

Opportunities and Challenges of the Trade-Related Intellectual Property Rights Agreement

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Acronyms and Abbreviations

DSU	Dispute Settlement System
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNP	Gross National Product
IPRs	Intellectual Property Rights
IT	Information Technology
MFN	Most-Favored National Treatment
OECD	Organization for Economic Cooperation and Development
PGRs	Plant Breeder's Rights
R&B	Research and Breeding
R&D	Research and Development
TRIPs	Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WHO	World Health Organization
WTO	World Trade Organization

1. Introduction

In a world where knowledge assures power and power assures wealth, the protection of intellectual property rights (IPRs) plays in every day life not a very obvious, but a very crucial role.

Property rights embody a bundle of legal rights over the use a resource is aimed for and over any income that may derive from this resource. Several interest groups felt that the safeguards of IPRs were not protected enough on a global level. They wanted to protect their power and wealth, even though the knowledge does not always 'exclusively' belong to them. The Trade-Related Aspects Intellectual Property Rights (TRIPs) agreement under the World Trade Organization (WTO) was brought into affect enfoldng all member states of the WTO. The fact that the WTO is a global organization makes this topic even more complex, but at the same time brings interesting aspects into the discussion.

The aim of this paper is to outline the opportunities and challenges of TRIPs.

This is a challenging task. In literature the TRIPs agreement and its articles have been elaborated in detail. However, an objective argumentation on the opportunities and threats was barely found. This may due to the fact that the agreement has an effect on so many aspects of life that it is hard to stay rational.

The agreement is like a prism; depending on what side you look through it, the opportunities and challenges seem differently. This is especially true from the point of view of a developing or developed country.

The paper will start with a description of the relationship between the WTO and the TRIPs agreement. A short outline and a substantiation of the enactment of the agreement will follow. Afterwards the opportunities and challenges will be elaborated.

A complete list of the advantages and disadvantages remains beyond the scope of this paper. This paper is not a juristic essay, therefore the focus is laid on the influence TRIPs has on economical and ecological, as well as social and moral aspects of life. Emphasis

mainly focuses on the trade-off between protection and freedom of IPRs which concern developing countries. A section where the opportunities for the implementation of the TRIPs agreement are analyzed will be added. The paper will end with a conclusion and a personal elaboration of the agreement.

2. The WTO

The World Trade Organization represents two aspects. At the one hand it is the central one of several free-trade agreements, which together constitutes the so called WTO system. On the other hand it is the name of the organization responsible for the administration and the further development of the WTO system and the underlying agreements. "The WTO constitutes the principal link that both overarches and connects all other agreements in the system."¹ Its three main pillars are the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and TRIPs.

The aim of the WTO is the harmonization and liberalization of world trade and related aspects of trade. While beneficial to trade as a whole, benefits for a specific country depend largely on the bargaining power of this member state.

Since GATT was originally launched in 1947, the Uruguay Round (1986-1994) incorporated for the first time an endeavor to harmonize international intellectual property rights protection. In 1994 the TRIPs agreement was signed by the negotiating states and came into effect on 1st of January 1995. At this time 111 states became signatories of the agreement, currently the number raised to 148. Joining the WTO automatically involves accession to the TRIPs agreement and therefore the scope of intellectual property governance will be widened significantly in the future.

The WTO will not be described in more detail in this paper. If the WTO as an organization plays a role with regard to the TRIPs agreement, it will be pointed out.

¹ Volz (1998), p. 15.

2.1 The TRIPs Agreement

The TRIPs agreement covers 31 pages with 71 articles which are divided into seven chapters. Three chapters deal with the central question of protection of knowledge. The other chapters cover questions regarding the institutionalization and conversion of the agreement.

The transition period for the implementation of the agreement amounts to one year for developed countries, beginning from the 1st of January 1995. For developing countries five years and least developed countries eleven years.

The agreement covers five broad issues:

- “How basis trading system and other international intellectual property agreements should be applied
- How to give adequate protection to intellectual property rights
- How countries should enforce those rights adequately in their own territories
- How to settle disputes on intellectual property between members of the WTO
- Special transitional arrangements during the period when the new system is being introduced”.²

The aim of the TRIPs agreement is the harmonization of the legislation of the member states. Further more, to bring the same level of protection of intellectual property to all states in the global trading system of the WTO. TRIPs sets minimum standards which should be reflected in the national legislation of all members. It does not preclude members setting more rigid protections, except when such extension represents an infringement of the TRIPs agreement.

The preamble to the TRIPs agreement, which itself was subject to some considerable negotiation, was finally agreed on the basis that the signatories desired: “[...] to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure

² Intellectual property: protection and enforcement (2003), website.

that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”³

TRIPs covers intellectual property in: copyright and related rights (including computer programs and databases); patents; trademarks; geographical indications; industrial designs; layout-designs of integrated circuits and undisclosed information (trade secrets).⁴ This broad coverage reflects the importance of intellectual property nowadays.

The TRIPs agreement includes many aspects of the Paris Convention (1883) on industrial property and the Berne Convention (1886) on copyright. These Conventions were previously administered by the World Intellectual Property Organization (WIPO).⁵ The perceived lack of robust enforcement procedures was one of the main motives for the inclusion of intellectual property in the WTO.

“The keystone of the agreement is the adoption of the principles that are central to the WTO (like the GATT before) in the realm of intellectual property: national treatment; most-favored nation treatment (MFN); [...]”⁶ National treatment signifies that nationals and foreigners should be treated equally in their jurisdiction. The MFN status requires that “any advantage, favor, privilege or immunity granted by a member to the national of any other country be accorded immediately and unconditionally to the nationals of all other members”.⁷

TRIPs is a detailed international agreement and it is not feasible to go through its clauses in detail here. This section is only an overview of the most important aspects of TRIPs; the interested reader may read the whole agreement.

³ Preamble, The TRIPs Agreement (1994).

⁴ For explanations on these terms please see Appendix.

⁵ The WIPO has been a specialized agency of the United Nations since 1974 and administers a number of international unions or treaties concerning intellectual property.

⁶ May (2000), p. 69.

⁷ Article 4, The TRIPs Agreement (1994).

2.2 Reasons for the TRIPs Agreement

A number of factors that congregated during the past elucidate the priority given by some countries to a restructuring of the intellectual property rights worldwide. For the analysis of the opportunities and challenges it is important to understand the reasons for the development of the agreement.

“The factors relate to the increase in R&D [Research and Development] costs, the shortening of the life-cycle of products, difficulties in appropriating the results of R&D, particularly in the field of easy-to-copy new technologies (such as computer programs), and the globalization of the economy.”⁸ Globalization is the reason for several phenomena in the past. The increased competition between industries world-wide is of special concern in connection with IPR. Competition normally leads to a drop of prices in order to attract the potential customer.

Another motive is the domination in manufacturing and technology of the USA and Europe. This was destroyed by Japan and newly industrializing countries in Asia in the mid 1980s. The loss of the technological leadership in certain high-tech areas and the trade deficits of the USA and Europe were partly attributed to a too open system. “A major source of declining [...] competitiveness was conceived to be the losses from overseas piracy and counterfeiting activities. The monopoly rights granted by IPRs were regarded as an instrument to avoid further catching-up based on imitative paths of industrialization, that is, as a tool to freeze the comparative advantages that had so far ensured US technological supremacy.”⁹

Also, the reduction or the elimination of trade barriers in developing countries increased the opportunities for direct exports to those countries. For this reason, multinational companies increased pressure to be freed from the obligation to exploit patented inventions locally or transfer the technology to local firms.

⁸ May (2000), p. 74.

⁹ Correa (2000), p. 4

3. Opportunities and Challenges of the TRIPs Agreement

There are several ways to find arguments for and against the protection of IPRs. In this paper, the focus will be laid on the analysis of the impact of the TRIPs agreement. Pursuing this strategy several methodological considerations should be taken into account:

Firstly, it is very difficult to identify the effects that are exclusively attributable to the protection of IPRs. Too many aspects could originate from other economic or institutional factors.

Secondly, intellectual property includes a wide range of terms. Therefore, any reference to the impact of intellectual property is likely to be an oversimplification.

Thirdly, even when one particular type of intellectual property is considered, its actual importance varies in accordance with the country, industrial sector, and product involved.

“This extension of the protection of intellectual property in the international realm as well as the harmonization of law within WTO members represent a major triumph for the US and European pharmaceutical, entertainments and informatics industries that were largely responsible for getting TRIPs in the agenda’ of the Uruguay Round.”¹⁰

The TRIPs agreement can be seen from two perspectives. Some argue that this agreement is a technical solution to an emerging problem. Others claim that TRIPs is a manifestation of structural supremacy within the global political economy.

The underlying conflict of the TRIPs agreement is basically reflected in two movements: “[...] the developed countries sought provision that would protect their industries from piracy and counterfeiting, while the developing countries sought provisions that would stimulate economic development and technological advancement”.¹¹

In the following sections these different points of view will be analyzed in more detail, because this controversy is closely linked to arguments for and against the TRIPs Agreement.

¹⁰ May (2000), p. 75.

¹¹ Stewart (1993), p. 2255.

The advantages and disadvantages of the TRIPs agreement are not separately dealt with, since they are usually dependently linked. An opportunity for one country or industry may be at the same time a drawback for another.

A critical study of the agreement can not take institutions, social and economic power relations as given. However, a proposal on how things could be handled in a better way is not within the scope of this paper.

The argumentation will start with the elaboration of economical aspects. The point of view of developing countries will be mainly discussed, since these countries depend highly on the goodwill of developed countries. Developed countries are responsible for the enactment of the agreement; therefore it is very interesting to analyze their argumentation.

Next, the influence of the TRIPs agreement on ecological factors will be evaluated. Followed by a discussion of the impact on health issues, such as the access to medicine. Afterwards the exceptions of the agreement will be elaborated, since they provide a chance to a better access of medicine. Then, the institutional aspects of the WTO will be illuminated. The final discussion will be made from formal point of view.

3.1 Economical Aspects

One of the biggest problems for developing countries is a low gross national product (GNP). A higher GNP could solve a lot of issues these countries have to struggle with. Therefore these countries pay close attention to the impact TRIPs has on economical aspects.

Of special concern for the developing countries is the question if a higher protection of IPRs in regard with the TRIPs agreement will affect **foreign direct investment (FDI)**.

“Among their main arguments, developed countries affirmed that enhanced and global protection of IPRs would foster technology and investment flows to developing countries.”¹²

Available evidence on the relationship of FDI and the protection of IPRs is very inconclusive.

Inflows of FDI in Asia and the Pacific have been concentrated on a few countries such as China, Indonesia, Malaysia, Thailand, and Singapore. These countries have become major recipient of FDI before changes in IPRs were applied. So far, no significant change in the flow of FDI has been observed as a direct result of the TRIPs agreement. It is questionable if higher IPRs standards will change the situation for developing countries in a tangible way. Especially regarding to the current situation countries like Indonesia, India, Malaysia, Sri Lanka, and Thailand have to face, estimates for the further development of the inflow of FDI are almost impossible to predict.

It should be noted that the implementation of minimum standards on IPRs will set all countries on an equal level in this matter. Once TRIPs fully applies, other aspects like infrastructure, availability of skills and R&D facilities will be important considerations for FDI.

It can be assumed, that the implementation of the TRIPs agreement will not ensure by itself greater attractiveness for FDI.

¹² Correa (2000), p. 23.

“Today’s world is divided not by ideology, but by technology.”¹³

The **role of technology for economic growth** has been subject of several studies in the past.¹⁴ They prove that the industrial progress, especially in developing countries, relies highly on the adaptation of imported technology. In addition the transfer of technology has been one of the main instruments through which developing countries progressed in their economic growth.

Will the TRIPs agreement stop or reduce industrial development?

“It is arguable if the IPR protection would increase the net flow of technology, since the patent-holder may prefer the direct exploitation of the invention through exports or subsidiaries.”¹⁵ Also, it is reasonable to argue that the transfer is more likely to take place if it is connected with the authorization to use patents and other IPRs. If protection of such rights is weak, companies are doubtful to enter the market.

The impact of reinforced IPRs depends strongly on the availability of scientific and technological skills in developing countries.

Most patents will be useless for developing countries due to the high prerequisites to be fulfilled. Patents as incentive to more local innovations and economic growth will only work in countries where a scientific infrastructure is already established.

The findings of Scherer¹⁶ for the case of Italy support this hesitation. He found that pharmaceutical product patenting displayed a strong upward trend well before the introduction of a patent system in 1978. He also validated that the changes of the patent regime had little or no impact on R&D expenditure.

The next paragraph deals with the topic **Information Technology** (IT). This subject is especially important to countries which depend to a high degree on the transfer of technology.

The analysis will be centered on the barriers that IPRs may create for the access to and the use of Information Technologies.

¹³ Sachs (2000), p. 113.

¹⁴ see OECD (1992).

¹⁵ United Nations (1993) p. 20.

¹⁶ Scherer (1995).

When analyzing the impacts of the TRIPs agreement on IT it is important to pay attention to the following considerations: Firstly, it is difficult to isolate legal from social and economic factors, since the use of IT highly depends on the access and the pre-existing knowledge the user has. Secondly, the IT industry is changing so fast that the impact of IPRs is difficult to measure.

Software products are generally developed using previously existing programs and algorithms. Innovations in the software industry are very dependent on the improvement of existing products. A patented program cannot be used as a basis for further development without the authorization of the patent-holder. This may block new innovations. Mathematical equations are logical and defined, and in some cases there may be no other alternative than using an existing program as a basis.¹⁷

In developing countries IPR protection mainly benefits foreign producers of software, but it can also help local firms to avoid illegal duplications and unfair competition. A stronger protection of IPRs may lead to some extent to the development of cheaper programs that better fit the local requirements.

Apart from that, IPRs may imply higher costs for royalties and other payments. In return this may reduce the investments in Research and Development.

Higher level of protection could also lead to negotiating imbalances. When one party highly depends on a certain patent/product and has no bargaining power this can lead to abusive practices that restrain competition. As stated by Maskus, “[...] economists cannot be entirely optimistic about the implications of stronger IPRs for technology [...]”.¹⁸

It can be concluded that the implementation of the TRIPs agreement affects the transfer and use of technology in an ambivalent way. On the one hand, it creates favorable conditions for the transfer of technology. On the other hand it weakens the bargaining position of recipients in developing countries.

It is easy to predict, and already affirmed for some products and countries, that the main impact of the TRIPs agreement in the short and medium term will be on the **market**

¹⁷ The author is thankful for the comments received from Torsten Knobloch, IBM Germany.

¹⁸ Maskus (1997a), p. 16.

prices of products that become protected. The existence of a patent, for example, allows an isolation of a product from price-based competition.

It is indisputable that the inventors should receive **adequate remuneration** so that there are enough incentives for creativity. For this reason it is necessary that their work is protected. But somebody that benefits or even depends on this invention should not pay an unreasonably high price. “The balance between the remuneration to the innovator and artist on the one hand, and the genuine interests of the public on the other, has been subject of debate for a long time.”¹⁹

The terms ‘adequate’ and ‘unreasonably’ are almost impossible to define, especially with regard to the global extension of this WTO agreement.

The current questions concentrate on the impact, rather than on the possible existence of the increase in prices. How will this effect countries that highly depend on imports and do not have enough money? This is of special concern to public health policies.

However, the WTO has no mandate to establish public health policies. It is the objective of other international organizations, such as the World Health Organization. Nevertheless, the TRIPs agreement should not impede the implementation of public health policies.

3.2 Ecological Aspects

Another issue which is broadly discussed is the significance of the conservation and sustainable utilization of **plant generic resources** (PGRs) for food and cultivation for Research and Breed (R&B). The development and sustainability of agriculture are strongly dependent on access to PGRs.

Farmers play a key factor in the process of maintenance and improvement of plant varieties. Their work guarantees the formation of new crops breeds through genetic mutation between cultivated and wild plants.²⁰ Access to already existing genetic

¹⁹ Stewart (1993), p. 356.

²⁰ The author is thankful for the comments received from her former biology teacher Mrs. Peters.

materials is necessary for the continuous adaptation and improvement of plants for food and agriculture.

Great criticism has been voiced that TRIPs will reduce, complicate or interdict the access to PGRs. Greenpeace Germany criticizes that patents compromise access to food. “India used to have 30.000 types of rice; today no more than 10 are of importance for the daily consumption. Only a great variety of plants assures that we can rely on different genetic characteristics for the breed of new plants that adapt to the changing of soil and world-climate.”²¹ It is questionable if the reduction of rice varieties is accountable to the patent system of the TRIPs agreement or the law of the market. Only the products that satisfy the market and promise a profit will be produced in the future.

Nevertheless, the industry should not have the right to patent the rice, which farmers used and improved for years. And from this point on to force the farmers to pay for the usage of their ‘own rice’.²²

A new plant variety cannot be created from scratch. In the area of plant development there is no intrinsic creation. The improvement of crops can only take place on the basis of the use and modification of what nature has created. “The granting of a patent entails a prohibition (*ius excluendi*) of use of the patented material in the countries where the rights have been already recognized.”²³

The same is applicable to the process to produce a plant. If the procedure is patented the commercialization and the usage is forbidden if the product “obtained directly by that process”.²⁴ These rights only apply to the country where the patent has been registered.

Article 27.3 (b) authorizes members to exclude plant and animals from patentability. The same article also postulates the protection for plant varieties either by patents or a *sui generis* system.

Microorganism, not biological and microbiological processes are excluded from patentability. On the first glance this exclusion seems harmless. But with the progress of bio technology and genetic engineering this subject becomes awkward. The production of

²¹ Translated by the Author from German into English on the basis of: “Auf dem falschen TRIP: Patente in der WTO (2003), website.

²² The author is thankful for the comments received by Tamira Chu, Attac Germany.

²³ Correa (2000), p. 176.

²⁴ Article 28.1(a), The TRIPs Agreement (1994).

gene manipulated plants is not declared as a biological, but as a technical method. For this reason not only patents for the process of production are granted, but genes are also patentable.²⁵

“[...] the protection by IPRs of living materials, including plants, raises a number of ethical issues that, in the view of many authors and organizations, should be a sufficient basis to prevent any private party from obtaining exclusive rights on such materials.”²⁶ Since especially this point led to main discussions “[...] the agreement calls for a review of the provision of article 27.3(b) four years after the agreement entered into force (i.e. in 1999). This review is underway in the TRIPs council”.²⁷ The TRIPs council consists of all WTO members. It is responsible for monitoring the operation of the agreement and the supervision on the way how members comply with their obligations.

3.3 Health Aspects

Criticisms on the TRIPs agreement focused to a great extent on the **access to medicine** for developing countries.

For the pharmaceutical industry knowledge is a main resource, because they depend on knowledge driven products. Effective and affordable medicine is crucial for individuals as well as for society as a whole.

Both parties want to protect their wellbeing, but their interests can differ sustainable from each other. The pharmaceutical industry wants to earn as much money as possible. When medicine is being copied the profit margin and incentives for the development of new products are reduced. High R&D investments need to be made before a new medicine enters the consumer market. The consumer, on the other side, wants to pay the lowest price possible, but at the same time they demand new well researched products.

This scenario points out that the two interest groups are dependently linked, but have different concepts of their ‘relationship’. Imagine that the pharmaceutical company is from a rich and the sick person from a poor country. The conflict of interest is in this

²⁵ In accordance with: Auf dem falschen TRIP: Patente in der WTO (2003), website.

²⁶ Correa (2000), p. 173.

²⁷ Frequently asked questions about TRIPs in the WTO (2003), website.

example especially visible, since developing countries sometimes are not capable to pay 'vital' high-priced medicine.

Strong IPR protection for pharmaceuticals drives medical progress by providing economic incentives for innovation. Pharmaceutical progress depends vastly on the enormous investments for drug development. Without strong patent protection nobody is willing to invest in such a high-risk project. But the contribution of strong IPR protection goes beyond economics. Of course, the medical problems of the world cannot be solved by strengthening protection, but it may be an incentive for more investment in R&D.

But 15 million people die worldwide each year, even though the illness is healable.²⁸ These people do not have access to or can not afford the medicine.

Of course, this figure is not only accountable to the price of the medicine, but it surely has a high impact on it.

Since access to medicine is a very 'vital' aspect, TRIPs includes exceptions which should simplify the access of medicine.

3.4 Exceptions of the TRIPs Agreement

Parallel importing is the importation of a product which than is sold under the common market price in the importing country. This usually happens without the permission of the patent holder. Countries' laws differ on whether they allow parallel imports or not. Article 6 of the TRIPs agreement states, that members are free to incorporate the principle of international exhaustion in their national legislation. "As various countries have their own system on parallel import, the effect of exhaustion will depend on the particular system and practice prevalent in the country."²⁹ This article can therefore been understood as an instrument to ensure parallel imports.

²⁸ Gibst du mir, nehm ich dir (2003), website.

²⁹ Correa (2000), p. 65.

The TRIPs agreement simply states that governments cannot bring legal disputes to the WTO on this issue.³⁰

In fact, parallel import can be an important tool to protect the interest of consumers. It ensures the availability of industrial and agricultural inputs, as well as the availability of essential drugs at competitive prices. But a higher price is not always assignable to patent protection. Import costs, wages or taxes can be another reason for the price difference.

Another method which can assure the accessibility to medications and other products is **compulsory licensing**. It permits the use and production of a protected work without the permission of the title-holder.

Article 31 refers to five conditions under which compulsory licensing is granted: refusal to deal; emergency and extreme urgency; anti-competitive practices; non-commercial use and dependent patents. There is also a provision for non-commercial use such as health care and national defense, but even then the “right holder shall, nevertheless, be notified as soon as reasonably practicable”.³¹

Article 31(b) also requires that compulsory licensing should only be undertaken if “[...] prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time”.

“Furthermore, such compulsory licensing must be non-exclusive, un-assignable (which is so to say they must be publicly and free available, not handed to a particular national producer), and the decision to grant them shall be subject to judicial review.”³²

It is also required that the “right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization”.³³ The question what ‘adequate remuneration’ means is again not answered by the agreement. The compensation is clearly connected with the economic value of the license, not with the economic prosperity of the searching state. What happens if the state

³⁰ In accordance with: http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief08_e.htm, website.

³¹ Article 31(b), The TRIPs Agreement (1994).

³² May (2000), p. 74.

³³ Article 31(h), The TRIPs Agreement (1994).

is not capable to pay the remuneration or does not have the manufacturing capabilities? This question is left open by the TRIPs agreement.

To the knowledge of the author no case is academically documented to be included in a scientific paper.

The agreement tries to combine two objectives which are almost incongruous. The challenge to protect intellectual property rights and the attempt to soften regulations when special circumstances or an emergency take place. Especially health issues are to some countries of the world a daily emergency.

Generally speaking this is a classical issue between the developed countries or the Northern states and the developing countries or Southern states.

3.5 Institutional Aspect

The protection of intellectual property will eventually result in safeguards that may hinder the access to all kind of information. Restrictive access to technical, scientific and general factual knowledge will have the highest impact on developing countries. These countries want to progress in their development, which is impossible without knowledge. The WTO is aware of this problem. Article 67 of the TRIPs agreement stipulates that developed countries must provide “on request and on mutually agreed terms and conditions, **technical and financial cooperation** in favor of developing and least-developed country members”.

“To ensure access to relevant information in this regard, developed country members have agreed to present annually to the TRIPs council a description of their technical cooperation activities in the area of intellectual property.”³⁴ Additionally, developing countries can ask for technical assistance to obtain information on technical cooperation’s. The idea itself maybe a right step, but it is very questionable if developed countries will supply constructive information that will help developing countries.

³⁴ Frequently asked questions about TRIPs in the WTO (2003), website.

The historical problem of the WIPO's ineffective ability to sanction states or their domiciled companies, who did not observe the formally adopted agreements, was solved by the TRIPs agreement. Any controversy as to compliance with the minimum standards of the agreement should be subject to a multilateral procedure with the **Dispute Settlement Understanding (DSU)**. Once the existence of a violation has been determined, the affected country can apply cross-retaliations to the non-complying country in any area covered by the WTO (e.g., it may apply quotas to exports from the non-complying country). A developing country that depends on imports but hardly exports is certainly not in the position to amerce a powerful developed country. The official database of the DSU shows, that mainly cases of IPRs violations of developing countries brought into charge by developed countries.

An agreement is useless if in case of unruliness no consequences will follow. The pure existence of this institution can be valued positively, as long as it is not used to exploit economic power.

3.6 Formal Aspects

From a **formal** point of view two points of the development of the TRIPs agreement can be criticized. "First, the divergence between initial aim and the resulting agreement. Second, the replacement of minimum by protecting standards."³⁵

The ministerial conference in 1986 which formulated the mandate for the Uruguay Round, asked for the reduction of distortion and obstruction of international trade.

"During the Uruguay Round the protection against product piracy shifted towards the arrangement of norms and principles for the access, the extent and usage of trade-related rights of intellectual properties."³⁶ The Uruguay Round abandoned the constitution of an international protection system; instead the traditional multinational system (for example the Berne and Paris Convention) for the protection of IPRs had been extended. Therefore, the risk insists that TRIPs is only an institutionalization of the protection of national markets on the basis of intellectual property rights. But TRIPs is not a further

³⁵ In accordance with Hanns (1995), pp. 624.

³⁶ Hanns (1995), pp. 623.

amelioration for international trade. “The title, trade-related aspects of intellectual property rights, of this WTO agreement owes its origin more to the historical process of the negotiations of the Uruguay Round than to the actual content of the subject covered. There is actually nothing related to trade in this agreement; it is all about the protection of intellectual property rights.”³⁷

It is also criticized that TRIPs replaces minimum by protecting standards, which are in favor for developed countries. This aspect was already discussed in detail in previous chapters and will not be further elaborated.

4. Options for the Implementation of the TRIPs Agreement

The TRIPs agreement does not constitute a precise instruction of the protection of IPRs. It maintains a certain level of liberty for the implementation into national legislation. The way TRIPs is implemented may be of high importance with regard to the countries social and economic welfare. Therefore, countries should pay close attention to the opportunities left by the agreement. They provide the foundation to represent the countries own interests and strategies.

Most of these opportunities were already discussed. Since these options represent an opportunity to protect the interests of certain groups, they will be again subject of this chapter.

The TRIPs agreement does not define the term *invention*. National laws are allowed to define this term in accordance with their national standards. This gives considerable room for interpretation by the WTO members especially in the context of patents. In particular, “[...] nothing in the agreement obliges members to consider that substances existing in nature, biological or not, are patentable, even if isolated and claimed in a purified form”.³⁸

³⁷ Lal Das (1999), p. 355.

³⁸ Correa (2000), p. 228.

article 27.3 obligates the patentability of microorganism. This is also a question of definition. “This obligation may be interpreted as applicable only to genetically modified microorganism, and not those existing in nature.”³⁹

Also as above-mentioned, the circumstances under which compulsory licensing can be granted. However, members can determine other reasons for such licensing. The TRIPs agreement only establishes the conditions to be met, not the explicit grounds. The requirements of article 31(b), the request for a voluntary license, can as a result be bypassed.

Reverse engineering represents another significant aspect left to national legislations. The study of a certain product to identify the underlying ideas and functions can be essential for the development of new product. This is especially crucial to computer programs and other technological creations. The TRIPs agreement does not specifically cope reverse engineering. But through the interpretation of article 9.2 considerable room is left open on this topic: “[...] copyright protection shall extend to expression and not ideas, procedures, methods of operation or mathematical concepts as such”.

These examples indicate that the TRIPs agreement leaves some room for the influence of national legislation. Every country has a certain freedom to incorporate own national concepts and ideas when implementing the TRIPs agreement.

Some least-developed and developing countries are not able to use this opportunity; due to the fact that these countries are not aware of it. They do not have sufficient official legal department who is able to go through the TRIPs agreement in detail.

³⁹ Correa (2000), p. 230.

5. Conclusion

At the beginning of the work for this paper I was enervated about the comments on the implications of TRIPs for the developing countries. From my point of view most of the sources were not well argued and too many ‘feelings and moral thoughts’ influenced the discussion. But I had to recognize that this discussion cannot be purely based on rational arguments. The debate on TRIPs has to be influenced by a personal view on justice/unjustness and the north-south conflict.

My research lead me to the conclusion which has been earlier articulated by Carlos Correa: “The TRIPs agreement was not merely conceived as an instrument to combat counterfeiting and piracy, an objective that most developing countries would have shared.”⁴⁰ The agreement is a component of a policy aimed to protect power, power of the rich countries.

I searched for arguments that supported the constitution of the TRIPs agreement, but only few were found. This may due to the short time period since TRIPs came into force (for least developed countries it is even delayed till 2006), or to the possibility that the lobbies that benefit from TRIPs are not interested to publish the advantages of it.

The protection of intellectual property rights will be a topic that will escort us in the near future. Considering the wide coverage of the agreement and the disparities existing among the countries of the world, it is very difficult to make a quantitative assessment of the likely impact of the TRIPs agreement. It is evident that the effect of TRIPs will significantly vary in accordance with the levels of economic and technological development of the countries involved. Nevertheless, the further development of intellectual property rights has to be watched closely, because of the fact (as stated in the introduction) that the protection of intellectual property rights plays in every day life a not very obvious but a very crucial role.

⁴⁰ Correa (2000), p. 5.

The protection of IPRs should not only be left to those interest groups that earn money with it, but also to those groups which are affected by it. And this is a reproach the WTO, as an organization that was founded to harmonize trade, cannot fully deny.

The whole discussion on the TRIPs agreement from the developing and developed countries point of view proves, that we live in a world where knowledge assures wealth and power. Otherwise industrialized nations would not have been so eager on the enforcement of intellectual property rights.

For some people of the world degrading living conditions are the result of the restless desire for power and wealth. Even though this people never had the knowledge nor the power to fight against these conditions.

The TRIPs agreement certainly could not have stopped the battle for power. But TRIPs provides now a legal basis for the battle for power on the odds of developing countries.

Appendix

A. Juristically Interpretation of Important Terms

This paragraph shall help to understand crucial terms of the TRIPs agreement. The definitions⁴¹ are in close connection, and with reference to certain articles of the agreement.

A.1 Copyright

“Copyright law covers the expression of ideas in tangible written form, rather than the ideas them-selves. Products protected by copyright include books, motion pictures, and sound recordings.”⁴²

During the Uruguay Round negotiations, it was recognized that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection.

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPs agreement clarifies and adds certain specific points.

Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such.

Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

A.2 Geographical Indications

Geographical indications are defined, for the purposes of the agreement, as indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (Article 22.1).

⁴¹ in accordance with http://www.wto.org/english/tratop_e/trips_e/tripsfq_e.htm, access date: November 25th, 2004.

⁴² Stewart (1993), p. 2288.

A.3 Industrial Designs

Article 25.1 of the TRIPs agreement obliges members to provide protection for independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations. The duration of protection available shall amount to at least 10 years (Article 26.3).

A.4 Layout-Designs of Integrated Circuits

An *integrated circuit* represents a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function. A layout-design (topography) is defined as the three-dimensional disposition of the elements. At least one of which is an active element, and of some or all of the interconnections of an integrated circuit are prepared for manufacture.

A.5 Patents

“The owner of a patent has the right to prevent other persons from making, using or selling the subject matter of the invention protected by the patent for a given period, usually twenty years from filing. Patents are granted to technological advances that display a significant advance over the prior work of others in technology.”⁴³

The TRIPs agreement requires member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination.

⁴³ Stewart (1993), p.2292.

There are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to ordre public or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of ordre public or morality (Article 27.2).

The second exception is that members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)).

The third is that members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective sui generis system of protection. Moreover, the whole provision is subject to review four years after entry into force of the agreement (Article 27.3(b)).

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions are mainly contained in article 31.

A.6 Protection of Undisclosed Information

The TRIPs agreement requires protection for *undisclosed information*. According to article 39.2, the protection must apply to information that is secret. That has commercial value because it is secret and that has been subject to reasonable steps to keep it secret.

A.7 Trademarks

The basic rule contained in article 15 is that any sign, or any combination of signs, capable of distinguishing the goods and services must be eligible for registration as a *trademark*, provided that it is visually perceptible. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of

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colors as well as any combination of such signs, must be eligible for registration as trademarks.

The registration of a trademark shall be renewable indefinitely (Article 18).

B. Agreement on Trade-Related Aspects of Intellectual Property

- PART I GENERAL PROVISIONS AND BASIC PRINCIPLES
- PART II STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND
 USE OF INTELLECTUAL PROPERTY RIGHTS
1. Copyright and Related Rights
 2. Trademarks
 3. Geographical Indications
 4. Industrial Designs
 5. Patents
 6. Layout-Designs (Topographies) of Integrated Circuits
 7. Protection of Undisclosed Information
 8. Control of Anti-Competitive Practices in Contractual Licenses
- PART III ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS
1. General Obligations
 2. Civil and Administrative Procedures and Remedies
 3. Provisional Measures
 4. Special Requirements Related to Border Measures
 5. Criminal Procedures
- PART IV ACQUISITION AND MAINTENANCE OF INTELLECTUAL
 PROPERTY RIGHTS AND RELATED *INTER-PARTES* PROCEDURES
- PART V DISPUTE PREVENTION AND SETTLEMENT
- PART VI TRANSITIONAL ARRANGEMENTS
- PART VII INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

**AGREEMENT ON TRADE-RELATED ASPECTS OF
INTELLECTUAL PROPERTY RIGHTS**

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

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;
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
- (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and
- (e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Hereby agree as follows:

PART I

GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.
2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.
3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.⁴⁴ In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.⁴⁵ Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention

⁴⁴ When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

⁴⁵ In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. "WTO Agreement" refers to the Agreement Establishing the WTO.

shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

Article 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).
2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection⁴⁶ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.
2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

⁴⁶ For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Article 5

Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 6

Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article 7

Objectives

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.

Article 8

Principles

1. 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.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

PART II

STANDARDS CONCERNING THE AVAILABILITY, SCOPE
AND USE OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: COPYRIGHT AND RELATED RIGHTS

Article 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Article 12

Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Article 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.
2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.
3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the re-broadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).
4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.
5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

SECTION 2: TRADEMARKS

Article 15

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Article 16

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.
2. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.
3. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

Article 17

Exceptions

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 18

Term of Protection

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

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Article 19

Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Article 21

Licensing and Assignment

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.

SECTION 3: GEOGRAPHICAL INDICATIONS

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.
2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:
 - (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
 - (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).
3. A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.
4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in

translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.⁴⁷

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24

International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

⁴⁷ Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

SECTION 4: INDUSTRIAL DESIGNS

Article 25

Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.
2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

Article 26

Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.
2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.
3. The duration of protection available shall amount to at least 10 years.

SECTION 5: PATENTS

*Article 27**Patentable Subject Matter*

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.⁴⁸ Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

*Article 28**Rights Conferred*

1. A patent shall confer on its owner the following exclusive rights:

⁴⁸ For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

- (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing⁴⁹ for these purposes that product;
 - (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Article 29

Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.
2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

Article 30

Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use⁵⁰ of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

⁴⁹ This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

- (a) authorization of such use shall be considered on its individual merits;
- (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;
- (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;
- (d) such use shall be non-exclusive;
- (e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;
- (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;
- (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;
- (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;
- (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

⁵⁰ "Other use" refers to use other than that allowed under Article 30.

- (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;
- (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;
- (l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:
 - (i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;
 - (ii) the owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent; and
 - (iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

Article 32

Revocation/Forfeiture

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

Article 33

Term of Protection

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.⁵¹

⁵¹ It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

Article 34

Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

- (a) if the product obtained by the patented process is new;
- (b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

SECTION 6: LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

Article 35

Relation to the IPIC Treaty

Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

Article 36

Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder:⁵² importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

Article 37

Acts Not Requiring the Authorization of the Right Holder

1. Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.
2. The conditions set out in subparagraphs (a) through (k) of Article 31 shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government without the authorization of the right holder.

Article 38

Term of Protection

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

⁵² The term "right holder" in this Section shall be understood as having the same meaning as the term "holder of the right" in the IPIC Treaty.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

SECTION 7: PROTECTION OF UNDISCLOSED INFORMATION

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices⁵³ so long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

⁵³ For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES
IN CONTRACTUAL LICENCES

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

PART III

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.
5. 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.

SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

*Article 42**Fair and Equitable Procedures*

Members shall make available to right holders⁵⁴ civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

*Article 43**Evidence*

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

*Article 44**Injunctions*

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their

⁵⁴ For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 45

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark

goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.
2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 49

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3: PROVISIONAL MEASURES

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:
 - (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
 - (b) to preserve relevant evidence in regard to the alleged infringement.
2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.
3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.
5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.
6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.
7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES⁵⁵

Article 51

Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures⁵⁶ to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods⁵⁷ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 52

Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the

⁵⁵ Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

⁵⁶ It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

⁵⁷ For the purposes of this Agreement:

- (a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- (b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.
2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

Article 54

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

Article 55

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been

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initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58

Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the

suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55;

- (c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60

De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5: CRIMINAL PROCEDURES

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

PART IV

ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED *INTER-PARTES* PROCEDURES

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.
2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.
3. Article 4 of the Paris Convention (1967) shall apply *mutatis mutandis* to service marks.
4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and *inter-partes* procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.
5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

PART V

DISPUTE PREVENTION AND SETTLEMENT

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse

of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article *6ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this

Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

PART VI

TRANSITIONAL ARRANGEMENTS

Article 65

Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.
2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.
3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.
4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.
5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

*Article 66**Least-Developed Country Members*

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

*Article 67**Technical Cooperation*

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

PART VII

INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

*Article 68**Council for Trade-Related Aspects of
Intellectual Property Rights*

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it

by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

Article 69

International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

Article 70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.
2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.
3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.
4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to

the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

- (a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;
- (b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and
- (c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Article 71

Review and Amendment

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

Article 72

Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

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(iii) taken in time of war or other emergency in international relations;
or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

References

- Benedek, W.** (1998), Die Welthandelsorganisation alle Texte einschließlich GATT (1994), GATS und TRIPS, Munich.
- Blakeney, M.** (1996), Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement, London.
- Correa, C.** (2000), Intellectual Property Rights, the WTO and Developing Countries, The TRIPs Agreement and Policy Options, London.
- Dieckheuer, G.** (1999), International Wirtschaftsbeziehungen, 5th ed., Vienna.
- Hagerdoorn, J., Schakenraad, J.** (1994), The internationalization of the economy, global strategies and strategic technology alliances, Brussels.
- Hanns, U.** (1995), Technologieschutz nach TRIPs: Prinzipien und Probleme, in: GRUR Int., H. 8-9, S. 623ff.
- Lal Das, B.** (1999), The World Trade Organization, A Guide to the Framework for International Trade, New York.
- Macdonald-Brown, C., Ferera, L.** (1998), First WTO Decision on TRIPs, European Intellectual Property Review, 2 (February): 69-73, London.
- Maskus K.** (1997a), The role of intellectual property rights in encouraging foreign direct investment and technology transfer, Boulder.
- May, B.** (1994), Die Uruguay-Runde Verhandlungsmarathon verhindert trilateralen Handelskrieg, Bonn.
- May, C.** (2000) A Global Political Economy of Intellectual Property Rights – The new enclosures?, London.
- OECD** (1992), Technology and the Economy, The Key Relationships, Paris.
- Scherer, F.M.** (1995), Industry Structure, Strategy and Public Policy, New York.
- Stewart, T.** (1993), The GATT Uruguay Round, A Negotiating History 1986-1992, Boston.
- Stoll, P.T., Schorkopf, F.** (1998), WTO – Welthandelsordnung und Welthandelsrecht, Munich.
- The TRIPS Agreement** (1994), Bundesgesetzblatt 1994 Teil II, pp. 1730, Berlin.

United Nations (1993), Intellectual property rights and foreign direct investment, New York.

Volz, G. (1998), The Organization of the World Economy, Vienna.

Newspaper articles

David, P. (1993), Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History, in M. Wallenstein; M. Moge and R. Schoen (Eds.), Global Dimension of Intellectual Property Rights, in: Science and Technology.

Sachs, J. (2000), A new map of the world, in: Economist, June 24th, 2000, pp. 113.

Thornhill, J. (2002), Foreign Direct Investment – Companies rush in with the cash, in: Financial Times, December 12th, 2002, p.24.

Websites

“Intellectual property: protection and enforcement”, (2003), author not known,

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm,

access date: November 25th, 2004.

“Frequently asked questions about TRIPs in the WTO”, (2003), author not known

http://www.wto.org/english/tratop_e/trips_e/tripsfq_e.htm,

access date: November 25th, 2004.

http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief08_e.htm,

access date: November 25th, 2004.

“Gibst du mir, nehm ich dir” (2003), Tenbrock, C., Uchatius, W.,

<http://www.zeit.de/2003/15/US-Solo>,

access date: December 15th, 2004.

“Auf dem falschen TRIP: Patente in der WTO” (2003), author not known,

http://www.greenpeace.org/deutschland/?page=/deutschland/fakten/umwelt_und_wirtschaft/wto/auf-dem-falschen-trip--patente-in-der-wto

access date: December 30th, 2004.

“Overview of the TRIPs Agreement” (2002), author not known,

http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm,

access date: January 6th, 2005.

<http://www.attac.org>

access date: January 6th, 2005.

Declaration of Academic Integrity

according to § 4 section 1 APRO BA from May 27, 2003

“With this statement I declare, that I have independently completed the above special research paper entitled with

“Opportunities and Challenges of the Trade-Related Intellectual Property Rights (TRIPs) Agreement”

The thoughts taken directly from external sources are properly marked as such. This thesis was not previously submitted to another academic institution and has also not yet been published.

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(Place)

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(Date of declaration)

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(Signature)