTION AND INDEPENDENCE OF PROTECTION

These two principles would unequivocally constitute applications of the right of States to choose their economic systems. However, it should be noted that the question whether “freedom on scope and level of protection” constitutes a basic principle of the IP conventions is controversial in the TRIPS negotiations, even though, as noted above, the conventions, particularly the Paris Convention, leave a very large measure of discretion as to terms of protection by their Member States.<sup>4</sup> It is, in fact, improbable that the Paris Convention in particular, would ever have been adopted by countries which were at widely varying stages of development at that time if the conventions had not permitted such freedom to their Member States. The fact

<sup>3</sup> Thus, Article 4 *quater* of the Paris Convention provides that the grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or the product from the patented process is subject to restrictions or limitations resulting from the domestic law.

<sup>4</sup> Examples of this are provided by Bodenhausen, *op. cit.* footnote 2, p. 15. “In the field of patents, for example, the Convention leaves the Member States entirely free to establish the criteria for patentability, to decide whether patent applications should or should not be examined in order to determine, before a patent is granted, whether these criteria have been met, whether the patent should be granted to the first inventor or to the first applicant for a patent, or whether patents should be granted for products only, for processes only, or for both, and in which fields of industry and for what term. With one exception (Article 5 *quater*), the Convention does not specify either the acts of third parties against which a patent should protect the patentee, etc. In the field of trademarks, the Convention does not prescribe whether the right to a trademark will be acquired either through registration or through use, or both. It also leaves the Member States free to decide to what extent they desire to submit applications for registration of a trademark to examination. Neither is the scope of protection of a trademark defined in the Convention, except in a few special cases (Articles 6 *bis*, 6 *quinquies* and 6 *septies*).”

that a few provisions of the Paris Convention, particularly Article 5A, have progressively been strengthened in successive revisions would only denote limited inroads into this principle rather than its abandonment. On the contrary, the successful revision of the Berne Convention in 1971, which allows more freedom to developing countries, and the revision process of the Paris Convention, have involved, or could involve an extension of this principle.

Full advantage of this freedom has been taken in the past by countries that are now developed. Many examples could be provided of this. In the patent field, for instance, food, chemical and pharmaceutical products were not protected by the Federal Republic of Germany until 1968; by Japan until 1987 (Japan also did not protect medical processes); and by Spain until 1986 (however, Spain will not implement protection for chemical and pharmaceutical products until 1992). Patentees in the Federal Republic of Germany had no exclusive rights of importation until 1978, and still have no such rights in Japan, Spain or Switzerland. In the copyright field, the United States maintained weak protection for a long time and was, during the 19th century, a leading "pirate" of English works.<sup>5</sup> The United States also maintained, until 1986, a "manufacturing clause" requiring that works be first published in the United States to qualify for protection (this was the subject of an adverse ruling by a GATT panel). Thus, this freedom has been used by States to promote their national technological and industrial development. In order to do so, they have attempted to find a proper balance between the encouragement of creativity, and the maximization of social welfare arising from the diffusion of the fruits of that creativity, and from free competition and trade. Such a balance underlies all national legislation on IPRs. The nature and scope of the proper balance depends on the particular conditions prevailing in each country at particular times, and as such are bound to differ from one country to another, and from one period to another. Such differences are likely to be important for countries at different levels of economic and technological development.<sup>6</sup>

It is generally accepted that independence of protection is a basic principle of IP conventions; it could indeed be considered to form a part of the principle of freedom on scope and level of protection. It entails that, in deciding whether or not to grant an IP title in respect of a given item or the terms upon which to grant protection, a

---

<sup>5</sup> See B. Kaplan and R. Brown, *Cases on Copyright, Unfair Competition and Other Topics bearing on the Protection of Literary, Musical and Artistic Works*, Rev. Ed. 1978, Part IV.

<sup>6</sup> A report by the Office of Technology Assessment of the U. S. Congress notes that: "Historically, there have been political tensions between nations whose role as producers of intellectual property allowed them greater access to such products and nations that imported technology products, and had only limited access to them. When the United States was still a relatively young and developing country, for example, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development." *Intellectual Property Rights in an Age of Electronics and Information*, OTA-CTT-302, p. 228.

Member State does not have to take account of the existence or terms of protection for that item in any other Member State.

#### NON-RECIPROCITY AND THE BALANCE OF RIGHTS AND OBLIGATIONS

Non-reciprocity would also constitute an application of the right of States to choose their economic systems; it is a basic principle of the IP conventions by virtue of the fact that their Member States have accepted unconditional obligations to respect the norms established by the conventions (including the grant of national treatment to nationals of other Member States). Thus, a State cannot invoke the fact that its nationals benefit from lesser protection in another Member Country than it itself provides in order to reduce or deny protection to the national of the latter country. The few exceptions to this principle of non-reciprocity, in Articles 2(7), 7(8) and 14 *ter* (2) of the Berne Convention, are of limited application. Although, as noted below, special agreements which do not adhere to this principle of non-reciprocity are permitted by the main IP conventions, such agreements are obviously distinct from these conventions, and are permitted derogations from the basic principle of non-reciprocity.

As may be noted above, the principle of non-reciprocity is closely linked in practice to national treatment, though they are separate and distinct principles. It has been in fact argued that *formal* reciprocity is the basis of the national treatment principle in the Paris Convention in that their Member States place the nationals of other Member States on an equal footing with their own nationals precisely because they expect their nationals to enjoy the same advantages elsewhere.<sup>7</sup> A similar argument has also been asserted in respect of the Berne and Universal Copyright Convention.<sup>8</sup> Under these arguments, the national treatment principle of the Paris Convention would only prohibit unilateral measures of *material* reciprocity. However, it is submitted that these arguments confuse formal reciprocity, the minimum standards laid down by the IP conventions, and the expectations of States in acceding to these conventions. They also overlook the vast areas of IP protection relating to which norms are *not* prescribed by the IP conventions and the principle of independence of protection.<sup>9</sup>

The principle of non-reciprocity in the Paris and Berne Conventions would also entail the prohibition of any recourse to retaliation by a State to counter the effects of the non-fulfillment of its obligations by another State. This is due to the main feature of the obligations to which States are linked by both conventions, i.e. their

---

<sup>7</sup> See Kunz-Hallstein, *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, *Vanderbilt Journal of Transnational Law*, Vol. 22, No. 2, 1989, p. 265.

<sup>8</sup> Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions*, *International Review of Industrial Property and Copyright Law (ITC)*, 1986, Nos. 5 and 6, 577 and 715.

<sup>9</sup> A persuasive rejoinder to Vaver's arguments is provided by Nordemann in *The Principle of National Treatment and the Definition of Literary and Artistic Works*, *Copyright*, World Intellectual Property Organization, October 1989, p. 300.

unconditionality. They are not reciprocal obligations but *erga omnes* obligations. In the event of non-respect of its obligations by one State, another State party to the relevant convention can only have recourse to the existing means of settlement of disputes provided in the IP conventions<sup>10</sup> (provided that the State against which it wishes recourse has accepted to be bound by the dispute settlement provisions of the relevant convention) or to means of dispute settlement provided by general international law. In general, the principle of non-reciprocity in the IP conventions has been an important means of maintaining their Member Countries' freedom to shape the IP regime they think fit. There has, however, been a trend towards the undermining of this principle through the adoption, on the basis of reciprocity, of *sui generis* legislation for the protection of integrated circuits by most developed countries, as well as legislation for the protection of functional designs by the United Kingdom. Such legislation appears to conflict with the national treatment provisions of the Paris Convention.<sup>11</sup>

Non-reciprocity is also a basic principle of the GATT by virtue of the fact that it is incompatible with unconditional national treatment and MFN. In addition, the principle of non-reciprocity *vis-à-vis* developing countries is enshrined in Part IV of the General Agreement (and repeated in the Punta del Este Declaration, setting out the basic negotiating mandate for the Uruguay Round negotiations). However, attempts are being made to undermine this basic GATT principle through bilateral and multilateral demands for the application in developing countries of the same norms and standards as are applied in developed countries, which necessarily implies reciprocity.

By contrast with non-reciprocity, the principle of the balance of rights and obligations would entail some limitations on the right of States to choose their economic systems. The principle of the balance of rights and obligations in the GATT is related to "the notion of full reciprocity (i.e. a broad balance of market access obligations by the contracting parties)."<sup>12</sup> However, the balance-of-rights principle is applied in a way which takes full account of the circumstances of countries; unequal parties are not treated equally. It is interesting to note that a principle of balance of rights and obligations also exists in the IP conventions, with the difference that the balance sought is between governments (representing the public interest) and IPR holders. In the area of compulsory licensing or forfeiture for the non-working of inventions (Article 5A), the Paris Convention balances its restrictions on government action with obligations on the patent holder, referring, for example, to compulsory

<sup>10</sup> It has been argued by Kunz-Hallstein, *op. cit.* footnote 7, that Member States of the Paris Convention could resort to retorsion or reprisals against any State not respecting its obligations under the Convention, although they would first have to resort to the dispute settlement mechanisms of Article 28 of the Convention (if they were bound by that Article). Reprisals could include the non-grant of benefits under the Convention to the offending State. However, it is submitted that this argument overlooks that the existence of a special provision on dispute settlement in the Paris Convention would override customary international law in this respect, and that in any event the withdrawal of benefits granted under the Convention would be unlikely to meet the international law requirement of "proportionality" of counter-measures.

<sup>11</sup> See on this point Reichman, *op. cit.* footnote 1, at pp. 851 and 852.

<sup>12</sup> See J. Bhagwati, *Protectionism*, The MIT Press, 1988, at pp. 35–36.

licences as a remedy for “the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.” (Article 5A(2)). Compulsory licensing provisions also exist in the Berne Convention. By and large, however, the IP conventions leave it to Member States to find for themselves, at their national level, the appropriate balance between the rights and obligations of holders of IP rights *vis-à-vis* the public (including potential competitors)<sup>13</sup> and do not usually attempt to regulate the use or abuse of IP rights (e.g. through unreasonable restrictions in licensing agreements).

This would suggest that, should more binding multilateral rules for IPR protection be adopted, it might be advisable to seek a multilateral balance of rights and obligations between IPR holders and States. In this connection, it may be useful to look at the approach used by the Havana Charter, Chapter V of which provides rules for the control of restrictive business practices (at least some of which are commonly imposed by IPR holders). It may be noted that Article XXIX (para. 1) of the GATT contains an undertaking by the Contracting Parties to observe to the fullest extent of their executive authority the general principles of several chapters of the Charter, including Chapter V.

#### NATIONAL TREATMENT AND MFN

National treatment and MFN constitute specific applications of non-discrimination, but as with non-reciprocity with which it is linked, the principle of national treatment in the IP conventions has indeed been a key element in maintaining the freedom of the Member States of the conventions to maintain IP systems of their choice. Although the national treatment principle exists in both the IP conventions<sup>14</sup> and the GATT, it applies in the former to persons<sup>15</sup> and requires the same treatment between nationals and foreigners, while in the latter it applies to goods, and requires no less favourable treatment between national and foreign goods (leaving open the possibility that more favourable treatment might be provided to foreigners than to nationals). Within the context of a TRIPS agreement, it remains to be seen how a principle of national treatment for persons, if adopted, would interact with the national treatment for goods already existing in the GATT, particularly if any link is

---

<sup>13</sup> In a comment on copyright which could be applied to other IPRs, Professor Goldstein notes that: “The balance that copyright and author’s rights systems strike between exclusive rights, compulsory licences, and no rights at all responds peculiarly to the aspirations—political, social, moral and cultural—of any particular country.” Professor Goldstein gives the U.S. Copyright Act as an example, particularly its exemptions and fair use provision. *Vanderbilt Journal of Transnational Law*, Vol. 22, No. 2, p. 363, 1989.

<sup>14</sup> Article 2(3) of the Paris Convention contains an exception to the principle of national treatment related to judicial and administrative procedures, to jurisdiction and to the designation of an address for service or the appointment of an agent. The Berne Convention also contains a few provisions which allow recourse to reciprocity in specific areas, as an exception to the principle of national treatment (Articles 2(7), 7(8) and 14 *ter* (2)). In these areas, State A would be authorized to provide to nationals of State B the same treatment as that applied by State B to the nationals of State A.

<sup>15</sup> However, Article 5 *quater* of the Paris Convention provides that if a country grants rights to holders of process patents, it has to grant such rights irrespective of whether the products made from the patented process are manufactured domestically or imported. Moreover, under the Berne Convention, persons and legal entities can benefit from the protection of the Convention if their works were first published in a Contracting State.

made between the TRIPS agreement and the GATT dispute settlement machinery (if, for example, disputes arise where a corporation, having its main headquarters in one country, produces in another country, and exports to a third country). To avoid such complications, it may be preferable to avoid such a link. As noted above, the national treatment principle in the IP conventions only applies to the protection of IPRs, and not to their use.

Unlike in GATT, the national treatment principle of the IP conventions only applies to “laws” for IP protection. Thus, there is nothing to prevent countries party to these conventions concluding, between or among themselves, or with other States not party to these conventions, treaties which apply only to nationals (and assimilated persons) of a limited number of countries, in pursuance to Article 19 of the Paris Convention or Article 20 of the Berne Convention. Such “special” treaties would not count as “laws” and any higher standards of protection they provide would not necessarily have to be extended to all the signatories of the relevant IP convention. Whether a State party to such a treaty would have to extend its benefits to other members of the IP convention in question would depend upon the constitutionality of “self-executing” treaty provisions under its domestic legal order—in countries where the self-executing character of treaty provisions was not accepted, legislation to apply the “special” treaty would have to grant the extra protection provided for to all signatories of the IP convention in question. Moreover, where the provisions of such a treaty would entirely replace the national laws of Member States, so that important subjects of intellectual property would no longer be dealt with by national legislation and would not be subject to the national treatment principle, this could be considered to amount to an insufficient implementation of the IP conventions.<sup>16</sup> In addition, more extensive protection must not prejudice the rights granted by the convention in question.<sup>17</sup> It has thus been pointed out<sup>18</sup> that the signatories of any TRIPs agreement, if members of IP conventions (the majority of such signatories are likely to be members), could not legally deny the extra IP protection that might be granted in their laws to nationals of all other Member States of the conventions, irrespective of whether or not all these States were signatories of a TRIPs agreement.

MFN does not exist in the IP conventions. In the GATT, it applies to products. It would therefore need to be extended to persons if the principle were to be applied to IPRs. Such an extension (which would necessarily cover all GATT Member Countries whose nationals held IPRs in other Member Countries) would affect a large number of bilateral and regional agreements which have been permitted as “special agreements” by the IP conventions. There would therefore be potential for some conflict between the trading and IP systems. On the other hand, should such agreements be exempted from an MFN principle which would otherwise be generally applicable, this would create

---

<sup>16</sup> See Bodenhausen, *op. cit.* footnote 2, p. 30.

<sup>17</sup> See Bodenhausen, *op. cit.* footnote 2, p. 16. The example he provides is the grant to nationals of certain countries' priority periods for longer periods than required under the Paris Convention.

<sup>18</sup> See Reichman, *op. cit.* footnote 1, at p. 853.

further distortions and exceptions to the MFN principle. To avoid such problems, it might therefore be better not to apply the MFN principle in the area of IPRs. However, it is true that a non-application of the MFN principle might provide an incentive to countries to gain competitive advantages over their trade competitors by imposing bilateral agreements on third countries providing for stronger protection for their nationals than that prescribed under a TRIPs agreement; this would suggest that appropriate means in a TRIPs agreement for preventing this should be established.

#### SPECIAL AND DIFFERENTIAL TREATMENT

This principle is applicable in all fields of international economic relations involving countries at different stages of development, and is based upon the notion that obligations should be commensurate with the level of economic development. By providing flexibility to developing countries in their assumption of international obligations, it has been a key element in maintaining their right to choose their economic systems. It is a basic principle of both the GATT and the Berne Convention,<sup>19</sup> but has so far been absent from the Paris Convention, perhaps because most of the obligations imposed by the latter convention are relatively weak. However, it is significant that, in areas where the obligations imposed by the Paris Convention are stringent, such as in its provisions relating to compulsory licensing or forfeiture of patents for non-working or insufficient working of inventions (Article 5A), the developing countries have requested special and differential treatment (s&dt) in the course of the negotiations for the revision of the convention. The application of this principle in these areas has indeed been conceded in the negotiations by developed countries,<sup>20</sup> although there are disagreements over the extent to which it should apply.

Should stronger norms for the protection of IP be adopted in a TRIPs agreement, it may be appropriate to mitigate the application of these norms to developing countries, thus preserving at least some of their freedom to tailor their IP regimes in accordance with their technological and developmental objectives. In this connection, it may be noted that, in both the GATT and the IP conventions (existing or under negotiations), s&dt is related to the application of substantive norms. This would imply that the mere grant of technical assistance to developing countries to help implement a TRIPs agreement, or a transitional period for its implementation, would not in themselves constitute sufficient applications of this principle. The nature, scope and extent of "substantive" s&dt might depend upon the general obligations assumed by countries party to a TRIPs agreement, and might perhaps take account of the terms of protection granted by developed countries in the past. "Substantive" s&dt could take into account the socio-economic importance of certain sectors (sectors of special importance to developing countries include agriculture, and the food and

---

<sup>19</sup> An appendix to the Berne Convention establishes preferential measures to enable developing country nationals to secure compulsory licences on works needed for teaching, scholarship or research, but with no right to export such works.

<sup>20</sup> See WIPO document *Sixth Consultative Meeting on the Revision of the Paris Convention*, PR/CM/VII.

pharmaceutical sectors), the GATT concept of the protection of “infant industries” and the enforcement problems of developing countries.

#### CONCLUDING REMARKS

The disagreements over the applicability of the basic principles of the GATT and the IP conventions which characterize the TRIPs negotiations thus hide a deeper discord over the extent to which countries should continue to maintain their sovereign right to adapt their economic systems, and specifically their IP regimes, to their perceptions of the public interest at the domestic level, or their national interests *vis-à-vis* other countries. (Although there is also discord over the extent to which the principle of non-discrimination, particularly MFN, should apply in the area of IPRs, such discord involves less crucial issues.) It is noteworthy that the developed countries have themselves made full use of this right in the past. The application of the prescriptive GATT approach to the area of intellectual property, which is so far governed by the more permissive “comity” approach of the IP conventions, could result in a severe curtailment of this sovereign right, leading to an enforced harmonization of the IP laws of most countries with the IP laws of the most technologically advanced countries.

Yet it is questionable whether the application of such a GATT-like prescriptive approach necessarily or automatically implies that the basic GATT principles should also be applied to the area of IPRs. While, in some respects, the application of certain of these principles might provide a useful supplement to the basic principles of the IPR conventions, it is submitted that such a positive contribution would be far outweighed by the confusion and the potential for conflict between the two systems which would result. The basic principles of the IP conventions were created to deal with the specific subject-matter of intellectual property, and have shown, over the century of their existence, their applicability and suitability in a changing economic and technological environment. Moreover, within the World Intellectual Property Organization (WIPO), discussions are proceeding on the harmonization of certain provisions in laws for the protection of inventions (i.e. patents and utility certificates or “petty patents”) and on the harmonization of laws for the protection of marks. It remains to be seen how the basic principles of the IP conventions and the GATT will be applied in a TRIPs agreement, but it may be noted that earlier proposals of some developed countries to apply, in a TRIPs agreement, national treatment and MFN in respect of both persons and goods, now appear to have been shelved. The latest texts put forward by these countries<sup>21</sup> only seek to apply these principles to persons. On the other hand, the current proposals of the developed countries do not provide for a full application of the principles of IP conventions to a TRIPs agreement.

In any event, should the results of multilateral negotiations be the limitation in important respects of the discretion of national policy-makers with regard to the

---

<sup>21</sup> See *Composite Draft Text* of 12 June 1990 prepared by the Chairman of the TRIPs Negotiating Group.

terms of IP protection, it would be appropriate to make provision, within the framework of any new multilateral regimes, for the attainment of those objectives which policy-makers had sought to attain through their own initiatives; i.e. it could be sought to install a multilateral balance of rights and obligations among States which would take into account their different levels of technological development and a multilateral balance of rights and obligations between States and IPR holders (these two sets of balances would, in practice, often overlap). A balanced outcome to the TRIPs negotiations will be possible only if full account is taken of “the underlying public policy objectives of the national systems for the protection of intellectual property, including developmental and technological objectives” (see paragraph 5 of the TNC decision). In this context, it should not be overlooked that unless countries willingly enter into a TRIPs agreement, without coercion from extraneous pressures, the implementation of such an agreement (particularly its enforcement at the national level) is likely to be beset with problems.