

Session III: Issues Concerning Enforcement and Dispute Resolution *

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Thank you very much to everyone. I won't consume my time with all my thanks. It's great to be here. I'm lucky to be part of this panel, and I will try to build on the two previous presentations.

Two important caveats, though, picking up from Sean.² Of course, we don't interpret treaty language, we organize a system whereby panel members and then the appellate body themselves *clarify* the terms, but I would just opportunistically make one quibble with what Sean said: I think one of the strengths of dispute settlement in the WTO is the institutional gravitas, the consistency, the coherence, the idea that it is a coherent system that is coherently managed.

Okay, I am a bureaucrat, so nothing I say—in fact if you can discern any coherent view from what I'm saying, don't attribute it to the WTO or to the Secretary or to the Members. I'm not going to talk about the law, or the interpretation of the law, so much as the ideas behind the law. It's very rare that I'm let loose in a law faculty so I'm going to talk rather abstractedly, partly as a bureaucratic defense but also because I think there are some very interesting abstract ideas that come up in this discussion about dispute settlement that are worth thinking about.

The idea of a TRIPS Agreement—we're still debating what are those "trade related aspects" of intellectual property rights. I like to say, essentially TRIPS reframed the international law of intellectual property by saying that indeed, IP *is* trade-related. In other words, when there are trade negotiations, when there are trade disputes, when there are trade relations generally, IP is on the table, is on the agenda.³ And that's the transformation that we're seeing washing through the system, not merely multilaterally, but in the RTAs and the bilateral agreements, too, that we've been talking about.

And behind this is this essential idea of what is adequate and effective protection of IP arts—and let's just hang onto that concept.

* These remarks are a transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. This informal commentary does not present views that can be attributed to the WTO, its Secretariat, or its Members.

2. Sean Flynn, *Session III: Enforcement and Dispute Resolution*, 40 COLUM. J.L. & ARTS 353 (2017).

3. ANTONY TAUBMAN, *Thematic Review: Negotiating "Trade-Related Aspects" of Intellectual Property Rights*, in *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 15, 15 (Jayashree Watal & Antony Taubman eds., 2015).

My infomercial concerns this book we put together last year concerning personal accounts from the TRIPS negotiations. Cathy Field's chapter (one of the US negotiators) has an excellent description of how this idea of adequate and effective protection of IP came through the US enforcement mechanism, and has become, really, the benchmark internationally for what an IP agreement—a bilateral, or a multilateral agreement—is for.⁴ And we'll see later just how that's really worked its way into the system. That's essentially, to my mind, what a TRIPS agreement is meant to do. It's meant to establish a baseline of what amounts to effective and adequate enforcement of IP, sufficient enough to ensure reasonable interoperability between national systems so that IP can play its role in a globalized economy. To make that "IP-related" part of trade work better. I think that's really the idea behind all of this.

Disputes is part of this package, and this is from the preamble of TRIPS.⁵ A reminder that there are disputes. Disputes do happen. It is a matter of contention between sovereign governments: what does amount to adequate and effective protection? That's why many countries signed up to a WTO package including TRIPS—so that there would be a benchmark, an objective, predictable, salient benchmark of what does amount to adequate and effective protection of IP.⁶ And so a reminder here⁷ that there were tensions. There were tensions in this area and that's one of the functions of TRIPS embedded in the WTO dispute settlement system. This, as it says, is to resolve those tensions, that's what it's for. And, by reference to a predictable rules based system, all of the things that the WTO is meant, in principle . . . to achieve.

Let's turn, though, to the specific question I want to focus on, which is not about the details of the individual agreements or legal standards: the core concept of any dispute settlement system—what is your cause of action?⁸ What is the legal foundation for the complaint? Because as it comes to Maria⁹ or Probir¹⁰, the complaint comes from industry, you know: "I don't like what's happening in that jurisdiction. Do something about it." But if it goes into a dispute settlement system it has to be framed in a particular way as a legal complaint. And this to me is one of the really fascinating issues—I'm conscious of abstracting here from the nitty gritty—but one of the really interesting issues when we look at dispute settlement. What is it really for? What is a dispute about intellectual property protection really

4. CATHERINE FIELD, *Negotiating for the United States, in THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 129, 131-33 (Jayashree Watal & Antony Taubman eds., 2015).

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) [hereinafter "TRIPS Agreement"].

6. Taubman, *supra* note 3, at 17.

7. ¶ 7, Preamble to the TRIPS Agreement.

8. Legal Basis for a Dispute: 4.1 Legal Provisions in the Multilateral Trade Agreements and the DSU, THE WORLD TRADE ORGANIZATION, <https://perma.cc/WHV6-KQDH> (last visited Feb. 12, 2017).

9. Maria Strong, *Enforcement Tools in the U.S. Government Toolbox to Support Countries' Compliance with Copyright Obligations*, 40 COLUM. J. L. & ARTS 359 (2017).

10. Probir Mehta, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J. L. & ARTS 311 (2017).

about? Is it simply about compliance with treaty obligations in the sense of parking in New York City—I have to park in accordance with the parking regulations, there’s compliance, there’s noncompliance, you get a ticket for noncompliance—or is it something deeper than that, is it something to do with a kind of “new age” form of market access where business models or forms of business that are dependent on IP protection do have, in a sense, an entitlement to market access. In short, in the jargon of trade law, what are the expected benefits that should flow from a TRIPS agreement? What are those expected benefits that can be defended, secured through dispute settlement?

And that to me is still a question that we are wrestling with. I looked at it in an extremely abstract way in a paper some time ago but I’m alone in this, in fact, this is exactly the question that goes to each and every Ministerial, this is the point that Maria has brought up. We are in this extraordinary situation where each WTO ministerial conference has on its agenda exactly that question: what should be the legal foundation, the cause of action, in a trade dispute concerning intellectual property protection? What is the cause of action? Is it about simple compliance or noncompliance with the letter of the law, with the treaty language, or is it looking at something broader, that’s more abstract, that does involve an idea of expected benefits, that does involve, if you like, a form of market access.¹¹ And that’s exactly the debate that Maria has mentioned.¹²

And, I have to say, personally, I was briefing a trade minister for one these ministerials on this point, it’s extraordinarily difficult to put in words of one syllable—which this trade minister insisted on—this extremely abstract concept. What is the nature of, what is a dispute settlement case about when it concerns intellectual property? What is it intended to secure, what is it intended to do, what interests is it meant to serve? The answer in that case was always, what does the EU want, what does the U.S. want, what does Japan want? It wasn’t a very abstract discussion.

And of course the decision from the ministerial conferences—this is the latest one—is to put it off for the next two years. So Maria’s right, there was a treaty provision in Article 64 which established a process for looking at exactly this question in the TRIPS Council initially, with proposals to go to the ministerial conference—well, the one that was in Seattle—and I’ve said about that. But then subsequent ministerials again, as I’ve mentioned, continued to put this off.¹³ This has not been resolved in the debate between our members. So it does go from being quite an abstract question to a very direct question of practical negotiations between WTO members about that fundamental question. Here we have a legal dispute settlement system, famous for its precision and predictability, I hope. But we have an ongoing debate between our members about what is the exact purpose of dispute

11. Ministerial Conferences, THE WORLD TRADE ORGANIZATION, <https://perma.cc/47BA-XDBE> (last visited Feb. 12, 2017).

12. Strong, *supra* note 9.

13. TRIPS Agreement, *supra* note 5, at art. 64.

settlement; what is—in the legal sense—what is the cause of action. And this process continues today.¹⁴

What is this about? Well, it's because the TRIPS agreement in a sense outsources the whole dispute settlement structure to the GATT, to the central "trade in goods" agreement.¹⁵ I'll cut it short and refer you to Adrian Macey's chapter in this book which describes why this happened, how this happened.¹⁶ It meant that there were three . . . in traditional GATT law, the cause of action isn't actually whether you're compliant with the treaty or not, but a more complex idea, it's whether you have nullified or impaired expected benefits.¹⁷ That's the, in a formal sense, that's the cause of action. And you can achieve that, or you can create that situation, in one of three ways: (i) by not complying with the treaty obligations, (ii) by another measure which is formally compliant, which is within the frame of the rules, but still . . . denies those expected benefits, and even more mysteriously, (iii) any other situation. And I'd like to defer to Petros; maybe he can explain what that is because I certainly don't know what it is so, a famous conundrum just exactly what that would mean.¹⁸

Now in practice, I have to say, in dispute settlement practice this has not so far been an issue. Firstly, because there's been a continued moratorium on the broader kinds of disputes, and secondly, there is a principle in the main treaty on dispute settlement—the Dispute Settlement Understanding—that says look, if there is noncompliance with the treaty, if there is a violation of treaty obligations, that is *prima facie*, that is nullification and impairment. That is rebuttable in principle, but it is extraordinarily hard to rebut; I don't think anyone has achieved that.¹⁹ So in other words, from a practical point of view, to win your case, you simply have to establish that I have violated the treaty, but technically what you are having to establish is that I have nullified or impaired your expected benefits, and I happen to have done that by violating the treaty obligations.²⁰

So that's the kind of cause of action that we have currently concerning TRIPS-related disputes. But as you can see there are some pretty fundamental questions, and this is one area where—I wouldn't normally encourage you to read the minutes of the TRIPS Council, but in this case, and a number of other recent areas, it's actually a very interesting debate: exactly what is the nature of dispute settlement.

Let's turn, then, to the dispute settlement experience. A reminder that just in the other Marrakesh conference in 1994, when the WTO was established, this was a

14. ADRIAN MACEY, *Dispute Settlement in TRIPS: A Two-edged Sword*, in *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 351 (Jayashree Watal & Antony Taubman eds., 2015).

15. *GATT and the Goods Council*, WORLD TRADE ORGANIZATION, <https://perma.cc/NQ9A-JHVS>.

16. *Id.*

17. *Id.* at 358.

18. Petros Mavroidis, Columbia Law School, <http://www.law.columbia.edu/faculty/petros-mavroidis>.

19. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter "DSU"].

20. See Suzy Frankel, *Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L. ECON. L. 1023 (2009).

typical concern on the part of developing countries: that dispute settlement would essentially be North vs. South, that developing countries would be constantly in the dock as defendants, that there would be what Indonesia here called “legal harassment.”²¹ In fact, looking back over the last twenty years, as we do in this brochure, the pattern has been rather different from that. Essentially what this chart shows is that most of the early disputes were between developed economies, transatlantic or similar.²² Interestingly, since 2009, all TRIPS disputes filed have been developing countries filing against developed economies: seven of them so far.²³ Two, in effect, were parallel disputes. The statistics, nonetheless, are very interesting; this is not what people had expected from TRIPS dispute settlement.

Now, why did that occur? That’s a huge question. I think Maria’s cloud²⁴ explains some of it, but there are still other areas that I’d like to conclude by focusing on. One is the fact of implementation: in that twenty-year period, and particularly since 2000, when developing countries fell due for implementing their TRIPS obligations, we have at the WTO received a huge amount of notifications of domestic law. This is humdrum stuff, I suppose, when disputes are so exciting—if you’re into that kind of thing—but these are literally: when I took up this job I came across a massive box—a cubic meter—of legal notifications that were still to be processed. It’s a huge amount of material, ranging from Moldova’s law on integrated circuit layout designs to Bolivia’s latest revision to its trademarks act. There’s a huge amount of legislative development, and when we’re talking about electronic commerce and the digital environment, for example, we are now receiving a very interesting array of updates of national laws and enforcement mechanisms in this area. So while there are points of contention and while there are potential disputes, that’s eclipsed, at least numerically, by this enormous legislative activity, which is completely unprecedented in the history of IP, both in terms of its intensity and its geographical spread. So that’s a reminder that the people in those developed countries who might have been defending against TRIPS disputes have instead been drafting and introducing laws that are being notified to the TRIPS Council.

The other factor that I’ve been talking about, the RTAs, that’s what I’d like to conclude on. The numbers are quite extraordinary. It’s very difficult indeed to count exactly what the boundaries are and to determine which ones have significant IP content. Some of them seem to feel like, “Well, we’d better say something about IP,” so what they do is simply reaffirm the TRIPS agreement. But they have a dispute settlement chapter. So the question is: does that raise a potential alternative forum for dispute settlement concerning TRIPS matters? I hope not, because we have a provision, Article 23, that says that’s not a good idea.²⁵ But nonetheless, that’s there.

21. See, e.g., Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993).

22. See *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION, <https://perma.cc/Y8QN-NMKF> (last visited Feb. 12, 2017).

23. *Id.*

24. Strong, *supra* note 9.

25. DSU, *supra* note 17, at art. 23.

Also, in the investment area, as Sean has mentioned,²⁶ numbers here are prodigious; there's over 2000 by my very, very rough count that deal with IP as an investment asset of some sort. And these are extremely diverse geographically, they're extremely numerous, and they're not classic "north-south"; this is Turkey and Tanzania, Bolivia and Vietnam, Germany and Afghanistan.²⁷ This is simply the first and last, and one random one, from a list of 2000. There's a huge range of bilateral investment treaties that deal with IP as an investment.

When it comes to bilateral trade agreements, we see countries like Mexico and Singapore with a very large number of bilateral undertakings; most of them have an IP component of some sort. They are not uniform, however, which raises questions. At the WTO we get inquiries from our members saying, "We've entered into undertakings in multiple directions; can you tell us what we've agreed to?" Well, no; you've agreed.

And this is my second point: whatever the virtues and benefits of these agreements, it's an enormous complex of data, of information, of legal standards, and each one of them is in a sense a commentary on exactly that point: what *are* adequate and effective standards for IP protection? Each one of them is, if you abstract from the legality, a stab at establishing what is adequate and effective.

The literature is full of references to the spaghetti bowl effect,²⁸ but I've spoken of the lasagna effect,²⁹ which is a layering of different standards.³⁰ It is a complex situation, and behind it are these questions: what are the expected benefits? From a theoretical point of view, I'll take a step back from the detail. What does amount to adequate and effective protection of IP in today's economy to enable reasonable interoperability between national IP systems? Again, just a random selection, the most recent one to come into effect is a bilateral agreement between the Eurasian countries, a number of former Soviet republics, and Vietnam, which came into effect last week; it uses exactly that standard—"adequate and effective protection" of each of those areas of industrial property.³¹ Interestingly, it takes a different formula when it comes to copyright and related rights. Nonetheless it's fascinating that in this kind of agreement you have a distinct stab at working out what is adequate and effective protection, with the potential, at least in principle, of dispute settlement having to

26. Sean Flynn, *Session III: Issues Concerning Enforcement and Dispute Resolution*, 40 COLUM. J. L. & ARTS 353 (2017).

27. See, e.g., Agreement Between The Government of the Islamic Republic of Afghanistan And The Government of the Federal Republic of Germany Concerning Bilateral Cooperation, May 16, 2012, <https://perma.cc/L53R-YMX7>.

28. See, e.g., JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE 61-71 (2008).

29. Antony Taubman, *The Lasagna Effect: what do layers of bilateral and regional norms mean for multilateral intellectual property law?*, SPANGENBERG CENTER FOR LAW, TECHNOLOGY & THE ARTS, (Apr. 5, 2016), http://law.case.edu/Lectures-Events/lec_id/460.

30. See, e.g., M.G. PLUMMER, 'Best Practices' in Regional Trading Agreements: An Application to Asia, 30 WORLD ECON. 1771 (2007).

31. See Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, June 27, 2016, <https://perma.cc/Y9FP-M8UG>.

come up with a standard of adequacy and effectiveness, because in some cases that could be the only IP provision in this agreement.

In principle, I don't have anything against either the virtue of adequacy and effectiveness of IP protection, but of course it begs enormous questions, especially when there is such a huge range of agreements. We've heard about the U.S. bilateral agreements, but the web of agreements is by no means a "north-south" one; there are very many "south-south" agreements in this area that have a go at this as well. The critical point, perhaps for the WTO in particular: the introduction of TRIPS into the dispute resolution system is the more judicial quality of the dispute settlement chapters.

This is from a paper by colleagues in the WTO.³² The central point is that the red chunk is non-judicial dispute settlement, more diplomatic dispute settlement, and the blue is a more judicial character of dispute settlement. And that's certainly the trend that we see across the board in the bilateral agreements: a move from dispute settlement as being more of a diplomatic function—the establishment of consultation mechanisms—to a more quasi-judicial function.³³ And that's precisely why these legal standards become ever more important.

Finally, my original point, the actual cause of action in bilaterals is also quite diverse. In some cases there's consistency, but in other cases there's not. The examples here include two bilateral parties, both of whom have objected to the introduction of non-violation disputes—this broader basis for TRIPS disputes in the WTO—but who've accepted it in their own bilateral agreement covering the same subject matter. So my point is that it not only concerns questions of interpretation in the standards of these RTAs, but that very core question: what is your cause of action, what is the dispute actually about, how do you frame the interests that you are defending? And of course NAFTA is the first such agreement to take us in the IP area beyond simple compliance or noncompliance to these non-violation disputes, but there are many others; this is only a partial list, and you'll see that it's hardly a "north-south" structure.

Concluding point: it is an enormous information challenge that I think the multilateral system has to step up to, to work on, to establish a clear information platform so that we all know what these many hundreds—in the investment area, thousands—of bilateral agreements add up to, without, in our case, seeking to judge them or to take a critical view. We do need to know what all this adds up to, because it's an enormously complex multipolar legal structure, and we do need to understand it better.

Here's an example of a bilateral agreement between the EU and South Africa, which is not only duplicated equally in all of those European languages, but also equally authentic in all of those domestic languages in South Africa—most of which, to my shame, I hadn't even heard of. So you can imagine the interpretive questions.

32. Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements—Innovative or Variations on a Theme?*, 14 (WTO, Staff Working Paper No. ERSD-2013-07, 2013), <https://perma.cc/9RSF-8MCZ>.

33. *Id.*

If you push the question to its legal limit you can see the challenge that is ahead of us.

Nonetheless I think the good news is that many people are working in this area in a serious minded way, and I think we will work towards that clear information platform. Then we'll have a better idea of what the world is working towards in terms of what is adequate and effective protection suitable for today's global economy.

Thank you.