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Economic Nationalism in Intellectual Property Policy and Law

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ABSTRACT

Most commentators see IP as a prime example of globalization. The article challenges this view on several levels. In a nutshell, it claims that economic nationalist concerns about domestic industries and economic development lie at the heart of the global IP system. To support this argument, the article summarizes and categorizes IP policies adopted by selected European countries, the European Union, and the USA. Section B presents three types of inbound IP policies that aim to foster local economic development and innovation. Section C adds three versions of outbound IP policies that, in contrast, target foreign countries and markets. Concluding Section D traces a dialectic virtuous circle of economic nationalist motives leading to global legal structures. This process has been at work throughout the history of modern IP, with the recent past posing no exception. The article furthermore shows that current EU and US international IP policies strongly resemble each other, casting doubt on the two players' seemingly contrasting attitudes toward globalization. The article provides a far more nuanced description than what is often described as a simplistic nationalist–globalist dichotomy. Finally, the article identifies the basic function and legal structure of IP as the reason for the resilience and even dominance of economic nationalist motives in international IP politics. Intellectual property concerns exclusive private rights that are territorially limited creatures of (supra-)national statutes. These legal structures make up the economic nationalist "DNA" of IP.

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A. INTRODUCTION

The long-standing battle between economic nationalism and globalism has again taken center stage in geopolitics. In broad strokes, the two camps can be characterized as follows: the globalist worldview conceives of globalization as a positive-sum game, whereas economic nationalists consider international trade a zero-sum game in which a gain in trade by one nation must be accompanied by a corresponding loss for another nation.[1] Accordingly, efforts to create and consolidate a unified world economy[2] clash with protectionist policies that discriminate in favor of the local

[1] David Levi-Faur, "Economic nationalism: From Friedrich List to Robert Reich" (1997) 23 *Review of International Studies* 359, 365; George T Crane, "Economic Nationalism: Bringing the Nation Back In" (1998) 27 *Millennium: Journal of International Studies* 55, 58 with further references; C Christopher Baughn and Attila Yaprak, "Economic Nationalism: Conceptual and Empirical Development" (1996) 17 *Political Psychology* 759, 763; Daniel C K Chow, Ian M Sheldon and William McGuire, "The Revival of Economic Nationalism and the Global Trading System" (2019) 40 *Cardozo L Rev* 2133.

[2] Graham Dutfield and Uma Suthersanen, *Dutfield and Suthersanen on Global Intellectual Property Law* (2nd ed, Edward Elgar Publishing 2020) 2.

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economy.[3] In the area of international law, the antagonism plays out in the dispute between supporters of global multilateral treaties and organizations, on the one hand, and proponents of equal sovereignty to be used in pursuit of national interests on the other.[4] In the course of these debates, the globalist worldview tends to refer to humankind as the primary polity and to global welfare as the ultimate end of politics.[5] Nationalists, in contrast, champion self-determination and independence as ends in themselves and strive to promote an idealized unity, identity, and autonomy of a distinct community.[6] In International Relations theory, the two opposite worldviews are associated with liberalism and realism, respectively, and their underlying assumptions about human nature. The one is more optimistic and idealistic – and thus progressive in terms of greater cooperation; the other is rather pessimistic in view of seemingly unavoidable conflicts.[7]

In this article, I apply the above distinctions to the law and policy of international intellectual property (IP). The prevailing view sees this field as a prime example of globalization. The Paris IP Union and Berne IP Union of 1883 and 1886, respectively, were among the first permanent multilateral organizations to react to

[3] Baughn and Yaprak (n 1) 760; Crane (n 1); Sam Pryke, "Economic Nationalism: Theory, History, and Prospects" (2012) 3 *Global Policy* 281, 285 ("Economic nationalism should be considered as a set of practices designed to create, bolster and protect national economies in the context of world markets."); critical of the centrality of this economic aspect see Stephen Shulman, "Nationalist Sources of International Economic Integration" (2000) 44 *International Studies Quarterly* 365.

[4] Thomas Cottier, "Sovereign Equality and Graduation in International Economic Law" in Marise Cremona and others (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2013) 218.

[5] David Ricardo, *On the Principles of Political Economy and Taxation* (John Murray 1817) 84 ("It is quite as important to the happiness of mankind, that our enjoyments should be increased by the better distribution of labour, by each country producing those commodities for which by its situation, its climate, and its other natural or artificial advantages, it is adapted, and by their exchanging them for the commodities of other countries, as that they should be augmented by a rise in the rate of profits.").

[6] Baughn and Yaprak (n 1) 764 et seq.; Levi-Faur (n 1) 360; Crane (n 1) 64 et seq., 75; Shulman (n 3) 368; Eric Helleiner and Andreas Pickel (eds), *Economic Nationalism in a Globalizing World* (Cornell University Press 2005); Sapna Kumar, "Innovation Nationalism" (2019) 51 *Connecticut Law Review* 205, 213–15; Federico Lupo-Pasini, "The Rise of Nationalism in International Finance: The Perennial Lure of Populism in International Financial Relations" (2019) 30 *Duke Journal of Comparative & International Law* 93, 97; See also Friedrich List, *The National System of Political Economy* (Sampson S Lloyd tr, Longman 1904) xliii (nationality as the "distinguishing characteristic" of his theory).

[7] Crane (n 1) 56; R O'Brien and M Williams, *Global Political Economy, Evolution and Dynamics* (3rd ed, Palgrave 2007) 17 ("If realism is the perspective in international politics, economic nationalism is the equivalent in political economy"); Dana Gold and Stephen McGlinchey, "International Relations Theory" in Stephen McGlinchey (ed), *International Relations* (E-International Relations 2017) 48–9; Carl Schmitt, *Der Begriff des Politischen* (9th ed, Duncker & Humblot 2015) 55 et seq. See also List (n 6) 100, 102 ("The popular school has assumed as being actually in existence a state of things which has yet to come into existence.").

ever-increasing global communication and commerce.[8] Over the past 140 years, the international IP system has consistently expanded in territorial and regulatory scope. Today, it provides for a practically worldwide level playing field for IP producers and users in all major areas of innovation and branding.[9] Economists embrace this status quo because it avoids non-cooperative bilateralism and trade diversion and thereby expands world welfare.[10] Leading international IP scholars observe "progress,"[11] which ought to continue via the ever "unfinished business"[12] of negotiating new IP treaties, preferably at the multilateral fora of WIPO and the WTO.[13] From this perspective, the current stalemate of multilateralism, events like Brexit, and other efforts to (re-)instate the national interest as the guiding principle of economic policy are perceived as a challenge; they indicate a pendulum that is swinging back from a relatively long phase of globalization.[14]

This article challenges that widespread view on several levels. In a nutshell, it claims that economic nationalist concerns about domestic industries and economic development lie at the root of the global IP system.[15] To support this argument, I summarize and categorize various IP policies adopted by Germany, selected other European countries, the European Union,[16] and the USA. Section B presents three types of inbound IP policies that aim to foster local economic development and

[8] Guy Fiti Sinclair, "State Formation, Liberal Reform and the Growth of International Organizations" (2015) 26 *European Journal of International Law* 445, 461–2.

[9] For an overview see Alexander Peukert, "*Vereinheitlichung des Immaterialgüterrechts: Strukturen, Akteure, Zwecke*" (2017) 81 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 158.

[10] Warren F Schwartz and Alan O Sykes, "The Economics of the Most Favored Nation Clause" in Jagdeep S Bhandari and Alan O Sykes (eds), *Economic Dimensions in International Law* (Cambridge University Press 1997) 59–63.

[11] Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright* (2nd ed, Oxford University Press 2015) paras 14.0.1–16.0.5.

[12] Ibid para 17.0.15; Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University Press 2002) para 10.01 ("continuation of the 'unfinished work'").

[13] Eugene M Braderman, "International Copyright – A World View" (1970) 17 *Bulletin of the Copyright Society of the USA* 147, 148 ("Clearly, international cooperation and recognition of common goals is necessary and desirable in dealing with these issues").

[14] Thomas Cottier, "The Common Law of International Trade and the Future of the World Trade Organization" (2015) 18 *Journal of International Economic Law* 3, 3; Lupo-Pasini (n 6) 94; Chow, Sheldon and McGuire (n 1) 2136; Thomas J Schoenbaum and Daniel C K Chow, "The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony" (2019) 30 *Stanford Law and Policy Review*, 115; Dani Rodrik, "Populism and the Economics of Globalization" (2018) 1 *Journal of International Business Policy* 12; Monica De Bolle and Jeromin Zettelmeyer, "Measuring the Rise of Economic Nationalism" (2019) Peterson Institute for International Economics Working Paper 19–15 <www.piie.com/sites/default/files/documents/wp19-15.pdf> accessed 31 August 2020.

[15] Accord concerning US international patent policies Kumar (n 6) 230–1.

[16] For reasons of simplicity, the author only speaks of the EU as established by the 2009 Lisbon Treaty. That abbreviation also covers IP policies and laws of the European Economic Community (EEC, 1957–1993) and the European Community (EC, 1993–2009).

innovation. Section C adds three versions of outbound IP policies that, in contrast, target foreign countries and markets. In the area of IP, inward-looking policies have typically been pursued by IP importers and the outward-looking policy by IP exporters. The significance of the distinction between inbound-import and outbound-export is acknowledged both in the economic literature and most recently in the preamble of the IP chapter in the 2020 US–China Economic & Trade Agreement, according to which "China recognizes the importance of establishing and implementing a comprehensive legal system of IP protection and enforcement as it transforms from a major IP consumer to a major IP producer."[17]

The overview demonstrates that the dialectic of nationalist motives producing global regulatory structures has been at work throughout the history of modern IP, and that the past five years (2017–2022) are no exception.[18] I furthermore show that current EU and US international IP policies very much resemble each other, casting doubt on the two players' seemingly opposing attitudes toward globalization.[19] The article thus provides a much more nuanced description than the simplistic nationalist–globalist dichotomy presented in the beginning.[20]

The concluding Section D draws the previous findings together. It first explains the dialectic virtuous circle of economic nationalist motives and global legal structures. Second, it identifies the basic function and legal structure of IP as the reason

[17] Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China (15 January 2020) <https://perma.cc/26BU-LKWB> accessed 2 September 2020, ch 1 s A (US–China Economic & Trade Agreement); see further Keith E Maskus, "Economic Development and Intellectual Property Rights: Key Analytical Results from Economics" (2016) <www.colorado.edu/faculty/kmaskus/sites/default/files/attached-files/ip_development_km.pdf> accessed 15 September 2020, 6–7 (IPRs expand in scope as economies grow richer and more technologically capable); Keith E Maskus and Lei Yang, "Domestic Patent Rights, Access to Technology, and the Structure of Exports" (2018) 51 *Canadian Journal of Economics* 483 (strengthening patents increases exports in R&D intensive goods); Sibylle Lehmann-Hasemeyer and Jochen Streb, "Discrimination against Foreigners: The Wuerttemberg Patent Law in Administrative Practice" (2018) Working Papers of the Priority Programme 1859 No 7, 5 <www.experience-expectation.de/sites/default/files/inline-files/WP07_Lehmann-Hasemeyer_Streb_0.pdf> accessed 2 September 2020 (patent discrimination against foreigners became less attractive with increased international trade).

[18] Cf also Kathleen Claussen, "Old Wine in New Bottles? The Trade Rule of Law" (2019) 44 *Yale Journal of International Law Online* 61 (there is little novel in what is occurring now); Andrew Lang, "Protectionism's Many Faces" (2019) 44 *Yale Journal of International Law Online* 54 (rebalancing of international trade).

[19] Compare the speeches of Donald Trump and Angela Merkel at the 2020 Davos World Economic Forum; available at <www.weforum.org/events/world-economic-forum-annual-meeting-2020/programme> accessed 2 September 2020. To be sure, there are also complaints about instances of protectionism in German industrial policy; cf Jeromin Zettelmeyer, "The Return of Economic Nationalism in Germany" (2019) Peterson Institute for International Economics Policy Brief 19–4 <www.piie.com/system/files/documents/pb19-4.pdf> accessed 2 September 2020.

[20] See also Shulman (n 3) 388 (nationalism and globalization should never be seen as inherently antithetical forces).

for the resilience and even dominance of economic nationalist motives in international IP politics. Intellectual property concerns exclusive private rights that are territorially limited creatures of (supra-)national statutes. These elements make up the economic nationalist "DNA" of IP.

B. INBOUND IP POLICIES

Inbound IP policies aim at fostering innovation and economic growth within an IP jurisdiction. This regulatory perspective is prone to nationalist motives and measures.

I. *IP First Movers*

When globalization gained momentum, economic policies logically mainly looked inward – that is, they were aimed at fostering domestic growth. The history of IP teaches that this general assumption also holds true for first movers in IP, namely Venice and England. Interestingly, both jurisdictions were very active and even dominant in international trade when they first adopted IP laws.[21] By the time the city of Venice enacted, in 1474, what is considered to be the first patent Act in history,[22] Venice had – over the course of several centuries – achieved the status of being the "cradle of dawning capitalism,"[23] the "chief trading city in the West,"[24] and a manufacturing hub.[25] When the Statute of Monopolies of 1624 established the basis for the British patent system,[26] the commercial center of gravity in Europe has already shifted from the Mediterranean to the ports facing the Atlantic, in particular to Amsterdam and London as the dominant cities.[27] Before the seventeenth-century

[21] Josh Lerner, "150 Years of Patent Protection" (2000) NBER Working Paper Series No 7478 <http://ssrn.com/abstract=179188> accessed 2 September 2020; Maskus, Economic Development (n 17) 6–7; Alexander Peukert, "Intellectual property and development-narratives and their empirical validity" (2017) 20 World Intellectual Property Journal 2, 15–6 with further references.

[22] Joanna Kostylo, "Venetian Statute on Industrial Brevets, Venice (1474)" in Lionel Bently and Martin Kretschmer (eds), Primary Sources on Copyright (1450–1900) (2008) <www.copyrighthistory.org> accessed 2 September 2020.

[23] Paola Lanaro, "At the Centre of the Old World. Reinterpreting Venetian Economic History" (2006) Working Papers of the Department of Economics, University of Venice No 50/WP/2006, 4, 16.

[24] Harry Elmer Barnes, *An Economic History of the Western World* (Harcourt 1940) 175.

[25] List (n 6) 3–9 (also on the reasons for Venice's fall); accord Lanaro (n 23).

[26] "Statute of Monopolies, Westminster (1624)" in Lionel Bently and Martin Kretschmer (eds) Primary Sources on Copyright (1450–1900), <www.copyrighthistory.org> accessed 2 September 2020.

[27] Jürgen Schneider, "The Significance of Large Fairs, Money Markets and Precious Metals in the Evolution of a World Market from the Middle Ages to the First Half of the Nineteenth Century" in Wolfram Fischer, R Marvin McInnis and Jürgen Schneider (eds), *The Emergence of a World Economy 1500–1914* (Steiner 1986) 18, 22; Barnes (n 24) 268; Lanaro (n 23) 4, 16.

civil war, England had experienced 150 years of significant annual output growth in agriculture, industry, and services, as well as population growth,[28] and the country was about to become the greatest naval and economic power on earth.[29] England would later also adopt the first modern copyright Act.[30]

Ranking high among the many reasons for the rise of Venice and England before the era of modern IP are policies that were specifically aimed at introducing foreign technologies through the immigration of skilled artisans.[31] One important regulatory tool to attract and establish certain high-tech industries of the time was the privilege awarded to people who introduced a new manufacture to the jurisdiction.[32] The first IP statutes were derivatives of these early modern privileges, both in terms of their legal-doctrinal structure[33] and regarding their purpose. Just like the privilege regime, the new patent and copyright laws implemented an inward-looking economic policy. The Venice Patent Act expressly refers to the "utility and benefit to our State" of granting exclusive rights to "men in this city, and also ... other persons ... from different places" in their "ingenious contrivances."[34] The Statute of Monopolies was intended to further the interests of industry "within this Realme," without, however, unjustifiably raising prices of commodities "at home."[35] And the Statute of Anne was meant to encourage learned men to compose and write useful books for the British public.[36] Although Venice and England operated within a highly internationalized trade context, none of their early IP statutes specifically targeted foreign markets and the export of new contrivances, manufactures, and books. Their main – if not sole – purpose was to foster domestic growth and innovation.[37]

[28] Stephen Broadberry and others, "British Economic Growth, 1270–1870: an output-based approach" (2011) University of Kent School of Economics Discussion Papers.

[29] Barnes (n 24) 226; List (n 6) 33–4.

[30] "Statute of Anne, London (1710)" in Lionel Bently and Martin Kretschmer (eds), Primary Sources on Copyright (1450–1900) <www.copyrighthistory.org> accessed 2 September 2020.

[31] List (n 6) 7, 31, 45–6; Lanaro (n 23) 17 (open Venice guild practices); Dutfield and Suthersanen (n 2) 6 ("Venetian style 'knowledge mercantilism'").

[32] Paul A David, "Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History" in National Research Council (ed), *Global Dimensions of Intellectual Property Rights in Science and Technology* (National Academy Press 1993) 44–8.

[33] Alexander Peukert, *A Critique of the Ontology of Intellectual Property* (Cambridge University Press 2021) 92–7.

[34] Venetian Statute on Industrial Brevets, Venice (1474) (n 22).

[35] *Supra* (n 26).

[36] See preamble, Statute of Anne (n 30).

[37] On the limited practical relevance of early UK patent law for the process of industrialization, see Christine MacLeod and Alessandro Nuvolari, "Patents and Industrialization: An Historical Overview of the British Case, 1624–1907" (2010) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipresearch-pindustrial-201011.pdf> accessed 2 September 2020.

II. *Discrimination against Foreigners*

This inbound perspective becomes even more apparent in the practice of many jurisdictions until the late nineteenth century to grant IP protection only to local people. Examples are numerous and well documented. They were observed in particular in middle-income countries that, at a given point in time, had established a certain level of industrialization and the capacity to absorb new technologies but still lagged behind the economic and technological leading countries.[38]

One of these purposefully discriminatory measures was the granting of privileges or patents for the introduction – that is, the first domestic practice – of inventions that were made and implemented abroad. What would today be considered an unfair incentive for piracy was long-standing practice in many European countries, such as in Renaissance "Italy," during the late French *Ancien* Regime, and even as late as the early nineteenth century in Prussia and Wuerttemberg.[39] Another way to foster local industry was to declare that only citizens or residents of the respective state were eligible for IP protection. This strict discrimination against foreigners was applied by, for example, the 1815 Prussian Patent Act[40] and the US patent and copyright laws from their first enactment until 1836 and 1891, respectively.[41] Even when foreigners were in principle granted access to the local IP regime, they had to fulfill additional requirements such as paying significantly higher patent fees than did locals.[42] Local working requirements like the famous manufacturing clause in US copyright law had the purpose of promoting the national publishing and paper industries.[43]

The effect of discriminating against foreign inventors and authors was that foreign patenting and copyrighting remained infrequent. Nations that imported IP thereby prevented IP-export nations from taking advantage of the protection available in their territories. In this way they avoided paying license fees, which would have increased the costs of absorbing knowledge and burdened the balance of trade.

The first prominent renunciation of this inbound nationalist IP policy was a French law of 1852, which for "reasons of universal justice" also granted protection

[38] Cf List (n 6) 93 (three stages of economic development: (1) nations trying to make advances in agriculture and simple industries, (2) nations trying to promote existing manufactures, fisheries, navigation, and foreign trade, (3) nations with the highest degree of wealth and power).

[39] David (n 32) 46 (regarding Renaissance "Italy").

[40] Art. 1 Prussian decree on the granting of patents (Publikandum über die Ertheilung von Patenten), 14.10.1815, <www.wolfgang-pfaller.de/Publikandum.htm> accessed 2 September 2020 (citizen or member of a municipality entitled to vote).

[41] Lehmann-Hasemeyer and Streb (n 17) 5; Golan v Holder 132 S Ct 873, 879 (2012) (19th century US a "Barbary coast of literature"); John A Rothchild, "How the United States Stopped Being a Pirate Nation and Learned to Love International Copyright" (2018) 39 *Pace L Rev* 361, 363.

[42] Lehmann-Hasemeyer and Streb (n 17), 10 et seq. (US and Wuerttemberg patent law/practice in the second half of the nineteenth century).

[43] Alexander Hamilton, Report on the Subject of Manufactures (1791/1901) 83 et seq.; Golan v Holder (n 41); Rothchild (n 41) 451 (extreme form of protectionism).

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to authors of works published abroad[44] – and at the same time targeted unauthorized foreign copying; this new law thus adopted an outbound perspective.[45] Whether that law was an expression of a genuinely globalist attitude or was still driven by the nationalist motive to improve the legal position of French right holders is considered below.[46]

The formerly popular strategy of discriminating against foreign right holders in order to allow domestic industries to free-ride on foreign innovations – and at the same time, protect their own – is nowadays prohibited for most IP markets, on the ground of national treatment obligations under the global IP acquis. In particular, it is not permissible to wholly exclude foreigners or certain areas of technology, such as pharmaceuticals, from industrial property protection or to provide that formalities must be fulfilled in order to secure a copyright.[47] In practice, patent offices and courts may favor domestic inventors and litigants,[48] but such practices must not become official policy. The globalization of IP law thus limits the leeway for economic nationalist approaches significantly and thereby complements the deep integration of national economies in intercontinental value chains.

Discriminatory measures have not, however, vanished completely. An interesting example is the "press publishers right" in the 2019 EU Directive on copyright and related rights in the Digital Single Market (DSMD).[49] According to Art. 15 DSMD, EU Member States must provide publishers of press publications with the exclusive rights of reproduction and making available "for the online use of their press publications by information society service providers," in particular by news aggregators like Google News. This two-year related right in press publications is independent of any rights in respect of works and other subject matter incorporated in a press publication. Whereas this content is already subject to international

[44] "French International Copyright Act, Paris (1852)" in Lionel Bently and Martin Kretschmer (eds), Primary Sources on Copyright (1450–1900) <www.copyrighthistory.org> accessed 2 September 2020 (French International Copyright Act).

[45] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights* (Vol I, 2nd ed, Oxford University Press 2006) para 1.30 (the "famous decree of 1852 concerning the protection of foreign works in France" cleared the blockages against bilateral copyright treaties with France).

[46] *Infra* C I.

[47] See Art. 3, 27.1, 66.1 TRIPS; Art. 2 et seq. Paris Convention; Art. 5 Berne Convention; Keith E Maskus, "Incorporating a Globalized Intellectual Property Rights Regime into an Economic Development Strategy" in Keith Maskus (ed), *Intellectual Property, Growth and Trade* (Vol 2, Elsevier 2008) 502 et seq. On discrimination of foreigners see Yi Qian, "Are National Patent Laws the Blossoming Rains?" in Neil Weinstock Netanel (ed), *The Development Agenda* (Oxford University Press 2009) 207 with further references.

[48] For studies to this effect cf. Lehmann-Hasemeyer and Streb (n 17) 6.

[49] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L130/92 (DSMD).

copyright treaties,[50] its "publication" is not.[51] There is thus no applicable national treatment obligation.

The German press publishers' right of 2013, which served as a model for the DSMD, had not addressed the status of non-German, non-EU, and non-European Economic Area press publishers explicitly.[52] The DSMD, however, is clear on the issue. Art. 15(1) DSMD only applies to – and thus benefits – press publishers "established in a Member State," that is, those legal persons that have their registered office, central administration, or principal place of business within the Union.[53] There is no reference to applicable international treaties (which do not exist anyhow) or to other exceptional avenues to protection, such as via simultaneous first publication in the European Union or reciprocal protection of EU publishers in the third country. The DSMD thus completely excludes the publishers of *Neue Zürcher Zeitung*, *The New York Times*, and all other third-country journalistic publications from the press publishers' right, despite the fact that many of those websites are indexed by news aggregators for a significant EU readership.[54]

In the past, such strict discrimination against foreigners had the purpose of fostering economic catch-up through cheap access to foreign works and lawful free-riding on foreign innovations. This, however, is not what the press publishers' right is meant to achieve. Its purpose is to ensure the sustainability of EU news publishers and news agencies by providing them with additional licensing revenues. The respective royalties are to be paid by news aggregators and similar online services, for whom the reuse of press publications is said to constitute an important part of their business models and a source of revenue.[55] In line with this telos, the German and Spanish precursor laws had indeed been asserted by local mainstream press publishers against Google.[56] The new IP right is thus not meant to foster dynamic catch-up and innovation but to support media companies that were

[50] Cf Art. 2, 10 Berne Convention; 2, 3, 8–12 WCT.

[51] See Kur and Ginsburg, in this volume.

[52] Manfred Rehbinder and Alexander Peukert, *Urheberrecht und verwandte Schutzrechte* (18th CH Beck 2018) para 1149 (The law was declared inapplicable for a lack of notification with the European Commission as a "technical regulation" of information society services); case C-299/17, VG Media v Google LLC (ECJ, 12 September 2019).

[53] Recital 55 sentence 4 DSMD (n 49).

[54] Arguably, this exclusion runs afoul of the principle of equality before the law (Art. 20, 21, 17 CFREU). See, to this effect, German Federal Constitutional Court, 23 January 1990, 1 BvR 306/86, GRUR 1990, 438, 442 (exclusion of US citizen from German copyright protection unconstitutional under the German Basic Law if there is not even a reciprocity requirement or if random results follow).

[55] Recitals 54, 55 DSMD (n 49).

[56] VG Media (n 52); Raquel Xalabarder, "The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its Compliance With International and EU Law" (2014) IN3 Working Paper Series <http://ssrn.com/abstract=2504596> accessed 8 September 2020.

established in analog times during their transition to digital journalism.[57] It nevertheless represents an inward-looking protectionist measure that discriminates in favor of the local economy.

III. *Weak IP Catch-up Policies*

Since early modern times, the economic and technological ranking of countries has corresponded to a pyramidal form. Few countries take a leading position, some follow as emerging economies, and most belong to the bottom group – with low levels of specialization, innovation, and export orientation. Although this structure is surprisingly stable, individual countries have moved up and (less frequently) down the ladder.[58] Countries like Germany, Switzerland, and the USA, whose economies nowadays are among the most technologically advanced and export-oriented, lagged behind the UK economy throughout most of the nineteenth century. In so far as those follower countries adopted IP during the nineteenth century at all, they pursued – well into the twentieth century – a weak IP catch-up strategy. They either forewent patents and copyrights altogether or limited these rights in a way that allowed local enterprises to copy or imitate on a massive scale, in full compliance with applicable local laws, in order to absorb foreign innovation and establish a highly industrialized formal economy.

Again, examples are plentiful and well documented.[59] In the area of copyright law, until the late nineteenth century there existed several European "copying hubs" that did not provide any protection to authors or publishers; among them is again the German state of Wuerttemberg.[60] In patent law, the Prussian patent office rejected up to 90 percent of patent applications and thus strictly controlled and effectively minimized the practical relevance of the patent system.[61] The German Patent Act of 1877 exempted precisely those two branches from patent protection – medicines and chemical products – in which German companies were particularly active and successful.[62]

Switzerland introduced a Patent Act only in 1888, under massive international pressure, but granted no protection for methods or for chemical products until 1907. This allowed the Swiss chemical and pharmaceutical industries to copy products that were patented in France and other places without hindrance; at the same time, the late nineteenth and early twentieth century are seen as the golden age of the

[57] Alexander Peukert, "An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis" (2016), Research Paper of the Faculty of Law, Goethe University Frankfurt am Main <https://ssrn.com/abstract=2888040> accessed 8 September 2020.

[58] Dutfield and Suthersanen (n 2) 7.

[59] See also Peukert 2017 (n 21) with further references.

[60] Herbert Hofmeister, "*Bemerkungen zur Geschichte des österreichischen Urheberrechts*" (1987) 106 UFITA 173–187; Ricketson and Ginsburg (n 45) para 1.29.

[61] Lehmann-Hasemeyer and Streb (n 17) 8.

[62] Peter Kurz, *Weltgeschichte des Erfindungsschutzes* (Heymanns 2000) 332 et seq., 372 et seq.

Swiss pharmaceutical and chemical industry. In 1869, the Netherlands completely revoked their patent law, which up until that point had been used predominantly by foreign registrants, and did not reinstate it until 1912. In the meantime, the Lever Brothers (Unilever) were able to lawfully produce margarine in disregard of the patent protection that existed in several European countries, and Philips manufactured light bulbs without paying license fees to Edison. Again, that period marked the high point of industrialization in the Netherlands.[63]

India pursued a similar strategy in doing away with product patents in the pharmaceutical and food sectors in 1972. This gap in protection, which under the maximum transition period for TRIPS was valid until 2005, is said to have contributed to the creation of the Indian generic sector.[64] Japan, to name one last example, has had a patent law since as far back as 1885. But until the late 1990s, the scope of protection of a patent was construed so narrowly that Japanese companies had an easy time in circumventing this protection by means of slight changes in the drafting of the claims.[65]

All these policies purposefully discriminated against foreign right holders, to the benefit of local industries. They can therefore be characterized as economic nationalist strategies of IP importers. This weak IP catch-up strategy is still considered to be an effective strategy in developing countries in order to adapt to, replicate, and distribute innovations along the international productive chain, with the long-term aim of inducing domestic economic complexity and productivity.[66] As with the discrimination of foreigners, however, weak IP catch-up policies are largely ruled out by international IP treaties, in this case by obligatory minimum levels of protection.[67] The remaining room to maneuver concerns some "residual policy space" allowing for "IP calibration."[68]

[63] Eric Schiff, *Industrialization without National Patents* (Princeton University Press 1971) 19 et seq., 85 et seq.

[64] Sudip Chaudhuri, "Is Product Patent Protection Necessary to Spur Innovation in Developing Countries?" in Neil Weinstock Netanel (ed), *The Development Agenda* (Oxford University Press 2009), 265–88.

[65] Peter Ganea and Sadao Nagaoka, "Japan" in Paul Goldstein and Joseph Straus (eds), *Intellectual Property in Asia* (Springer 2009) 87, 140; Hiroyuki Odagiri, Akira Goto and Atsushi Sunami, "IPR and Catch-Up Process in Japan" in Hiroyuki Odagiri and others (eds), *Intellectual Property Rights, Development, and Catch-Up* (Oxford University Press 2010) 122.

[66] Cassandra Sweet and Dalibor Eterovic, "Do Patent Rights Matter? 40 Years of Innovation, Complexity and Productivity: Does the Rigorous Protection of Patents Advance or Retard Economic Development?" (2019) 115 *World Development* 78–93.

[67] Maskus, Economic Development (n 17) 28; Graeme B Dinwoodie and Rochelle Cooper Dreyfuss, "Brexit and IP: The Great Unraveling?" (2018) 39 *Cardozo L Rev* 967, 983.

[68] Keith E Maskus, "International Agreements on Intellectual Property Rights: TRIPS and Beyond" in Robert Looney (ed), *Routledge Handbook of International Trade Agreements* (Routledge 2020) 9 et seq.; Daniel J Gervais, "*IP Calibration*" in Daniel J Gervais (ed), *Intellectual Property, Trade and Development* (2nd ed, Oxford University Press 2014); Silke v Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008) para 25.32.

It is doubtful whether this remaining leeway is sufficient to account for the vastly different levels of absorptive capacity and innovativeness among national economies. The most prominent test case is China, which the United Nations still counts among the developing economies[69] but which has risen to become the second-largest economy in the world in terms of gross domestic product.[70] In 2019, the patent office of China received nearly half of all patent applications in the world and had the second highest number of international patent applications via the Patent Cooperation Treaty, just behind US-based applicants.[71] Being bound to the TRIPS Agreement since 2001 has apparently not hampered but potentially fostered this impressive performance of the Chinese economy.

The seemingly happy relationship between strong IP and Chinese economic development has been tarnished, however, by long-standing complaints of the USA and the European Union about insufficient IP enforcement, and, more recently, about so-called forced technology transfers.[72] Both practices support the local acquisition of knowledge and the building of innovative capacity and thus, eventually, technological and economic catch-up. The significance of these informal, weak IP policies is confirmed by the fact that the 2020 US–China Economic and Trade Agreement specifically addresses these issues; it obliges China firstly to stop the manufacture and block the distribution of pirated and counterfeit products, and secondly to not require or pressure persons of the other party to transfer technology to its persons in relation to acquisitions, joint ventures, or other investment transactions.[73] The agreement thus documents and at the same time aims to contain a conflict between Chinese inbound and US outbound nationalist IP policies.

Like the USA, the European Union generally also pursues an outward-looking, pro-IP policy.[74] In the already mentioned 2019 DSMD, the EU legislature has, however, adopted yet another version of an inward-looking IP regulation. As

[69] United Nations, "Monthly Briefing on the World Economic Situation and Prospects" (2020) Economic Analysis No 134 <www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-february-2020-briefing-no-134/> accessed 13 September 2020.

[70] World Bank <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true> accessed 14 September 2020.

[71] WIPO IP Facts and Figures (2019) <https://www.wipo.int/publications/en/details.jsp?id=4487> accessed 14 September 2020, 11 et seq.

[72] Lee G Branstetter, "China's Forced Technology Transfer Problem – And What to Do about It" (2018) 18–13 Peterson Institute for International Economics Policy Brief 1; Bob Carbaugh and Chad Wassell, "Forced Technology Transfer and China" (2019) 39(3) *Economic Affairs* 306–319; Jyh-An Lee, "Shifting IP Battlegrounds in the US–China Trade War" (2020) 43 *Colum J L & Arts.* 147, 153-4.

[73] Art. 1.18 et seq., Art. 2.2.3 US–China Economic & Trade Agreement. See also id, Art. 2.1(3) ("A Party shall not support or direct the outbound foreign direct investment activities of its persons aimed at acquiring foreign technology with respect to sectors and industries targeted by its industrial plans that create distortion.").

[74] EU: European Commission, "A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in

explained, Art. 15 DSMD strengthens IP to the benefit of EU press publishers. Art. 8 DSMD, in contrast, *weakens* EU copyright by permitting the non-commercial mass digitization of out-of-commerce works. It also reverses the discrimination. Whereas Art. 15 DSMD discriminates against third-country press publishers, Art. 8 DSMD discriminates against EU right holders and leaves exclusive rights in third-country out-of-commerce works intact. Under Art. 8 DSMD, only out-of-commerce-works of EU origin may be digitized and made available online.[75] Recital 39 DSMD explains this discrimination against EU works and right holders with "reasons of international comity." And indeed, this rarely adopted measure eliminates any concerns that the limitation of copyrights in out-of-commerce works might go too far and run afoul of the international acquis of minimum copyrights, which does not apply to the internal copyright regulations of a country for works of that origin.[76] It thus seems that Art. 8 DSMD expresses a concern for foreign right holders and international law. The European Union's globalist attitude is so strong that the Union is even prepared to discriminate against its own citizens.

From an historical perspective, however, Art. 8 DSMD appears in a very different light. According to this view, Art. 8 DSMD is a late reaction to events that took place in the USA between 2004 and 2015, namely the Google Books Project, the Google Books Settlement, and the Second Circuit Court decision – which eventually held that Google's unauthorized digitizing of more than twelve million copyright-protected works, the creation of a search functionality, and the display of snippets from those works were non-infringing fair uses under US copyright law.[77] Many non-US copyright holders, as well as the German and French governments, had actively intervened in these developments. They successfully argued that a settlement reached between Google and certain US authors and publishers would violate international copyright law, although the settlement only covered works of US, Canadian, UK, and Australian origin plus foreign works registered with the US copyright office.[78] In Germany and other European countries, the Google Books Project and settlement were portrayed as an impertinent global misappropriation of

Europe" COM (2011) 287 final, 6 ("IPR constitute a major asset for the EU's competitiveness on emerging markets"); European Commission, Intellectual Property <https://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/> accessed 9 September 2020. US: US Department of State, Intellectual Property Enforcement <https://www.state.gov/intellectual-property-enforcement/> accessed 9 September 2020 ("The Office of Intellectual Property Enforcement (IPE) advocates for the effective protection and enforcement of intellectual property rights (IPR) around the world" inter alia to "ensure that the interests of American IP rights holders are protected abroad").

75 Art. 8(7) DSMD (n 49).

76 Art. 5(1), (4) Berne Convention.

77 See Authors Guild v Google Inc 770 F Supp 2d 666 (S.D.N.Y. 2011); Authors Guild v Google Inc 804 F 3d 202 (2d Cir 2015).

78 Authors Guild v Google Inc 770 F Supp 2d 666 (S.D.N.Y. 2011) (settlement not fair, adequate, and reasonable also because of international law concerns).

the rights of European authors and publishers by the same US internet giant that, by the way, is the primary target of the new press publishers' right.[79]

At the same time, the unavailability of millions of orphan and out-of-commerce works in the digital age was generally acknowledged to pose a real problem. The first response in line with European copyright values, the 2012 EU Orphan Works Directive, unfortunately proved unfit for the purpose because of its requirement of a prior diligent search in every single case.[80] In 2016, a French effort to allow for the mass digitization of out-of-commerce works was struck down by the Court of Justice of the European Union because of its incompatibility with the EU copyright acquis.[81] In order to finally allow for mass digitization projects, Art. 8 DSMD now adopts the "digitize first and opt out later" mechanism that had infuriated European right holders and governments against the Google Book settlement ten years earlier. The EU legislature therefore took great pains to avoid international law-related complaints by US or other third-country right holders.

It is finally worth noting that not only US works are beyond the scope of Art. 8 DSMD. Google and other private internet companies also cannot rely on the provision, which only permits non-commercial digitization projects. In sum, Art. 8 DSMD is not only an inward-looking but also a hermetical EU measure: it benefits EU cultural heritage institutions in their taxpayer-funded efforts to preserve and make available their collections of EU works, for future generations of EU citizens.[82] With this cultural, etatist focus, and considering its historical background, the provision represents a (supra-)nationalist approach to IP. Together with the new press publishers' right, it forms part of the overall EU digital policy that strives for a European version of digital sovereignty, independent from and often opposed to US and Chinese approaches.[83]

C. OUTBOUND IP POLICIES

The growth of global trade during the long nineteenth century concerned high-tech products, books, and trademarked goods, which increasingly enjoyed IP protection in their country of origin. The more important cross-border exchange became for original producers, the more they became interested in IP protection abroad.[84] And along with the significance of these IP industries grew the readiness of governments to switch from inbound to outbound IP policies.

[79] Alexander Peukert, "*Deutschland v Google: Dokumentation einer Auseinandersetzung*" (2010) 2 *Archiv für Urheber- und Medienrecht* 477–487.

[80] Council Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5; Rehbinder and Peukert (n 52) paras 564–572.

[81] Case C–305/15 Marc Soulier and Sara Doke [2016] ECLI:EU:C:2016:878.

[82] Cf Art. 2(3) and recitals 5, 25 DSMD (n 49).

[83] European Commission, "Shaping Europe's digital future" COM (2020) 67 final, 2 ("Europe needs to have a choice and pursue the digital transformation in its own way.").

[84] Braderman (n 13) 150 (US copyright industries).

In view of today's levels of global economic and legal integration, no country can afford to ignore the international consequences of its IP policies. Even self-contained measures like Arts. 8 and 15 DSMD are embedded in, and reflect upon, the international economic context. Economic globalization has thus clearly induced a change of perspective from local to global markets. It has not, however, eliminated the focus on the interests of domestic industries and thus the essentially economic nationalist motive of IP-export countries' policies.

I. *Sanction Foreign Pirates*

An interesting example in IP history is the already mentioned French International Copyright Act of 1852.[85] That law did not merely extend the French *droit d'auteur* to works published abroad and thus, in practice, to foreign authors for "reasons of universal justice." It also made counterfeiting and piracy within France a criminal offense – in fact, this is the only substantive content of the law.[86] The immediate purpose of this criminalization was to curb the influx of cheap copies of works by French authors from Belgium and the Netherlands, where this activity was perfectly legal.[87] The indirect effect was that after the "pirates" lost their biggest market, their governments were more inclined to enter into bilateral treaties with France – and finally to protect French authors in Belgium and the Netherlands.[88] Thus, a law that according to its preamble pursued a noble universalist aim turns out to be an outbound nationalist policy move.

The US trade policy in the late twentieth century provides a more straightforward example of efforts to fight unauthorized foreign copying and imitation. The US Trade and Tariff Act of 1984 made the adequate and effective protection of foreign IP a principal US negotiating objective, and it declared inadequate or ineffective protection of IP in third countries a trade practice that could lead to trade retaliation by the USA.[89] The Reagan Administration used this tool intensively, for example vis-à-vis South Korea and Brazil.[90] In 1988, the US Congress amended the Trade Act "to provide for the development of an overall strategy to ensure adequate and

[85] *Supra* text accompanying notes 44–46.

[86] French International Copyright Act (n 44) ("1st Article: Counterfeiting, on French territory, of works published abroad and mentioned in article 425 of the Criminal Code, constitutes an offence. 2. The same is true of the sale, the exportation and the expedition of counterfeit works. The exportation and the expedition of these works is an offence of the same kind as the introduction, on French territory, of works which, after having been printed in France, have been counterfeited abroad.").

[87] Stephen P Ladas, *The International Protection of Literary and Artistic Property*, vol 1 (Macmillan 1938) 71–2.

[88] Id.

[89] Omnibus Tariff and Trade Act of 1984 [1984] PL 98–573; Adrian Otten, "The TRIPS Negotiations: An Overview" in Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS Agreement* (WTO 2015) 58.

[90] Kumar (n 6) 238.

effective protection of intellectual property rights and fair and equitable market access for US persons that rely on protection of intellectual property rights."[91] As part of this overall strategy, the Office of the US Trade Representative has since then published an annual "Special 301 Report" in which it identifies foreign countries where IP protection and enforcement have deteriorated or remained at "inadequate" levels, which may result in actions under US trade law or in dispute settlement proceedings pursuant to WTO or other trade agreements.[92] More than thirty countries find themselves on the 2020 watch and priority watch lists, among them well-known targets like China, but also Canada and Romania.[93]

Some thirty years after the USA, the European Union adopted very similar measures. As part of a comprehensive "[s]trategy for the protection and enforcement of intellectual property rights in third countries,"[94] the European Commission has since 2006 carried out biannual surveys among EU stakeholders and Member States in order to identify third countries in which the state of IPR protection and enforcement gives rise to concern, so that the Commission can focus its efforts and resources on those countries. The most recent report lists twenty countries in four priority categories, with China as the only country in Category One, and, somewhat ironically, the USA listed among the problem countries in Category Three.[95]

On an abstract level, one can thus observe a convergence of EU and US policy aims and measures. In practice, however, the two actors apparently regard each other with suspicion. Each tries to extract as much revenue from foreign IP markets as possible.

II. *Unilateral Reciprocity Requirements*

Another way to induce other countries to adopt or strengthen their IP laws is to demand some form of reciprocity. It was common practice in nineteenth-century Europe for governments to make eligibility for their IPRs dependent on a corresponding treatment of their own citizens in the other country.[96] Reciprocity is a

[91] Omnibus Trade and Competitiveness Act of 1988, § 1303(a)(2), 102 Stat 1179.

[92] Cf Judith H Bello Alan, "'Special 301': Its Requirements, Implementation, and Significance" (1989) 13 *Fordham International Law Journal* 259.

[93] United States Trade Representative, 2020 Special 301 Report (April 2020).

[94] European Commission, "Trade, growth and intellectual property – Strategy for the protection and enforcement of, intellectual property rights in third countries" (Communication) COM (2014) 389 final; see Xavier Seuba and Elena Dan, "The European Foreign Policy for Intellectual Property Enforcement" in Josef Drexl and Anselm Kamperman Sanders (eds), *The Innovation Society and Intellectual Property* (EIPIN Series, Edward Elgar Publishing 2019) 160–187.

[95] European Commission, "Report on the protection and enforcement of intellectual property rights in third Countries" SWD (2018) 47 final.

[96] Silke von Lewinski, "Intellectual Property, Nationality, and Non-Discrimination" (1999) WIPO Publication No 762 (E), 190–1 <www.wipo.int/edocs/pubdocs/en/intproperty/762/

particularly promising tool if the domestic market is of a significant size and there is some corresponding demand for international protection. Accordingly, the 1838 UK International Copyright Act made the protection within Her Majesty's vast dominions of literary works that were published abroad conditional upon the reciprocal protection of British books in those foreign countries.[97] Within a few years, this carrot-and-stick strategy had led to copyright treaties with German states in 1846 and 1847 and with France in 1851.[98]

Whereas France initially adopted, as explained, a different tactic to internationalize copyright law, it successfully implemented reciprocity in trademark law. The decisive move here was the law of 1857, according to which protection of foreign trademarks in France was not simply dependent upon reciprocal protection but also upon a diplomatic agreement with the home country of the foreign trademark owner. Countries that sought protection for their citizens' marks in France therefore had to negotiate and usually to legislate. Within a few years, France concluded several treaties on the matter, starting with its great rival, Britain.[99] Thus, the targeting of foreign pirates and the discrimination of foreign right holders contributed to the emergence of international IP treaties, first in the form of numerous bilateral[100] and eventually in the form of the permanent multilateral IP Unions of the 1880s, with their guarantee of automatic national treatment.[101]

Beyond this emerging international IP acquis, however, reciprocity requirements have remained an attractive tool for export-oriented countries. One example concerns layout designs (topographies) of integrated circuits. The 1984 US Semiconductor Chip Protection Act only applies to nationals and domiciliaries of the USA and of countries with which the USA has concluded a respective IP treaty.[102] The 1986 European Economic Community Directive on the legal protection of topographies of semiconductor products is equally restricted to nationals and residents of a Member State, with a proviso that Member States may conclude

wipo_pub_762.pdf> accessed 15 September 2020; Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, Practice* (3rd ed, Oxford University Press 2013) 109; Daniel Gervais, *The TRIPS Agreement. Drafting History and Analysis* (4th ed, Sweet & Maxwell, Thomson Reuters 2012) para 2.62. On the various forms of reciprocity see Ricketson and Ginsburg (n 45) paras 1.24–8.

[97] Ronan Deazley, "Commentary on International Copyright Act 1838 (2008)" in Lionel Bently and Martin Kretschmer (eds) Primary Sources on Copyright (1450–1900) <www.copyrighthistory.org> accessed 9 September 2020.

[98] Ladas (n 87) 21.

[99] Paul Duguid, "French Connections: The International Propagation of Trademarks in the Nineteenth Century" (2009) 10 *Enterprise & Society* 3, 17 et seq.

[100] V Lewinski (n 68) paras 2.03–24; Ricketson and Ginsburg (n 45) para 1.30; Ladas (n 87) 43–6 (69 bilateral treaties in the area of industrial property law in 1883).

[101] *Infra* C III 2.

[102] 17 USC § 902.

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agreements with third countries concerning that subject matter.[103] Whereas such bilaterals did not occur, and the 1989 WIPO Washington Treaty on Intellectual Property in Respect of Integrated Circuits remained dead letter law,[104] Arts. 35–38 TRIPS eventually made this new form of IP obligatory for all WTO Members.

The protection of geographical indications (GIs) by the European Union provides an example of where the use of reciprocity to globalize new types of IPR partially failed. The original 1992 Regulation made GI protection for agricultural products and foodstuffs coming from a third country dependent upon equivalent GI protection for EU products in that country, "without prejudice to international agreements."[105] Arts. 22–24 TRIPS indeed address this issue but only set out very limited obligatory GI protection levels. Also within WIPO, the European Union has thus far failed to establish its preferred high standard as the global norm, mainly because of US opposition.[106] The inclusion of GI protection in the TRIPS Agreement even backfired when in 2005 a WTO panel found that excluding WTO nationals from the EU system for GIs violates the national treatment obligation owed to them.[107] As a result, the European Union has to accept third-country GIs within its market, but only a handful of other countries have committed to offer EU GI producers comparable levels of protection.[108]

Just like the discrimination against foreigners, unilateral reciprocity requirements have also largely been ruled out and replaced by mutual national treatment provisions in IP treaties. Nowadays, reciprocity is thus useful only beyond the international acquis. At these edges of the international IP system, however, reciprocity is still popular – and it has retained its purpose, namely, to provide a country's own nationals or residents with protection abroad.

[103] Art. 3 Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products [1987] OJ L 24/36–40.

[104] <www.wipo.int/treaties/en/ip/washington/> accessed 9 September 2020.

[105] Art. 16 Council Regulation (EEC) No 2082/92 of 14 July 1992 on certificates of specific character for agricultural products and foodstuffs [1992] OJ L 208/9–14.

[106] Daniel J Gervais and Matthew Slider, "The Geneva Act of the Lisbon Agreement: Controversial Negotiations and Controversial Results" (2017) 58 *IUS Gentium* 15. See also Art. 1.15, 1.16(b) US–China Economic & Trade Agreement (international GI agreements must not undermine market access for US exports to China of goods and services using trademarks and generic terms, and any GI may become generic over time, and may be subject to cancellation on that basis).

[107] WTO Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174/R, 2005).

[108] As of March 31, 2020, only 64 applications (amounting to 1.72 percent of all 3,712 applications) for GI protection in the EU came from third countries (see <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/> accessed 9 September 2020), a fact that indicates there is high demand for this form of protection within the EU but relatively little corresponding interest from abroad. As of May 20, 2020, only four non-EU countries have acceded to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications of May 20, 2015 (Albania, Cambodia, Democratic People's Republic of Korea, and Samoa).

The first example concerns German copyright law vis-à-vis "*non-ressortissants*," that is, nationals of non-members of the international copyright system. In a move that somewhat contradicts the rhetoric of purportedly universal authors' rights (*Urheberrecht*),[109] generally only nationals of Germany, the European Union, and the European Economic Area are eligible for exploitation rights in works, performances, and other subject matter.[110] Third-country ("foreign") nationals qualify for German copyright protection only according to international treaties, because of first publication in Germany, or on condition of reciprocity.[111] In a case that went all the way up to the German Federal Constitutional Court in the 1980s, Bob Dylan fell prey to these restrictions. The civil courts dismissed his claim for an injunction against the distribution of an Italian bootleg in Germany based on his rights as a performer because of his US nationality and the lack of applicable international treaties. The Federal Constitutional Court also denied a violation of the principle of equality before the law, because Dylan's exclusion from property protection was justified by the purpose of inducing the USA either to join the Rome Convention[112] or to enter into a bilateral treaty with Germany.[113] In the former alternative, reciprocity helps to expand the international IP system and thus the level global playing field in IP. But the latter alternative, a reciprocal bilateral treaty, still situates reciprocity in a nationalist setting of individual countries that pursue separate interests. In any case, the ultimate purpose is to guarantee German performers reciprocal protection in the USA and that remains an outbound nationalist policy aim.

The second recent example of IP reciprocity concerns the protection of non-original databases, for which no multilateral treaties exist.[114] Consequently, states are generally free to decide whether and under which conditions foreign producers of such databases are eligible for protection. In the case of the EU sui generis right in databases, only those persons qualify who are nationals of a Member State or have their habitual residence, central administration, principal place of business – or at least their actively operating, registered office – in the European Union.[115] In contrast to Art. 15 DSMD, the Database Directive refers to the possibility that the

[109] Cf section 11 German Copyright Act (German CA) ("Copyright protects the author in his intellectual and personal relationships to the work and in respect of the use of the work. It shall also serve to ensure equitable remuneration for the use of the work.").

[110] Sections 120, 124, 125(1), 126(1), 127(1), 127a(1), 128(1) German CA.

[111] Sections 121(1) and (4), 125(5) German CA.

[112] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961.

[113] German Federal Constitutional Court, January 23, 1990, 1 BvR 306/86, GRUR 1990, 438 – Bob Dylan, 438, 442.

[114] In contrast, compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such (Art. 10(2) TRIPS, 5 WCT).

[115] Art. 11(1), (2) Directive 96/9/EC of March 11, 1996 on the legal protection of databases [1996], OJ L 77/20 (Database Directive).

EU Council may extend the sui generis right to third-country database producers on the basis of an international agreement.[116] Reciprocity is not expressly mentioned in this context, but it was discussed in the course of the legislative proceedings and is not ruled out under the terms of the directive.[117] In any case, the sui generis right in databases has not been an export hit. There is neither clear evidence for an investment stimulus,[118] nor has the European Union concluded treaties on reciprocal database protection with third countries. An endeavor to globalize the Database Directive via a WIPO treaty equally failed.[119] If that was a cooperative effort to advance a global public good (that is, more databases), then why did the European Union not adopt a universal approach in the first place? It is therefore more plausible to again interpret these moves as attempts to provide EU database makers with the benefit of transplanting the EU acquis to foreign markets – an instance of outbound IP (supra-)nationalism.[120]

III. *International IP Treaties*

1. General Function of IP Treaties

Since the mid-nineteenth century, international IP policy has mostly taken the form of treaty negotiations among states with the aim of guaranteeing all nationals or residents of the contracting parties a minimum level of protection. At first sight, it seems odd to interpret these treaties as expressions of economic nationalism. Indeed, bilateral IP treaties and even more so the permanent multilateral IP Unions and later WIPO all establish a certain and ever more comprehensive level playing field for the global exchange of IP-protected goods and services. One of WIPO's aims is "to contribute to better understanding and co-operation among States for their mutual benefit on the basis of respect for their sovereignty and equality."[121] That

[116] Art. 11(3) Database Directive (n 115).

[117] J H Reichman and Pamela Samuelson, "Intellectual Property Rights in Data?" (1997) 50 *Vand L Rev* 51, 96–97; Miriam Bitton, "Exploring European Union Copyright Policy through the Lens of the Database Directive" (2008) 23 *Berkeley Technology Law Journal* 1411, 1456–57.

[118] Annette Kur and others, "First Evaluation of Directive 96/9/EC on the Legal Protection of Databases – Comment by the Max Planck Institute for Intellectual Property, Competition and Tax Law" (2006) 37(5) IIC 551, 553; European Commission, Study in support of the evaluation of Directive 96/9/EC on the legal protection of databases (2018) iii.

[119] Mark Davison, "Database Protection: Lessons from Europe, Congress, and WIPO" (2007) 57 *Case W Res L Rev* 829, 850–2 (pointing at the absence of unconditional American support for any proposal).

[120] Davison (n 119), 850–2.

[121] Preamble, WIPO Convention. See also the preamble of the original Paris Convention 1883: "*Egalement animes du désir d'assurer, d'un commun accord, une complète et efficace protection à l'industrie et au commerce des nationaux de leurs États respectifs et de contribuer à la garantie des droits des inventeurs et de la loyauté des transactions commerciales, ont résolu de conclure une Convention à cet effet . . . .*"

intention is, on the one hand, precisely what characterizes globalist rather than self-interested or conflict-oriented nationalist attitudes and policies.

On the other hand, it is crucial to distinguish between the structural effects of the international IP system and its distributive consequences and underlying dynamics. What emerged in the nineteenth century indeed grew into a regulatory cornerstone of the global knowledge economy. It is difficult to imagine the numerous global IP-intensive industries of today without at least some basic form of protection in most markets. I accept, in other words, that the international IP system is a result of – and at the same time, a driver of – globalization.

But that observation does not respond to the realist concern raised by Alexander Hamilton and Friedrich List as the two classical proponents of economic nationalism, namely: Who pushed for and benefits from these treaties?[122] If one only looks at the largely homogenous interests of IP proponents, one tends to interpret the history of the global IP system as a kind of logical, linear, and largely apolitical development ("progress").[123] From the outset, such an analysis cannot account for the power struggles that also define the history of international IP.[124]

If one takes, instead, a more realist approach and focuses on the conflicts surrounding the globalization of IP, international treaties in this area turn out to be essentially economic nationalist policy tools of net IP exporters.[125] These countries gain protection for their domestic IP industries in foreign markets, and they can expect the private beneficiaries' and their own total revenues to more than offset the royalties they have to send to the foreign companies or countries to whom they accord national treatment.[126] Silke von Lewinski consequently calls copyright provisions in trade agreements "money making machines" for major exporters of

[122] Hamilton (n 43) 25 ("In such a position of things, the United States cannot exchange with Europe on equal terms; and the want of reciprocity would render them the victim of a system, which should induce them to confine their views to agriculture, and refrain from manufactures."); List (n 6) 103 ("under the existing conditions of the world, the result of general free trade would not be a universal republic, but, on the contrary, a universal subjection of the less advanced nations to the supremacy of the predominant manufacturing, commercial, and naval power").

[123] Compare Ricketson and Ginsburg (n 45) paras 2.05 et seq. (referring to the 1858 Brussels Congress on Literary and Artistic Property) with Peter Drahos and John Braithwaite, *Information Feudalism. Who Owns the Knowledge Economy* (The New Press 2002) 194.

[124] Schwartz and Sykes (n 10) 44; Laurence R Helfer, "Regime Shifting: The Trips Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 *Yale J Int'l L* 1, 13–4 (power dynamics central); Graham Dutfield, *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History* (Edward Elgar Publishing 2003) 201 ("power is central to any plausible explanation."); v Lewinski (n 68) para 12.03 (US network of bilaterals resembles "a sun, representing the powerful player(s) who transmit certain legal standards to other countries like a sun radiates light").

[125] Dutfield and Suthersanen (n 2) 3 (IP "as globalised localism").

[126] Lehmann-Hasemeyer and Streb (n 17) 6; Frederick M Abbot, Thomas Cottier and Francis Gurry, *International Intellectual Property in an Integrated World Economy* (3rd ed, Wolters Kluwer 2015) 6–7; Goldstein and Hugenholtz (n 96) 104.

copyright-protected products.[127] In addition, multinational firms have proven to be more responsive to treaty-induced increases in patent protection in developing countries than firms established there. Whereas foreign applications in developing countries grew significantly after their accession to the WTO, the number of domestic patents increased much less, if at all.[128]

No-one seriously disputes that the benefits of international IP treaties come with a cost, namely increased prices for access to innovation, innovative products, and follow-on innovation.[129] These costs are particularly problematic for net IP-import states because they impede their economic catch-up.[130] Not surprisingly, therefore, low-income developing states have repeatedly criticized and opposed the globalization of IP. Until now, however, IP proponents and exporters have successfully overcome any resistance.

2. The Berne and Paris IP Unions

The establishment of the Berne and Paris Unions did not cause much trouble. It occurred among a coalition of the willing, among them all major colonial powers. Beginning in the early nineteenth century, these European states had already extended their national IP laws internally to their dependent territories.[131] When they created the IP Unions to establish a world IP market, it was only logical to incorporate the colonial markets. To this end, Art. 19 Berne Convention 1886 provided that "[c]ountries acceding to the present Convention shall also have the right to accede thereto at any time for their Colonies or foreign possessions." A functional equivalent rule was added to the Paris Convention in 1911.[132] All colonial powers made extensive use of this option, ensuring that, at the dawn of the twentieth century, the scope of application of the IP conventions covered practically the entire planet.[133]

[127] v Lewinski (n 68) para 14.08.

[128] Maskus, Economic Development (n 17), at 11–2, 15–6 with further references.

[129] Maskus (n 17). The best theoretical account is provided by Michele Boldrin and David K Levine, "Intellectual Property and the Efficient Allocation of Social Surplus from Creation" (2005) 2 *Review of Economic Research on Copyright* 45–67.

[130] Peukert 2017 (n 21) with further references.

[131] Lionel Bently, "The 'Extraordinary Multiplicity' of Intellectual Property Laws in the British Colonies in the Nineteenth Century" (2011) 12 *Theoretical Inquiries in Law* 161, 171–81; Alexander Peukert, "The Colonial Legacy of the International Copyright System" in Mamadou Diawara and Ute Röschenthaler (eds), *Copyright Africa: How Intellectual Property, Media and Markets Transform Immaterial Cultural Goods* (Sean Kingston Publishing 2016) 40–3.

[132] Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press 2015) para 8.23.

[133] Tshimanga Kongolo, "Historical Developments of Industrial Property Laws in Africa" (2013) 5 (1) *WIPOJ* 105–17, 115 et seq.; Tshimanga Kongolo, "Historical Evolution of Copyright Legislation in Africa" (2014) 5 *WIPOJ* 163, 163 et seq.

And yet this was only true in geographical terms, for the sole purpose of including the colonies was to protect the citizens of the colonial powers, for instance book publishers based in London or Paris. They were to enjoy the same protection of their rights in the conquered territories as in the home metropole.[134] The colonized peoples, on the other hand, were barred from obtaining copyrights or patents, whether de jure – as in the case of "natives" in the German colonial law – or de facto, through requirements such as first publication in the UK or restrictions on access to the courts.[135] If the age of IP colonialism was about progress, then it was only with regard to the metropoles and the enterprises established there.

3. Decolonization

This finding is confirmed by the coinciding of the collapse of colonial empires and the first true crisis of the international IP system in the 1950s and 60s. When colonies became independent states and "developing countries," they finally gained a voice in treaty negotiations. This triggered the fear within the BIRPI,[136] the predecessor of WIPO, of an exodus of newly independent states and consequently a drastic shrinking of the global IP territory.[137] In the 1960s, India in fact raised the claim that the Berne Convention's high level of protection stood in opposition to the developing countries' primary interest in gaining access to available knowledge in order to promote education and technological progress.[138]

And yet the system did not implode. The reasons for this resilience are complex but are again rooted in post-colonial, asymmetric power relations between economically and technologically advanced IP exporters in the Global North and low-income IP importers in the Global South. In particular, the lower the IP capacity of a country, the more vulnerable it is to a pro-IP agenda running against its interests as a knowledge importer.[139] Furthermore, accession to the key conventions, of which both the Western and the Eastern blocs were a part, held out the promise

[134] Drahos and Braithwaite (n 123) 74; Bently (n 131) 198; Catherine Seville, *The Internationalisation of Copyright Law* (Cambridge University Press 2006) 41 et seq.

[135] Peukert, The Colonial Legacy (n 131) 43–8 with further references.

[136] *Bureaux Internationaux Reunis pour la Protection de la Propriété Intellectuelle*.

[137] Claude Masouyé, "Decolonization, Independence and Copyright" (1962) 36 *Revue International du Droit d'Auteur* 85, 86; critical Alan H Lazar, "Developing Countries and Authors' Rights in International Copyright" (1971) 19 Copyright Law Symposium 1, 17 et seq. ["neo-colonialism"].

[138] Shri M Chagla "Address" in Indian Copyright Office (ed), International Copyright: Needs of Developing Countries (1967) x; Braderman (n 13) 154.

[139] Carolyn Deere, *The Implementation Game* (Oxford University Press 2009) 241, 311; Ruth L Okediji, "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System" (2003) 7 *Singapore Journal of International & Comparative Law* 315, 384.

of international recognition. After all, this was the only way to ensure that the citizens of the developing countries would be granted legal protection in the former metropoles.[140]

4. The TRIPS Agreement

Specific private and state interests finally also spurred the last apex of the international IP system, namely the TRIPS Agreement, which achieved an "unprecedented level of substantive harmonization of IP law."[141] On the face of it, this treaty too is the result of globalist motives and aims. According to its preamble, WTO Members desire to reduce distortions and impediments to international trade; recognize the need for a multilateral framework of principles, rules, and disciplines; and emphasize the importance of reducing tensions through multilateral procedures. All of this resonates well with the ideological mainstream after the fall of the Eastern bloc, when the Washington Consensus propagated a universally valid version of the open market economy in tandem with unequivocally defined and effectively protected titles of property.[142]

Yet the well documented history of the TRIPS Agreement again supports a realist interpretation of the agreement.[143] According to Adrian Otten, then Director of the Intellectual Property Division of WTO and thus a neutral representative of the multilateral forum,

> [t]he driver behind the inclusion of IP in the Uruguay Round was the United States. The background was that, in the years following the end of the Tokyo Round, large parts of US industry as well as the US Government became increasingly of the view that what they saw as inadequate or ineffective protection of US IP abroad was unfairly undermining the competiveness of US industry and damaging US trade interests. These concerns went beyond the issue of border controls to prevent the importation of counterfeit goods, to the substantive standards of IP protection in other countries and the effectiveness of means for their enforcement, internally as well as at the border. This, in turn, was part of a wider perception of many in the United States that the GATT system, while doing quite a good job in

[140] Peukert 2016 (n 131) 49–58.

[141] Annette Kur, "From Minimum Standards to Maximum Rules" in Hanns Ullrich and others (eds), *TRIPS Plus 20. From Trade Rules to Market Principles* (Springer 2016) 135.

[142] John Williamson, "What Washington Means by Policy Reform" (1990) < www.piie.com/commentary/speeches-papers/what-washington-means-policy-reform> accessed 11 September 2020 ["there is general acceptance that property rights do indeed matter"].

[143] Drahos and Braithwaite (n 123) 12 (trade power crashed democracy); Rochelle Dreyfuss and Susy Frankel, "From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property" (2015) 36 *Michigan Journal of International Law* 557, 596; Dinwoodie and Dreyfuss (n 67) 33–4 (coercion narrative). On the linkage between the US manufacturing clause (*supra* n 43) and international trade policy see Rothchild (n 41) 451. On the political economy of the 1996 WIPO Copyright Treaties see Ficsor (n 12) paras 1.34–40 (US, EC, and Japanese policy papers pushing for the "digital agenda" of WIPO).

> regard to standard technology manufactured goods where the United States was losing international competitiveness, was doing a bad job, or none at all, in the areas of agriculture, services and IP[,] where US competitiveness increasingly lay. It should also be remembered that this was a period when the international value of the US dollar increased enormously, almost doubling between its low point in 1978 and high point in 1985 according to the DXY index (US dollar relative to a basket of foreign currencies); this greatly exacerbated concerns in the United States about the country's international competitiveness.[144]

The change in the IP policy of the USA from an inward- to an outward-looking perspective went hand-in-hand with the move from a net IP-import to a net IP-export economy and becoming a global superpower after World War II.[145] This shift in perspective, however, left the concern for the interests of US industries unaffected. Worried about foreign counterfeits and piracy, the USA, supported by the European Community, in 1978 put forward a proposal for a respective GATT agreement, but to no avail.[146] After corresponding efforts to close two major loopholes in the international IP system (concerning the patentability of pharmaceutical products and copyright protection for computer programs) had failed in WIPO because of opposition by developing countries,[147] the USA shifted the forum back to the GATT, where "trade preferences were now used as a bargaining chip for higher levels of IP protection."[148] The main push for that move came from a group composed of twelve top executives from the US pharmaceutical, software, and entertainment industries.[149]

In June 1988, European, Japanese, and US business communities joined lobbying forces and published a "Basic Framework of GATT Provisions on Intellectual Property," which significantly influenced the positions of their respective home

[144] Otten (n 89) 58.

[145] Braderman (n 13) 150.

[146] Jörg Reinbothe and Anthony Howard, "The state of play in the negotiations on Trips (GATT/Uruguay round)" (1991) 13 *European Intellectual Property Review* 157, 157 ("sterile North–South confrontation"); Gervais (n 96) paras 1.10–1; Otten (n 89) 57.

[147] Ricketson (n 132) paras 15.03–5; Gervais (n 96) para 1.12; Drahos and Braithwaite (n 123) 110–114 ("WIPO talkshop"), 124.

[148] Josef Drexl, "The Concept of Trade-Relatedness of Intellectual Property Rights in Times of Post-TRIPS Bilateralism" in Hanns Ullrich and others (eds) (n 141) 53–85, 61; Reinbothe and Howard (n 146) 157; Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003); v Lewinski (n 68) para 9.08; Abbot, Cottier and Gurry (n 126) para 1.12; Dinwoodie and Dreyfuss (n 67) 32. On the high rate of private sector interest and participation in WIPO's work see Carolyn Deere Birkbeck, *The World Intellectual Property Organization (WIPO). A Reference Guide* (Edward Elgar Publishing 2016) 187.

[149] Antony Taubman, "Thematic review: Negotiating 'trade-related aspects' of intellectual property rights" in World Trade Organization (ed), The Making of the TRIPS Agreement: Personal insights from the Uruguay Round Negotiations (WTO 2015) 25; Gervais (n 96) para 1.12–3 (US administration's "Private Sector Advisory Committee on Trade Policy Negotiations (ACTN)"); Drahos and Braithwaite (n 123) 85 et seq.; Dutfield (n 124) 196–201.

governments.[150] As early as 1991, the main content of TRIPS was settled.[151] Inter alia, the agreement obliges all WTO Member States to protect computer programs as literary works under the Berne Convention (Art. 10(1)) and to grant patents for any inventions, whether products or processes, in all fields of technology (Art. 27(1)). It thus satisfied the core demands of IP demandeurs.

5. IP Treaty Making in the Twenty-First Century

Multilateralism lost traction as early as the turn of the millennium. The Washington Consensus in general and the TRIPS Agreement in particular became the target of heavy criticism for their perceived failure to foster global development and innovation.[152] This backlash has, however, not brought IP treaty making to a standstill. On all levels, IP exporters continue to push for their outbound IP (supra-)nationalist policy aim to strengthen IP across the globe, and successfully so.[153]

This also includes already widely adopted multilateral treaties, namely the 2006 Singapore Treaty on the Law of Trademarks, which further harmonizes administrative trademark registration procedures,[154] and the 2012 Beijing Treaty on Audiovisual Performances, which closes loopholes in the international copyright acquis.[155] The USA and the European Union furthermore actively rely upon the WTO dispute settlement procedure to enforce TRIPS obligations. On March 23, 2018, the USA requested consultations with China concerning certain measures that the USA claims to be inconsistent with Art. 3 (national treatment) and Art. 28 (rights conferred by a patent), which the European Union requested to join.[156] On June 1, 2018, the European Union initiated its own WTO procedure against China, referring to the very same Arts. 3 and 28 TRIPS, which the USA requested to join in turn.[157]

Bilateral and plurilateral treaty negotiations complement these efforts. This flexible, multilevel, forum-shifting approach also appears to be the norm rather than the exception.

[150] Intellectual Property Committee, Keidanren and Union of Industrial and Employers' Confederations of Europe (UNICE), "Basic Framework of GATT Provisions on Intellectual Property [June 1988]" in Friedrich-Karl Beier and Gerhard Schricker (eds), *From GATT to TRIPs: The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Wiley-VCH 1996) 355–402.

[151] Taubman (n 149) 17, 29; Gervais (n 96) para 1.19 with reference to an EC proposal from March 1990; Reinbothe and Howard (n 146) 158.

[152] See eg William Fisher III and Cyrill P Rigamonti, *The South Africa AIDS Controversy: A Case Study in Patent Law and Policy* (Harvard Law School 2005).

[153] The legal basis defining the principal negotiating objectives of the United States regarding intellectual property, 19 US Code § 2901(b)(10), has remained unchanged since 1988; see Pub. L. 100–418, title I, § 1101, August 23, 1988, 102 Stat. 1121.

[154] <https://www.wipo.int/treaties/en/ip/singapore/> accessed 11 September 2020.

[155] <https://www.wipo.int/treaties/en/ip/beijing/> accessed 11 September 2020.

[156] See WT DS 542: China – Certain Measures Concerning the Protection of Intellectual Property Rights. At the time of writing, this procedure is suspended in light of ongoing bilateral negotiations between the U.S. and China. See also Claussen (n 18) 63.

[157] WT DS 549: China – Certain Measures on the Transfer of Technology.

Bilateral pressure by IP exporters prepared the ground for the IP Unions in the late nineteenth century and the TRIPS Agreement in the late twentieth century.[158] That acquis then served as a platform for the Berne, Paris, and TRIPS-plus bilateral treaties after multilateralism in WIPO and the WTO had largely come to a halt.[159] Although the European Union and the USA act independently, their IP bilaterals even support each other in that the industries of both IP exporters benefit from the IP provisions in all TRIPS-plus free trade agreements (FTAs) via the most-favored-nation treatment of Art. 4 TRIPS.[160]

At present, the European Union is actively negotiating FTAs that include comprehensive IP chapters with numerous countries.[161] In its early days, the Trump Administration withdrew from the Trans-Pacific Partnership (TPP) and thereby surrendered significant IP benefits for various US industries, including longer patent terms for drugs, additional protections for biological medicines, and longer copyright protection.[162] It would, however, come as a surprise if "Trump had turned away from innovation nationalism."[163] And indeed, the agreements the USA concluded in late 2019 and early 2020 with Mexico, Canada, and China prove the contrary. Chapter 20 of the United-States–Mexico–Canada Agreement (USMCA) is "virtually identical to the TPP" in terms of the IP provisions negotiated by the Obama Administration.[164] China has committed itself to very precise measures to improve IP protection and enforcement to the benefit of US pharmaceutical and tech companies that are active in China, whereas the USA mostly only "affirms that existing US measures afford treatment equivalent to that provided for" in the agreement.[165]

6. Art. 31bis TRIPS and the Marrakesh VIP Treaty

In my view, only two twenty-first century IP treaties truly live up to the narrative of cooperation for the global public good, namely Art. 31bis TRIPS, which entered into

[158] *Supra* C III 2,4.

[159] See, e.g. Abbot, Cottier and Gurry (n 126) 36–59; Josef Drexl, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer 2014); Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press 2016) ch 5; Dreyfuss and Frankel (n 143) 566–85.

[160] Clemens Keim, TRIPS-plus Patentschutzklauseln in bilateralen Freihandelsabkommen der EU (Wolters Kluwer 2017) 101–2.

[161] <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 11 September 2020.

[162] Kumar (n 6) 241–2.

[163] But see Kumar (n 6) 244.

[164] Thomas J Schoenbaum, "The Art of the Deal and North American Free Trade: Advantage for the United States?" (2020) 14 *Ohio St Bus LJ* 100, 123–24; see Agreement between the United States of America, the United Mexican States, and Canada (13 December 2019) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 11 September 2020.

[165] Cf Ch 1 US–China Economic & Trade Agreement.

force in 2017,[166] and the 2013 Marrakesh VIP Treaty.[167] Neither of these multilateral agreements establishes private exclusive rights, but they do facilitate access to and use of knowledge primarily for humanitarian and social developmental reasons.

Moreover, the beneficiaries of the access rules are located partially if not exclusively *outside* of the territories in which the patents or copyrights concerned are in force. The only formal amendment of WTO law provides the legal basis for WTO Members to grant special compulsory licenses exclusively for the production and *export* of affordable generic medicines to other members that cannot domestically produce the needed medicines in sufficient quantities for their patients.[168] Similarly, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled permits the *exchange* of these works across borders by organizations that serve those beneficiaries.[169] Thus, and in contrast to the rest of the international IP acquis, these agreements specifically tackle and partially overcome the territorial fragmentation of IP markets, to the benefit of foreign IP users. It must be noted, however, that Art. 31bis TRIPS and the Marrakesh VIP Treaty address very specific access problems of marginal economic significance. They do not disturb the functioning of the global IP money-making machine.

D. CONCLUSION

I. *A Dialectic Virtuous Circle*

This article has demonstrated the complex and indeed dialectic relationship between economic nationalism and globalism in the area of IP. On the one hand, outward-looking policy perspectives have largely taken precedence over inbound IP nationalism. Even self-contained measures like Arts. 8 and 15 of the EU DSMD are embedded in and reflect upon the deep levels of global economic integration. Moreover, today's international IP acquis establishes an effectively global and substantively comprehensive level playing field for IP producers and users alike. The leeway for inbound IP nationalist catch-up policies, whether in the form of no or weak IP or as discrimination against foreigners, has shrunk considerably – and in certain core areas of patent, copyright, and trademark law has shrunk to effectively being nothing at all. In those regards, IP nationalism has clearly lost ground.

On the other hand, the overview of past and present IP policies confirms that economic nationalist motives were, and remain, the main driver of international IP policy and law.[170] This is also true as regards the international IP treaty acquis. This

[166] <https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm> accessed 11 September 2020.
[167] <https://www.wipo.int/treaties/en/ip/marrakesh/> accessed 11 September 2020.
[168] <https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm> accessed 11 September 2020.
[169] Arts. 5, 9 Marrakesh VIP Treaty.
[170] Levi-Faur (n 1) 370 ("versions of nationalism have always been part of human history; this is so obvious that it seems unnecessary to supply examples").

poster-child of universal cooperation is indeed merely a side effect of outbound IP nationalist policies of powerful net IP exporters. These players adopt unilateral, bilateral, plurilateral, and multilateral measures as functional equivalents to pursue one and the same immediate goal, namely, to support domestic industries in an interconnected world market.

At this point, a dialectic virtuous circle emerges. The more that private parties depend upon foreign sales, the more they lobby their home governments for IP protection abroad. The deeper global economic integration, the greater the demand for global IP. Global economic integration thus turns selfish or nationalist short-term aims and benefits into drivers of an ever more comprehensive body of international IP law. This is the realist answer to the question of why IPRs and IP laws have continuously grown in number and expanded in scope, territorial reach, and duration – while at the same time having been contested far more than other branches of property law.[171]

II. *The Economic Nationalist DNA of IP*

The resilience and dynamic of this virtuous circle vest in two universally accepted basic legal structures of IP. First, IPRs are private rights.[172] They are granted to private parties who acquire and enforce them at their will.[173] While it is true that these property rights have to serve the public good,[174] their immediate benefit is private. Accordingly, the political economy of IP differs greatly from branches of international law and policy that directly aim at global public goods, such as biological diversity. Whereas the latter require a global perspective of all stakeholders involved and equally global solutions, international IP protection is demanded by individual private parties who have strong vested interests. If governments respond to their demands, they can easily present themselves as putting local industries first and thus boost their domestic legitimacy.[175]

Secondly, the private IP privilege is "territorial in nature."[176] The principle of territoriality has been accepted by all states ever since the early call by France for

[171] Conceptual aspects of this puzzle are addressed in Alexander Peukert, "Fictitious Commodities: A Theory of Intellectual Property Inspired by Karl Polanyi's 'Great Transformation'" (2019) 29 *Fordham Intell Prop Media & Ent LJ* 1151–1200.

[172] Preamble, TRIPS.

[173] Christoph Menke, Kritik der Rechte (Suhrkamp Verlag 2015).

[174] Arts. 7, 8 TRIPS.

[175] See, for example, Braderman (n 13) 148 ("What we can do in the international copyright field, as in most other areas of foreign affairs, is dependent on our domestic base. Therefore, I wish to make clear that as a matter of fundamental policy, I believe in a strong and effective copyright law."); generally Crane (n 1) 59 with further references.

[176] Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers [2004] 2 SCR 427, para 2; case C–192/04 Lagardère v SPRE [2005] ECR I–7199, para 46; Voda v Cordis [2007] 476 F3d 887, 902 (Fed Cir).

universal cross-border protection was defeated by the pragmatic demands of greater national control during the negotiations of the Paris and Berne Conventions in the 1880s.[177] Global trade and communication are still not governed by one world IPR but by a mosaic of more than 190 national IP territories or jurisdictions.[178] In other words, fragmentation and particularism are the only truly universal aspects of IP. It is the nation state that ultimately guarantees IP protection. And those states that call for increasing levels of IP protection do so in the vested private interest of their local IP constituency.

The ensuing system could be considered universal only if it provided for a full harmonization or even unification of all existing national IP laws, which would logically rule out any IP nationalism. Such a level of integration has, however, not been achieved within the European Union, and it remains utopian on a global level.[179] Even if a global IP code were adopted,[180] it would not be normatively neutral, and jurisdictions on a lower regulatory level might, in addition, still pursue self-serving aims by turning their attention to non-IP mechanisms – such as prizes, grants, tax credits, or in-house government research – to foster local innovation.[181] In other words, the end of history and politics has not yet arrived.[182] And it requires strong visionary skills to imagine its realization.[183]

[177] Graeme B Dinwoodie, "The Architecture of the International Intellectual Property System" (2002) 77 *Chi-Kent L Rev* 993, 995–96; Graeme B Dinwoodie and Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press 2012) 23.

[178] Alexander Peukert, "Territoriality and Extraterritoriality in Intellectual Property Law" in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Brill 2012) 189–228. On the link between territoriality and economic nationalism see also Chantal Thomas, "Trade and Development in an Era of Multipolarity and Reterritorialization" (2019) 44 *Yale Journal of International Law Online* 77; Generally Cottier (n 4) 217. It also merits noting that Friedrich List, one of the masterminds of economic nationalism, had a generally positive view of patents as a tool to foster innovation and economic progress; see List (n 6) 246.

[179] David (n 32) 57 (proposals for an international regime of IP "not practical"); Maskus, International Agreements (n 68) 21 ("the international system remains controversial and subject to further revisions").

[180] Cf Robert M Sherwood, "Why a Uniform Intellectual Property System Makes Sense or the World" in National Research Council (ed), *Global Dimensions of Intellectual Property Rights in Science and Technology* (National Academy Press 1993) 68 et seq. with Claudio R Frischtak, "Harmonization Versus Differentiation in Intellectual Property Right Regimes" in ibid 89 et seq.

[181] Daniel J Hemel and Lisa Larrimore Ouellette, "Knowledge Goods and Nation-States" (2016) 101 *Minn L Rev* 167, 171–72; Daniel J Hemel and Lisa Larrimore Ouellette, "Innovation Policy Pluralism" (2019) 128 *Yale LJ* 544, 549, 588–9.

[182] Dutfield/Suthersanen (n 2) 2; Lee (n 72) 186.

[183] Billion or trillion-dollar multinational companies might strive to detach from any nation state. However, as long as international treaty-making power vests exclusively with states, even the most powerful company requires a good relationship with a government (or more than one) that is willing to act as a proxy for "its" company.

In conclusion, I want to stress the descriptive character of this analysis. It demonstrates how, in which forms, and why economic nationalism manifests itself so strongly in IP. The more important IP becomes, the more likely it is that its nationalist DNA will impact other policy areas. Such tendencies can only be successfully counteracted if "scholars . . . speak the same nationalistic language that the government understands."[184]

[184] Kumar (n 6) 246.

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