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**THE INTERGOVERNMENTAL
ORGANISATION
OF THE SOUTH**



History of the TRIPS Agreement

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Lessons from history: USA

- “...When the United States was still a relatively young and developing country...it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development.”

U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302, Washington, DC: U.S. Government Printing Office, April 1986).

US technological learning

- After the Revolution, the leaders of the republic supported the piracy of European technology in order to promote the economic strength and political independence of the new nation.

Doron Ben-Atar Trade Secrets. Intellectual Piracy and the Origins of American Industrial Power, 2004.

US policy on copyright- 19th Century

- Expanding literacy demanded cheap yet excellent books;
- there was no inherent property right in literature;
- granting copyright to foreigners would give them a monopoly at the expense of US reading public;
- US publishers and their employees needed the de facto advantage afforded by the absence of protection

1880-1890

Paris 1883
Berne 1886
Madrid 1891

1890-1960

Revisions of Paris &
Berne
Universal Copyright
Convention

1960-1970

Rome 1961

UPOV 1961

Lisbon 1967 GIs

Patent Cooperation Treaty 1970

Geneva 1971 phonograms

Brussels 1974 signals

Budapest 1977

Room for manoeuvre under patent law

- Non patentability of pharmaceuticals (+50 countries in 1986)
- Diversity of patent terms and scope of exclusive rights
- Revocation for non-working

Swiss Federal Councillor Brenner during the Parliament's debates about patent law

- 'In our deliberations on this law, we would do well to bear in mind that it should be framed in such a way that it is adapted to the needs of our own industries and conditions in our own country. These considerations, rather than the demands and claims of foreign industries, must be our primary concern in shaping the law' (1906)

The Economic History of Switzerland, Intellectual Property Rights Series #4, Third World Network, Penang, p. 10.

The international patent system

- “Up to the present, the regime for the international protection of patent rights has been developed primarily in the interest of patentees. The gains to be derived from an extension of the patent system have been stressed, but the concomitant increase in social costs has been seriously neglected.

Penrose, E. T. (1951). *The Economics of the International Patent System*. The Johns Hopkins Press.

Machlup: study for the US Senate

- “If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one”.

Fritz Machlup, *An Economic Review of the Patent System* (Washington, D.C.: Subcommittee on Patents, Trademarks, and Copyrights, Senate Committee on the Judiciary, 1958), p.80.

Developing countries's concerns: patents & transfer of technology

- UNCTAD, DESA, WIPO 'The role of the patent system in the transfer of technology to developing countries', 1975

Developing countries offensive (1980)

- Revision of the Paris Convention: exclusive compulsory licenses, national treatment, priority right, inventors' certificates, etc.
- International code on transfer of technology (NIEO)

Towards IP minimum standards

- US trade deficit, imitation of US technologies abroad
- Loss of competitive edge of US companies (electronics, semiconductors)
- Uncertainty about the protection of new technologies (software, biotechnology, semiconductors)
- Industry's lobbies (pharmaceuticals, semiconductors, entertainment, software)

USTR & businesses leading role

- USTR (Harvey Bale Jr, later Director-General of IFPMA)
- Joint document of US, European and Japan industry associations
- US submission to GATT 1982

Choice of forum

- Why GATT, not WIPO?

GATT & intellectual property

- Article XX (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ...the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

GATT Tokyo Round (1978)

- Agreement on counterfeiting in trade (US, European Communities)

Punta del Este Declaration 1986-Uruguay Round

- **Trade-related aspects of intellectual property rights, including trade in counterfeit goods**
- In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.
- Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT...

Developing countries position

- Negotiations only on counterfeiting
- Deep asymmetry in science and technology (6% of global R&D)
- New IP rules would 'freeze' the competitive advantages of developed countries

Developing countries' resistance

- IP/agriculture & textiles (Montreal, Dec. 1988): the 'grand deal'
- Section 301 v. multilateral dispute settlement

May 1990, first developing countries' text

PARADIGM CHANGE-1994

- AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Developing countries : influence on the final text

- Asymmetries in political, economic power
- Asymmetries in expertise

Negotiation or coercion?

Article 8 Principles

- 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, **provided that such measures are consistent with the provisions of this Agreement.**

The GATT 'victory'

- 'The current GATT victory, which established provisions for intellectual property, resulted in part from the hard-fought efforts of the US government and US businesses, including Pfizer, over the past three decades. We've been in it from the beginning, taking a leadership role' (E Pratt, Pfizer 1972-91).

TRIPS' origin

- Overall, TRIPS reflects and promotes the interests of global corporations that seek to extend their control over their intellectual property. These firms, acting through the United States government (and with the support of Europe and Japan), largely captured the WTO process and succeeded in making public international law to suit their particular needs.

SUSAN K. SELL 'TRIPS-PLUS FREE TRADE AGREEMENTS AND ACCESS TO MEDICINES',
Liverpool Law Review (2007) 28:41–75.

Thank you!

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