Global regulation of international intellectual property through Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS): The European Union and Brazil

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Abstract

Purpose – This paper focuses on the regulation of copyrights at international level by comparing the situation under the TRIPS agreement in Brazil and in the European Union.
Methodology/approach/design – This article analyses standards and literature on regulation, as well as the role of TRIPS agreement. Attention was specially drawn to the market failure theory for justifying regulation, advocated by Baldwin & Cave. The TRIPS agreement will be analysed through Baldwin's five criteria for good regulation.
Findings – The TRIPS agreement substantially widened the scope of governance of copyrights but imposes the WTO view on the matter. Notwithstanding its flaws, the TRIPS agreement remains the most comprehensive international agreement on intellectual property. According to Baldwin's theory, the TRIPS agreement as a regulation is a good regulation. Indeed, it achieves the major part of the goals it set. However, some of the declared goals have never come to existence and had been replaced by other goals. On the overall, the TRIPS agreement has the capacity to regulate international intellectual property.
Originality/value – This paper analyses the TRIPS agreement as a way forward in the harmonization of the rules on intellectual property.

Keywords: TRIPS, Brazil, EU law, direct effect, harmonisation.

Introduction

Copyright is traditionally regarded as a territorial right granted to the creator of the original work to exclusively use and distribute such work in a given country. (Correa, n.d) Copyrights are given international recognition based on the

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interplay among the nations, in the form of treaties and conventions. However, negotiations at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 saw the emergence of new global intellectual property regime, embodied in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is administered by World Trade Organisation (WTO). (Yu, 2009, p.46) TRIPS sets the minimum standards for various forms of intellectual property regulation. One of the greatest features of the TRIPS agreement is that it obliges the Contracting States to apply similar or better treatments to the copyrights of nationals of other WTO Members, according to Article 1(3) in conjunction with Article 3(1). More than setting minimum standards, the TRIPS elevates copyright onto a new stage of development by linking it with international trade and technology. The TRIPS agreement also substantially widened the scope of governance of copyrights. (Yu, 2009; Reichman, 1996)

The three basic features of the TRIPS agreement are; first, it covers all the main areas of intellectual property rights, not only patents. Second, it lays down not only the minimum substantive standards of protection that should be provided in each of these areas of intellectual property but also the procedures and remedies that should be available so that rights holders can enforce their rights effectively. Finally and more importantly, together with some 25 other legal texts, it is an integral part of the Agreement Establishing the World Trade Organization (and therefore subject to the WTO dispute settlement system).

The TRIPS agreements are capable of creating a globalised system for intellectual property. As Eeckhout said: "[…]. Think only of TRIPs, with its potential impact on daily practice in intellectual property law". (Eeckhout, 2004, p.38) Indeed, the TRIPS agreement remains the most comprehensive international agreement on intellectual property. TRIPS is the most important multilateral instrument and is widely spread, as it is a compulsory requirement of World Trade Organization membership; any country wanting to obtain access to international markets opened by the WTO must enact the rather strict intellectual property laws required by the TRIPS agreement. (Yu, 2009; Reichman, 1996) At the same time, TRIPS agreement imposes the WTO view on the matter and could conflict with national views. The TRIPS is sometimes viewed as a supranational code. (Mossinghoff, 2000, p. 593)

This article is based on the hypothesis that TRIPS agreement can be a way forward in the harmonization of the rules on intellectual property. TRIPS agreements are making it possible to deal internationally with intellectual property, even though some major issues still exist. Thanks to the minimum standard established by the agreement, international communication is achieved in an easier way. In order to demonstrate this hypothesis, the article will look at the TRIPS agreements in general as well as their aims. Then it will move on to

compare the way TRIPS agreements are operated in both Brazil and the European Union. This comparison will be the basis for the conclusion.

1. Theoretical background

Various motives exist to explain the wish of a government entity to regulate a specific field of law. The most frequent use of regulation is the response to market failure. (Baldwin, 2012, p.15) Structural problems are likely to be efficiently and effectively resolved by regulation. (Dunne, 2015) In a world more and more connected, regulation is necessary as the market itself fails to produce the expected results. (Francis, 1993, ch. 1) Market absence is the second good reason for regulating a specific market. However, a global regulation is hard to achieve. The more countries are involved in the process, the harder it will be for the law enacted not to contradict or interfere with national laws. It is also interesting to look at the deadline the developed and developing countries had to put TRIPS into practice. For instance, Brazil promptly incorporated TRIPS in 1996. However, some European countries took much more time.

The difference in deadline between the two types of countries maintains a strict separation and fails to fairly resolve the problem. At the same time, such approach allows all countries to be in the same equal playfield after the incorporation period has lapsed, therefore achieving a fairer allocation of resources. (Black, 2002; Baldwin, 2012) An equal bargaining power is a precondition for efficient and fair markets, which is one of the goals of the TRIPS agreement. Indeed, regulation might be justified when bargaining power is unequal as advocated by Prosser. (Prosser, 2010, pp. 11-20) Regulatory laws are not limited to correcting the market and can help constituting market relations but more importantly to provide frameworks of rights and processes which will avoid market fragmentation. (Shearing, 1994) Avoiding market fragmentation is an important step to be taken to allow the market to work properly. Regulation is the primary method for the organization of social relations. (Baldwin, 2012, p.20) Often regulation of this type is pursuing a public interest objective. (Morgan & Yeung, 2007, p. ch.2; Hantke-Domas, 2003; Levine & Forrence, 1990)

One of the principles of law we will be concerned with is the authority of the state to regulate private conducts. This is closely intertwined with the principle of public international law about jurisdiction because states can only exercise their regulatory power where they have jurisdiction. (Gerber, 2010) A unitary approach to law will not be adequate to investigate the regulatory aspect that the TRIPS agreements can have. By using a comparative approach, we will be able to demonstrate the impact the TRIPS has and whether it can be a basis for further harmonization. In order to ascertain whether further harmonisation is necessary and after having compared the two systems, namely the European

Union and Brazil, the TRIPS will be analysed according to Baldwin five criteria of good regulation.

2. Historical background

Nowadays, almost every member of the World Trade Organization (WTO) had reformed their intellectual property laws in order to implement the minimum standards of protection prescribed in the TRIPS Agreement.[1] This is an important step forward as global intellectual property protection was once largely fragmented and ineffective. Until the enactment of the 1883 Paris Convention for the Protection of Industrial Property and the 1885 Berne Convention for the Protection of Literary and Artistic Works, the protection of intellectual property rights and patents was nearly inexistent. (Yusuf, 2008, pp. 3-21; Gervais, 2nd edn, 2003; Emmert, 1990, p.1137; Taketa, 2002, p.958)

The development of international intellectual property laws can be divided into three periods; the first period is featured by the total lack of international protection, the second period is highlighted by the enactment of the Paris and Berne Conventions, and finally, IP rights were linked to trade which leads to the emergence of the TRIPS Agreement. (Drahos, pp. 2-7)

The Berne and Paris Conventions were a direct response to the lack of effective protection that national law provided for foreign rights, especially for countries having less rigid regimes in place. These agreements had the advantage to oblige signatories to impose basic minimum standards of intellectual property protection. (Mossinghoff, 2000) Indeed, the protection of copyright was restricted to national borders, leading to a proneness to assure trans-border enforcement of IP rights and to the near impossibility of trans-border coordination. (Reichman, 1996) Due to this lack of trans-border protection, the prevention of imitation or copies abroad was rare unless the other countries granted in their national IP laws a very similar protection. Although extensively revised and amended over time, these landmark conventions long embodied the basic principles of international intellectual property law. (Emmert, 1990, p. 1337; Taketa, 2002, p. 958)

Once globalization seriously spread, the conventions started to show signs of aging and the omission of IP rights in trade-related matter lead to abuse. Even though the treaties protected inventors and authors, it became common practice in underdeveloped countries to breach IP rights, which created a negative impact on the USA, Europe and Japan's trade balances. The major problem of

[1]Article 1 of the TRIPS establishes the minimum standard: "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"

both conventions was that they did not contain a good enforcement system, but only included an optional dispute resolution mechanism as stipulated in Article 29 of both conventions (YU, 2004, p.15) As a direct result, the USA and the European Union tried to convince developing countries to accept negotiation on a GATT's framework on intellectual property. (Yu, 2009, p.18) Due to the USA's threats of trade sanctions, IP was included on the agenda of the Ministerial Conference in Geneva in November 1982. During that conference, contracting parties agreed that a new round of negotiations would start in September 1986. (Evans, 1994; Emmert, 1990, p.1337) During these negotiations, the inclusion of IP in the GATT's framework was discussed and finally added during the Uruguay Round of Multilateral Trade Negotiations at Punta del Este in September 1986. (Abbott, 1989)

All aspects of the negotiations were finally resolved on the 15 December 1993. The "Final Act Embodying the Results of the Uruguay Round on Multilateral Trade Negotiations" was signed at Marrakesh, Morocco, on 15 April 1994. By signing this Final Act, countries agreed on the content of the Marrakesh Agreement establishing the World Trade Organization (also called WTO Agreement). The TRIPS Agreement is one of the agreements which is part of the umbrella of the WTO Agreement. Indeed, the Marrakesh Agreement is composed of four annexes. The three first annexes are integral parts of the agreement binding all members while the fourth is only binding on members that accepted it.

The main achievements of the Uruguay Round negotiations were the establishment of the WTO, the inclusion of Annex 1C, which is commonly called TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights) and the incorporation of dispute settlement mechanisms. (Cooper Dreyfuss & Lowenfeld, 1997; Weiss, 1990) The TRIPS Agreement is by far the most comprehensive and encompassing effort to regulate IP right at an international level. Opinions diverge as for instance, Jagdish Bhagwati is advocating the idea that IP rights should never have been included in the WTO agenda. In his opinion "Intellectual property protection is not a trade issue; and the WTO ought to be about lowering trade barriers and tackling market access problems that will often go beyond border measures to internal regulations: a thorny issue". Although Jagdish Bhagwati has a valid point, by increasing the level of minimum standards for all members of the WTO, WTO is also lowering the barriers to trade. It is true that the minimum standard is a relatively high standard certainly for developing countries. However, it was the best compromise between the highest standards, that can be for instance found in the US or the European Union, and the lowest standards applicable in some developing countries. (Drahos P.)

3. The post-TRIPS framework

With globalization spreading, global counterfeit and piracy have been rising. This had a direct impact on trade relations causing the hindrance of technological transfer and innovation as well as economic tensions. The TRIPS was seen as the solution to ease the problem. The TRIPS Agreement encompasses all forms of intellectual property and aims at harmonizing and strengthening standards of protection and providing for effective enforcement at both national and international levels. (Otten, 1998; Dreier, 1996, p.249; Reichman, 1997, pp. 340-344)

The major challenge that the legislator faces concerning the protection of intellectual property is to find a fair balance between the short-term interests in maximizing access and the long-term interests of promoting creativity and innovation. This is even truer regarding the international level. The purpose and expectations when increasing the level of protection are to boost the number of new works created leading to an economic enhancement. However, as Landes and Posner argue such effect will occur up to a certain point, after that point, the negative impact of the strengthening of the level of copyright, namely a highest cost of creating a new work, will dominate (Landes & Posner, 1989). Consequently, it is critical to strike a balance in copyright regulatory policies.

TRIPS agreement is not simply raising the level of protection for intellectual property; it tries to achieve the best possible balance, which will satisfy all the stakeholders. The TRIPS agreement is concerned with intellectual property in general but more particularly with pharmaceutical patents. (Yusuf, 2008) The main reason is that the tension between making existing drugs as available as possible and at the same time there is a need to provide incentives for research and development of new drugs is acute. Article 7 of the TRIPS, which embodies the objectives of the agreement, emphasises this dichotomy. Indeed, Article 7 recognizes that the protection of intellectual property should contribute to the promotion of technological innovation. At the same time, the transfer and dissemination of technology must contribute to the mutual advantage of users and producers of technological knowledge. These two objectives need to be conducted in a manner useful to social and economic welfare, but also in the best possible manner taking into account the balance of rights and obligations.

The TRIPS agreement provides strong protection for intellectual property rights. For instance, Article 12 and 14 requires the copyright terms to be extended for at least 50 years, unless they are based on the life of the author. However, Brazil went way further than the 50 years requirements, Article 96 of the Brazilian Copyright Act, established 70 years of protection. However, it is left to the domestic law of each nation to determine the enforcement procedure and the procedures to ensure that intellectual property rights are respected both by

foreign right holders and by their nationals. One of the issues that will be discussed in this dissertation lies exactly there. There is no harmonisation of criminal and civil procedures at neither international nor European level. As a result, failures of enforcement at the national level are as widespread as the TRIPS agreement is, as exemplified by the China case.[2]

Even with its flaws, the TRIPS agreement remains the most comprehensive international agreement on intellectual property. Among other things, TRIPS agreement specifies enforcement procedures, which is rather powerful, remedies, and dispute resolution procedures. TRIPS is also a compulsory requirement of World Trade Organization membership; "under the terms of TRIPS, current and future members of WTO must adopt and enforce strong, non-discriminatory minimum standards of intellectual property protection". (Maskus, 1998, p.109) In other words, to obtain access to international markets opened by the WTO, countries must adopt the rather strict intellectual property law found in the TRIPS agreement.

The TRIPS agreement is subject to other conventions in place such as the Berne Convention for the Protection of Literary and Artistic Works of 1971, as stipulated in Article 9(1) of the TRIPS agreement. This is not surprising as many of the TRIPS provisions were modeled on the Berne Convention. (Drahos; De Castro, 2011) The provisions on trademark and patent were based on the Paris Convention for the Protection of Industrial Property. For instance, the provisions on the protection of software and database are identical, Article 10 of the TRIPS agreement. However, these conventions and WTO rules under TRIPS have not been implemented uniformly in every contracting state, leading to important disparities.

One of the main reasons for these implementation problems was that governments were obliged to deal with concepts that they were unfamiliar with and rather complex copyright issues. Article 6(1)(c) of the Trade Mark Act 1994 illustrates this problem. Indeed, Article 6(1)(c) is not reflecting exactly the requirements of the TRIPS Agreement Article 16(2). An important part of Article 16(2), namely 'Members shall take account of the knowledge of the trademark in the relevant sector of the public', is left out in Article 6(1)(c). The English courts may remedy to this problem by imposing a similar standard when looking at the case. However, until the courts do so, there is no certainty that the missing requirement of the TRIPS agreement will be applied, leaving the members of WTO in an uncomfortable situation. Well-known marks are falling under the tort of passing off, which has no equivalence in continental Europe. Additionally, the UK being still part of the European Union, it is bound by various European piece of legislations which sometimes conflict with the TRIPS agreement.

[2]DS362 - China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights

In the US, the implementation of the TRIPS was also complicated due to Article 6(1)(2) of the US Constitution whereby any provisions of an international treaty conflicting with US law is void. Uruguay Round Agreement Act of 1994 (URAA) modified existing US law to embodied the TRIPS agreement. However, Section 102(a) of the URAA reiterates Article 6(1)(2) of the Constitution meaning that domestic law prevails over international law. Prior to TRIPs, discrimination against foreign inventors was part of the daily routine. For instance, US law was awarding patents to the party who is the first to invent in the US, not considering the activities that occurred abroad. After the European trading partner's objections, the US amended its legislation to allow foreign inventors to rely on activities in any WTO Member nation. (Byrne, 1995, p.131) Nevertheless, the US decided to keep its difference by maintaining the first to invent system rather than the first to file system that is in place in many countries.

a. Declared goals v. Model adopted

Various problems have been pinpointed in the introduction. The role played by the WTO in providing an effective international copyright protection and enforcement regime is of crucial importance to this distortion between the declared goals and the model adopted. Indeed, within the TRIPS system itself, there are contradictions between the declared goals and the model adopted. If such contradictions already exist within the system, it is logical that contradiction will be found between the TRIPS system and national laws. This is partially because while WTO does provide a platform for the member nations to dispute copyright violation by other member nations, it is yet to get the full confidence of its members as reflected by only ten cases that have reached WTO since 1996. Maybe the one-size-fits-all approach which establishes a unique standard of intellectual property protection is not the best solution, even though the TRIPS agreement also includes more flexible provisions. It can even be said that this approach solely favors the interests of developed states and big transnational corporations by making the refusal to perform as required by developed states less desirable than complying with such demand. (Gerhart, 2000, p.369; Reichman, 2000; Abbott, 1989) Indeed, the agreement is mostly interpreted by developed countries and ignores the local needs, national interests, technological capabilities, institutional capacities, and public health conditions of less-developed countries. (Yu, 2007, p.828; Correa, 2007, p.91; UNCTAD-ICTSD, 2004, p. 118) Often the standards under the TRIPS agreement were implemented in developing countries while few of them had in place a competition law regime that would allow them to control and remedy abuses in the exercise of IPRs. However, that was not the case of Brazil, as it already had a competition law. (Correa, 2000)

The dichotomy between declared goals and model adopted is exemplified by the question of direct effect.

4. The direct effect question

The different interpretations of Article 1(1) of the agreement illustrate this divergence between desired goals and adopted model. Article 1(1) is to be read as followed; "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."

At first glance, the first sentence suggests that the contracting states are under the obligation to grant direct effect to all the provisions of the TRIPS. This would be the most appropriate solution to make the TRIPS a real global system. However, the second sentence annuls the effect of the first sentence by referring to the implementation of the TRIPS into national law and granting the possibility to extend the rights further. Finally, the third sentence renders the direct effect of the provisions an unviable solution, as this sentence leaves room to the contracting states to determine the appropriate method of implementation under their legal system. The desired goal was to make the TRIPS directly effective, while the adopted model is to rely on national willingness to implement the agreement.

This lack of clarity allowed scholars to affirm that the TRIPS agreement is aimed at states and therefore cannot have direct effect as it was never its purpose to grant rights to individuals. (Barbosa, 2003, p.49) TRIPS is only setting minimal patterns to be followed and not uniform rules. Therefore national law is of crucial importance. (Barral W. , 2000, p.72) There are no doubts about the fact that some provisions of the TRIPS agreement are of normative nature, as some provisions are "either directly based on or inspired by those of the Draft International Code of Conduct on the Transfer of Technology which was negotiated under the auspices of UNCTAD but was never adopted as an international instrument". (Yusuf, 2008) Article 2 of the draft was copied in Articles 7 and 8 of the TRIPS.[3]

[3]"(1) Parties recognize that intellectual property rights are granted not only in acknowledgement of the contributions of inventors and creators, but also to assist in the diffusion of technological knowledge and its dissemination to those who could benefit from it in a manner conducive to social and economic welfare and agree that this balance of rights and obligations inherent in all systems of intellectual property rights should be observed.

(2) In formulating or amending their national laws and regulations on IPRs, Parties have the right to adopt appropriate measures to protect public morality, national security, public health and nutrition, or to promote public interest in sectors of vital importance to their socioeconomic and technological development.

(3) Parties agree that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and enhance the international

The ideas convey by paragraph 1 to 3 of Article 2 are embodied in Article 7 while the last paragraph became part of Article 8.

Part of the discussion on the nature of Articles 7 and 8 is based on the fact that Article 7 refers to 'should' instead of 'shall', leading some commentators to argue that the provision is encouraging contracting States to enhance the protection of IP rights provided by their national law. (Chon, 2006, p.2843; Correa, 2007, p. 93; Gorlin, 1999, p.16) Nevertheless, the place of the provision should be taken into consideration. As Professor Gervais said '[t]he fact that a provision of this nature is contained in the body of the agreement, and not in the preamble, would seem to heighten its status.' (Gervais, 2003, p.116) One certainty, with regard these two provisions, is that they embody norms accepted in developed countries, which were the very fear developing countries had during the negotiations. (Gervais, 2005, pp.507-508)

Another important provision that can hardly be considered as a minimum standard is Article 66 which states that '[d]eveloped 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'. This provision sounds more like an obligation rather than an invitation for developed countries to help less-developed countries. Similarly, Article 67 provides that "[d]eveloped 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[…]". In this respect, the regulatory power of the TRIPS agreement can be directly recognised. The TRIPS is forcing developed countries to help to establish a fairer system. The TRIPS, through this provision, is regulating the balance of powers and tries to incorporate as many countries as possible, creating an even playfield for all the participants. This in turn proves the capacity of the TRIPS agreement to create a globalised system regulating IP rights. This globalised system is based on a fairer distribution of powers and a transfer of knowledge. Close scrutiny of the use of Article 67 is necessary as developed countries could use their

transfer of technology to the mutual advantage of producers and users of technological knowledge.

(4) Each Party will take the measures it deems appropriate with a view to preventing the abuse of intellectual property rights or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Parties undertake to consult each other and to co-operate in this regard."

obligations to help as a mean to implement regulations that are favourable for them and less for the less-developed country they are helping.

The TRIPS agreement system has flaws and the lack of a centralised system for regulating the matter, resulting in an increase in the gap between these two goals. One of the major reason is also that no harmonised civil or criminal procedures exist, obliging WTO to rely on the good will of the contracting parties. Other measures do exist. However, for these measures to be effective, WTO needs to play more proactive role in protecting and enforcing copyrights between the nations. The lack of direct effect of Articles 41 to 50 on enforcement of intellectual property rights renders these articles weak and vulnerable to the goodwill of the contracting states. (Bronkers, 2008, p.255)

Even though WTO does not enforce these rights itself, there are mechanisms put in place for WTO to exercise scrutiny over its contracting states. The WTO panels and the Council for TRIPS have an important role to play in safeguarding the declared goals of the TRIPS. The Council is responsible for monitoring the operation of the Agreement, ensuring that members comply with their obligations and affording opportunities for consultations between members. However, the contracting states are the one in charge of passing the laws and taking the measures. The use of the principle of consistent interpretation can be used as a strong mechanism in the domestic rulings of WTO, especially in countries that deny direct effect.

5. The European Union

The European Union had a strong influence on the shaping of various countries' laws inside but also outside of the European Union.[4] It was agreed that the Commission would conduct the negotiations during the Uruguay round on behalf of both the Member States and the European Community. (Hestermeyer, 2013, p.928) However, this strong influence and the strong framework that have been put in place create, for the Member States of the European Union, bigger problems as a layer of law is added to the original picture. Most of the current member states were signatory of the Paris and Berne Conventions. On top of the existing national legislature, a layer of law was added when the European Union signed an agreement on TRIPS.[5] The TRIPS agreement was not implemented in

[4]For instance, the Chinese Regulations on Customs Protection of Intellectual Property Rights was strongly influenced by Regulation 1383/2003 on customs actions against goods suspected of infringing intellectual property rights. See: (Hong, 2009, p. 298)

[5]Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)

one document but rather various parts were implemented in various legislation. For instance, the Trade Mark Regulation is based on the TRIPS.[6]

The idea carried in the TRIPS is rather similar to one of the cornerstone principle of European law; the principle of mutual recognition and the prohibition to treat national of other members in a less favourable than their nationals. The Union has enacted several instruments[7]. The Regulation 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems aims to prevent distortion of competition among operators in the single market, which is in line with the TRIPS agreement. The Copyright Directive[8] has been enacted to implement the WIPO Copyright Treaty and to harmonise aspects of copyright law across Europe, such as copyright exceptions. Therefore, this Directive is also in line with the TRIPS agreement.

However, the European Parliament views IPR enforcements as the biggest challenge for EU's internal market. (De Gucht, 2011, pp. 1-6) Conflicts exist between the provisions of the TRIPS Agreement and the provisions of the old EC Treaty or the Treaty on the Functioning of the European Union (TFEU), especially Article 102 or 133. The picture is even more blurry regarding the provisions of the TRIPS that are outside of the scope of Community law.[9] These unlegislated provisions of the TRIPS fall under the competences of the Member States and must be interpreted by the contracting parties within their own legal systems, as in *Netherlands v. Parliament.*[10]

Though TRIPS does not embody specific standards for dealing with anti-competitive practices, it allows members to adopt a legislative framework for the control of anti-competitive practices which may arise from the abusive and restrictive use of IP rights, Article 8(2) and 40(1) of the TRIPS agreement.[11] The case *Microsoft v. Commission*[12] perfectly exemplifies this conflict. Microsoft was

[6]Regulation 733/2002. See: Dickie J (2005), Producers and Consumers in EU E-Commerce Law, Oxford: Hart Publishing

[7]Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The Panel was required to examine this Regulation in the case named *European Communities I* WTO document WT/DS174/R 5 March 2005.

[8]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also known as the Information Society Directive or the InfoSoc Directive

[9]Joined Cases C–402/05 P and C–415/05 *P, Kadi et al. v. Council and Commission*, [2008] ECR I–6351. 2 at para. 285 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty'

[10]Case C–377/98, *Netherlands v. Parliament and Council* [2001] ECR I–7079

[11]Article 31(k) of the TRIPS Agreement is of relevance with regard to the procedure applicable. See: (Dusollier, 2013, p. 24)

[12]Case T–01/04, *Microsoft Corp. v. EC*, [2006] ECR II–1491; EC Decision of 24 Mar. 2004, *Microsoft Corp.*, COMP/C–3/37.792, OJ (2004) L 32/23

ordered by the then European Court of First Instance (CFI) to license interface information to its competitors on reasonable terms and to supply a fully functioning version of Windows Personal Computer Operating System without Windows Media Player. The main argument of Microsoft was that the remedies infringed the minimum standards of IP protection provided by the TRIPS. However, the CFI refused to examine the TRIPS provisions. (Subramanian, 2010)

The lack of clear-cut hierarchy of norms and direct effect creates problems with regard the interpretation and application of the TRIPS provisions. (D.G. Trade, 2004; DG Trade. , 2006) The Court of Justice of the European Union (CJEU) refused to give to the TRIPS a direct effect. The Court held that "the provisions of TRIPs are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law". But, the CJEU resisting attitude is not specifically toward the TRIPS agreement but rather in general concerning granting direct effect to WTO laws. The main reason for this reluctance is due to the lack of reciprocity, as exemplified in the judgment of the CJEU in *Portuguese Republic v. Council of the European Union: Commercial Policy*.[13] In paragraph 44, the Court admitted that "the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18)".

a. Prior to Lisbon

Before the entry into force of the Lisbon Treaty, the TRIPS agreement was within the mixed competence, under Article 113 of the Treaty establishing the European Economic Community (Treaty of Rome). After the amendments brought by the Treaty of Nice, the TRIPS was under Article 133 of the Treaty establishing the European Community. These two articles provided that the common commercial policy was based on uniform principles with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

According to the case law, the competence of the EU over the common commercial policy was exclusive and included in the Community measures focusing on international trade.[14] The reason behind this was that the common commercial policy had as primary goals the promoting, facilitating and regulating

[13]Case C-149/96, *Portuguese Republic v. Council of the European Union: Commercial Policy*, 23 November 1999, paras. 42-46.
[14]Opinion 1/75 Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty [1975] ECR 1355.

trade. Furthermore, infringement of the common commercial policy had a direct and immediate effect on trade in the goods concerned.[15]

Even though the TRIPS was concluded by both the Union and the Member States as a mixed agreement,[16] the Court in its Opinion 1/94 held that apart from the provisions prohibiting the release into free circulation of counterfeit goods, the TRIPS did not fall within the field of the common commercial policy.[17] The reason why only the provision prohibiting the release of counterfeit goods was accepted by the Court is that the requirements in Section 4 of Part III of the TRIPS corresponded with the EC provisions on the same matter. The EC provision on prohibition of circulation of counterfeit goods was based on Article 113 EC and was, therefore, part of the Community competences.[18] As the Court stated in its Opinion 1/94, the Community had exclusive competence to conclude international agreements dealing with enforcement of intellectual property rights. However, even though the Community had exclusive competences, it did not have competences over every aspect regulated by the TRIPS agreement. As a result, the TRIPS agreement was concluded as a mixed agreement. Therefore, the Community and the Member States shared competence.[19]

The idea, which was reiterated in the *Merck Genéricos* case, was that the Member States enjoyed competence with regard to the protection of intellectual property rights as long as the Community had not already passed legislation.[20] The Court recognised the connection between intellectual property law and trade in good but found that the connection was not sufficient to allow all the provisions of the TRIPS to fall within the scope of Article 113 EC.[21] In the Court's opinion, intellectual property rights are not only related to international trade as they also affect internal trade.[22]

At the same time, the Court acknowledged that measures that could be implemented to respond to the lack of protection of intellectual property rights in third countries could fall within the meaning of the common commercial policy. The Court agreed with the Commission that those measures were not related to harmonisation of intellectual property protection but rather they enhance the

[15]Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585, para 71
[16]Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-1344, para 33, and the judgment in Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos Merck & Co* [2007] ECR I-7001, para 33.
[17]Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228 (6) of the EC Treaty* [1994] ECR I-5267.
[18]Opinion 1/94, paragraphs 55 and 71; (Gervais, The TRIPS Agreement: Drafting History and Analysis, 2nd edn, 2003, pp. 11-31).
[19]Opinion 1/94, paragraph 105.
[20]Paragraph 34 of the case.
[21]Opinion 1/94, paragraph 57.
[22]Opinion 1/94, paragraph 57.

movement of such goods. This reading is problematic on at least one level; the primary objective of the TRIPS Agreement is to harmonise the protection of intellectual property, therefore one may wonder how the Court could twist the agreement in such a way that it arrives to establish that measures put in place to respond to a lack of protection of intellectual property rights are not measure to harmonise such a field. This shows the creative interpretation that the Court can sometimes come up with to justify some actions on the side of the Union. Surely so when the TRIPS agreement has been enacted to harmonise the protection of intellectual property and such competences were in fact only competences of the Member States. Certainly so when the case law of the Court related to Article 113(1) EC and the other provisions focusing on the common commercial policy in general, never referred to intellectual property.[23]

By allowing the Union to legislate on this matter, under Article 113(1) EC, the Court further extended the prerogative of the Union without a real legal basis. Neither Article 113(1) EC, that was applicable at the time of the conclusion of the TRIPS Agreement, nor Article 133 EC expressly refers to the commercial aspects of intellectual property while laying down the principles of the common commercial policy. In fact, Article 133 EC refers to international agreements regulating commercial aspects of intellectual property. However, this specific paragraph, paragraph 5, only provides for the procedure for the conclusion of international agreement concerning commercial aspects of intellectual property in so far as the agreements are not falling within the scope of Article 133(1) to (4) EC. Furthermore, such agreements should not fall within the subject matter described in Article 133(1) EC as subjects that are subjects of the common commercial policy. Even though there is an express reference to intellectual property, the reference is only concerning the conclusion of the agreements. This paragraph certainly does not relate the commercial aspects of intellectual property protection but just to some procedural matters.

b. Conflicts with the provision of the Lisbon Treaty

The Lisbon Treaty had an impact on the competence of the European Union over the content of the TRIPS Agreement. (Riffel, 2016, pp. 289-290) In the *Daiichi* case,[24] the Court of Justice of the European Union (CJEU) decided that the exclusive external competence for the common commercial policy covers the whole of the TRIPS Agreement. (Krajewski, 2012) The competence of the European Union to act externally, in particular, to conclude agreements with international organisations or with one or more third countries, may either be a

[23]Opinion 1/78, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty— International Agreement on Natural Rubber* [1979] ECR 2871, para 45.
[24]Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* [2013] ECLI:EU:C:2013:520.

shared competence or exclusive competence. Competences must always be conferred on the Union, but it may be explicit or implied.

The common commercial policy is an exclusive competence of the EU, meaning that the Member States no longer have competence over this area of their foreign policy.[25] This was reiterated in the *Daiichi* case, the Grand Chamber of the CJEU decided that the TRIPS agreement falls fully within the scope of the common commercial policy. This means that the TRIPS falls within the exclusive competences of the EU. This exclusive competence is embodied in Article 207(1) of the Treaty on the Functioning of the European Union (TFEU), which now includes the commercial aspects of intellectual property as part of the common commercial policy.[26] Furthermore, Article 3(1)(e) TFEU now provides for exclusive competence of the Union over the common commercial policy. Consequently, the problem moved from one of the exercises of internal competences to one of the scope and meaning of 'commercial aspects of international property.'

With the broadening of the definition of the 'commercial aspects of international property', but above all, with the explicit competence of the Union over this matter, it soon started to be obvious that the competence over the content of the TRIPS agreement would switch to an exclusive competence of the Union. Needless to say that nothing in the content of the TRIPS agreement was altered, however, the position of the Union radically changed.[27] This change of position was reaffirmed in the *Daiichi* case. Even though it is a patent case, the Court gave its opinion concerning the TRIPS agreement in general.

In the *Daiichi* case, the referring court asked whether Article 27(2) and (3), which determines the conditions under which WTO Members are entitled to exclude inventions from patentability, is still within the competences of the Member States or not and if the provision had direct effect. The Commission argued that since the Lisbon Treaty, all the content of the TRIPS agreement now falls within its exclusive competences.[28] The Member States of course disagreed by arguing that the majority of the provisions of the TRIPS relates only indirectly to international trade.[29]

The Court used four distinct elements to issue his judgment. First, the Court clearly distinguished this case and the *Merck Genéricos* judgment, on the

[25]Articles 2(1) and 3(1)(e) TFEU. See: WT/TPR/S/317, European Union, 18 May 2015, p. 26.
[26]WT/TPR/S/317, European Union, 18 May 2015, p. 26.
[27]The only change was to Article 31(f). See *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005). Available at: <https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm> (last visited on 21 August 2016).
[28]Paragraph 43 of the judgment.
[29]Paragraph 44.

basis that this case is based on Article 207 TFEU while the other case was based on Article 133 EC. The Court, in doing so, established that the previous case law was no longer relevant with regard to Article 207 TFEU.[30] The second element taken into consideration by the Court was that Article 207 TFEU is only concerned with trade between the Union and third countries and does not regulate any aspect of the trade within the internal market.[31] The strong point that the Court made, the third element, was that on the basis of earlier case law, European act could only fall within the common commercial policy if the purpose of the act is to promote, facilitate or govern trade.[32] As an alternative, the European act can be proven to have a direct and immediate effect on international trade.[33] Finally, the Court concluded that all the provisions of the TRIPS agreement exhibit a link with international trade. The Court gave two reasons as to why, in its opinion, the TRIPS have a specific link with international trade. First reason is that the TRIPS agreement, on top of being an integral part of the WTO system, is the cornerstone aspect on which the system is build.[34] Most importantly, the Court held that "[…] when providing in Article 207(1) TFEU that the 'commercial aspects of intellectual property' are now fully part of the common commercial policy, the authors of the TFEU Treaty could not have been unaware that the terms thus used in that provision correspond almost literally to the very title of the TRIPs Agreement."[35] Furthermore, the use of the term that resembles the one used in all the WTO Agreement on intellectual property right shows the intention of the European legislator to recognise an exclusive competence broader than that established in the case law.

In Paragraph 56, the Court concluded that "The existence of a specific link between the TRIPs Agreement and international trade justifying the conclusion that the agreement falls within the field of the common commercial policy is not rebutted by the argument of the governments which took part in the oral proceedings that at least the provisions of Part II of the TRIPs Agreement, concerning the availability, scope and use of intellectual property rights, which include Article 27 of the agreement, fall within the field of the internal market, by virtue in particular of Articles 114 TFEU and 118 TFEU."

[30]Paragraph 48.
[31]Paragraph 50. Reiterated in C-137/12 *Commission v Council* [2013] EU:C:2013:675, paragraph 56.
[32]Paragraph 51 referring to Opinion 2/00 [2001] ECR I-9713, paragraph 40; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, paragraph 75; and Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585, paragraph 71.
[33]Paragraphs 51-52. Reiterated in C-137/12 *Commission v Council* [2013] EU:C:2013:675, paragraphs 57-58.
[34]Apparent in Annex 2 of the WTO Agreement.
[35]Paragraph 55.

The Court went a step further by stating that "The primary objective of the TRIPs Agreement is to strengthen and harmonise the protection of intellectual property on a worldwide scale (Case C-89/99 *Schieving-Nijstad and Others* [2001] ECR I-5851, paragraph 36)."[36] The Court took the view that Part II of the agreement regulates the liberalisation of international trade rather than imposing any type of harmonisation. The Court continued by stating that the Union can enact legislation regulating intellectual property rights for the internal market. However, such legislation needs to comply "with the rules concerning the availability, scope and use of intellectual property rights in the TRIPs Agreement, as those rules are still, as previously, intended to standardise certain rules on the subject at world level and thereby to facilitate international trade."[37] This judgment consolidated the position of the Commission as having exclusive competences and being the only entity able to determine whether the TRIPS provisions have direct effect or not.

Such reasoning possesses problem with regard to Article 13 of the TRIPS. Article 13, about limitations and exceptions, is read as follows: "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." After the judgment of the Court, it means that the only entity able to decide on the matter is the Union. This in turn will create an inefficiency in the protection of copyrights as the Commission will have to review each authorization on a case by case basis. Certainly, concerning copyrights, fast decisions are necessary to avoid the author to be prejudiced in a way or another. The system imposed by the Court does only the contrary. Furthermore, the outcome of this case conflicts with the *Consten and Grundig* case[38], in which the Court distinguished the granting of rights with the exploitation of IPR and held that the granting of IPR is part of the property law of the Member States and is covered by the old Article 295 EC (Article 345 TFEU). Property law is the only area of law that is granted, by a treaty provision, 'immunity' against European interaction. (Nguyen, 2010, p. 65) However, with the judgment in the *Daiichi* case, it seems that now granting property rights could be part of the Union competences.

The fourth element that the Court used as a strong argument was that the TRIPS agreement is an integral part of the WTO system. As much as this statement is veridic, as much as it does not demonstrate that the TRIPS agreement has a specific link with international trade. The Court failed to show that the substantive content of the TRIPS agreement exhibits such link. Instead, the Court seems to be convincing of such link only on the face that the TRIPS agreement

[36]Paragraph 58.
[37]Paragraph 59.
[38]Case 54/64, *Consten SaRL and Grundig GmbH v Commission* (1966) ECR 299.

forms part of the WTO system. This statement, in turn, suggests that every agreement which forms part of the WTO system falls directly within the common commercial policy of the Union. This approach is dangerous as the Court omitted to take into consideration the fact that the TRIPS agreement was a compromise between developed and developing countries, and that there are still uncertainties remaining due to that decision. (Taubman, 2011)

The same holds true for Article 207 TFEU, on which the Court relied heavily. Article 207 TFEU is the result of the gradual broadening of the concept of the common commercial policy through the Court's case law and the further developments occurring in the international legal framework. (De Baere & Van Damme, 2012, pp.320-324) However, the Court did not take the negotiation into account.

Finally, the Court never refer to the possible conflict between Article 102 TFEU and the TRIPS agreement. A conflict between the provisions of Article 102 TFEU and the provisions of the TRIPS agreement exists, making it difficult to enforce the TRIPS agreement. Especially, when it is not sure which of the two instrument prevails.[39] Though TRIPS does not embody specific standards for dealing with anti-competitive practices, it allows members to adopt a legislative framework for the control of anti-competitive practices which may arise from the abusive and restrictive use of IP rights, Article 8(2) and 40(1) of the TRIPS agreement.[40] On the other hand, Article 102 TFEU clearly prohibits abuse of a dominant position in so far as such abuse could affect trade between the Member States, leading to conflicting provisions.

The Court and the Commission have a propensity to find breaches of Article 102 TFEU in standardized markets. (Ullrich, 2016, p. 541) In the *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG,* the main problem was that the copyrighted brick that was needed was *de facto* part of the industry, creating, therefore, some confusion.[41]

The case *Microsoft v. Commission*[42] perfectly exemplifies this conflict. Microsoft was ordered by the then European Court of First Instance (CFI) to license interface information to its competitors on reasonable terms and to supply a fully functioning version of Windows Personal Computer Operating System without Windows Media Player. The main argument of Microsoft was that the

[39]Joined Cases C–402/05 P and C–415/05 *P, Kadi et al. v. Council and Commission*, [2008] ECR I–6351. 2 at para. 285 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.
[40]Article 31(k) of the TRIPS Agreement is of relevance with regard to the procedure applicable. See: (Dusollier, 2013, pp. 24-57).
[41]Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG,* ECLI:EU:C:2004:257.
[42]Case T–01/04, *Microsoft Corp. v. EC,* [2006] ECR II–1491; EC Decision of 24 Mar. 2004, *Microsoft Corp.*, COMP/C–3/37.792, OJ (2004) L 32/23.

remedies infringed the minimum standards of IP protection provided by the TRIPS. However, the CFI refused to examine the TRIPS provisions. (Subramanian, 2010)

Since the TRIPS agreement allows exceptions to and limitation on the exclusive rights, the remedies provided by the CFI were not inconsistent with the TRIPS. Without a court intervention, such outcome would not be evident. The TRIPS recognises the need to prevent anti-competitive abuse of IP rights, however, what is regarded as an abuse is very different within the European Union. Microsoft claimed that the remedies granted by the CFI infringed the minimum standards of IP protection provided by the TRIPS. This was exemplified by the main argument in the *Microsoft* case that the compulsory licensing imposed by the Court was a breach of Article 13 of the TRIPS.[43]

Article 13 embodies a three-fold test with each of its components working cumulatively.[44] Microsoft practice could not fall within the meaning of 'certain special cases', as it applies to every computer sold using the Microsoft software. Article 13 of the TRIPS is heavily based on Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, however, the WTO Dispute Panel refused in *United States – Section 110(5) US Copyright Act* to equate 'special cases' to 'special purpose'. Instead, the WTO Panel found that 'special' connotes 'having an individual or limited application or purpose'. Even though the Commission's arguments were not strong, the CFI ruled in its favour. Subramanian argued that even though one of the requirements of the threefold test was not fulfilled, the Commission does not breach Article 13 of the TRIPS agreement as long as it weights the right holder's interest against the public welfare. (Subramanian, 2010, p.1017)

Since the decision in the *Microsoft* case, the Court made clear that the provisions of the TRIPS Agreement are applicable within the European legal order.[45] In the *SCF* case, the Court established that the TRIPS agreement does not have direct effect and therefore cannot be relied on by an individual. This places the TRIPS agreement in a strange position in the hierarchy of norms, as the TRIPS agreement does not prevail over the Treaties but is placed above secondary legislation. (Wessel & Blockmans, 2013, p.2; Stamatoudi & Torremans, 2014, p.80)

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[43]Article 13 TRIPS states that the limitations on and exceptions to exclusive rights:
(a) are to be confined to certain special cases,
(b) should not conflict with normal exploitation of the work, and
(c) should not unreasonably prejudice the legitimate interests of the right holder.

[44]WTO Panel Report, *United States – Section 110(5) Copyrights Act*, WT/DS160/R, 15 June 2000, at paras 6.97, 107. See (Heide, 1999).

[45]Case C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, ECLI:EU:C:2012:140.

6. Brazil

On the other hand, Brazil adopted a different approach to the TRIPS agreement. There is a misconception that Brazil never really cared about protecting intellectual property. Brazil was one of the first parties to the Paris and Bern Conventions, therefore introducing intellectual property right regulation a long time ago. (Schulz & Wu, 2004) As an illustration, the Paris Convention of 1883 was incorporated through Decree 9.233/1884, while the Paris Convention for the Protection of Industrial Property, was promulgated by Decree 1.263 of 1994. At national level, Brazil was one of the first countries recognising patent holders' rights and embodying these rights in a constitutional act, namely the Constitution of Brazil of 1824.

The TRIPs Agreement constitutes the Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization. The process of incorporation of the TRIPS followed the ordinary procedure of treaty incorporation in Brazil. The TRIPS were incorporated into Brazilian law through Presidential Decree No. 1.355/94, of December 1994. The instrument of Ratification of the Final Act was deposited in Geneva in December 1994. Consequently, Brazil can be said as having a long-standing tradition of respect for international agreements on intellectual property, sometimes incorporating international agreement more due to external pressure than domestic interest. (Barral & Pimentel, 2007, pp. 13-15)

The protection of IP rights was raised to the level of fundamental individual rights and guarantees of Article 5 XXVII of the Federal Constitution of 1988. Article 5 XXVII stipulates that "the exclusive right of use, publication or reproduction of works rests upon their authors and is transmissible to their heirs for the time the law shall establish". Under the next paragraph, paragraph XXVIII, states that "[…] b) the right to authors, interpreters and respective unions and associations to monitor the economic exploitation of the works which they create or in which they participate". The protection of IP rights provided by the Constitution is already extensive. But even though IP rights obtained the status of fundamental rights in 1988, the Brazilian legislator decided to further protect IP rights. As a result of this governmental willingness, Brazil has a very modern intellectual property law, with Federal Statute 9.279/96, 9.456/97, 9.609/98 and 9.610/98.

TRIPS agreement was approved by Legislative Decree N°1.355 of 30 December 1994. TRIPS agreement did not introduce any new IPR system in Brazil. That is might be the reason why the Legislative Decree N°1.355 was promulgated easily. The Brazilian government pushed for acceptance of the TRIPS agreement, arguing that this instrument could enhance Brazilian industrial policies on innovation. Since then, Brazilian Congress has been trying its best to

fully implement the compromises under the agreement by sometimes amending substantially previous national laws. (Ribeiro Barbosa, 2008, p. 24) The most significant change was made by Federal Law 9.279/96 which revoked the old Industrial Property Code of 1971 to bring Brazilian law in line with the TRIPS requirements. This amendment was executed before the end of the transitional periods provided in Article 65(2) and (4) of the TRIPS agreement. It can be concluded that in Brazil, the TRIPS agreement, thanks to the willingness of the Brazilian government, have had a harmonising effect. The regulatory impact of the TRIPS agreement at a global level is obvious within Brazilian legislation.

Maybe Brazil was so prompt in incorporating the agreement because the regulatory system in place was not diametrically opposed to the system imposed by the TRIPS. Another reason is that TRIPS enhanced Brazilian industrial policies on innovation placing Brazil in a more 'trustworthy' position with respect to the rest of the world. However, the implementation of the TRIPS was not problem-free. There were some internal fights as the INPI (Brazilian Industrial Property Office) was of the opinion that the TRIPS agreement was not directly incorporate in Brazilian law. In INPI's opinion, the TRIPS agreement required being implemented to be fully applicable in the Brazilian system. Some members of the Federal Court of Appeal of the 2nd Region supported the same view.[46] Their position is based on the fact that the TRIPS agreement belongs to a modality of international treaties, as the TRIPS only sets pragmatic rules which need to be implemented at national level. The TRIPS agreement can be viewed as only establishing minimum standards for the protection of intellectual property rights rather than fixing normative rules.

The major problem with this approach is that it conflicts with some provisions of the TRIPS agreement itself that can be interpreted in various ways. The general goals of the agreement are embodied in the Preamble of the Agreement and basically reproduce the Uruguay Round negotiating objectives. The major objectives of the agreement are to reduce distortions and impediments to international trade, promote effective and adequate protection of IP rights and finally to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. (David & Halbert, 2014) As much as the second objective, namely to promote effective and adequate protection of IP rights, suggests that the TRIPS only set minimum standards, as much as this approach is inconsistent with the first objective. No states will ever admit that their laws distort international trade. Furthermore, these three objectives need to be read in conjunction with Article 7. The major argument countering the fact that the TRIPS only establishes minimum standards comes from the wording of Article 8 which grants to the Contracting States the rights to

[46]TRF-2: 2nd Group, Civil Appeal AC 2005.51.01.507229-7, Rel. LILIANE RORIZ

adopt measures for public health and public interest to prevent abuses of intellectual property rights. However, such measures should be consistent with the TRIPS. This obligation seems more of a substantive norm rather than just a minimum standard.[47]

This reluctance of Brazil to view the TRIPS agreement as implementing substantive norms as well is not a recent one. Already during the negotiation Brazil and India claimed that only WIPO had the institutional competences to discuss substantive issues and that such issues were outside of the scope of the GATT mandate. (Yusuf, 2008) However, as Jayashree Watal, rightly pointed out "[…] Clearly, the negotiations were aimed not only at clarifying GATT provisions but elaborating, "as appropriate", new rules and disciplines". (Watal, 2001, p. 21)

Even though this discussion is fascinating and it led to some internal problems, the implementation of the TRIPS provisions in Brazil was rather done successfully. The relationship between the TRIPS agreement and Brazilian IP law is based on the general principles of conflict of laws that are on the same hierarchical level. (Yueh, 2009) The two principles governing the settlement of conflict of laws is the *lex posterior derogat legis anteriorii*, and *lex posterior generalis non derogat legi priori speciali*. The TRIPS always prevails over infra-legal provisions. If the TRIPS is incompatible with mandatory law or supra-legal provisions, then the TRIPS provisions that are conflicting will be void. Luckily, in general, the TRIPS agreement are compatible and coherent with Brazilian law but above all, with the Brazilian Federal Constitution and constitutional practice. This is mainly because the TRIPS has been implemented in a way that gives full effectiveness of the TRIPS agreement content. As a result, any previous disposition contrary to its terms will be revoked.

Brazil won a case against the US concerning retaliate of cotton. Brazil has opened the door for developing countries to cross-retaliate against their trading partners under the TRIPS Agreement and has not implemented a suspension scheme. Moreover, Brazil is one of the largest markets for the legal trade of copyrighted materials, particularly over the Internet, even though it loses a lot of revenue from copyrighted material through piracy. The Government tried to work some solutions, but no one of them was sufficient to stop the problem. In Brazil, the TRIPS agreement partly shaped its legislation. However, Brazil still needs to do some effort to comply with the terms of the TRIPS. In order to achieve a better compliance with Article 39 (3), a change of policy is necessary**.**

[47]In Canada—Patent Protection of Pharmaceutical Products, WTO panel agreed with the Canadian view and allowed for 'certain adjustments' while preventing 'a renegotiation of the basic balance of the Agreement'. See: World Trade Organization (2000), Canada—Patent Protection of Pharmaceutical Products, Panel Report, WT/DS114/R.

7. Baldwin's five criteria for good regulation

By comparing the two systems, it seems that although the TRIPS agreement is solving an important part of the problem and tries to create an even playfield to enhance interaction between developed and developing countries, it is important to compare the regulatory framework itself to Baldwin's five criteria.

" Is the action or regime supported by legislative authority?
_ Is there an appropriate scheme of accountability?
_ Are procedures fair, accessible, and open?
_ Is the regulator acting with sufficient expertise?
_ Is the action or regime efficient?" (Baldwin, 2012, p. 27)

With regard to the first question, the TRIPS agreement is supported by legislative authority. However, it is not sure the TRIPS agreement had popular support. Certainly, Brazil had a predominant role in pushing the agreement forward. The second criterion is accountability. Even though the TRIPS agreement does not provide for enforcement procedure, some mechanisms have been created to keep national government accountable for their failure to fulfil their obligations. The TRIPS agreement establishes a fair, accessible and open procedure as exemplified by the implementation periods. The room of manoeuvre left to the states allows for flexibility and a higher level of participation. WTO has sufficient expertise to legislate on the matter. Finally, the efficiency of the regime can be ameliorated but is already a huge step forward in contrast to the previous regime. Under these criteria, the TRIPS agreement is a good regulatory framework. However, perfection does not exist and there is still a need for further harmonisation.

Conclusion

We are living in a post-TRIPS era in which every member of WTO is required to reform their intellectual property laws in order to meet the minimum standards of protection prescribed in Article 1 of the TRIPS agreement. The TRIPS provisions are embodied in the majority of the world. Notwithstanding its flaws, the TRIPS agreement remains the most comprehensive international agreement on intellectual property.

The TRIPS agreement has the potential to be used as a regulatory system in the global economy. It could lead to a better harmonisation. However, the main weaknesses of all the WIPO agreements are the lack of enforcement mechanisms as well as the fact that membership of the conventions is not compulsory. (Emmert, International Trade Law, 2012) There is no legal obligation on the members to grant direct applicability to WTO provisions and no impediment to

do so. Such legal obligation will enhance the efficiency of the system. Even though many WTO provisions are sufficiently clear and precise to be eligible to be directly effective, the matter is left to the discretion of the contracting state. For instance, Article 12 clearly set down the minimum periods for the expiration of intellectual property rights and can easily regard as having self-executing nature.

According to Baldwin's theory, the TRIPS agreement as a regulation is a good regulation. Indeed, it achieves the major part of the goals it set. However, some of the declared goals have never come to existence and have been replaced by other goals. On the overall, the TRIPS agreement has the capacity to regulate international intellectual property.

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