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**Non-Discrimination Principle in Trade-Related Aspects of
Intellectual Property Rights - Its Function, Scope and Effects on
Negotiating Preferential Trade Agreements**

(disertační práce / dissertation thesis)

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“[T]he significance of the national treatment obligation can hardly be overstated.”
(WT/DS176/AB/R, para. 241)

„It [the most-favoured-nation principle] is, in a word, fundamental.”
(WT/DS176/AB/R, para. 297)

“Trade liberalisation is not an end in itself, it is a means.” (Cottier and Schneller in
Kamperman Sanders 2014, p. 4)

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během celého studia.

Práci věnuji svému tatínkovi.

Prohlášení

Prohlašuji, že jsem práci vypracovala samostatně a že jsem vyznačila všechny citace z pramenů.

Declaration

I hereby declare that I have written the thesis on my own and that I have noted all citations and its sources.

V Praze dne 14.dubna 2018/ Prague, 14. April 2018

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List of abbreviations

AANZFTA	ASEAN Australia New Zealand Free Trade Agreement
ACP	Africa, the Caribbean and the Pacific
ACTA	Anti-Counterfeiting Trade Agreement
ARIPO	Agreement on the creation of an industrial property organisation for English-Speaking Africa
ASEAN	Association of South East Asian Nations
AUSFTA	Australia – United States Free Trade Agreement
BIT	Bilateral Investment Treaty
CARICOM	Common Market of the Caribbean
CARIFORUM	Caribbean Forum
CETA	Comprehensive Economic and Trade Agreement
COMESA	Common Market of the Caribbean
DCFTA	Deep and Comprehensive Free Trade Area
DG	Directorate General
DS	Dispute settlement
DSU	Dispute Settlement Understanding
EC	European Commission
EFTA	European Free Trade Agreement
EIA	Economic Integration Agreement
EPA	Economic Partnership Agreement
EPO	European Patent Office
ETMs	Effective Technological Measures
EU	European Union
FDA	US Food and Drug Administration
FPA	Framework Partnership Agreement
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade

GI	Geographical Indication
HIV/AIDS	Human immunodeficiency virus infection and acquired immune deficiency syndrome
IIA	International Investment Agreement
ILO	International Labour Organization
IP	Intellectual Property
IPRs	Intellectual Property Rights
ISPs	Internet/Intermediary Service Providers
JAEPa	Japan-Australia Economic Partnership Agreement
KAFTA	Korea-Australia Free Trade Agreement
KFDA	Korea Food and Drug Administration
MAFTA	Malaysia-Australia Free Trade Agreement
MERCOSUR	Common Market of the South
MFN	Most-Favoured Nation Treatment
NAFTA	North-American Free Trade Agreement
NT	National Treatment
PTA	Preferential Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SAFTA	Singapore-Australia Free Trade Agreement
SCM	Agreement on Subsidies and Countervailing Measures
SPC	Supplementary Protection Certificate
TAFTA	Thailand-Australia Free Trade Agreement
TPP	Trans-Pacific Partnership Agreement
TRIMs	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership

UNCTAD	United Nations Conference on Trade and Development
UNCTAD-ICTSD	United Nations Conference on Trade and Development - International Centre for Trade and Sustainable Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV Convention	International Convention for the Protection of New Varieties of Plants
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

Introduction

The innovative and creative potential of an entrepreneur constitutes a strategic asset in international business. Consequently, promoting innovation and creativity is reflected in governments' trade policies. The Intellectual Property Rights (IPRs; alternatively "IP" for intellectual property) represent legally awarded time-restricted monopolies, which are, generally speaking, meant to serve as a tool to reward and further encourage innovation and creativity. The intellectual property rights, granted by governments under the public law, aim to provide sufficient incentives for private sector actors to invest in generating new knowledge and products as well as to ensure that there is sufficient spill over of knowledge so that it, in exchange contributes to generating public goods (Maskus and Reichman 2005).

Despite these general conclusions on the role of the IPRs as an innovation incentive, there have been on-going debates on the precise economic relations and implications between the IPRs on one side, and technological advancement and economic development on the other side. The development of the legal regulation of IPRs is, as described by A. A. Yusuf (*in* Correa & Yusuf 2008) „periodically shaped by the tensions arising from the need, on the one hand, of those responsible for new industrial and technological breakthroughs to capitalise on their value, and, on the other hand, of second comers or consumers to gain access to them at little or no cost. “

The business potential of the IPRs in the international context has been, since their inception, restricted by their inherent territorial nature. As legal rights, IPRs have been granted and guaranteed by governments and as such restricted by the scope of the power of a government within its borders. However, the business potential of innovative and creative ideas is not limited to national borders. Consequently, the territorial restrictions have become a burden to the development of international trade. Therefore, discussions on international cooperation leading to an alignment of the IPRs protection and enforcement across borders arose as soon as in the 19th century. Initial bilateral negotiations in the frame of trade and strategic governmental talks were later succeeded by multilateral technical negotiations focusing solely on intellectual property rights, leading to the conclusion of the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886). Later, further amended and with expanded memberships, these conventions, followed by other multilateral conventions focusing mainly on specific IPRs categories, have become administered by the *World Intellectual Property Organisation* (WIPO)

established in 1967 by the WIPO Convention, a self-funding agency of the United Nations, which currently joins 191 member states.

The Uruguay Round of multilateral trade negotiations in 1986 to 1994 was the first time when international regulation of intellectual property rights (IPRs) was addressed in connection with the negotiations on the international trade liberalisation. As a result, the negotiators concluded the *Marrakesh Treaty* establishing the World Trade Organisation (WTO), with three agreements representing the pillars of the international trade liberalisation annexed thereto: the *General Agreement on Tariffs and Trade* (GATT), the *General Agreement on Trade in Services* (GATS) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement* (TRIPS). Importantly, the TRIPS Agreement stipulated the minimum standard of both protection and enforcement of IPRs binding upon all WTO members (Štěřbová *in* Štěřbová et al 2013).

Even though the connection between the international regulation of IPRs and the multilateral liberalisation of international trade has been often challenged, implying practical rather than theoretical reasons for including IPRs in the Uruguay negotiation mandate and thus promoting interests of specific industries, namely pharmaceutical, chemical or broadcasting industry, the TRIPS Agreement had a significant impact on the subsequent understanding of the IPRs. As described thoroughly in this thesis, the IPRs have since then become connected with trade liberalisation to the extent that their regulation has become extensively included not only in multilateral but also in bilateral and regional negotiations on the liberalisation of international trade.

After the foundation of the WTO, the number of trade agreements covering IP provisions accelerated. Currently, a significant proportion of newly concluded preferential trade agreements (PTAs) contain some type of IP provisions (174 out of 245 regional trade agreements analysed *in* Valdés and McCann 2014). Nevertheless, as obvious from the analysis of the provisions in Part II, the number and depth of specific IP provisions concluded as a result of trade negotiations vary significantly.

In the international trade liberalisation negotiations, it is believed that protectionism as well as discrimination against other partners is contrary to the utmost goal of liberalism and undermines the advantages gained from the international cooperation (Bastiat 1845). Reflecting these principles, governments have included in their agreements provisions stipulating the national treatment and most-favoured nation treatment (MFN) principles governing trade in

goods and subsequently services.¹ These two principles stem together out of the non-discrimination principle, and reflect the goal of equal conditions of competition and of opportunity (Cottier and Schneller 2014). Similarly, starting with the initial international conventions concluded in the 19th century, the international regulation of IPRs has been governed by the national treatment (NT) principle.

As analysed below in more detail, based on the national treatment principle, governments shall provide foreigners with the same or at least the same treatment they provide to their nationals. According to the MFN principle, should a government provide for a preferential treatment of nationals of another country, it is obliged to provide the same level of treatment to other trading partners, with whom they agreed the MFN principle. As highlighted later in the analysis, whereas the NT principle has been included in the wordings of all WIPO-administered treaties, the MFN principle stems from trade negotiations and has been for the first time introduced into the international IPRs negotiations only in the TRIPS Agreement.

“In order to pursue liberalization, countries act simultaneously at three levels: bilateral, regional and multilateral, producing a special synergy among the different processes.” (M. M. Aleman, 2014). Generally speaking, governments are encouraged to seek further liberalisation of trade and are therefore allowed to conclude bilateral or plurilateral agreements (in general referred to as *economic integration agreements* – EIAs in line with the WTO law, or *preferential trade agreements* – PTAs – in order to stress the bilateral or plurilateral nature as oppose to the binding multilateral minimum; *the terminology followed in the present research is explained in detail below*), going beyond their obligations agreed on the multilateral level. From the perspective of economists, authors refer to the theory of the prisoner's dilemma (E.W. Bond 2005).

In order to further encourage bilateral and regional negotiations on the liberalisation of international trade, governments agreed to allow for an exemption from the national treatment and the most-favoured nation principles. Subject to the fulfilment of given conditions, the principles do not apply to these agreements. As a result, signatories are not obliged to provide the same treatment to all other WTO members. Such a departure from the non-discrimination principle is allowed in the WTO law system in the GATT and GATS Agreements (Art. XXIV GATT and Art. V GATS). In addition to Art. XXIV GATT and Art. V GATS, there are further exemptions from the non-discrimination principle in the form of the *Decision on Differential*

¹ Cotier and Schneller (2014) further state that ‘[o]n the basis of reciprocal advantages, governments agreed to contractually limit their sovereign rights to discriminate and to engage in obligations of equal treatment, thus implementing principles of substantive equality in international relations.’ However, the author does not agree with the premise that, at any stage of political and historical development, *rights to discriminate* were vested in governments.

and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the so-called *Enabling Clause*). The Enabling Clause, adopted on 28th November 1979 during the Tokyo round of negotiations (1973-1979), allows for differential and more favourable treatment for developing countries. At this moment, it shall be stressed that the purpose of the exemptions is to facilitate trade and not to raise barriers to the trade of other Members (e.g. in M. M. Aleman 2014).

Importantly, as oppose to trade in goods (Art. XXIV GATT) and trade in services (Art. V GATS), the TRIPS Agreement does not cover an express provision for the exemptions from the non-discrimination principle. In reflection of the above explained circumstances, the main research objective of the present thesis is to analyse the principle of non-discrimination in trade-related aspects of intellectual property rights in the multilateral trading system.

Should a government conclude a bilateral or plurilateral agreement covering obligations going beyond the minimum standard of the TRIPS Agreement, it shall, pursuant to the most-favoured nation principle, provide the nationals from other members of the WTO with the same level of treatment. The obligations going beyond the wording of the TRIPS Agreement are commonly referred to as the TRIPS-plus provisions.

It shall be highlighted that, as described in more detail in the Methodology, all legally binding inter-governmental arrangements shall be considered as a possible source of provisions going beyond the TRIPS Agreement. In other words, the formal tool and the title of a given treaty or mutual, legally binding understanding between governments is not decisive. Even though the TRIPS-plus provisions are most often discussed in connection with trade agreements, other international treaties might also serve as a legal source of rights and obligations in the field of international IPRs. Therefore, there have been specific chapters included in the thesis analysing possible TRIPS-plus provisions in international investment agreements (IIAs) as well as other international law instruments.

In order to establish the scope of the principle of non-discrimination in the TRIPS Agreement, what constitute the TRIPS-plus provisions, it is crucial to determine, in line with the main research objective no. 2, the scope of the principle of non-discrimination in the TRIPS Agreement.

In order to answer the main research objectives, there have been additional research objectives defined, based on which this thesis aims to analyse selected preferential trade agreements. This analysis shall serve as a basis for defining a typology of provisions going beyond the TRIPS Agreement that are most often included in PTAs. Consequently, in its second half, this thesis focuses on the specific provisions which often occur in PTAs.

R. Valdés and M. McCann (2014, p. 1) conclude that the PTAs are characterized by a hub-and-spoke architecture, meaning that “*the wording and structure of IP provisions converged around the RTAs of specific countries or blocs*”. These blocks are formed predominantly by the USA, the EU and the EFTA. Therefore, also in this work, the prevailing attention is devoted to treaties concluded by the EU and the USA (see the additional research objective No. 2). The present research analyses all preferential trade agreements concluded and/or negotiated by the EU and the USA. The detailed analysis of the provisions of these agreements is in detail described in the Tables which constitute the Annexes to this thesis.

Apart from the EU and the USA, as highlighted later in the text, other countries, such as China, Australia or Japan, have been also extensively incorporating IPR-related chapters in their trade negotiations. Gradually, the IPRs also often explicitly occur in PTAs negotiated by developing countries, including treaties concluded between two developing countries. However, in the latter case, specific provisions differ significantly, stressing rather the relation between the intellectual property rights and other aspects of governance, such as public health or technology transfer. The selected issues and special interests systematically incorporated in treaties concluded by countries other than the USA and the EU might prove to be crucial in setting the future direction and pace of the international IPRs negotiations. Therefore, special attention is also devoted to the role of IPRs in trade policies and subsequent specific provisions of PTAs concluded by developing countries, illustrating the often discussed divergence, referred to as the North – South perspectives on IPRs (*see below*).

Last but not least, IPRs are also covered in negotiation packages of plurilateral negotiations of so called mega-deals including the Trans-Pacific Partnership (TPP)², the Transatlantic Trade and Investment Partnership (TTIP)³ or the Regional Comprehensive Economic Partnership (RCEP)⁴. The outcomes of these regional negotiations among diverse negotiating partners might reveal the willingness or the lack of willingness of the governments with regard to possible further developments in the specific matters concerning the regulation of IPRs.

² The TPP was a trade agreement negotiated between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and United States signed on 4 February 2016, which was not ratified as required and therefore did not become effective. Following the withdrawal of the USA, its provisions were later incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, also known as TPP11, concluded between the remaining parties. (Australian Government: TPP-11; 2018)

³ The TTIP is a trade agreement under negotiations between the European Union and the USA (EC: TTIP; 2018).

⁴ The RCEP is a negotiated free trade agreement (FTA) between ten member states of the Association of Southeast Asian Nations (ASEAN, which comprises of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and the six states with which ASEAN has previously concluded individual free trade agreements (individually referred to as ASEAN+1: Australia, China, India, Japan, South Korea and New Zealand). (ASEAN: RCEP; 2018).

The present research aims to establish the scope of the non-discrimination principle in trade-related aspects of intellectual property rights. The conclusions should serve as a basis for examining whether the inclusion of the exemption from the non-discrimination principle in the TRIPS Agreement would facilitate trade negotiations on preferential trade agreements and streamline trade relations on the bilateral, regional and multilateral level (additional research objective 3).

The research builds upon the analysis of the IP provisions in all agreements negotiated by the European Union and all agreements negotiated by the United States of America as well as selected agreements of important players in international trade: China, Australia, South Korea and selected agreements from countries in South America and Africa. Based on this first-stage analysis, the research shall establish a typology of all so called TRIP-plus provisions. Once the typology is defined, each agreement shall be subject to the second-stage analysis which should screen the given agreement based on the defined typology in order to establish whether the given provision has or has not been covered under the given agreement.

Consequently, the main research objectives of this thesis have been set as follows:

Main research objectives:

1. To analyze the principle of non-discrimination in trade-related aspects of intellectual property rights in the multilateral trading system.
2. To determine the scope of the principle of non-discrimination in the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS).

In order to answer to the main research objectives, the following additional objectives were set:

Additional research objectives:

1. To analyse selected preferential trade agreements and based on the analysis to create a typology of the provisions going beyond the TRIPS Agreement that are most often included in PTAs.
2. To analyse the context of the non-existence of the exemption from the non-discrimination principle in terms of the regulation of the trade-related aspects of intellectual property rights with the specific provisions of the preferential trade

agreements concluded by the EU and the USA and their impact on the trade policy of the EU and the USA.

3. To examine whether the inclusion of the exemption from the non-discrimination in the TRIPS Agreement would facilitate trade negotiations on preferential trade agreements and streamline trade relations on the bilateral, regional and multilateral level.

1 Methodology and state of the art

This thesis is divided into five chapters. The first chapter presents the methodology, the state of the art and explains the terminology applied in the present thesis. The second chapter focuses on the non-discrimination principle in international IPR treaties, explaining the background in terms of historical developments prior to the TRIPS Agreement, the negotiations of the TRIPS Agreement as well as the theory of the non-discrimination principle, covering both national treatment and the most-favoured nation principle. Lastly, the second chapter analyses also the non-discrimination principle in other important international treaties: the Paris Convention, the Berne Convention and the Rome Convention. The third chapter is devoted to the sources of the TRIPS-plus provisions. A special attention is paid to the intellectual property in international investment agreements. In line with the research objectives outlined above, the fourth chapter presents the regulation of the intellectual property from the perspective of the EU as well as in the US trade policy. The fifth chapter builds upon the analyses of the IP provisions of the EU, US and selected other trade agreements. Thereupon, it presents a comprehensive typology of IP provisions in preferential trade agreements. Each type of the provisions is explained in detail, together with its possible impact on doing business in international trade, and is illustrated by the exact wording of selected preferential trade agreements. Examples of specific wordings are chosen based on their relevance; in light of the research objectives explained above, preference is given to agreements negotiated by the EU and the USA based on the comprehensive analysis available in the Annexes hereto, agreements of other countries are also quoted, if relevant with regard to its role in international trade or often referred to in the literature.

In a summary, whereas the first part of the thesis focuses on the analysis of the principle of non-discrimination from the theoretical perspective, the second part analyses specific IPRs provisions in existing trade agreements with the aim of identifying the scope of the non-discrimination principle on a case by case basis based on the typology of the most often included IPRs provisions. With regard to its sources, the thesis builds upon the analysis and interpretation of the primary sources – relevant provisions of the international agreements, i.e. the TRIPS Agreement, relevant WIPO-administered treaties and preferential trade agreements.

The main research methods applied through the present research cover legal interpretation, analysis, selection and comparison, followed by synthesis and generalisation, leading to the establishment of a general classification system of the IP provisions.

The non-discrimination principle, including both the national treatment and the most-favoured nation principle, is the fundamental stumbling block of the multilateral trading system. Therefore, the non-discrimination principle is of course not restricted to the IPRs regulation. Both the NT and the MFN principles represent the fundamental rules governing trade in goods (Article 1 of GATT) and trade in services (Article 2 of GATS). There has been a significant volume of research as well as numerous WTO disputes devoted to the interpretation of the MFN and NT principles under the WTO law. Due to its focus on the non-discrimination principle in trade-related aspects of IPRs, this thesis does not attempt to provide an extensive analysis of the MFN and NT principles in international trade. Nevertheless, as argued in more detail below in the analysis of the WTO cases, *the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement*” (in WT/DS176/AB/R, para. 242). Therefore, the existing research focusing on the non-discrimination principle in general will be also considered, where relevant.

In order to complete the analysis of the relevant sources of the TRIPS-plus provisions, this thesis considers all legally binding inter-governmental international arrangements as a possible source of provisions going beyond the TRIPS Agreement. Even though the TRIPS-plus provisions are most often discussed in connection with trade agreements, other international treaties might also serve as a legal source of rights and obligations in the field of international IPRs. Firstly, there have been numerous international agreements devoted exclusively to the regulation of IPRs, such as treaties establishing mutual cooperation in the protection and enforcement or treaties focusing on an individual category of IPRs, that being most often bilateral arrangements governing protection of geographical indications (GIs).⁵ Secondly, the international regulation of IPRs is closely connected with the international investment policy, since IPRs might be under certain circumstances considered to constitute a covered investment under the international investment agreements (IIA or IIAs).

In the fifth chapter, the thesis presents a comprehensive typology of IPRs provisions concluded in the PTAs. While the majority of all research devoted to the TRIPS-plus provisions limit themselves to a statement that there have been provisions going beyond the TRIPS Agreement concluded in the preferential trade agreements, the author builds upon a complex analysis of the provisions actually incorporated in the preferential trade agreements. Similarly, for example T. Allee and M. Elsig (2015), who compiled data concerning 30 variables related

⁵ For example the international agreements on the mutual protection of GIs between the EU and China (see below).

to the dispute settlement, they consider their work as a “*part of a more general move to identify differences among seemingly similar treaties such as PTAs*”.

In order to establish the typology, the author builds upon the methodology introduced by Valdes and Runyowa (2012), as further revised and updated by Valdes and McCann (2014 and 2016). These working papers elaborated within the *Economic Research and Statistics Division* of the WTO, focus on IPRs in regional trade agreements. Valdes and McCann (2014) assess the strength of the IPRs regulation in each of 245 analysed RTAs notified to the WTO. The RTAs analysed in their research were identified based on the WTO’s database system. The research undertaken by Valdes and McCann (2014 and 2016) represents a significant contribution to the existing state of the art by presenting a complex analysis of the specific provisions of all regional trade agreements notified to the WTO.

By contrast to the research undertaken by Valdes and McCann (2014), the analysis of international agreements presented in this thesis is, in line with the broad understanding of the sources of the TRIPS-plus provisions described above, not restricted to regional trade agreements notified to the WTO under Art. XXIV GATT and Article V GATS and the Enabling clause. As explained above, other legal sources are also analysed. In addition, where relevant, the provisions incorporated into PTAs are compared with negotiating demands which remained unmet in the conclusion of the TRIPS Agreement (*as in detail in Watal 2014*).

In line with the research objectives identified above, it is not among the objectives of this thesis to assess the strength of the IPRs regulation in each of the selected PTAs separately, as it was performed by Valdes and McCann (2014). The analysis, interpretation and comparison of the IPRs provisions incorporated in PTAs shall serve as a basis for a subsequent synthesis and generalisation leading to a classification of the provisions into a comprehensive typology of the IPRs provisions in PTAs, while the previous research limit itself to the “*yes/no*” analysis of the existence or non-existence of the provisions, the present thesis aims at providing an in-depth analysis of the provisions, including an explanation and their context in the international trade.

1.1 State of the art

The present research builds upon the existing scientific research which might be divided into three general groups. The first group focuses on the TRIPS Agreement as such and its role in the international regulation of intellectual property on one hand and international trade regulation on the other. The second group of research builds upon the first and focuses on the so called TRIPS-plus provisions going beyond the TRIPS Agreement in bilateral or plurilateral

agreements. Lastly, the scientific research also scrutinizes the non-discrimination principle in the international trade law. This thesis aims at combining the described three branches.

As described in detail below, the inclusion of the intellectual property agenda into the WTO negotiations was a significant milestone which was reflected in a corresponding manner in the scientific research. The leading research includes the works of C. Correa, J. Drexler, B. Mercurio, K.E. Maskus or Ch. Arup; within the Czech academia, the topic was extensively researched by L. Štěrbová or T. Dobřichovský.

The major comprehensive contribution to the second group of research represents a research compilation prepared by Josef Drexler, Henning Grosse Ruse-Khan, Souheir Nadde-Phlix: *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?*. Apart from their overarching attitude, there are numerous subgroups related to this topic, divided mostly based on geography or industry or by a given specific IP right. In the first subgroup, authors focus on free trade agreements concluded by a given country, in a given region or between major trading partners. Consequently, the significant part of the research focuses on the agreements concluded by the European Union, then by the USA. A significant portion also scrutinizes the TRIPS-plus provisions from the perspective of developing countries. Additionally, the research focuses on a specific country and its position towards the TRIPS-plus provisions due to its ground-breaking role with regard to a specific aspect, such as due to the case law developed in the country or their adopted public policy. In this respect, a significant proportion of research is devoted to India and its position towards the TRIPS-plus provisions (relevant research summarized in Štěrbová, Trojanová 2014). Recently, the research has also focused on China, highlighting that the role of China has shifted lately from the pure recipient of the international regulation to a more active role shaping the development on the international scene, including through its international agreements (relevant research summarized in Trojanová 2015). With regard to the specific industries, a significant volume of research has been devoted to the perspectives of the pharmaceutical industry on one side and the issue of the access to medicines on the other (see in Štěrbová, Trojanová 2014). Given the broad understanding of the preferential trade agreements applied in this research, the second group covers also research focusing on other international legal arrangements which serve as a source of the so called TRIPS-plus provisions. In this regard, the relation between the IPRs and international investment agreements has been researched by L. Liberti (2010).

The third group of relevant research is devoted to the general principle of non-discrimination in the international trade context. This subgroup has not been addressed by the

present research in its entirety, but only where it is relevant to the IP context. This aspect is most closely elaborated in the section devoted to the relevant WTO disputes.

In all the existing research, the authors highlight the game-changing nature of the TRIPS Agreement which has brought the topic of IP into the core of the international trade negotiations under the auspices of the WTO. While the existence of the TRIPS-plus provisions have attracted a significant volume of research, the existing state of the art departs from stating that the TRIPS Agreement, as oppose to the GATT and GATS Agreements does not cover an explicit exception from the non-discrimination principle, but does not devote further attention to the scope of the non-discrimination principle itself. Consequently, this research aims to complement and, potentially, also challenge the existing state of the art by connecting the analysis of the specific provisions of a significant volume of PTAs with the analysis of the wording of the TRIPS Agreement and the scope of the non-discrimination principle.

The author believes that in case the scope of the non-discrimination principle applicable to the trade-related intellectual property rights was clearly defined, future trade negotiations on bilateral, regional and multilateral level might build upon the already concluded trade agreements. Clearly and specifically defined starting blocks might improve the efficiency and clarity of the negotiations as well as the resulting concluded obligations. The clarity on the understanding of the content and context of negotiated provisions and their interlinkages with the existing multilateral as well as bilateral and regional framework should contribute to forming informed and purposeful decisions as well as increase the understanding at the side of the recipients and future beneficiaries of the negotiated provisions, be it entrepreneurs or citizens. Ultimately, the understanding of the meaning and the context of the negotiated provisions may contribute to the recipients' ability to make informed decisions about the possible advantages and disadvantages of the negotiated treaties as well as their more pro-active attitude in the subsequent implementation.

1.2 Terminology

The thesis refers to all analysed bilateral and plurilateral agreements as *preferential trade agreements* (PTAs). In the existing literature, the international agreements focusing on liberalising international trade are referred to as regional trade agreements (RTA or RTAs in plural), preferential trade agreements (PTA or PTAs in plural) or economic integration agreements (EIA or EIAs). Often, the fundamental and basic form of trade liberalisation – a free trade agreement (FTA or FTAs) is used as a general reference to all stages of trade liberalisation. These terms are, as observed also by Valdes and McCann (2014) used

interchangeably, even though the terms PTAs and FTAs have in the context of the WTO law a narrower meaning. On the other hand, if the term RTAs is used, the term “regional” is not meant to refer only to agreements concluded within a geographical region as such, but also to cover all agreement including treaties concluded between geographically distant countries (Valdes, McCann 2014, note 2). Therefore, the term preferential trade agreements was chosen in order to highlight the character of the treaties going beyond the minimum standard agreed at the multilateral level and is to be read in its broadest sense, beyond the scope of this term within the World Trade Organisation. For example, M. M. Aleman (2014) uses the term preferential trade agreements in a same overarching meaning as the author: “[t]o avoid confusion, the expression preferential trade agreements will be used (...) in relation to European Union economic partnership agreements (EPAs)/FTAs and Interim Agreements, because it is most descriptive of the integration systems that are currently in place.” Similarly, the terminology of preferential trade agreements and the abbreviation PTA is also applied by A. Dür and M. Elsig (eds.) (2015) and J. Flett (2015).

2 The Non-Discrimination Principle in International IPR Treaties

2.1 *Historical development prior to the TRIPS Agreement*

The history of international regulation of IPRs dates back to the 19th century and was spurred by the ongoing industrial revolution and growing international exchange of goods. The objective of all international arrangements was to overcome the territoriality principle and the consequent geographical limitation of the protection granted by the intellectual property rights. The agreements have been often subject-related and focused on separate types of intellectual property rights. Gradually, the membership of the treaties expanded and the international IPRs treaties were later convened under the umbrella of an international organisation – the World Intellectual Property Organisation (WIPO). The WIPO was established in 1967 by the *WIPO Convention*. It is an agency of the United Nations which, with the mission to „lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all” (WIPO 2017 – Inside WIPO), administers the international IPR agreements, referred to as the WIPO-administered treaties. Currently, there are 26 WIPO-administered treaties, including the WIPO Agreement.

The *Paris Convention for the Protection of Industrial Property* was adopted in 1883 and applies to industrial property, which covers patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. As analysed later in detail, the Paris Convention incorporated the national treatment principle, stating that each Contracting State must grant the same protection to nationals of other Contracting States that it grants to its own nationals. Currently, the treaty has 221 contracting parties and the contractual process is still on-going.⁶ The Paris Convention is important also because the later agreements refer to the treaty or to selected articles and incorporate them into their wordings. The treaty therefore still governs crucial aspects of the international protection of the IPRs.

The subsequent convention, the *Berne Convention for the Protection of Literary and Artistic Works*, was adopted in 1886 and focuses on the protection of the works and rights of their authors – on the copyright law. The Berne Convention offers creators such as authors, musicians, poets, painters etc. the means to control how their works are used, by whom, and on

⁶ Afghanistan acceded to the Paris Convention on 14 February 2017 and Kuwait on 2 September 2014.

what terms (WIPO: Berne Convention, 2017). The Berne Convention also includes the national treatment principle (Art. 5).⁷

The Rome Convention (1961) secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organizations. The Rome Convention is administered jointly by the *International Labour Organization* (ILO) and the *United Nations Educational, Scientific and Cultural Organization* (UNESCO).

As analysed in detail below, the TRIPS Agreement refers expressly to the three international conventions above – the Paris Convention, the Berne Convention and the Rome Convention – and incorporates selected articles of these treaties. In addition, the TRIPS Agreement refers to the fourth treaty – *Treaty on Intellectual Property in Respect of Integrated Circuits*. However, this treaty has not yet entered into force, since it has been ratified or acceded to only by three states: Bosnia and Herzegovina, Egypt and Saint Lucia. (WIPO: Washington Treaty, 2017).

The latest agreements concluded in the WIPO include for example the *Beijing Treaty on Audiovisual Performances*, adopted on June 24, 2012, which governs the IPRs of the performers in audio-visual performances.

2.2 The TRIPS Agreement

The *Trade-Related Aspects of Intellectual Property Rights Agreement* (TRIPS Agreement) constitutes the Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (WTO). The Marrakesh Agreement, signed on 15th April 1994 in Marrakesh, Morocco, was the result of the Uruguay round of the negotiations on trade liberalisation and represents the founding document of the WTO. In its Annexes, the Marrakesh Agreement included three fundamental documents of the liberalisation of the multilateral trading system: GATT and GATS Agreements.

The TRIPS Agreement is considered to be a landmark treaty in the history of the international IPRs regulation. Considering diverging interests of different stakeholders in the society, A. A. Yusuf (2008) is of the opinion that the TRIPS “*clearly tips the balance in favour of technology creators.*” On the other hand, other authors, such as E. Siew-kuan Ng (2010), stress the fact that the TRIPS Agreement contains flexibilities which allow member countries

⁷ Art. 5 (3) of the Berne Convention: „*Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.*”

to incorporate safeguards that are necessary to protect the public interest, building upon the objective of the TRIPS Agreement that

‘the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’

(Art. 7 TRIPS)

As an international agreement, the TRIPS Agreement is subject to the general obligation to perform contracts in good faith. The customary international law principle “*pacta sunt servanda*” was codified in Article 26 of the *Vienna Convention on the Law of Treaties (VCLT)*. The TRIPS Agreement itself refers to this obligation using the phrase “*Members shall give effect to the provisions of this Agreement*” (Art. 1). (UNCTAD-ICTSD 2005) The Agreement itself does not decide for the members whether the treaty shall have a direct effect or whether its obligations are to be at first implemented into the domestic law.

With regard to the interpretation of the TRIPS Agreement, the Dispute Appellate Body in the dispute on India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (DS50) argued that “[t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.” (para. 45).

Under Article 1 TRIPS “*Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.*” The express inclusion of the phrase “*but shall not be obliged to*” has been referred to in discussions concerning the TRIPS-plus provisions concluded in PTAs. As highlighted in UNCTAD-ICTSD (2005) a question shall be posed whether in case that a Member demands the adoption of the TRIPS-plus standards in diplomatic negotiations, this behaviour might actually amount to a failure to perform its TRIPS Agreement obligations in good faith, as the multilaterally negotiated standard in the TRIPS constitutes a result that provides a secure framework for the conduct of international trade relations. On the other hand, it might be argued that diplomatic negotiations are presumed to always include bargaining and pressure in some form and the Members are sovereign and,

theoretically, free to accept or decline to conclude other binding instruments going beyond the TRIPS obligations. Nevertheless, UNCTAD-ICTSD (2005) argues that, especially in the context of public health, the WTO Dispute Settlement Body (DSB) might consider whether the bilateral or regional pressure in a specific case has exceeded the limits of the good faith performance of the TRIPS.⁸

With regard to the scope of the TRIPS Agreement, based on its name, regulates the trade-related aspects of intellectual property rights. The scope of the subject-matter of the TRIPS Agreement is decisive for further considerations with respect to the scope of the non-discrimination principle, detailed attention will be therefore devoted to this phrase.

Firstly, the TRIPS Agreement regulates intellectual property rights. Nevertheless, the Agreement itself fails to define the term of IPRs and refers rather to all categories of intellectual property that are subject of Sections 1 through 7 of Part II. *"For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II."* (Art. 1(2) TRIPS).

Subsequently, the TRIPS covers the following types of IPRs (*based on the TRIPS Agreement and Valdés and Runyowa 2012*): (1) Copyright and related rights; (2) Trademarks; (3) Geographical indications; (4) Industrial designs; (5) Patents; (6) Layout-designs (topographies) of integrated circuits; and (7) Protection of undisclosed information.

As explained by N. Pires de Carvalho (2010), the scope of intellectual property as defined in Article 1.2 is extended by the Article 2.1 of the TRIPS Agreement, which incorporates specific provisions of the Paris Convention into the TRIPS Agreement, namely: (8) Trade names; and (9) Repression of unfair competition.

The definition of the IP incorporated in the TRIPS Agreement fails to attempt to define intellectual property as a concept but rather refers to the categories of IPRs as governed by the enumerated sections of the Agreement (UNCTAD-ICTSD 2005).

Historically, there were proposals from the WTO members, mostly from developing countries, to expand the subject matter scope of the TRIPS Agreement, namely by the traditional knowledge, folklore and genetic resources (UNCTAD-ICTSD 2005). Interestingly, the TRIPS Agreement fails to follow the dichotomy between industrial rights on one hand and the copyright and related rights on the other, by contrast to the previously separate treaties (UNCTAD-ICTSD 2005).

⁸ In this context, the UNCTAD/ICTSD research paper makes an analogy to a common law contract doctrine of "unconscionability".

The definition of intellectual property in the *Convention Establishing the World Intellectual Property Organization* is similar to the point that it also refers to specific categories.⁹ As oppose to the TRIPS Agreement, the WIPO Convention does not merely refer to other provisions, but provides a list of intellectual property rights. Secondly, the definition applied in the TRIPS Agreement while referring to the relevant sections of the TRIPS Agreement is focusing already on the means for the protection provided, i.e. on the categories intellectual property rights (e.g. patents, copyright etc.). The WIPO Convention, on the contrary, lists the intellectual property (e.g. inventions, literary, artistic and scientific works etc.). However, Art. 1(2) TRIPS refers to *intellectual property*, rather than intellectual property rights. As further observed by UNCTAD-ICTSD (2005), the term intellectual property appears mainly in the Preamble and in Part III of the TRIPS Agreement devoted to the enforcement. Among the critics of this wording, J. H. Reichman (*in* Correa & Yusuf 2008) claims that the effectiveness of the non-discrimination principle in the TRIPS Agreement is diminished by the limited definition of the term '*intellectual property rights*' therein.

The scope of the TRIPS Agreement is crucial for the interpretation of the non-discrimination principle. A. Kamperman Sanders (2014) claims that the NT obligation applies only to the categories of IP rights that are covered by the TRIPS Agreement.

2.3 The theory of the non-discrimination principle

The principles of non-discrimination are the underlying principles of international trade, as they "*amount to the backbone of the international relations and of the multilateral system*", because they "*implement cosmopolitan values of moral and political philosophy and make an important contribution to the goal and ideal of global justice*" (Cottier and Schneller *in* Kamperman Sanders 2014). Their objective is to create non-discriminatory legal arrangements (UNCTAD-ICTSD 2005) in international relations.

As highlighted below with respect to individual treaties, the non-discrimination principle was introduced in the international intellectual property law as early as in the first international IPRs treaties in the end of 19th century, therefore far earlier than the

⁹ "(viii) '*intellectual property*' shall include the rights relating to:

- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavour,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition, and all other rights resulting from intellectual

Activity in the industrial, scientific, literary or artistic fields." Article 39 The Convention Establishing the World Intellectual Property Organization.

multilateralism in international trade started. However, the NT principle might be traced back even prior to the signature of the Paris and the Berne Conventions in bilateral friendship and commerce agreements concluded in the eighteenth century.¹⁰

The non-discrimination principle consists of two interconnected, but independent parts: the national treatment (NT) principle and the most-favoured-nation principle (MFN). Apart from the NT and the MFN, the international regulations of multilateralism as well as the international IPRs law are built also upon other principles. According to the TRIPS Agreement, the WTO's IP regime should contribute to technological innovation and transfer of technology (Valdés and Runyowa 2012; Article 7 TRIPS). In this respect, attention shall be devoted also to the preamble to the TRIPS Agreement, that i.a. recognizes „*the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.*”¹¹ Furthermore, the preamble of the TRIPS Agreement is to be read also in conjunction with the preamble to the WTO Agreement to which the TRIPS Agreement is annexed (UNCTAD-ICTSD 2005, p. 13). In this regard, it is also necessary to keep in mind that “*most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO Agreement.*” (WT/DS58/AB/R, para. 17)

Ch. Heath (in Kamperman Sanders 2014) offers an overview of principles potentially applied with regard to the IPRs protection from the international perspective governing the treatment of foreigners in international trade, introduced with the initial aim to overcome the pitfalls of the territoriality principle in IPRs, including: National treatment (*see below*); Most-favoured nation treatment (*see below*); Reciprocal treatment, i.e. “[a] national of one of the contracting states shall enjoy in the other state/states such protection as a national of such state/states does enjoy in the state of the national seeking protection.” (*see below*); Automatic extension, i.e. „*Patent rights validly registered in country X shall be given unconditional recognition also in country Y/in all countries of the Union.*“; and Universal right, e.g. rights granted by an universal institution, e.g. a world patent or a world trademark office.

Based on the reciprocity principle, parties to the agreement allow for favours provided to nationals from other parties provided that these parties also allow for such a favour for their nationals. Theoretically, UNCTAD-ICTSD (2005) claims that it is possible to grant national

¹⁰ In this respect, the UNCTAD-ICTSD research paper (2005) refers to the Belgian-American Diplomacy Treaty of Commerce and Navigation: November 10, 1845, at art. 1; and the Swiss-American Diplomacy Convention of Friendship, Commerce and Extradition between the United States and Switzerland; November 25, 1850, at art. 1.

¹¹ With respect to the preamble, UNCTAD-ICTSD 2005 highlights the interpretation of the principles underlying the TRIPS Agreement in the dispute DS58: *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

treatment subject to exceptions and to place conditions on the MFN treatment, e.g. consent to agree to provide equal treatment to all trading partners but only subject to matching the same level of treatment from the side of the other party. That would mean conditioning a national treatment principle upon reciprocity. However, in that case the principle of MFN treatment would lose its substance.

UNCTAD-ICTSD (2005) points out that the WTO agreements were negotiated on the basis of reciprocity and the results of these agreements, the treaties themselves, rely on the NT and MFN principles. Consequently, should a Member fail to provide for the relevant level of the protection and enforcement of IPRs to the nationals of other Members, other Members may not resort to denying the corresponding treatment to the nationals of this given Member.

Similarly, the Paris Convention relies also on the NT principle and does not allow for reciprocity. As highlighted by Carvalho (2005), the draft versions of the Paris Convention included the word “*reciprocally*”, however, this word was later, based on concerns expressed by Switzerland, Hungary and The Netherlands, omitted from the final text. Interestingly, Switzerland and The Netherlands failed to provide for patent protection in that time and omitting the reciprocity allowed them to free ride on other parties’ protection based on the national treatment (Carvalho 2005). On the other hand, there are provisions in the Berne Convention that allow for “material reciprocity” (Art. 7(8) and Art. 14ter Berne Convention).

Cottier and Schneller (*in* Kamperman Sanders 2014) approach the non-discrimination principle from a different perspective, claiming that it primarily addresses the risks of a state failure, as governments are repeatedly tempted to privilege their nationals or nationals from one state over the other. J. H. Reichman (*in* Correa & Yusuf 2008), sees the inclusion of the non-discrimination principle in the TRIPS Agreement as “*an attempt to rectify the damage that some states recently inflicted on the international intellectual property system by unilaterally asserting claims of material reciprocity with respect to hybrid legal regimes falling in the penumbra between the Paris and Berne Convention.*”

As a concluding remark in this chapter, it is crucial to stress a principle that is inherently underlying even in relation to the underlying principles of international trade and IPRs regulation: “*Trade liberalisation is not an end in itself; it is a means to these ends. (...) It equally holds true for the basic principle of non-discrimination.*” (Cottier and Schneller *in* Kamperman Sanders 2014) Ultimately, there is an overall core objective of the WTO trading system, as described in the preamble of the Agreement establishing the World Trade Organisation, which builds upon and expands the preamble of the GATT 1947 Agreement: ‘*raising standards of living, ensuring full employment and a large and steadily growing volume*

of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*

2.3.1 History of Non-discrimination principle in the TRIPS negotiations

During the negotiations of the TRIPS Agreement, there had been three drafts of the TRIPS Agreement: *the Annell Draft, the Brussels Draft and the Dunkel Draft* (UNCTAD-ICTSD 2005). The Annell Draft (MTN.GNG/NG11/W/76), named after Lars Annell, a former Ambassador of Sweden to the GATT and the Chairman of the Uruguay Round Negotiating Group on TRIPS, was released on 23rd July 1990. The Brussels Draft (MTN.TNC/W/35/Rev.1), presented on 3rd December 1990, was prepared for a Brussels meeting at a ministerial level. The Dunkel Draft, released in December 1991 and named after the Director-General of the GATT during 1980-1993, included the Footnote 3 into the wording (*explained below*).

Historically, both the MFN and NT principles were not included in the first negotiations proposal of the TRIPS Agreement submitted by the USA. However, the first EC's proposal referred expressly to both NT and MFN as fundamental principles that should, bearing in mind the difference in attachment, as the GATT regulates treatment of goods and the TRIPS was negotiated with the aim to address the protection of the rights held by persons (*see further below*), constitute essential elements also in the agreement on trade related aspects of intellectual property rights (UNCTAD-ICTSD 2005).

Later, convinced to include the national treatment into the treaty, the negotiations focused on the wording of the provision itself. Generally, there was a possibility to follow the Paris and the Berne Conventions and to incorporate the equal treatment of nationals employing the phrase "*the same treatment as*". Alternatively, there was an option to incline closer to the GATT's wording, allowing for preferential treatment of foreigners based on the "*treatment no less favourable than*" (*Annell Draft Art. 6.1 MTN.GNG/NG11/W/76; UNCTAD-ICTSD 2005*).

Nevertheless, the Annell Draft also included an express reference to the NT and MFN principles under the GATT Agreement. In a specific chapter on trade in counterfeit and pirated goods, it proposed to incorporate safeguards against creating trade impediments due to applying IPRs enforcements measures in import of goods. In order to refrain from applying their national

legislation in a discriminatory manner, the parties shall “*observe the principles of national treatment and MFN enshrined in the GATT*” (MTN.GNG/NG11/W/76).

M. M. Aleman (2014) recalls that the MFN clause negotiation was not an easy process. The delegates, mostly from the developing countries, expressed doubts questioning the necessity to include the principle that was “*alien to the intellectual property system*”, particularly when there were numerous exceptions to be included (MTN.GNG/NG11/27) and questioned the positive contribution of this principle in the IP field (Aleman 2014).

The EC’s proposal of 29th March 1990 included both the NT and the MFN principle, the later worded in a way that the protection of IPRs shall not be carried out in a manner that would constitute “*an arbitrary or unjustifiable discrimination*” or “*a disguised restriction on international trade*” (MTN.GNG/NG11/W/68, Art. 3). Additionally, it included an extensive exception from the MFN principle for regional integration. It referred expressly to Article XXIV GATT, stipulating that the Contracting parties which constitute a customs union or a free trade area within the meaning of Article XXIV GATT may, in order to facilitate trade between their territories, apply measures relating to the protection of IPRs without extending them to other contracting parties (MTN.GNG/NG11/W/68, Art. 4). Interestingly, only protection of IPRs is expressly mentioned and the provision fails to include any express reference to enforcement. However, the Dunkel draft later dropped the previous wording of the exemption and stated that only the agreements that were already in existence when the WTO was formed will be exempt from the MFN provision (Ranjan 2007).

2.4 National treatment principle

The national treatment principle is the “*fundamental principle of the world trading system*” (WT/DS176/AB/R, para. 233). Moreover, the Appellate Body in DS176 stated that “*the significance of the national treatment obligation can hardly be overstated*” (WT/DS176/AB/R, para. 241), as it has been a cornerstone of both international intellectual property regulation and of the world trading system.

Generally speaking, the NT principle stipulates that parties to an agreement shall treat nationals from other parties at least as well as they treat its own nationals (Štěrbová *in* Štěrbová 2013; UNCTAD-ICTSD 2005). Therefore, the national treatment is a generous principle that ensures that foreign nationals, goods, services or investments are treated equally rather than on a reciprocal basis that would result in a fragmented trade environment (A. Kamperman Sanders 2014). The national principle should also contribute to a greater certainty in international trade (Kamperman Sanders 2014).

The national treatment principle was firstly introduced in the international intellectual property regulation as soon as in the first international treaty governing the IPRs, namely in the Paris Convention 1883. The necessity to include the NT principle in the very first international arrangements governing the IPRs stems from the territorial character of the IPRs protection. A. Kamperman Sanders (2014) is of the opinion that the wording of the NT principle in the Paris Convention (*analysed in detail below*) is “*perhaps the most concise and elegant in intellectual property law*”. Consequently, Ch. Heath (in Kamperman Sanders 2014) stresses that the NT principle in international trade law is a relatively new phenomenon, as its scope in the GATT 1947 Agreement is in fact relatively limited. Similarly, A. Kamperman Sanders (2014) states that “*the principle of national treatment in intellectual property law is far richer than its limited application in the field of international economic law suggests*”.

The non-discrimination principle is governed by Articles 3 and 4 of the TRIPS Agreement. Nevertheless, Art. 3 and 4 shall be read in connection with Article 1 and Article 2 TRIPS. With regard to the definition of nationals, under Article 1(3) TRIPS, “*Members shall accord the treatment provided for in this Agreement to the nationals of other Members.*” The term nationals is interpreted in the footnote No. 1, “*they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.*” Nevertheless, Article 1 further states that with respect to relevant intellectual property rights, the criteria for eligibility provided for in the enumerated IPR-related international treaties, namely the *Paris Convention* (1967), the *Berne Convention* (1971), the *Rome Convention* and the *Treaty on Intellectual Property in Respect of Integrated Circuits* are to be applied.

The following sections analyse the national treatment principle and the most-favoured nation principle and its wording in the selected relevant multilateral international treaties. At a later stage, it is to be borne in mind that also preferential trade agreements may include devoted provisions incorporating the NT as well as the MFN principles, and that separately as well as in their IPRs chapters. This phenomenon is further analysed in the fifth chapter of the thesis.

2.4.1 National treatment under the TRIPS Agreement

Even though the TRIPS Agreement incorporates the pre-existing IPRs treaties that provide for the NT, it also covers its own provision of the NT principle. According to the Appellate Body in *DS176 – United States — Section 211 Omnibus Appropriations Act of 1998*,

having included a separate national treatment provision in the TRIPS Agreement “*emphasizes the fundamental significance of the obligation of national treatment to their purposes in the TRIPS Agreement*” (WT/DS176/AB/R). Moreover, the national treatment principle is deemed to serve as an important tool for harmonization of the national legislation on IPRs (A. A. Yusuf in Correa & Yusuf 2008).

Importantly, there are two separate national treatment provisions that cover IPRs under the TRIPS Agreement (WT/DS176/AB/R): Article 3 and Article 27.1 in connection with Article II.4 of the GATT 1947. They differ in attachment, whereas the NT principle in Art. 3 provides for national treatment of persons holding the rights, the last sentence in Article 27.1 of the TRIPS Agreement in connection with Article II.4 of the GATT 1947 allows for national treatment of goods incorporating or bearing IPRs (Carvalho 2010; *explained in more detail below*).

Article 3 National Treatment

*1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement.*¹²

Articles 3 and 4 (and 5) TRIPS are expressly excluded from the transitional arrangements stipulated in Article 65 TRIPS, pursuant to which “*a developing country Member is entitled to delay for a further period of four years the date of application*” (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, p. 395; UNCTAD-ICTSD 2005).

The EC as a complainant in the WTO dispute *DS176, United States — Section 211 Omnibus Appropriations Act of 1998*, interpreted in its submission the national treatment principle under the TRIPS Agreement in the following straightforward manner: “*A WTO Member cannot treat a national of another WTO Member in relation to an intellectual property right which its IPR system offers less favourably than it treats its own nationals in relation to*

¹² ‘Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS’.

such an intellectual property right” (WT/DS176/R, para. 4.108). The Appellate Body, at a later stage of the same dispute, stated that *“to fulfil the national treatment obligation, less favourable treatment must be offset, and thereby eliminated, in every individual situation that exists under a measure”* (WT/DS176/AB/R, para. 286). The same treatment must be provided to all owners and not only to some of them. Consequently, the Appellate Body found the violation of the national principle under both the TRIPS Agreement and the Paris Convention, reversing the previous Panel ruling and concluding that the national treatment principle is violated as the disputed provision¹³ *“imposes an additional obstacle”* or, in other words, applies the *“extra hurdle”* on non-nationals (WT/DS176/AB/R, para. 268).

A. Kamperman Sanders (2014) highlights that the TRIPS Agreement, as oppose to the preceding international IPR treaties, follows the trade-based form of national treatment, allowing for more favourable treatment for foreigners than for nationals. A. A. Yusuf (*in* Correa & Yusuf 2008) questions this principle in the light of international trade, stating that if a party is obliged to accord the rights recognized therein to the nationals of other parties, regardless of whether or not it provides such rights to its own nationals, *“[t]his may in fact be viewed as an antithesis to national treatment, resulting in the establishment of a standard of ‘foreign nationals treatment’.”*

The national treatment obligation under Article 3 is a standalone provision that might be challenged and violated on its own. As far as the violation of Article 3 is concerned, the US as a claimant in a dispute at the WTO *Indonesia — Certain Measures Affecting the Automobile Industry* claimed that *“Article 3 and its footnote do not require that a practice violate both the national treatment obligation and the provision specifically addressing the particular use of the right.”* (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R)

The role of the GATT with regard to the trade-related aspects of IPRs is generally two-fold. Firstly, the GATT 1947 and the jurisprudence related thereto are to be used in interpreting the national treatment obligation in the TRIPS Agreement. Secondly, the GATT 1995 might be, in limited cases, applied in parallel with the TRIPS Agreement in certain IPRs issues. In fact, the application of the GATT has only been discussed in connection with issues of exhaustion (Heath *in* Kamperman Saunders 2014). Nevertheless, even the preamble to the TRIPS Agreement recognizes among the reasons for concluding the TRIPS Agreement *“the need for new rules and disciplines concerning, i.a. the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions”*.

¹³ Section 211(a)(2).

The Panel in the dispute within the WTO DS176 observed, based on the submission of the EC as a claimant (WT/DS176/R, para. 4.108), the similarities between the language used in drafting the NT principle in the TRIPS Agreement and the wording of Article III:4 of the GATT 1994. The Appellate Body later confirmed this opinion, stating that the *“jurisprudence on Article III: 4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement”* (WT/DS176/AB/R, para. 242).

The EC in *DS176 – United States – Section 211 Omnibus Appropriations Act of 1998* (WT/DS176/R, para. 4.108) argued that there is indeed a similarity in the language used in the NT principle in the TRIPS Agreement and the NT principle in the GATT 1994. Nevertheless, the provisions differ in terms of attachment – the GATT 1994 being attached to goods, not the respective owners of the goods, whereas the TRIPS Agreement attaching the NT principle to the person of the right holder. Based on the EC’s submission, *„[t]his modified "attachment" is systematically linked to the territorial character of intellectual property rights”* (WT/DS176/R, para. 4.108). Ch. Heath (*in* Kamperman Sanders 2014) speaks about the difference between international trade laws treaties dealing with goods, whereas the international treaties on intellectual property concern rights, or the possibility of obtaining them. As far as its attachment is concerned, the NT principle in the TRIPS is similar to the national treatment principle in Article XVII GATS which applies to service suppliers. Nevertheless, the national treatment principle with regard to the services, incorporated in the GATS Agreement, operates differently, as each Member’s obligations are defined in their Schedule of Commitments.

Consequently, the EC in DS176 argued that the Regulation at question complies with the national treatment principle, *“because they discriminate according to the location of GIs and not according to the nationality of persons with rights in relation to GIs”* (WT/DS176/R, para. 7.91).

Secondly, the discussions on the national treatment question the character of this principle: whether the *de facto* or *de jure* discrimination is prohibited. *De jure* discrimination would happen if legal regulation distinguished between nationals and foreigners. On the other hand, there would be a *de facto* discrimination if regulation which reads as non-discriminatory had a discriminatory effect (UNCTAD-ICTSD 2005). As pointed out by Ch. Heath (*in* Kamperman Sanders 2014), while cases of open discrimination have become rare, examples of subtle *de facto* discrimination occur; as a possible example might serve research and innovation programmes subsidizing directly domestic applicants in order to encourage them to

file patent applications, such as a government subsidizing national companies filing PCT¹⁴ applications. Authors in UNCTAD-ICTSD (2005) are of the opinion that the TRIPS national treatment provisions cover both *de jure* and *de facto* discrimination.

Apart from the general principle of the national treatment, the TRIPS Agreement covers a non-discrimination principle devoted to patents. Under Art. 27(1) TRIPS, “[s]ubject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”

Under the TRIPS Agreement, the WTO members are bound to provide the non-nationals with no less favourable treatment as its nationals with regard to the "protection" of trade-related intellectual property rights (WT/DS176/AB/R, para. 243). The term protection is defined in Footnote 3 in the TRIPS Agreement as: "matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed" in the TRIPS Agreement.

The interpretation of Footnote 3 is crucial for defining the scope of the non-discrimination principle in the TRIPS Agreement. As highlighted by de Carvalho (2005), the purpose of including the footnote 3 into the TRIPS is twofold. Firstly, it defines the word “protection” and secondly, it specifies the coverage of such protection for the purposes of the NT and MFN principles. De Carvalho (2005) is of the opinion that the concept of protection under the footnote is broad, covering both substantive and procedural aspects.

The wording of the NT principle in the TRIPS Agreement includes certain exceptions defined under Article 3.2 TRIPS. These exceptions mirror the exemptions in the Paris Convention. Interestingly, the Paris Convention, as oppose to the Berne Convention discussed below, does not include any exceptions concerning substantive rights. Carvalho (2010) is of the opinion that it is due to the character of the Paris Convention, as it is not a minimum standard treaty and thus any substantive exemptions are not necessary.

Under Art. 3.2 TRIPS, ‘Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.’

¹⁴ The Patent Cooperation Treaty.

Based on the wording, all exceptions are subject to the condition that they are “*necessary*” to secure compliance with laws and regulations. Carvalho (2010) observes that necessity is employed as a *sine qua non* condition for admitting measures deviating from the stipulated implementation of obligations.

2.5 *The most-favoured-nation principle*

The most-favoured-nation (MFN) principle is referred to, similarly to the national principle, as one of the cornerstones of the world trading system (WT/DS176/AB/R, para. 297). The MFN principle obliges a country to grant to the nationals of every other country that concluded a MFN principle a treatment not less favourable than it grants to nationals of any other country (e.g. *in* Ranjan 2007). Prior to being incorporated into the TRIPS Agreement, the most-favoured-nation principle served as a basic principle for trade liberalisation, as it constitutes Article 1 of the GATT 1947 Agreement. Nevertheless, its history traces back to the 18th century, when it was firstly incorporated in trade agreements (UNCTAD-ICTSD 2005).¹⁵

As oppose to the national treatment principle, the MFN principle has not been incorporated into the preceding IPRs-related international treaties (e.g. A. A. Yusuf *in* Correa & Yusuf 2008). However, in the second part of the 1980s, during the Uruguay negotiations, with an intention to increase the protection and enforcement of the IPRs internationally, there were voices advocating the inclusion of the previously only trade-related principle into the Agreement governing trade-related IP rights. As highlighted later by the Appellate Body in DS176, “*the most-favoured-nation obligation must be accorded the same significance with respect to intellectual property rights under the TRIPS Agreement that it has long been accorded with respect to trade in goods under the GATT. It is, in a word, fundamental.*” (WT/DS176/AB/R, para. 297)

Under Article 4 of the TRIPS Agreement, „[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.“

As highlighted by P. Ranjan (2007), the agreement does not define the terms such as advantage, favour, privilege or immunity. The definition is followed by exemptions (analysed

¹⁵ The examples cited by the UNCTAD-ICTSD (2005, p. 64) are Treaty of Amity and Commerce between the United States and France; February 6, 1778, at arts. 3 & 4. See also Convention to Regulate Commerce between the United States and Great Britain (1815), at Article 2.

below). Likewise the national treatment principle, the MFN principle under the TRIPS Agreement is distinguished by its modified attachment. The EC argued in DS176 that Article 4 “*attaches to persons and not to situations*”. In other words, the EC claimed that the MFN principle in Article 4 “*requires that all nationals of other Members be treated similarly in respect of a certain event*” (WT/DS176/R, para. 8.143).

The MFN principle is the crucial provision with regard to preferential trade arrangements. The wording of the MFN treatment in the TRIPS was drafted based on the considerations of the *existing* integration agreements that were incorporated within its exemptions (UNCTAD-ICTSD 2005; A. A. Yusuf *in* Correa & Yusuf 2008). Exempted from the obligation of the most-favoured-nation principle under Article 4 of the TRIPS Agreement are any advantage, favour, privilege or immunity accorded by a Member „*deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.*“ Article 4(d) TRIPS.

P. Ranjan (2007) summarizes the four conditions as follows: (1) the international agreement should have entered into force prior to the entry into force of the WTO Agreement, (2) it should be related to the protection of the intellectual property, (3) should have been notified to the TRIPS Council, (4) such agreements should not constitute arbitrary or unjustifiable discrimination against nationals of other countries. With regard to the last point, UNCTAD-ICTSD (2005) is of the opinion that “*the legal formula used in Article 4 (d) to establish that accommodation is oddly suited to such a purpose*”, as it led to broad notifications of the pre-existing arrangements to the Council for TRIPS. A. A. Yusuf (*in* Correa & Yusuf 2008) further adds that the provision fails to clearly indicate who should indicate whether or not the agreements at question constitute an arbitrary or unjustifiable discrimination against others. Later he concludes that “*it may be assumed that they will be closely scrutinized by the Council subsequent to their notification.*” However, it is probable that if the question was raised, it would be the Dispute Settlement Body who would be asked to determine whether the MFN principle is to be applied in a specific case, i.e. whether the specific treaty is to be applied or rather omitted based on the Article 4(d) exemption.

The European Communities and its Member States notified to the Council for Trade-Related Aspects of Intellectual Property Rights, based on Article 4(d) of the TRIPS Agreement both the Treaty establishing the European Community and the Agreement establishing the European Economic Area. As stated in the notification, „*[n]otification of these agreements*

covers not only those provisions directly contained therein, as interpreted by the relevant jurisprudence, but also existing or future acts adopted by the Community as such and/or by the Member States which conform with these agreements following the process of regional integration.“ (IP/N/4/EEC/1, 29 January 1996).

The other exemptions to the MFN principle under the TRIPS Agreement include obligations that are: (a) deriving from international agreements on judicial assistance and law enforcement of a general nature that are not particularly confined to the protection of IPRs; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention, authorizing that the treatment accorded to be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organisations, not provided for under the TRIPS Agreement (see further in the section *Rome Agreement*).

In addition, with regard to both the national treatment and the most-favoured nation treatment, Article 5 applies, which stipulates an exception for Multilateral Agreements on Acquisition or Maintenance of Protection. Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO related to the acquisition or maintenance of intellectual property rights.

Ch. Heath (*in* Kamperman Sanders 2004) is of the opinion that the MFN principle is better suited for IPRs used in commerce (“*truly trade-related rights*”). He finds the MFN principle more appropriate in matters of trademark or unfair competition regulation where the confusion to the detriment of honest trade could equally arise by the use of IPRs from nationals that are not parties to the particular treaty, whereas the issues of acquisition and enforcement of rights, that involve dealing with people, is better governed by the NT principle.

With regard to the effects of the most-favoured nation principle on the preferential trade agreements concluded *after* the TRIPS Agreement, M. M. Aleman (2014) concludes, in line with the majority of the existing research, that ‘[a]s far as the TRIPS Agreement MFN clause is concerned, it is clear that TRIPS-plus provisions in PTAs are global in nature.’, stating later that ‘TRIPS-plus provisions are immediately and unconditionally multilateralized through the MFN clause of TRIPS, which does not include the regional exception that exists for concessions concerning trade in goods and services.’ In order to further analyse these conclusions, P. Ranjan (2007) outlines two scenarios – Situation 1 when country extends the TRIPS-plus treatment promised in its PTA to the nationals of all WTO members in line with the MFN principle, or Situation 2 when country B limits the TRIPS-plus provision only in favour of nationals of other signatories to the PTA. For Situation 1, P. Ranjan (2007) concludes that it

may result in an interpretation going counter to other provisions of the TRIPS Agreement and would nullify the right that the country possesses under the TRIPS Agreement and might reduce the relevant TRIPS provision to nullity. However, he further contemplates that there is no hierarchy in international law that would put the TRIPS Agreement over and above the individual PTAs and a country is entitled to enter into agreements that would limit, *erga omnes*, its rights resulting from the flexibilities of the TRIPS Agreement. Secondly, in order to argue against the application of the TRIPS-plus provision towards all WTO Members, P. Ranjan (2007) argues that countries notify their entire trade agreements under the exception of Article XXIV GATT, not parts of it. Therefore, P. Ranjan (2007) is of the opinion that the GATT exemption should be valid towards the entire agreement. In order to support this argument, P. Ranjan (2007) quotes Article 31 of the Vienna Convention on Law of Treaties (VCLT), pursuant to which a treaty shall be interpreted in lights of its object and purpose and the purpose of a PTA *'is to establish a free trade area consistent with Article XXIV GATT'*. In addition, M. M. Aleman (2014) is of the opinion that the VCLT *'would give preference to TRIPS-plus provisions that interpret a multilateral norm, narrow down the flexibility or provide an increased level of protection, either because the PTAs are signed later (lex posterior) or because they contain special rules on the subject (lex specialis).'* (Art. 41 VCLT). The author's opinion in this respect is further analysed in the following sections.

2.5.1 Non-discrimination principle in TRIPS in dispute settlement

The non-compliance with the TRIPS Agreement was currently challenged in 34 dispute settlement cases (*see* Annex I). The non-discrimination principle (Art. 3 and 4 TRIPS) under the TRIPS was raised in eleven cases (*see* Annex I).¹⁶ Thereof, in DS28 *Japan — Measures Concerning Sound Recordings* both parties reached a mutually satisfactory solution to the dispute and DS186 – *United States — Section 337 of the Tariff Act of 1930 and Amendments thereto* remains in consultations since 12th January 2000. Additionally, four connected cases against Australia concerning plain packaging are to be ruled on in 2017.¹⁷ Therefore, the non-discrimination principle under the TRIPS Agreement has been currently addressed by the panel in five cases analysed below (DS59, DS174, DS176, DS290, and DS362).¹⁸ Apart from the

¹⁶ The disputes were selected based on the Articles cited in the request for consultations. The requests for consultations usually refer to specific Articles of WTO law that the claimant considers to be violated by the respondent. Nevertheless, the requests for consultations is usually not limited to the specific Articles stated in the text, using the phrase *"including but not necessarily limited to"*.

¹⁷ Despite its already delayed intention to issue the ruling in 2017, on 14 April 2018, the ruling has not been made publicly available yet (WTO – DS458: 2018). Reportedly, as announced earlier in May 2017 by Bloomberg, the Australian law on plain packaging was upheld by the decision (e.g. Reuters 2017).

¹⁸ The disputes DS174 and DS290 address the same issue and are therefore analysed together.

TRIPS Agreement, the national treatment principle has featured in over 200 GATT complaints (Brauneis 2014).

The following sections analyse the important case law concerning the non-discrimination principle in the trade-related aspects of intellectual property rights.

a. Indonesia – Certain Measures Affecting the Automobile Industry

In *DS59 – Indonesia – Certain Measures Affecting the Automobile Industry*, the United States challenged certain measures affecting the automobile industry in Indonesia.¹⁹ The US claimed non-compliance not only under the TRIPS Agreement, but also under the *GATT Agreement*, the *Agreement on Subsidies and Countervailing Measures* (SCM) and the *Agreement on Trade-Related Investment Measures* (TRIMs). The USA claimed that under the challenged Indonesia's National Motor Vehicle programme, the "national motor vehicle" enjoys the benefits only if it bears a unique Indonesian trademark owned by Indonesian nationals and consequently, the programme discriminates against foreign-owned trademarks (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 3.4(f); para. 11.2). Indonesia responded claiming that a national company in order to enjoy the benefits under the designated programme must use a new brand name, not a brand previously used on the market. Therefore, both foreigners and nationals are to be treated in the same way with respect to trademarks. The US counter-argued that the national car trademark "*must be acquired by an Indonesian company, be that company a joint venture or a wholly-owned Indonesian company*" (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; p. 315). Therefore, it discriminates in respect of the acquisition of a trademark. Moreover, it discriminates in respect of maintenance of the trademark, as the US submission deemed it, due to marketing reasons, unlikely for a foreign manufacturer to market its products on the Indonesian market under two trademarks. Consequently, the global mark, replaced on the Indonesian market in exchange for the new national mark, might be subject to cancellation for non-use in Indonesia and the owner would not be able to argue that it arose independently of its will.

The Panel concluded that the claimant (US) failed to demonstrate that the non-discrimination principle was violated in respect to both the acquisition and maintenance of trademarks. In terms of the maintenance, the Panel warned from reading into the national treatment principle "*obligations which go far beyond the letter of that provision and the*

¹⁹ The dispute was joined by India and the Republic of Korea as third parties. The dispute was, pursuant to Art. 9.1 DSU examined by a single panel together with WT/DS54 (raised by the EC), WT/DS55 (raised by Japan) and WT/DS64 (raised by Japan). However, these claims did not claim the non-compliance with the TRIPS Agreement.

objectives” of the TRIPS Agreement (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; p. 396).²⁰

b. European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs

In *DS174 – European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, the US claimed that, inter alia, the EC Regulation 2081/92 and its related implementing and enforcement measures²¹ fail to provide national treatment for geographical indications, as it limits the GIs that the EU protects.²² The claim was addressed together with DS290 raised by Australia.²³ The arguments provided and the citations are further analysed in the section focusing on the national treatment principle.

c. United States – Havana Club Case

The *DS 176 United States – Section 211 Omnibus Appropriation Act of 1998* (also referred to as ‘*Havana Club Case*’; hereinafter referred to as DS176) was initiated by the European Communities against the United States.²⁴ The European Communities alleged that Section 211 is inconsistent with Art. 2, 2.1, 3, 3.1, 4, 15, 16, 16.1, 17, 18, 19, 20, 21, 41, 42, 62 of the TRIPS Agreement, as read with the relevant provisions of the Paris Convention, which are incorporated by reference into the TRIPS Agreement (WT/DS176/AB/R, p. 1).

The Panel concluded that the appropriate standard to apply under Article 3.1 of TRIPS was a question whether a measure provided “*effective equality of opportunities as between [nationals and non-nationals] in respect of protection of intellectual property rights*” (DS 176 Panel Report; Brauneis in Kamperman Sanders 2014). The Appellate Body Report agreed with the Panel Report that a measure “*could be considered to provide a less favourable treatment to nationals of other Members as it denies effective equality of opportunities to non-United States nationals in the United States*” (DS176 Appellate Body Report). As highlighted by Brauneis (in Kamperman Sanders 2014), this standard of the national treatment was drawn from a

²⁰ „It would not be reasonable to construe the national treatment obligation of the TRIPS Agreement in relation to the maintenance of trademark rights as preventing the grant of tariff, subsidy or other measures of support to national companies on the grounds that this would render the maintenance of trademark rights by foreign companies wishing to export to that market relatively more difficult.“ (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; p. 396)

²¹ Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as amended, and its related implementing and enforcement measures, as amended.

²² Argentina, Australia, Brazil, Canada, China, Chinese Taipei, Colombia, Guatemala, India, Mexico, New Zealand, Turkey joined as third parties.

²³ Argentina, Brazil, Canada, China, Chinese Taipei, Colombia, Guatemala, India, Mexico, New Zealand, Turkey and the United States joined as third parties.

²⁴ Japan, Nicaragua and Canada joined as third parties. The consultations were requested on 08 July 1999, the panel report was circulated on 06 August 2001 and the Appellate Body Report was circulated on 02 January 2002.

decision on case United States – Section 337 of the Tariff of 1930 adopted in 1989 under the GATT 1947 stating that “[t]he words ‘treatment no less favourable’ in paragraph 4 [Article III of GATT 1947] call for effective equality of opportunities for imported products in respect of the application laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.”

d. China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights

The DS362 dispute was initiated by the United States against China in 2007.²⁵ The request for consultations addressed the Chinese Copyright Law. The US delegation claimed China’s non-compliance with the obligation of the national treatment, as there was a different pre-distribution and pre-authorization review process for Chinese nationals’ works, performances (or their fixations) and sound recordings than for foreign nationals’. These procedures were to differ in terms of the length and requirements and thus result in earlier or otherwise more favourable protection or enforcement for Chinese copyright and related rights holders. The national treatment principle was challenged not only under the TRIPS Agreement, but also under the Berne Convention, as the Article 9 of the TRIPS Agreement incorporates Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto (*see also below*).²⁶ However, as explained in the subchapter devoted to the NT principle under the Berne Convention in more detail, the Panel later did not rule upon the compliance with the Art. 3.1 TRIPS, as the US failed to assert any claim related thereto and later confirmed that it was no more pursuing the claim under this provision (WT/DS362/R, para. 7.188, 7.189).

2.6 Relation of the TRIPS Agreement with other Intellectual Property Conventions

The TRIPS Agreement, concluded in 1994, was negotiated in the time when there were already numerous international treaties governing specific categories of IPRs. As pointed out by A. A. Yusuf (*in* Correa & Yusuf 2008), it is not unusual for international treaties of a technical character to be amended or revised. The TRIPS Agreement, as obvious from the complex relations with the existing treaties described below, has served as a complex

²⁵ Argentina, Australia, Brazil, Canada, European Communities, India, Japan, Republic of Korea, Mexico, Chinese Taipei, Thailand and Turkey joined as third parties.

²⁶ Article 9.1 TRIPS: „Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom. “

amendment to a numerous IPRs-related treaties.²⁷ Apart from being the first agreement to expressly place the IPRs in the context of international trade, its provision overlapped other treaties and it was necessary to determine the relationship between the preceding as well as most probably following IPRs-related treaties.

There are international law standards applicable with respect to interpreting international law and the relationship between different treaties. However, the special status of the TRIPS Agreement given its nature of the binding minimum standard including the enforcement, requires an express regulation of this topic. During the negotiations, the delegates expressed their understanding that the IPRs regulation within the WTO system “*should build on the long history of work in this area in other organizations, in particular WIPO.*”²⁸

Firstly, the TRIPS Agreement expressly incorporates provisions of the preceding treaties administered by the WIPO. Article 2²⁹ of the TRIPS Agreement is divided in two subparagraphs which concern two different issues. Under Art. 2(1) TRIPS, members shall comply with Articles 1 through 12, and Article 19 of the Paris Convention (1967). These Articles of the Paris Convention are thus incorporated in the TRIPS Agreement and, consequently, binding upon all WTO members and can be challenged under the Dispute Settlement Understanding (DSU) in the same manner as all obligations arising under the TRIPS Agreement. This is in line with the interpretation of N. Pires de Carvalho (2010) who states that „*[t]hose provisions have become, for all purposes, provisions of the TRIPS Agreement. Failure to comply with those provisions may be subject to disputes under the WTO dispute settlement mechanism.*”

Whereas the significance of the first consequence is, with the rising membership of the WTO, which amounts already to 164 members since 29 July 2016 (WTO: Members and Observers 2015) rather limited (as further analysed below in the context of the Paris Convention, this situation concerns mainly the case of Taiwan, being the member of the WTO as Chinese Taipei as of January 1st, 2002 and not being a party to the Paris Convention, as well

²⁷ A. A. Yusuf (in Correa & Yusuf 2008, p. 21) is of the opinion that „*[a]pparently, a basic objective of the proponents of the TRIPS Agreement was to avoid the time-consuming amendment procedure of individual IP conventions, and to work instead toward a comprehensive new agreement that would supplement and modify existing conventions.*” On the other hand, the author would argue that the inclusion of the IPRs in the multilateral trading system, regulation of the enforcement and the inclusion of the dispute settlement under the WTO was the crucial objective of the proponents. Such a significant shift could not have been done merely through amending the existing international treaties.

²⁸ Meeting of the Negotiating Group of 29 Feb.–3 Mar. 1988 MTN.GNG/NG11/6, 8 April 1988.

²⁹ Article 2 *Intellectual Property Conventions*

1. *In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).*

2. *Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.*

as other members of the WTO that do not qualify to be states entitled to accede to international obligations – Hong Kong and Macao; *in de Carvalho* 2005), the importance of the second consequence might be crucial. During the negotiations, the wording of Article 2(1) was subject to several adjustments. The draft referred to as the *Brussels Ministerial Text* used the verb “*shall not depart from*” instead of “*shall comply with*”.

Apart from the general incorporation provision in Art. 2(1) TRIPS, there are additional references related to a given IPR category within the substantive provisions of Part 2 of the TRIPS Agreement. Thus, Article 9 incorporates Articles 1-21 and the Appendix of the *Berne Convention*, as amended in 1971, Article 35 incorporates Article 2-7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the *Treaty on Intellectual Property in Respect of Integrated Circuits* (IPIC).

Based on the Incorporation Article, the TRIPS Agreement incorporates also the national treatment principles stipulated in the above mentioned international treaties. The NT principles differ in their wordings, as the TRIPS uses a different formula than is used in the WIPO conventions, however, authors in UNCTAD-ICTSD (2005) highlight that “[t]he differences are not great, and their practical significance is uncertain”, stressing that there are several relatively complex exceptions in the WIPO treaties; nevertheless, these are largely incorporated in the TRIPS Agreement.

Concerning the interpretation of the non-discrimination principle, the two crucial articles of the Paris Convention, namely Article 2(1) and Article 19 are both included within the list of the incorporated provisions. However, the above mentioned Articles are to be complied with only in respect of Parts II, III and IV of the TRIPS Agreement (Art. 2(1) TRIPS). Consequently, the non-discrimination principle under the TRIPS Agreement is to be applied as it is on its own and the national treatment principle under the Paris Convention might be challenged under the DSU in respect, therefore, in connection with a specific provision of Parts II, III, or IV of the TRIPS Agreement.

The second part of Art. 2 refers to a broader scope of international IPRs treaties, stating that nothing in Parts I to IV of the TRIPS Agreement “*shall derogate from existing obligations that Members may have to each other*” under four international treaties, namely the *Paris Convention*, the *Berne Convention*, the *Rome Convention* and the *Treaty on Intellectual Property in Respect of Integrated Circuits*. As oppose to Art. 2(1) TRIPS, this subparagraph does not incorporate any binding obligations into the TRIPS Agreement and the listed international treaties remain binding only upon the WTO members that are simultaneously parties to these Agreements. The provisions of these Agreements might be still challenged in

the WTO dispute settlement proceedings, but only in relation to a specific obligation under the TRIPS Agreement in order to assure that its interpretation will not derogate from the existing obligations between members that are party to the given treaty. As highlighted by A. A. Yusuf (*in* Correa & Yusuf 2008), the provision of Article 2(2) serves as a crucial clarification of the relationship of successive treaties – between the two sets of legal relations, i.e. those between the parties to both treaties and those between a party to one treaty and a party to both treaties (*as in* Article 30(4) of the *Vienna Convention on Law of Treaties*). Therefore, Article 2(2) „affirms the maintenance in force of the obligations contracted under the earlier conventions (...) in addition to obligations undertaken in the TRIPS Agreement. “ (A. A. Yusuf *in* Correa & Yusuf 2008).

2.7 The National treatment under the Paris Convention

„Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.”

Article 2(1) Paris Convention

The Article 2(1) has been a part of the Paris Convention since its initial version adopted in 1883. Since then, it has been a treaty obligation to all members of the Paris Union. As pointed out by the Appellate Body in DS176: *“If there were no TRIPS Agreement, if there were no WTO, the parties to this dispute would be bound, nevertheless, under Article 2(1) of the Paris Convention (1967), to accord national treatment to other countries of the Paris Union.”* (WT/DS176/AB/R, para. 237).

Prior to the Paris Convention concluded in 1883, there were bilateral treaties addressing the IPRs protection relying on the reciprocal treatment, providing nationals of the parties to the agreement with the national treatment based on reciprocity (for the historical perspective on IPRs protection and consequences for international protections, *see* Ch. Heath *in* Kamperman Sanders 2014).

Under Article 19 Paris Convention *“Special Agreements: It is understood that the countries of the Union reserve the right to make separately between themselves special*

agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.” The treaties following the Paris Convention and their relation to the Paris Convention are addressed by Article 19, stipulating that the countries of the Union are entitled to conclude separate special agreements, between themselves, for the protection of industrial property upon a condition that these agreements do not contravene the Paris Convention. Ch. Heath highlights that Article 19 applies only to agreements concluded between the members of the Paris Union (Heath *in* Kamperman Sanders 2014), as it specifically refers to special agreements made “*separately between themselves*”. The author of the thesis is of the opinion that the wording referring to “between themselves” does not necessarily restrict the exception only to the agreements to which all of the contracting parties are members of the Paris Union. As pointed out by A. Bogisch, former Director General of WIPO, there has been a well-established practice of concluding special arrangements between states party to the Paris Convention and entities not party to the Paris Convention (*in* WIPO: Diplomatic Conference, The Hague, 1991, p. 518). A. Bogisch further elaborates that one such example was the Agreement on the creation of an industrial property organisation for English-Speaking Africa (ARIPO) and that “[a]n eventual agreement on trade related aspects of intellectual property rights (TRIPS) in the Uruguay Round of trade negotiations could also be another instance of a special agreement open to the participation of states that were not party to the Paris Convention.”

Article 19 of the Paris Convention thus encourages countries to conclude subsequent Agreements that would provide for a higher level of protection of IPRs among those members that are willing to enhance their level. These special agreements provide for their separate regulation of national treatment and do not apply the NT principle to all countries within the Paris Convention. Therefore, Article 19 is based on the recognition that “*different levels of IP protection may best serve the needs of countries at a different level of industrial development, or with different natural and human resources*”. As argued by Ch. Heath (*in* Kamperman Sanders 2014), this opinion was not taken into account by the TRIPS Agreement when including the MFN clause.

Further to the interpretation of Article 19, Ch. Heath (*in* Kamperman Sanders 2014) is of the opinion that it shall not be applied also to trade and friendship agreements, including RTAs, as they are not specifically focused on IPRs. Based on Ch. Heath (*in* Kamperman Sanders 2014), Article 19 refers *i.a.* to the Madrid Agreement 1890 or Lisbon Agreement 1957, Madrid Agreement 1891 and Madrid Protocol 1989 and the PCT. On the other hand, the author of the present research argues that complex trade agreements are not specifically focused *solely*

on IPRs, however, the IPRs chapters in RTAs often include extensive and *specific* provisions on IPRs. Moreover, at the time of concluding the Paris Convention, the authors could not have foreseen that trade agreements will be the prevailing source of international IP regulation in the 21st century. Additionally, the author is of the opinion that the meaning of the word “*agreement*” shall be interpreted broadly as covering any legally binding arrangement between subjects of the law recognized under the international law. The broad interpretation of Article 19 of the Paris Convention is supported also by the interpretation of G.H.C. Bodenhausen (1969) who states that the special agreements referred to in Article 19 consist of bilateral agreements between States regarding or including subjects of industrial property. „*Such agreements are frequent. They may form part of general treaties of commerce or concern special subjects, such as the protection of appellations of origin.*“

The TRIPS Agreement, unlike the post-TRIPS PTAs, focuses specifically on the IPRs issues. Nevertheless, even though both the Paris Union³⁰ and the WTO are truly multilateral, comprising of the vast majority of countries in the world, the members of the WTO include also countries that are not parties to the Paris Convention, such as Taiwan.³¹

Another example of the special agreements under Article 19 of the Paris Convention (“P.C.”) is the *Convention on the Grant of European Patents*, under which the Board of Appeals ruled that “*having regard in particular to the fact that EPC constitute a special agreement within the meaning of Article 19 of the P.C. (...) the provisions of inter alia Article 4B P.C., (...) have also been taken duly into account for the purpose of interpreting the relevant provisions of the EPC.*” (T 0301/87 (Alpha-interferons) of 16.2.1989 available at EPO, 1989)

At the Hague Revision Conference in 1925, the US representatives proposed an amendment to the NT principle in the Paris Convention, replacing the NT principle by the principle of reciprocity. The proposal was later rejected.

Paragraph 2 of Article 2 of the Paris Convention prohibits requirements of domicile and Paragraph 3 stipulates the equal treatment of nationals and residents. There are exceptions in Paragraph 3 for the requirements to use an agent if the non-residents are filing their applications and for requirements concerning judicial proceedings. These exemptions serve as a significant source of financial income for local professionals especially in countries with a high proportion of foreign filings (Heath *in* Kamperman Sanders 2014).

³⁰ There have been 176 contracting parties to the Paris Convention as of May 9th, 2015. The list is available at WIPO-administered treaties: Contracting Parties: Paris Convention, 2015.

³¹ Thailand, incorrectly cited as a non-member in Heath *in* Kamperman Sanders 2014, p. 224, acceded to the Paris Convention on May 2nd, 2008, the convention became effective on August 2nd, 2008 (WIPO-administered treaties: Contracting Parties: Paris Convention, 2015).

Due to procedural matters, the panel in DS174 had to interpret the relation between Paragraph one and two in Article 2 of the Paris Convention (1967). While Paragraph 1 of the Article 2 expresses the national treatment obligation, Paragraph 2 prohibits conditions for the enjoyment of industrial rights in terms of local domicile or establishment requirements (WT/DS174/R). The EC claimed that “*Article 2(2) prohibits the imposition of requirements as to domicile or establishment and is therefore different from, and additional to, the obligations resulting from the national treatment provision of Article 2(1)*” (WT/DS174/R, para. 7.22). However, as the paragraphs are linked with the word „*however*“, the Panel concluded that they are interlinked and that paragraph 2 shall be read as a restriction to paragraph 1 that „*in effect provides that certain conditions may not be imposed on foreign nationals, even if they are imposed on a country’s own nationals*”(WT/DS174/R) Therefore, the Panel concluded that „*all three paragraphs either establish a single obligation or are very closely related: paragraph 1 sets out an obligation to provide national treatment and paragraphs 2 and 3 limit that obligation*“ (WT/DS174/R).

The NT principle in Paris Convention applies to the industrial property. The term “*industrial property*” shall be, according to Ch. Heath (*in Kamperman Sanders 2014*) interpreted as in Article 1(2)-1(4) of the Paris Convention and is thus wider than the catalogue of IPRs in the TRIPS Agreement, as it includes utility models, trade names and unfair competition (*addressed above*).

The national treatment is an important underlying principle, nevertheless, its impact might be fully realised only in connection with other rights and principles. The sum of privileges accorded based on the Paris Convention is sometimes referred to as the “*Unionist Treatment*”, referring to the “Paris Union” as the community of the parties to the Paris Convention. *The Unionist Treatment* (as in Heath *in Kamperman Sanders 2014*) comprises the right of priority (Art. 4), the independence of patents (Art. 4^{bis}), and trademarks (Art. 6(3)), the global protection of trade names (Art. 8), the registration of trademarks *telle quelle* (Art. 6^{quinquies}), the protection of process patents (Art. 5^{quater}), service marks (Art. 6^{ter}) and the protection against unfair competition (Art. 1 Q^{bis}). Were it not for the right of priority, the NT principle on its own might not be of any use for the foreign right holders, the country, whose nationals usually tend to apply for the protection in their home country (Heath *in Kamperman Sanders 2014*).

If compared with other international treaties, N. Pires de Carvalho (2010) notes that the coverage of the NT principle under the Paris Convention was broader than national treatment under GATT 1947, as the GATT 1947 applied only to specific measures in relation to the sale,

purchase, distribution of goods, whereas the Paris Convention was not restricted in terms of activities covered.

As highlighted repeatedly in a different context, the TRIPS Agreement sets the minimum standards of protection and enforcement. That is also reflected in its wording, as the nationals of other Members shall receive treatment no less favourable than the nationals. Therefore, as concluded by N. Pires de Carvalho (2005), if a WTO Member fails to provide the minimum standard stipulated in the TRIPS to its nationals, it is obliged to provide this standard to the nationals of other Members, even if that means discrimination in favour of nationals of other Members. On the other hand, under the Paris Convention, if a member decides to lower the level of protection and/or enforcement of IPRs to its nationals, the NT principle under the Paris Convention is still fulfilled.

2.8 The Berne Convention

The Berne Convention lies on three basic principles: national treatment, no formalities (Article 5(2) Berne Convention) and independence of protection (Kamperman Sanders 2014). Argentina as a third party to the WTO dispute *DS362 – China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* summarizes the three basic principles of the Berne Convention as: principle of national treatment, principle of automatic protection and independence of protection (WT/DS362/R Annex C-1; para. 34). A. Kamperman Sanders (2014) states that the combination of the first two, the second one providing for protection of literary and artistic works without any need for the formality of registration, leads to „*an extremely generous application of the principle of national treatment*“. In other words, because of the automatic protection, the national treatment is not dependent on any formality (WT/DS362/R Annex C-1; para. 35).

Article 9 TRIPS – Relation to the Berne Convention

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

As analysed above, the national treatment principle under both the TRIPS Agreement and the Berne Convention was challenged in *DS362 China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (complainant: United States). The Panel expressly noted that the NT principle under Article 5.1 Berne Convention, as incorporated

under the Art. 9.1 TRIPS, is distinct from Art. 3.1 TRIPS Agreement (WT/DS362/R, note 113). As highlighted by the Panel in DS362, Article 5(1) provides for the enjoyment of two overlapping sets of rights that have been described as *"the twin pillars on which protection under the Convention rests"* (Ricketson, Ginsburg 2006). Those two pillars are the national law incorporated under the national treatment obligation, more specifically *"the rights which their respective laws do now or may hereafter grant to their nationals"* on one hand and *"the rights specially granted by this Convention"* on the other. It shall be noted that these two sets of rights are granted to *"works"* and the definition of *"works"* vary according to the respective Article of the Berne Convention that grants the rights. The rights specifically granted by this Convention are not defined by the Berne Convention. The Panel in the dispute DS362 provided an illustrative and non-exclusive list of these rights, including but not limited to Articles 6bis, 8, 9, 11, 11bis, 11ter, 12, 14, 14bis and 14ter (WT/DS362/R, para. 7.107). It should be noted that Article 6bis is specifically excluded in the Incorporation Article 9.1 TRIPS. Interestingly, the US as a claimant in the dispute *DS362 – China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* claimed these rights as a group (WT/DS362/R, para. 7.108). The works that have failed content review and the deleted portions of works edited to satisfy content review³² constituted a class of works that were denied protection under Article 4(1) of the Copyright Act and the Panel concluded that China has an international obligation to protect copyright in such works (WT/DS362/R, para. 7.107).

Argentina argued in its third party submission in dispute DS362 that China's copyright protection violated the national treatment principle under the Berne Convention, as the copyright protection shall be ensured with no requirement of any formality of registration, deposit, authorization, or the like and thus the national treatment is not dependent on any formality (WT/DS362/R Annex C-1, para. 34-35). Consequently, the wording of the Chinese Copyright Law (Art. 4) stating that *"[w]orks the publication or the distribution of which is prohibited by law shall not be protected by this Law"* was interpreted to contravene the national treatment principle.

With regard to special agreements, the Berne Convention's Article 20 is an equivalent to the Article 19 of the Paris Convention. Under Article 20 of the Berne Convention, 'Special Agreements Among Countries of the Union', *„[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or*

³² To the extent that they constitute copyright works.

contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.”

Both Article 20 of the Berne Convention and Article 19 of the Paris Convention employ the phrase “*reserve the right to make separately between themselves special agreements*.” Under Article 9(1) of the TRIPS Agreement, “*Members shall comply with Articles 1 through 21 of the Berne Convention (1971).*”

2.9 The Rome Convention

The Rome Convention also covers the national treatment principle which is also incorporated in the TRIPS Agreement. Under Article 2, ‘*national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed: (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; (b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory; (c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.*’

Thereafter, Articles 4 to 6 define the conditions for each category of protection. In case of producers of phonograms, national treatment is provided subject to the fulfilment of the following conditions: criterion of nationality, criterion of fixation and criterion of publication. The national treatment shall be provided in case that one of the listed conditions is met. Under the nationality criterion, the national treatment shall be granted by each contracting state if the producer of the phonogram is a national of another Contracting State. Under the fixation criterion, the national treatment shall be granted if the first fixation of the sound was made in another Contracting State. Lastly, under the publication criterion, the national treatment is provided to producers of phonograms if the phonogram was first published in another Contracting State. The national treatment can thus stem from both the nature of the producer of the phonogram as well as from the nature of the phonogram. However, the contracting countries may opt out from the two latter criterions. ‘*By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation.*’ (Art. 5 Rome Convention).

With regard to the national treatment to performers, all possible conditions are linked only with the nature of the performance. Under Article 4, the national treatment shall be granted to performers upon the fulfilment of at least one of the conditions: a) the performance takes

place in another Contracting State; (b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention; (c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

Regarding protected broadcasts, each contracting state shall grant national treatment to broadcasting organisations if either of the following conditions is met: (a) the headquarters of the broadcasting organisation is situated in another contracting state; or (b) the broadcast was transmitted from a transmitter situated in another contracting state. The contracting states may, however, decide to apply the conditions cumulatively (Art. 6). In such a case, the contracting state would deposit the notification with the Secretary-General of the UN, such as in the case of the producers of phonograms.

3 Sources of TRIPS-plus provisions

The TRIPS Agreement, as explained above, sets forth the binding minimum standards of the protection and enforcement of the IPRs. Legally binding arrangements concluded by, between or among Members of the WTO, which go beyond the TRIPS minimum, are referred to as ‘TRIPS-plus provisions’. The author is of the opinion that all legally binding arrangements concluded by the subjects of international law may be considered as potential sources of TRIPS-plus provisions, irrespective of the formal name of the arrangement, such as treaty, agreement, convention etc., and irrespective of the prevailing content of the legally binding arrangements, be it trade, or IP only, as long as the arrangement represents legally binding right and/or obligation in the field of intellectual property. The following chapter analyses the most common sources of TRIPS-plus provisions, as well as special cases.

3.1 *Preferential Trade Agreements*

The Preferential Trade Agreements represent the most common source of the TRIPS-plus provisions and is therefore often referred to as the main – general and umbrella-type legal source. The author’s understanding of the concept of the trade agreements was laid down in the Methodology section.

Even though the role of PTAs in trade liberalisation is rather complex and the relationship between the WTO and PTAs negotiations and subsequent provisions is subject to research and discussions, it is generally understood that the WTO Members are encouraged to promote trade liberalisation. Therefore, the WTO Members are permitted, in order to negotiate further liberalized trade conditions, to depart from the non-discrimination principle, namely from the MFN principle, under specific conditions. These conditions are enumerated in Article XXIV GATT in paragraphs 4 to 10 in connection with the *Understanding on the Interpretation of Article XXIV of the GATT 1994*, in Article V GATS in relation to trade in services and in the “*Enabling Clause*” that allows for preferential treatment of developing countries (*Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*). The conditions in the GATT and in the GATS cover the conclusion of custom unions and free trade agreements. Despite the historical negotiations described above, there is no explicit condition allowing departing from the MFN principle stipulated in the wording of the TRIPS Agreement.

In general, the preferential trade agreements cover regional trade agreements, covering areas like the European Union (EU), the Common Market of the South (MERCOSUR), North America (NAFTA), the Asian Nations (ASEAN), and the Common Market of the Caribbean (CARICOM), the Association of Southeast Asian Nations (ASEAN), and the Common Market for Eastern and Southern Africa (COMESA) (*see also* M. M. Aleman 2014).

3.2 IP in International Investment Agreements

In order to promote investment, countries have been bilaterally concluding international treaties on investment protection (in general: *International Investment Agreements* – IIAs). IIAs are concluded between countries (or integration groups, i.e. the European Union), however, they provide for obligations for governments and rights for investors. Currently, there are almost 2500 IIAs in effect (2223 BITs and 274 other IIAs; *in* UNCTAD 2015). Additionally, investment protection is, similarly to the IP regulation, extensively included in complex PTAs, concluded both bilaterally and regionally. There has been no international treaty on a multilateral level covering investment, however, the WTO law includes a plurilateral *Agreement on Trade-Related Investment Measures* (TRIMS), covering only investment measures related to trade in goods. Additionally, investment-related measures are stipulated in other WTO Agreements, e.g. the GATS with regard to services, the TRIPS with regard to IPRs or the GPA concerning public procurement (WTO: TRIMS, 2015; *in detail in* Štěrbová 2013).

The relationship between IPRs and investment protection have extensive impacts on real investor-state relationships, as investors start to realise the IIAs might provide them with a possible additional way of reversing decisions or regulation related to their IPRs interests. To illustrate, there have been recently three important cases, namely the case of plain packaging, when Phillip Morris challenged restrictions on the advertising and packaging of cigarettes in Australia and Uruguay (further *in* Ch. Farley 2014; Mercurio 2012; Mercurio (2014)), and the case of Eli Lilly, a pharmaceutical company claiming that invalidating two of its patents by Canadian courts violated its rights as an investor under the North American Free Trade Agreement (NAFTA; *in* Managing IPRs, 2013). Previously, the NAFTA Agreement was also used as a tool to initiate arbitration proceedings against the USA by Apotex, generic drugs manufacturer, who failed to obtain an FDA³³ approval for their generic drugs, claiming that the USA failed to provide MFN and fair and equitable treatment for their investment (Managing IPRs, 2013).

³³ The US Food and Drug Administration.

3.2.1 Intellectual Property Rights as Covered Investment

From a legal point of view, IIAs provide for protection of investment that fulfils their definition, i.e. falls under the definition of so called ‘*covered investment*’. The definition of ‘*covered investment*’ usually consists of two parts – general definition, stating that an investment means every asset that the investor owns or controls, directly or indirectly, followed by the second part – an express list of forms that an investment may take. Currently, IPRs have been standardly expressly included in the list of forms of covered investment which is, as stressed by L. Liberti (2010), not a novelty.

The extent and wording of the definition is crucial. Some IIAs include into the list of forms of covered investment only reference to ‘*intellectual property rights*’. Other IIAs stipulate a broader definition that includes a sublist of intellectual property covered, provided that the sublist is usually meant as illustrative and non-exhaustive. Still, the lists often include additional rights going beyond the definition in the TRIPS Agreement, e.g. goodwill or confidential business information (Ch. Farley 2014). The wording of the list is then crucial, as sometimes it is limited to types of IPRs, however, sometimes it refers to the “*rights with respect to copyright, patents, (...)*”, followed by other types of IPRs. In the latter case, the list of covered rights is, arguably, broader than merely types of IPRs, provided that the disputed institute constitutes a right (*see below*). Occasionally, IIAs do not expressly mention IPRs in their definition of investment. However, as argued by B. Mercurio (2012), IPRs may also qualify as covered investment as “*a form of property rights and an intangible asset used for economic benefit or other business purposes*”.

Similarly, definitions in IIAs often cover royalties. Those might be expressly included (i) under return on investment or, similarly, under transfers relating to covered investment, or, less frequently, (ii) under investment itself, or theoretically, (iii) not expressly mentioned at all. The definition of covered investment is usually stipulated in introductory paragraphs of an IIA and thus, if disputed, subject to interpretation in compliance with dispute settlement procedures under the agreement.

Once the issue is determined to fall under the covered investment, expropriation is a key word in investment cases to establish whether the government’s decision or regulation might have amounted to violating the given IIA. As highlighted by V. Lowe (2002), expropriation is no longer understood only in a sense of uncompensated takings of private property by the state, as “*(...) it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be*

deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.” As obvious in the above described cases, this finding is crucial also in IPRs-related investment disputes.

3.2.2 Applications for IPRs in investment law

A patent application, and any application for intellectual property rights in general, do not constitute an intellectual property right per se. Nevertheless, it may be covered by IIAs that use the broad definition of covered investment with regard to IPRs: “*rights with respect to copyright, patents, (...)*” (see above). However, in that case it should be scrutinised whether a patent application would constitute an “*intangible property*”, specifically, whether it may be qualified as “*property*”. L. Liberti (2010) argues that “[a]lthough a patent application creates a mere expectation of obtaining an exclusive right, it entitles the holder with certain prerogatives such as the ability to act against infringers.” Additionally, it is generally possible to legally dispose of a patent application, e.g. by means of an assignment or a licence.

Secondly, L. Liberti argues that patent applications might be also covered by IIAs whose definition of covered investment includes “*copyright and related rights*”. However, this term is traditionally used to address specific rights related to copyright, therefore, if only this connotation is used in the definition of covered investment, the author is of the opinion that the patent applications should not be considered to be included based on this term.

Additionally, some BITs concluded by the USA, Canada or Japan cover not only the investment phase, but also allow for national treatment of investment projects in their pre- and post-establishment phases (Liberti 2010; Štěrbová 2013). Consequently, some authors argue that applications for IPRs might be considered as a pre-establishment phase of an investment project (Liberti 2010). Nevertheless, these considerations should reflect the IPRs principles, as it remains in the discretionary power of a patent office to decide whether, subject to compliance with applicable national and international regulation and MFN and NT principles, a patent (or any IPR in general) shall be granted.

Recently, several IIAs have addressed this issue expressly, leaving no further room for doubts, e.g. agreements concluded by the USA set out that investment provisions do not apply to the cases of revocation, limitation or creation of IPRs, provided they are in compliance with the TRIPS, or, interestingly in case of comprehensive PTAs, in compliance with the Chapter of the same Agreement regulating the IPRs protection. However, as mentioned also in the case of compulsory licences, such compliance would be, if disputed, assessed by dispute settlement mechanism foreseen in the given IIA, i.e. by arbitrators in an investor-to-government case, who,

as argued by B. Mercurio (2014), might lack sufficient expertise in interpreting the TRIPS Agreement and jurisprudence related thereto.

3.2.3 Compulsory licences in investment law

A compulsory licence represents an institute of the IP law that is meant to balance monopoly rights awarded to an owner of a patent. Subject to Article 31 TRIPS, governments may decide, primarily in cases of national emergency, to grant a compulsory licence without the consent of a rights owner.

Recently, given the disputable status of compulsory licences under IIAs, they have been expressly exempted from the covered investment definitions by numerous IIAs. Other IIAs do not exempt compulsory licences expressly, however, provide for an exemption for cases of transfer of IP undertaken in a manner not inconsistent with the TRIPS Agreement. Consequently, this general wording may cover also other questionable issues, including protection of undisclosed information or protection of public health. Some PTAs prefer a more general approach, stating that „*[i]n the event of any inconsistency between this Chapter [on Investment] and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*” This provision would exclude from possible investment cases all limitations of IPRs that are in compliance with the IPRs Chapter that usually further refers to the TRIPS Agreement.

The compulsory licences or transfers of IP in general are usually exempted subject to the compliance with the TRIPS Agreement. Nevertheless, the TRIPS compliance would be, in case of a dispute, also interpreted by means of dispute settlement mechanisms foreseen in the given IIA, i.e. by arbitrators (*see also Fig. 1 in Boie 2010*).

The relationship between standards of treatment of investment on one hand and IPRs on the other hand constitutes a complex question. Even when regulated in one comprehensive PTA, IPRs and investment chapters provide separately for their own definition of standard of treatment – e.g. IIAs concluded by the USA stipulate NT and MFN treatment for investment, in connection with minimum standard of investment treatment in accordance with customary international law, including fair and equitable treatment and full protection and security, as provided for in international law; whereas the US PTAs provide for NT for IPRs.

Therefore, some of the IIAs regulate this question specifically, stipulating that: “*[n]othing in this Agreement shall be construed so as to oblige either Contracting Party to extend to investors of the other Contracting Party and their investments treatment accorded to investors of any third country and their investments by virtue of multilateral agreements in*

respect of protection of intellectual property rights, to which the former Contracting Party is a party.” In other words, all provisions contained in this given IIA shall be exempted from the NT and MFN principles not only under the TRIPS Agreement, but also under other multilateral IPRs agreements, i.e. those administered by the WIPO. Therefore, provisions contained in this IIA shall not be deemed to constitute the potentially multilaterally binding TRIPS-plus standard.

4 TRIPS-plus provisions in the EU and US Trade Policy

Even though the present research does not focus on the EU and US Trade Policy as such, before analysing relevant so called TRIPS-plus provisions in the EU's and US PTAs, in line with the additional research objectives as explained above, this section highlights the major milestones of the EU Trade Policy from the IPRs perspective.

For its Trade Policy, the European Union launched its *Global Europe Strategy* in 2006. Previously, in 2004 the European Commission adopted the *Strategy for the Enforcement of Intellectual Property Rights*. Since then, it has been actively seeking negotiations of preferential trade agreements with a significant focus on enhanced protection of intellectual property rights (Maskus 2014). According to S. Nadde-Phlix (2014), these strategies brought the EU to a similar level with the United States, Japan and the European Free Trade Association (EFTA) as part of the '*tough new approach on intellectual property rights*' (similarly in Maskus 2014), as the US trade policy '*in particular demands strong protection for patent owners, particularly in pharmaceuticals and agricultural technologies, and extensive rules covering digital copyrighted materials.*'

The 2004 Strategy for the Enforcement of IPRs states that with regard to the bilateral and regional treaties, "[i]t is also envisaged to make the enforcement clauses in future bilateral or bi-regional agreements more operational and to clearly define what the EU regards as the highest international standards in this area and what kind of efforts it expects from its trading partners." Other proposed actions to address the problem cover: identifying the priority countries, political dialog, incentives and technical cooperation, dispute settlement and possible sanctions, creation of public private partnerships, awareness raising and institutional cooperation.

The 2004 Strategy was subject to an evaluation in 2010 which confirmed its relevance (EC 2014: Trade, growth and intellectual property). With regard to the bilateral trade agreements, it was concluded that they "*can address country-specific IPR challenges, and have facilitated more progress on IPR enforcement in third countries*". (EC 2014: Trade, Growth and Intellectual Property). Additionally, the European Commission highlighted the role of the EU's bilateral customs cooperation agreements in which the IPR enforcement is also a priority. Within its action tasks, the EC listed an action "*to ensure that IPR chapters in bilateral trade agreements offer adequate and efficient protection for right-holders and address key*

weaknesses in partner countries' IPR systems while calibrating commitments to third countries' level of development".

In 2015, the European Commission proposed a new strategy "*The Trade for All - New EU Trade and Investment Strategy*" (EC 2015). Among its goals, the EC aimed at protecting innovation, stating that "*creativity, research and design are essential to a value chain economy (as they) account for a third of EU jobs and 90% of EU exports, [h]owever, they are particularly vulnerable to poor protection and enforcement of intellectual property rights (IPR) in other jurisdictions and are at times subject to forced technology transfer.*" With regard to the IP negotiations, the European Commission explicitly stated that the EU should, building on an agreement in Nairobi (i.e. the Tenth WTO Ministerial Conference held in December 2015 in Nairobi; more detail in WTO 2015), seek to *reinvigorate* the WTO, "*by entrusting the WTO with a central role in developing and enforcing the rules of global trade*", including the intellectual property. Except for the two references described above, the Strategy does not devote any other points to the protection of IP.

As argued by the European Commission (in EC: COM/2010/0612 final; 2010), "*[f]or our companies to stay ahead, they need to be able to rely on inputs, services and highly qualified people from around the world, and their investments and intellectual property require robust protection.*" Therefore, the European Commission continues, "*[i]n negotiating FTAs, the IPR clauses should as far as possible offer identical levels of IPR protection to that existing in the EU while taking into account the level of development of the countries concerned.*"

With regard to the EU's PTAs, P. Roffo (2014) argues that, "*the evolution has been incremental in terms of upward harmonisation of IP minimum standards*", while the initial agreements, aimed at committing partners to "*the highest international standards of protection*" via references to the existing international treaties, the later development being closer to the US comprehensive approach. These two approaches are in line with the general conclusion drawn by P. Roffo (2014) that "*the incorporation of IP in the negotiations is one of the main incentives to major trading partners to engage in FTA negotiations because of the active and influential industrial lobby that sees the bilateral track as a more productive and issue-oriented process than multilateral negotiations.*" Regarding differences between the US and EU's PTAs, as illustrated by specific examples of the treaties analysed below, the EU negotiations focus on strengthening protection of geographical indications and reiterate the enforcement provisions of the TRIPS Agreement (e.g. in Watal 2014).

J. Watal (2014) further concludes that "*[c]ertainly, EU agreements seemingly offer a better package for developing countries in relative terms, if only because they do not go far*

beyond concessions that countries have already made elsewhere and they at least formally, if not substantively, acknowledge the legitimate IP-related concerns of these countries.” The EU stresses its focus on sustainable development also among its general objectives of the treaties³⁴ and recognizes the primacy of economic development goals for agreement partners, including in the context of IPRs (e.g. Maskus 2014).

With regard to the US trade policy, the *“USTR’s Office of Intellectual Property and Innovation (IPN) uses a wide range of bilateral and multilateral trade tools to promote strong intellectual property laws and effective enforcement worldwide, reflecting the importance of intellectual property and innovation to the future growth of the U.S. economy.”* (in USTR: Intellectual Property 2018).

As recalled for example by P. Roffo (2014), the principles of the US negotiating model are recalled in the expired Trade Act of 2002 which, among others, lists the principle negotiating objectives of the USA regarding trade-related intellectual property as: *“ensuring that the provisions of any multilateral or bilateral trade agreement governing IPRs that is entered into by the USA reflect a standard of protection similar to that found in the US law.”* The scholars have paid particular attention to the US model, which is characterized by a long-established comprehensive strategy in the field of IP, dating back before the TRIPS Agreement (including the NAFTA Agreement; in Roffo 2014).

As concluded by J. Drexler (2014), the EU by large avoids entering into obligations that would result in a need to change the EU laws. That might be thanks to its negotiating power, resulting in the wordings of PTAs that do not go beyond EU’s intentions, however, the EU’s negotiating position is internally strengthened by the fact that the European Commission is aware of the difficulties related to the political implications of obligations going beyond the EU legislation which would require internal implementation.

4.1 IPRs in EU’s Association Agreements

The EU represents a union which has gradually expanded in terms of its membership. The accession process of a possible future member previously as well as currently consists of several stages that should ensure that a candidate country is suitable and ready for such a close cooperation. The agreements preceding the full membership to the EU, often referred to as the Association Agreements, constitute the framework of the relations and serve as the basis for the implementation of the accession process (*EC 2016 - Stabilisation and Association Agreement*;

³⁴ E.g. in EU-CARIFORUM.

for details on the Accession Agreements of the Czech Republic and other Central and Eastern European countries *see* Plchová, B. et al., 2010).

Given the fact that the agreements serve not only economic but also political reasons, the structure as well as the incorporation of the regulation of IPRs into the agreement is different. Having said that, this characteristic does not mean that the IPRs are not incorporated into the agreements at all. On the contrary, the acceding countries agree to increase the level of protection of the IPRs to the level of the European Union. The specific nature of the association agreements has led to a decision of authors analysing the IPR provisions in PTAs not to fully reflect this category of agreements (P. Roffe 2014).

The content and the depth of the regulation of the IPRs provisions vary among the accession agreements. There are accession agreements more general in its nature with regard to the IPRs. These include for example *the Accession Agreement of Bosnia and Herzegovina*, *the Accession Agreement of the Former Yugoslav Republic of Macedonia*, and *the Accession Agreement of Kosovo*. In these agreements, parties confirm the general importance which they attach to ensuring adequate and effective protection and enforcement of IPRs, agree to grant each other the most-favoured nation treatment, and secondly, the acceding country undertakes to take all necessary measures in order to guarantee a level of protection of IPRs *similar* to that existing in the EU³⁵, including effective means of enforcement. The required level of protection is further explained in the joint declarations, in particular requesting the newly associated to make available the measures, procedures and remedies provided for in the *Directive 2004/48/EC on the enforcement of intellectual property rights*.³⁶

Lastly, the acceding country agrees to accede to multilateral IPR conventions listed in the attachment to the accession agreement. Both of these obligations are to be fulfilled within a limited period of time. Bosnia and Herzegovina, Kosovo and Montenegro agreed to comply with the requirement within five years.³⁷ On the other hand, there are other Accession Agreements which provide for a complex regulation of the IPRs in a separate chapter (e.g. Georgia).

³⁵ In other cases than official references to titles of international agreements, the reference to the European Communities and the European Union is used interchangeably. Since the topic of the European integration is not the main focus of this research, the European Union is most often referred to as the EU throughout its historical development.

³⁶ The Parties further agree that the level of protection referred to in Article 75, paragraph 3 of this Agreement, shall include the availability of the measures, procedures and remedies provided for in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. (Joint Declaration on Article 75 of the EU-Montenegro Association Agreement).

³⁷ Art. 73 of the Bosnia and Herzegovina's Association Agreement, Art. 77 of the Kosovo's Association Agreement, Art. 75 of the Montenegro's Association Agreement.

Lastly, the accession agreements often govern the specific issue of geographical indications, both protection of geographical indications for agricultural and fishery products and foodstuffs, as well as wine and spirit drinks. With regard to the former, the acceding country agrees to provide protection of geographical indications of the EU registered under the *Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuff*. The acceding country shall prohibit any use of the names as well as to refuse the registration of trademark which would infringe the protected geographical indications. With regard to the wine and spirits, for example the Accession Agreement of the Bosnia and Herzegovina incorporates in its annex to the protocol an *Agreement on the reciprocal recognition, protection and control of wine, spirit drinks and aromatised wine names*. The agreement covers an extensive list of protected wines and spirit drinks originating in the member states of the EU as oppose to seven wine regions originating in Bosnia and Herzegovina.

4.2 IPRs in agreements establishing a customs union

A customs union represents a deep economic integration stage. Its proper functioning requires a high level of harmonization of the domestic regulation of a direct relevance to the functioning of the customs union.

Serving as an example, the *EU-Turkey customs union* requires Turkey to adopt domestic legislation in the areas of IPRs which is equivalent to the legislation adopted in the EU or its Member States. This is in accordance with the general rules that in areas of direct relevance to the operations of the Customs Union, Turkish legislation shall be harmonized as far as possible with the EU legislation.³⁸ With regard to the Protection of intellectual, industrial and commercial property, which is governed by Chapter IV on Approximation of Laws, the Parties confirm the importance they attach to ensuring adequate and effective protection and enforcement and “*recognize that the Customs Union can function properly only if equivalent levels of effective protection [of IPRs] are provided in both constituent parts of the Customs Union*”. Consequently, Annex 8 to the Decision lists the requirements laid upon the parties, especially regarding the accession to the existing IP international treaties.

³⁸ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union; Art. 54 of the Decision.

4.3 Other

Lastly, any research analysing IPR provision in bilateral and regional agreements shall cover also the development related to the *Anti-Counterfeiting Trade Agreement* (ACTA). The ACTA is a plurilateral draft treaty focusing on the enforcement of IP. The agreement was negotiated by the EU and its member states, the US, Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and Switzerland to improve the enforcement of anti-counterfeiting law internationally.

In 2010, the European Commission (*in EC: COM/2010/0612 final; 2010*) argued that *‘[t]he Anti-Counterfeiting Trade Agreement (ACTA) aims to establish a comprehensive international framework – a catalogue of “best practices” – that will assist its members to effectively combat the infringement of IPRs. When agreed and implemented, ACTA will effectively introduce a new international standard, building on the WTO TRIPS agreement.’* However, reflecting also the wide-spread antagonism against the treaty among the public, the ACTA was later rejected by the European Parliament. This was the first time that the Parliament exercised its Lisbon Treaty power to reject an international trade agreement (*in EP – European Parliament rejects ACTA: 2012*).

The major opposition arguments against the treaty highlighted the secretive approach to the negotiations which were held behind the strictly closed doors and the public was not made aware about the content of the treaties. The lack of democratic participation in the IP norm-making was later criticised also in the academic research. D. Gervais (2014) argues that *“the ACTA plurilateral ‘country-club’ approach entailed a reconfiguration around like-mindedness, not geography, with a view of designing norms that will then be exported via other instruments to countries that would likely have been more critical or defend other views had they been allowed in the negotiation room.”*

5 Typology of IPR provisions in PTAs

As often argued by scholars, preferential trade agreements (PTAs)³⁹, through the combined effect of the national treatment and the most-favoured nation principle, constitute an important trend in the IP policy making (e.g. Roffo 2014). The author shares the opinion that the thorough knowledge and understanding of the IP provisions concluded in individual PTAs is crucial with regard to the future developments for the IP policy.

As explained above, there is an increasing number of PTAs covering IPRs, either as a separate chapter or in general. Valdés and McCann (2014) speak about “*a growing and increasingly complex network of RTAs with IP content*”. S. Nadde-Phlix (2014) notes that ‘*[s]urprisingly, the recession of IP negotiations at the multilateral level is faced by a proliferation of IP negotiations at the bilateral and regional levels (...).*’ According to P. Roffe (2014), FTAs incorporating IP chapters ‘*are not a generalised phenomenon, but they are a significant one, as they mark a trend towards upward expansion of norms and of their potential impact on the evolving international IP architecture.*’

Generally speaking, the PTAs might be divided into three groups: agreements lacking any regulation of IPRs, agreements covering IPRs provisions repeating the minimum standards required by the TRIPS Agreement and agreements going beyond the TRIPS regulation. The latest group, often referred to as the ‘*TRIPS-plus provisions*’, cover rules that go beyond the minimum standards of the TRIPS Agreement as well as the rules that take away the flexibility given in the TRIPS Agreement (e.g. in Ranjan 2007).

Alternatively, there are other possible systems of classification. Valdés and McCann (2014) divide their 245 PTAs in four groups: agreements lacking any IPRs-related provisions, agreements with general provisions, agreements with specific provisions and agreements including pharmaceutical provisions. Interestingly, there are four agreements including specific provisions but lacking any general regulation (Canada-Chile, Canada-Costa Rica, MERCOSUR and Peru-Mexico; in Valdés and McCann 2014).

A sub-category of the agreements lacking any material IPRs provisions represent PTAs which do not cover any IPRs provisions, but contain the so called *rendez-vous clause*,

³⁹ For the explanation of the terminology applied in the present research, please see section Methodology and state of the art.

stipulating that the parties undertake to conclude the negotiations, within a limited period of time upon entry into force of the given PTA, in the listed trade related issues, including IPRs.⁴⁰

Special attention is also devoted to the differences of treaties based on the development status of the parties. This issue is often referred to as the ‘*North – South*’ divergent perspectives on IPRs. As highlighted by A. A. Yusuf (*in* Correa & Yusuf 2008, p. 4), “[d]ivergences on the scope of protection of IPRs have always existed between technologically advanced countries and those in the process of industrialization,” as limited protection and enforcement of IPRs allow for greater utilization of foreign IPRs in their industrial catching-up strategies. Therefore, developing countries, being already bound by the minimum standards of the TRIPS Agreement, are generally reluctant to bind themselves to additional international obligations. On the other hand, P. Roffe (2014) argues that the treaties which involve developing country partners seek similar objectives as all other PTAs concluded with developed trading partners. In the Asian region, L. Hsiu (2015) highlights the USSFTA and the KORUS Agreements, as two examples of PTAs containing TRIPS-plus provisions. According to L. Hsiu (2015), both Singapore and South Korea are high-income countries with geopolitical interests in maintaining strengthened ties with the US.

The categorisation of the individual institutes below has been established based on the analysis of the TRIPS Agreement together with the first-stage analysis of the selected preferential trade agreements. In addition, this thesis builds upon the methodology used by Valdes and Runyowa (2012), as further elaborated by Valdes and McCann (2014 and 2016). Therein, the provisions are firstly divided into three groups: (a) general IP provisions, (b) provisions related to specific IPRs and (c) public health and pharmaceutical sector related provisions. The general IP provisions group consisted initially of three distinct subcategories: (i) statements referring generally to IP protection, enforcement and international cooperation, (ii) national treatment and MFN principles and (iii) references to IPRs agreements, including express references to the TRIPS Agreement. They were later supplemented in the revised and updated paper of Valdes and McCann (2014) with investment-related IP provisions and dispute settlement for non-violation claims reaching the total of 32 provisions.

As highlighted by Valdés and Runyowa (2012), it should be borne in mind that the IP provisions sometimes appear not only in the main body of RTAs, but also in side letters exchanged in connection with the negotiations. These side letters are likely to regulate specific topics, such as health-related provisions or liability of internet service providers.

⁴⁰ E.g. Art. 3 of the Interim Economic Partnership Agreement between the EU and East African Countries, Art. 53 of the Economic Partnership Agreement between the EU and Madagascar, Mauritius, the Seychelles, and Zimbabwe.

M. M. Aleman (2014) classifies the provisions in four groups of rules: the first being “provisions that aim to clarify, interpret or narrow down a TRIPS flexibility, as well as provisions that go beyond the minimum standard protection of TRIPS”. The second group covers provisions that develop new matters not covered by the TRIPS Agreement. The third group represents provisions that repeat the text of the TRIPS Agreement and the fourth group covers provisions stipulating an obligation to apply or accede to other treaties or to respect international commitments in force.

Additionally, as the results of trade negotiations in general are to be characterized not only based on the provisions expressly concluded, but also based on the topics consciously omitted in the final wordings of PTAs, a special attention shall be paid to provisions deliberately left out of the final wordings of the PTAs. Only then it is possible to understand the entire standpoint of a given country in international negotiations on both bilateral as well as multilateral level. The proliferation of some provisions concluded in the majority of PTAs may imply an increasing understanding to cover the given topic also in multilateral negotiations, whereas intentional omission of specific topics might suggest a lack of common understanding and possible failure of potential multilateral discussions. As an example, that might be illustrated by the lack of copyright and related rights protection stipulated in China’s PTAs, except for the case of the far-going IP chapter in the China-Switzerland FTA (*discussed below*).

Additionally, the authors distinguish between the obligations that expand rights already recognized under the TRIPS Agreement, then referred to as ‘*TRIPS-plus*’ in a narrow sense, while in others they introduce obligations in areas not covered by the Agreements, referred to as ‘*TRIPS-extra*’ (*e.g. in C. Corea 2014*).

5.1 *Introductory provisions*

The initial provisions of IPRs chapters of PTAs often include general statements referring to IP protection, enforcement and international cooperation. General statements and proclamations on the importance of IPRs are also included in cases where there is no separate IPRs chapter. The introductory provisions cover general proclamations including streamlining of procedural measures of acquisition and maintenance of IPRs, transparency, requirement of publicity and a written form of laws, regulations and procedures or promotion of public awareness and education of protection of IPRs. Parties also usually undertake to cooperate in terms of exchange of information and promotion of contacts of their respective agencies.

Secondly, PTAs often expressly include their own provisions stipulating the MFN and NT principles. These are of an importance for the discussions on the scope of the NT and MFN

principles in the TRIPS Agreement and are therefore closely analysed below. Thirdly, not only the TRIPS Agreement incorporates preceding international IPRs treaties. The PTAs also often refer to the TRIPS itself, but very often also to other international agreements. Parties might also stipulate in a PTA an undertaking to accede to or ratify the existing multilateral agreements.

For example, in the CETA or the US-Singapore FTA, the parties proclaim to facilitate the production and commercialisation of innovative and creative products, and the provision of services, between the Parties; and to achieve an adequate and effective level of protection and enforcement of intellectual property rights.⁴¹ The EU-Singapore FTA further recalls the objectives and principles set forth in the TRIPS Agreement⁴², which shall apply to the given IPR chapter *mutatis mutandis*.

Based on the general IP provisions, the PTAs might be divided into two groups. Whereas some PTAs limit themselves to general proclamations and do not cover any further substantive regulation of IPRs, other PTAs use general introductory statements as a springboard to the often detailed substantive provisions on both protection and enforcement of IPRs. In this respect, especially developing countries, due to reasons discussed in more detail in relation to specific IP rights, have been recently hesitating to agree to far-reaching IPRs provisions and tend to limit the wording of IPRs chapters to introductory statements or references to existing international treaties.

The group of agreements which are limited to its general proclamations might be represented by the *Interim Economic Partnership Agreement between the EU and Cameroon*. Its interim nature is apparent also from the IPR chapter which foresees further cooperation and further negotiations. In addition, the Agreement aims at reinforcing the regional integration initiatives in Central Africa, stating that “*negotiations shall be based on a two-step approach, first applying the rules in the context of regional integration in Central Africa and, after a transition period to be determined jointly, applying the rules bilaterally.*”⁴³ Similarly, the *Economic Partnership Agreement between the EU and the Southern African Development Community* (SADC) state that the parties may consider entering into negotiations on the protection of IPRs in future.⁴⁴

Legally interesting introductory general statements refer to *effective* protection of the IPRs. The EU-Turkey customs union includes a provision stating that ‘*Turkey shall continue to*

⁴¹ Article 20.1 CETA; Art. 11. EU-Singapore.

⁴² Art. 7 Objectives and Art. 8 Principles.

⁴³ Art. 58.

⁴⁴ “*The Parties may consider entering into negotiations on the protection of IPRs in future, and the SADC EPA States have as their ambition, and will endeavour, to negotiate as a collective. Should negotiations be launched, the EU will consider including provisions on cooperation and special and differential treatment.*” (Art. 16(6)).

improve the effective protection of intellectual, industrial and commercial property rights in order to secure a level of protection equivalent to that existing in the European Community and shall take appropriate measures to ensure that these rights are respected.' The provision as it is drafted is a legally enforceable obligation which refers to effective protection. The possible actual enforcement, however, is complicated by the vagueness wording of the treaty – obligation *to continue to improve and appropriate measures*.

The introductory provisions of the IPRs chapter may also address the issue of a transfer of technology. Usually, the transfer of technology would be the subject matter covered by the so called *South-North* cooperation, i.e. between parties at a different stage of the economic development. For example, the *Economic Partnership Agreement between the EU and the CARIFORUM States* highlights that the parties shall pay particular attention to creating an adequate enabling environment for technology transfer, including development of human capital and legal framework. The measures shall take a form of, among others, information flows, business partnerships, licensing and subcontracting.⁴⁵ The parties shall in particular present an abuse of intellectual property rights by right holders or an abuse of obvious information asymmetries in the negotiation of licences.⁴⁶ In case of the EU-CARIFORUM Agreement, the IPRs are also governed together with the innovation and fostering innovation and creativity. The *EU-Central America Agreement* also covers the topic of the transfer of technology, which in addition highlights the importance of education and professional training for the transfer of technology.

The introductory provisions of the PTAs may also reveal the political connotations and the importance of the IPRs in relations to other topics. The *Trade Agreement between the European Union and Colombia and Peru* thus highlights in the introductory paragraphs that the parties recognise the need to maintain a balance between the rights of intellectual property holders and the interest of the public, particularly regarding education, culture, research, public health, food security, environment, access to information and technology transfer.⁴⁷

Occasionally, a PTA may introduce a new institution which is entrusted with a specific role and tasks, e.g. to further promote cooperation between the signatories in the area, to monitor the achievements reached due to the collaboration established in the PTA. This is the case of the *Trade Agreement between the European Union and Colombia and Peru*, establishing among the specialised bodies under the agreement a *Sub-committee on Intellectual Property*.⁴⁸

⁴⁵ Art. 142(1).

⁴⁶ Art. 142(2).

⁴⁷ Art. 196(2).

⁴⁸ Art. 15(1) (h).

The *EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement* requests the *Joint Council* established under the Agreement to decide on “a consultation mechanism with a view to reaching mutually satisfactory solutions in the event of difficulties in the protection of intellectual property”.⁴⁹ The *Economic Partnership Agreement between the EU and the Southern African Development Community (SADC)* establishes a *Special Committee on geographical indications and trade in wines and spirits*.⁵⁰

In case of plurilateral agreements among both developed and developing countries, the parties may agree to provide assistance to the signatories with insufficient capacity to implement IPRs provisions. The latter is the case of the AANZFTA which establishes a special *Committee on IP* to monitor implementation and administration of the provisions stipulated therein, co-chaired by Australia, Singapore and New Zealand (Australian Government: IP, 2015). That is in line with Australia’s goal to provide assistance in IP matters to countries in the region and also an example of a developed – developing country PTA (Valdes, Runyowa 2012).

The PTAs may also expressly allow the parties to incorporate provisions going even beyond the level of protection agreed in the given PTA. The *EU – Kazakhstan Enhanced Partnership and Cooperation Agreement* states that its IPRs chapter “shall not prevent the Parties from applying provisions in their law providing for higher standards for the protection and enforcement of intellectual property rights, provided that those provisions do not contravene the provisions of this [IPRs chapter]”.⁵¹

Lastly, recent EU PTAs may also cover a provision on the disclosure of information among the introductory provisions. For example, the CETA stipulates that the IPRs chapter “does not require a Party to disclose information that would otherwise be contrary to its law or exempt from disclosure under its law concerning access to information and privacy.”⁵²

5.1.1 National treatment and MFN principles

Based on Valdes and Runyowa’s findings (2012), 68 agreements out of their sample incorporate separate provisions on NT and MFN principles in their IPRs chapters. Based on the summary available in the Annexes, not all the EU’s PTAs cover these principles separately in their IPRs chapter. If so, they often expressly include the most-favoured nation principle and not the national treatment principle. The US agreements, on the contrary, cover the national

⁴⁹ Art. 12(2).

⁵⁰ Art. 13.

⁵¹ Art. 62(4).

⁵² Article 20.5.

treatment principle separately in their IPRs chapters, while they do not expressly include the most-favoured nation principle (agreements concluded with Australia, Bahrain, CAFTA-DR, Jordan, South Korea, Morocco, NAFTA, Oman, Panama, and Peru). The wording of the negotiated TPP also covers the national treatment principle. As stressed in the conclusions of this thesis, the national treatment principle might play a more significant role in the system, also due to the fact that the governments are not likely to provide for a more favoured treatment of foreigners as oppose to their nationals (so called reverse discrimination, *also in* Dobřichovský 2010).

As an example of the wordings of the provisions, the EU-Vietnam FTA states that: *‘With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Party to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of the other Party, subject to the exceptions provided for in Articles 4 and 5 of the TRIPS Agreement.’*⁵³

The EU-Central America Association Agreement includes an express provision on both national treatment and the most-favoured treatment principle: *“In accordance with Articles 3 and 4 of the TRIPS Agreement and subject to the exceptions foreseen in those provisions, each Party shall accord to the nationals of the other Party: (a) a treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property; and (b) any advantage, favour, privilege or immunity it grants to the nationals of any other country with regard to the protection of intellectual property.”*^{54 55}

With regard to other international players, the IPRs chapters in most of the Australia’s PTAs provide for a specific regulation of the principle of national treatment. Among the PTAs concluded by Australia within the Asian region, only *the Thailand-Australia Free Trade Agreement* (TAFTA) and *the Singapore-Australia Free Trade Agreement* (SAFTA) do not address the NT principle in the IPRs chapter. Inspired by the TRIPS Agreements, some of the PTAs also define the term of “protection” in the footnote such as *“matters affecting the availability, acquisition, scope, maintenance, and enforcement of IPRs, matters affecting the use of IPRs”* and, in some treaties, going beyond the TRIPS Agreement, if the regulation is

⁵³ Article X.

⁵⁴ Art. 230.

⁵⁵ Similarly, the *Trade Agreement between the European Union and Colombia and Peru* addresses both the national and the most favoured treatment principles. Under the national treatment, *“[e]ach Party shall accord to the nationals of another Party treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided for in Articles 3 and 5 of the TRIPS Agreement.”* Under the Most Favoured Nation Treatment principle, *“[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Party to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of the other Parties, subject to the exceptions provided for in Articles 4 and 5 of the TRIPS Agreement.”*

included in the substantive part of the PTAs, “*prohibition on circumvention of effective technological measures and the rights and obligations concerning rights management information*”. Any derogation from the NT principle is generally possible only in judicial and administrative procedures, requiring designation of an address within the Party’s territory or appointment of an agent.

The *Partnership and Cooperation Agreement* between the EU and Russia incorporates the most favoured nation principle as an obligation binding only one party – Russia, which shall grant to the EU companies and nationals treatment no less favourable than that granted by it to any third country under bilateral agreements.⁵⁶ Secondly, the *EU-Russia Partnership and Cooperation Agreement* stipulates the national treatment with regard to the enforcement of IPRs with competent courts and administrative organs.⁵⁷

An interesting example is also the *US-Israeli FTA*, dating back to 1985 as the first FTA signed by the USA, which devotes only one Article to the Intellectual Property.⁵⁸ While parties reaffirm their obligations under bilateral and multilateral agreements, the treaty stresses that “*nationals and companies of each Party shall continue to be accorded national and most favoured nation treatment with respect to obtaining, maintaining and enforcing patents of invention, with respect to obtaining and enforcing copyrights, and with respect to rights in trademarks, service marks, trade names, trade labels, and industrial property of all kinds.*”

Some of the FTAs cover an exemption to the general national treatment principle stating that it does not apply to procedures provided in multilateral agreements concluded under the auspices of the WIPO relating to the acquisition or maintenance of intellectual property rights.⁵⁹

5.1.2 References to IPRs agreements

As explained in detail above, IPRs are governed on the multilateral basis by the WIPO-administered agreements. Additionally, the minimum standard of protection and enforcement concerning the trade-related aspects of IPRs is set forth in the TRIPS Agreement binding all WTO members. Generally, PTAs often refer to these multilateral agreements in order to determine their relationship. These referrals take a form of a general referral in the introductory

⁵⁶ Annex 10 referring to Art. 54 of the Partnership Agreement.

⁵⁷ „Each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property.“ (Art. 98 of the Partnership and Cooperation Agreement between the EU and Russia).

⁵⁸ Art. 14.

⁵⁹ E.g. Art. 4.5 of the US-Jordan FTA, Art. 18.1.8 of the KORUS FTA.

articles of the PTA's IPRs chapter, or a form of multiple referrals in specific articles related to the given subject-matter; or a combination of both.

The referrals to multilateral IPRs international treaties differ in their strength. Some of the PTAs expressly stipulate an obligation to comply with the treaty. That would be the case when parties have already previously exceeded to the given treaty. However, the precise wording of the provision varies. Parties may agree to ensure the adequate and effective implementation of the international treaties dealing with the IPRs to which they are parties.⁶⁰ In other cases, parties reaffirm their commitment to the listed conventions⁶¹, confirm the importance they attach to the obligations arising from the following multilateral conventions⁶², or undertake to ensure the adequate and effective implementation of the international treaties dealing with intellectual property to which they are parties, including the TRIPS Agreement⁶³.

The referral might also be only one-sided, which reveals the negotiating position of the party, or alternatively, diverse levels of the initial protection. Should one of the parties already provide for a high level of protection, including ratification and compliance with given international conventions, the PTA may oblige only the other signatory(ies) to accede to or to comply with given agreements. This is the case of the EU-Turkey customs union, in which Turkey undertook to implement the TRIPS Agreement no later than three years after the entry into force of the *Decision establishing the customs union*⁶⁴.⁶⁵ In addition, the Decision states that “*the provisions of the TRIPS Agreement will apply after its entry into force for both Parties to the extent to which there are no rules laid down in this Decision.*”⁶⁶

Parties may also decide to refer to selected articles of the multilateral IPRs agreement only. As oppose to the commitments to comply with the treaties, the referral may take the form of a general proclamation stressing parties' intention and endeavours. In such a case, parties conclude to make all reasonable efforts to comply with the given international agreement, or the selected article thereof⁶⁷.⁶⁸

In some PTAs, parties undertake to accede to one of the treaties they have not signed yet, or proclaim to make all reasonable efforts in order to accede to a specified treaty.

⁶⁰ E.g. Art. 151 *Association Agreement between the EU and Georgia*.

⁶¹ E.g. Art. 153 *Association Agreement between the EU and Georgia*.

⁶² Art. 54 *EU-Russia Partnership and Cooperation Agreement*.

⁶³ Art. 158 *EU-Ukraine Association Agreement*.

⁶⁴ Art. 1(1) of the Annex 8.

⁶⁵ *Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union*.

⁶⁶ Art. 1(2) of the Annex 8.

⁶⁷ E.g. Art. 20.13 CETA.

⁶⁸ Each Party shall make all reasonable efforts to comply with Articles 1 through 22 of the *Singapore Treaty on the Law of Trademarks*, done at Singapore on 27 March 2006, and to accede to the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, done at Madrid on 27 June 1989.

The CETA as well as the EU-Singapore FTA state that its IPRs Chapter *complements* the TRIPS Agreement. Later, the CETA refers to specific multilateral IPR Agreements, however, rather than the entire treaty, it selects specific provisions related to individual IP rights, such as copyright.⁶⁹

The AUSFTA belongs to the most rigorous agreements in this regard: Australia and the USA at first acknowledge their obligations under eight multilateral treaties and the TRIPS Agreement and further undertake to accede to the *WIPO Copyright Treaty* (1996) and the *WIPO Performances and Phonograms Treaty* (1996) by the date of AUSFTA's entry in force.⁷⁰ Additionally, parties agreed to comply with the provisions of the *Geneva Act of The Hague Agreement Concerning the International Registration of Industrial Designs* (1999), and the *Patent Law Treaty* (2000). As oppose to this example, the Japan-Australia Economic Partnership Agreement (JAPEA) includes only a vague general referral stating that “[e]ach Party reaffirms its rights and obligations under the international agreements relating to intellectual property to which both Parties are party”. A similar provision was included in the *Thailand-Australia Free Trade Agreement* (TAFTA). In the substantive part of the chapter, it refers to the *TRIPS Agreement* and to the *Paris Convention*⁷¹ with regard to utility models and unfair competition and the *UPOV Convention* with regard to protection of new varieties of plants. The Korea-Australia Free Trade Agreement (KAFTA) further stipulates that “[e]ach Party shall undertake reasonable efforts to ratify or accede to” the *Patent Law Treaty* and the *Singapore Treaty on the Law of Trademarks*. A soft-law provision was incorporated in the ASEAN Australia New Zealand FTA (AANZFTA), which only declares that should a party intend to accede to any of the ten following treaties, it may seek assistance with other parties. The Malaysia-Australia FTA (MAFTA) is more straightforward, as parties affirm that they have ratified five international treaties⁷² and, further undertake to ratify or accede to four treaties as soon as practicable⁷³. In the SAFTA, Australia and Singapore agreed to comply with the *Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs*.

⁶⁹ For example, with regard to copyright, it expressly refers to and oblige parties to comply with selected articles of the Berne Convention for the Protection of Literary and Artistic Works, done at Paris on 24 July 1971, the WIPO Copyright Treaty, done at Geneva on 20 December 1996, the WIPO Performances and Phonograms Treaty, done at Geneva on 20 December 1996; and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961.

⁷⁰ Both are in force for Australia as of July 26th, 2007.

⁷¹ Paris Convention for the Protection of Industrial Property done at Paris on 20 March 1883, as amended.

⁷² The Berne Convention (1971); the Patent Cooperation Treaty (1970); the Paris Convention (1967); the Convention Establishing the WIPO (1967); and the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks (Geneva Act 1977).

⁷³ The *WIPO Copyright Treaty* (1996), the *WIPO Performances and Phonograms Treaty* (1996), the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989); and the *Singapore Treaty on the Law of Trademarks* (2006).

China and NZ confirmed their obligations arising from the international agreements they have signed, however, apart from the TRIPS Agreement, they neither mention any other agreement nor undertake to accede to it. Additionally, its definition of the IPRs refers further to the TRIPS Agreement. China and Iceland reaffirmed their obligations under enumerated international treaties and the TRIPS Agreement that was also incorporated into the FTA itself which might have significant consequences related to the dispute settlement (*see below*). Under the China-Switzerland FTA, the parties reaffirm their commitments under ten international agreements. Additionally, they shall make all reasonable efforts to ratify and accede to the Beijing Treaty. In the China-Peru FTA, the parties recognize their obligations under the international agreements, referring expressly to the TRIPS Agreement and to the public health related WTO documents (*see below*) as well as to the *Convention on Biological Diversity*.

The KORUS FTA, concluded by the USA and South Korea, states that the signatories are obliged to ratify or accede to the list of ten enumerated multilateral IPR treaties.⁷⁴ Additionally, three agreements are stated which the parties shall take all reasonable efforts to ratify or accede to. Also the EU-Korea FTA often refers to other multinational treaties, however, it does not include one introductory list, rather referring to separate treaties based on their subject-matter. Therefore, for example the chapter on Patents is rather short, stating the obligation to comply with articles 1 through 16 of the *Patent Law Treaty* (2000)⁷⁵.

The precise wording of the referral would have an impact on the applicable dispute settlement mechanism (*see in detail* Dispute Settlement Mechanism below). It is to be argued that the less strong referrals which only evoke the commitment under the existing treaties do not amount to new commitments concluded under the given PTA. In such a case, in case of the failure to fulfil the commitment, only dispute settlement mechanisms under the given multilateral convention would be available, if any. In cases when the referral is strong enough to constitute a new binding provision, the failure to comply with the provisions of the multilateral convention might be also referred to the dispute settlement mechanism under the PTA, that being recently most often arbitration (*details below*).

A special example of a referral to an international convention is the case of the *Economic Partnership Agreement between the EU and Southern African Development Community* (SADC), which refers to the Cotonou Agreement. The Cotonou Agreement is a framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP) (EC: ACP, 2017) and it also covers a general provision stressing the importance of the IPRs. Therein,

⁷⁴ Art. 18.1.

⁷⁵ Art. 10.33.

the Parties recognise the need to ensure an adequate and effective level of protection of IPRs and agree on the need to accede to all relevant international conventions on IPRs which are referred to in Part I of the TRIPS Agreement, and that in line with their level of development.⁷⁶

All agreements negotiated by the USA include at least some reference to the international multilateral IP Agreements. There is an extensive list of the WIPO-administered agreements in the draft TPP Agreement, under which the parties acknowledge their accession or undertake to accede thereto. On the other hand, for example under the US-Jordan FTA, while it also covers obligations to accede to the agreements, the parties undertake to give effect to the selected provisions of the referred treaties.⁷⁷

To conclude, the author concurs on this topic with J. Watal (2014), that the EU's but also the US agreements have had the effect of enlarging the geographical coverage of the international IP system governed by the WIPO-administered treaties.

5.1.3 Exhaustion

Generally, there are two modes of exhaustion of IPRs: international and national/territorial. The national/territorial exhaustion is generally preferred by developed countries, as it prohibits parallel exports, i.e. exports of products introduced onto a market by a right holder and later exported to another market by a third party. Subsequently, under the national/territorial mode of exhaustion, the right holders have a greater control over the distributional channels internationally. On the other hand, the international exhaustion, which is advocated by the developing countries, stipulates that if a product is rightfully obtained in one territory, the specific IPRs to this particular product are exhausted internationally and it can be traded freely, including the export and import to other countries by distributors not controlled by the original right holder.

When concluding the TRIPS Agreement, there was no agreement among the negotiators on the mode of exhaustion. As recalled by J. Watal (2014), the US and the EU preferred the national exhaustion of IPRs, *“or, when that seemed not possible, to at least not permit parallel imports from jurisdictions where prices were controlled.”* Nevertheless, the national exhaustion was not a part of the written submissions of the US and the EU in the initial stages of the Uruguay Round (J. Watal, 2014).

Subsequently, the TRIPS Agreement stipulates that subject to the provisions of Articles 3 (NT principle) and 4 (MFN principle), nothing in the Agreement shall be used to address the

⁷⁶ Art. 46.

⁷⁷ Art. 4.

issue of the exhaustion of intellectual property rights. This omission, that acknowledges the issue but leaves it entirely to the Member States to regulate it, was later criticized, for example A. A. Yusuf (*in* Correa & Yusuf 2008) points out that *“it could reasonably have been anticipated that the new agreement would explicitly address one of the most controversial issues arising from the interface between international IP protection and the freedom of movement of goods and services among nationals.”*

A. A. Yusuf (*in* Correa & Yusuf 2008) argues based on the minimum standards of the protection adopted in the TRIPS Agreement in favour of an international exhaustion that *“would have been more consistent with the GATT legal framework as well as with the liberalisation of international trade, [as] parallel imports as well as exports of genuine goods promote free trade, encourage competition and exert a salutary pressure for price levelling.”*

The *Declaration on the TRIPS agreement and public health* of 14 November 2001, in light of the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics, provides for several flexibilities, including an explicit provision that *“the effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.”*

With regards to the exhaustion, PTAs might be divided into three groups. They either do not refer to exhaustion at all, or they repeat the provision of Art. 6 TRIPS, highlighting that parties are free to employ the mode of exhaustion of their choice.⁷⁸ The last group incorporates specific provisions regulating the mode of exhaustion.

As highlighted by J. Watal (2014), *“there does not seem to be a demand in the EU trade agreements to adhere to national exhaustion of intellectual property rights”*. Most of the EU’s PTAs, including the EU-Turkey customs union state that the agreement *„does not imply exhaustion of intellectual, industrial and commercial property rights applied in the trade relations between the two Parties under this Decision.”*⁷⁹ In this respect, the *Enhanced Partnership and Cooperation Agreement between the EU and Kazakhstan* is rather unusual, as it states that *“[e]ach Party shall apply a national or regional exhaustion regime of intellectual property rights, in accordance with its respective domestic law, in respect of copyright and related rights, designs, and trademarks.”*⁸⁰

⁷⁸ E.g. Art.10 (4) EU-Korea FTA.

⁷⁹ Art. 10 of Annex 8.

⁸⁰ Art. 64.

The CETA expressly stipulates that the IPRs Chapter “*does not affect the freedom of the Parties to determine whether and under what conditions the exhaustion of intellectual property rights applies.*”⁸¹ The same provision was concluded in the EU-Singapore FTA, which states that “*each Party shall be free to establish its own regime for the exhaustion of intellectual property rights subject to the relevant provisions of the TRIPS Agreement.*”⁸²

With regard to the US FTAs, the US-Australia FTA stipulates that “*each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory, at least where the patentee has placed restrictions on importation by contract or other means.*”⁸³ In other words, the parties must apply the national exhaustion in case that it has been contractually agreed between the parties. On the other hand, this provision does not appear for example in the US-Bahrain FTA.

5.1.4 Other

Other provisions incorporated in the introductory parts of the PTA or the IPRs chapter of the PTA may reflect the political connotations of the given treaty. For example, the agreement establishing the customs union between the EU and Turkey⁸⁴ stresses the importance of the compliance with the IPR-related obligations as it conditions the expiry of special arrangements for trade in textile and clothing products with the effective implementation of the measures regarding, inter alia, intellectual, industrial and commercial property.⁸⁵

5.2 Copyright and related rights

The standards concerning the availability, scope and use of copyright and related rights are governed by Part II Section 1 of the TRIPS Agreement. Firstly, the TRIPS incorporates *the Berne Convention* (1971), as Members shall comply with Articles 1 through 21 and the Appendix thereto. Most of the substantive regulation is thus regulated directly by *the Berne*

⁸¹ Art. 20.4.

⁸² Art. 11.3.

⁸³ Art. 17.9.4.

⁸⁴ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union.

⁸⁵ Statement by the Community on textile and clothing on Article 6: ‘*Arrangements for trade in textile and clothing products will expire as soon as it is determined that Turkey has effectively implemented the measures for which the adoption is required under this decision, regarding intellectual, industrial and commercial property (Articles 2, 3, 4 and 5 of Annex 8), competition, including the measures regarding public aid (Chapter IV, Section II, Article 39 (1) and (2) (a), (b) and (c)), and that Turkey has put into operation, according to the multilateral rules presently in force, the measures necessary for the alignment of its commercial policy with that of the Community in the textile sector, in particular the arrangements and agreements referred to in Section III Article 12 (2).*’

Convention. The related rights confine the protection of performers, producers of phonograms (sound recordings) and broadcasting organizations (Art. 14 TRIPS).

Copyright is an important tool also in the software industry, as the TRIPS Agreement stipulates that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).⁸⁶

The regulation of copyright in PTAs usually covers the term and scope of duration, rights management information, effective technological measures (ETMs), liability of internet service providers and government use of software.

In relation to the enforcement of rights, the PTAs, such the CETA, may incorporate the presumption of authorship or ownership. *“For the purposes of civil proceedings involving copyright or related rights, it is sufficient for the name of an author of a literary or artistic work to appear on the work in the usual manner in order for that author to be regarded as such, unless there is proof to the contrary.”* The same rule shall apply mutatis mutandis to the holders of related rights.⁸⁷

Deeper economic cooperation such as a customs union may be also reflected in the detailed regulation of the IPRs, leading to the harmonisation of the provisions. The customs union between the EU and Turkey thus refers to specific EU legislation⁸⁸, including copyright and neighbouring rights directives⁸⁹.

5.2.1 Term of duration

Under the TRIPS Agreement, the term of protection of a work, other than a photographic work or a work of applied art, shall be no less than 50 years from the end of the calendar year of authorized publication or, should the authorised publication fail to occur within 50 years from the making of the work, 50 years from the end of the calendar year of making.⁹⁰ However, the term of duration is most often calculated based on the life of a natural person. In such a case, the Berne Convention shall be applied.

The PTAs often extend the term of protection of a work⁹¹, performance or phonogram to that usually used in other PTAs that regulate the term of protection, i.e. not less than the life of the author and 70 years after the author’s death in cases calculated on the basis of the life of

⁸⁶ Art. 10(1) TRIPS.

⁸⁷ Art. 20.42 CETA.

⁸⁸ Council Directive 93/98/EEC (OJ No L 290 of 24 November 1993), Council Directive 92/100/EEC (OJ No L 346 of 27 November 1992), Council Directive 92/100/EEC (OJ No L 346 of 27 November 1992), Council Directive 91/250/EEC (OJ No L 122 of 17 May 1991).

⁸⁹ Article 4 of Annex 8 on protection of intellectual, industrial and commercial property.

⁹⁰ Art. 12 TRIPS.

⁹¹ Also *e.g.* in SAFTA, including a photographic work in case of the AUSFTA and KAFTA.

a natural person⁹² or in other cases not less than 70 years from the end of the calendar year of the first authorised publication, or, alternatively, not less than 70 years from the end of the calendar year of the creation, should there be no authorised publication within 50 years from the creation. The term of protection of a broadcast shall not be less than 50 years after the first broadcast took place. In general, the duration of the protection is crucial for the creative industries.

The extension of the duration of copyright is covered by all US FTAs except for the FTA with Israel (1985) and Jordan (2010). The EU treaties are not unified in their approach, the FTA negotiated with Vietnam, in its agreed text as of January 2016, interestingly, stipulates fifty years. The EU laws also provide for the extended duration of the rights of an author of a literary and artistic work, which shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.⁹³

5.2.2 Rights management information

The protection of rights management information provides for the protection to electronic information that is attached to the protected subject-matter to identify it, its author or the owner of the rights or terms and conditions of its use (*in detail in Štěrbová, 2012*).

The CETA defines the rights management information as “*information that identifies the work (...) or the author of the work, the performer of the performance, as well as information about the terms and conditions of use of the work, performance, or phonogram.*”⁹⁴ Subsequently, the CETA as well as the EU-Singapore FTA stipulate that each party shall provide adequate legal protection and effective legal remedies against acts of knowingly removing or altering any electronic rights management information, or distributing or making available copies of works altered in such a manner.⁹⁵

Among, the EU FTAs, for example the Singapore and Vietnam treaties, CETA or the agreement with Moldova include the regulation of the rights management information. All US FTAs except for the first agreements (NAFTA and Israel) cover the rights management information.

⁹² In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author. (Art. 11.5.2 EU-Singapore FTA)

⁹³ Art. 1 of the Council Directive 93/98/EEC of 29 October 1993.

⁹⁴ Art. 20.10 CETA.

⁹⁵ Art. 11.10 EU-Singapore FTA.

With regard to other players in the international trade, both the AUSFTA, KAFTA and MAFTA require parties to implement effective legal measures against removal or alternation of these measures as well as distribution of such altered copies of protected works.

5.2.3 Technological measures

The Technological measures, sometimes referred to as the ‘*Effective Technological Measures*’ (ETMs), include technology, devices, or components that are meant to protect access to copyright-protected subject-matter. Far-reaching PTAs (e.g. AUSFTA, KAFTA) provide for an extensive regulation of the liability for circumvention of ETMs, including criminal liability in cases of wilful acts. An infringement circumventing the ETMs can take form of a device or product, including computer programs, or a service. On the other hand, there have been rather vague agreements concluded stipulating that parties shall only endeavour to provide protection against circumvention of ETMs.⁹⁶

The CETA as well as the EU-Singapore FTA do not stipulate the criminal liability, they only foresee that each party shall provide adequate legal protection and effective legal remedies against the circumvention.⁹⁷ Both specifically state that the adequate legal protection shall be provided to the extent provided by its domestic law, which means that each party has a flexibility in implementing the obligation, with regard to the unauthorised circumvention of the ETMs, and offering to the public a means of circumventing an ETM. On the other hand, the PTA sets forth directly adequate legal protection and effective legal remedies against manufacturing, importation, or distribution of a tool to circumvent ETMs that is primarily designed or produced for the purpose of circumventing an ETM or has only a limited commercially significant purpose other than circumventing an ETM.

From the other perspective, the PTAs may stipulate explicit assurances that the industry is not obliged to introduce or develop new measures. For example, the CETA states that it “*does not require a Party to mandate interoperability in its law: there is no obligation for the information communication technology industry to design devices, products, components, or services to correspond to certain technological measures.*”⁹⁸

Another approach to the incorporation of the protection of technological measures into the PTA is applied in the *Trade Agreement between the European Union and Colombia and Peru*. The provision is very short and only refers to the specific articles of the multilateral

⁹⁶ E.g. AANZFTA.

⁹⁷ Art. 20.9.2 CETA.

⁹⁸ Art. 20.9.5 CETA.

treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). All three signatories – the EU, Colombia and Peru – have ratified both the WCT and the WPPT. However, the express referral in the wording of ‘*the parties shall comply with the provisions of*’ incorporates the listed provisions into the PTA (*as in detail above*).

With regard to the US FTAs, the situation mirrors the provisions on the rights management information, all FTAs except for the recent agreements with Israel and the NAFTA cover these provisions.

5.2.4 Liability of intermediary service providers

The regulation of liability of intermediary service providers, previously often referred to as ‘*internet service providers*’ (both abbreviated as ‘*ISPs*’) is meant to limit their liability for copyright infringement in materials stored or transmitted by means of their services and, on the other hand, provide for an incentive to cooperate with copyright holders in deterring acts of infringement.

In accordance with Article 14 rationale of the provision, the CETA stipulates that “*each Party shall provide limitations or exceptions in its law regarding the liability of service providers, when acting as intermediaries, for infringements of copyright or related rights that take place on or through communication networks.*”⁹⁹ The CETA further affirms that the eligibility for the limitations to the liability may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating the infringing activity. The CETA agrees that further details are to be governed individually by the parties in accordance to their domestic laws. Specifically, the PTA shall not affect the possibility of a court or administrative authority of requiring the service provider to terminate or prevent an infringement.

Among the US FTAs, the regulation of ISPs is included in all FTAs except for the FTAs with Israel, Jordan and the NAFTA.

With regard to other players in international trade, the regulation of the ISPs appear also in the AUSFTA, the KAFTA, and in the SAFTA; briefly also in the JAEPa and in the MAFTA and also further addressed in the side letters to the AUSFTA that form an integral part thereof, stipulating the requirements for a model of an effective notice by copyright owner and to an ISP and by a subscriber using its services.

⁹⁹ Article 20.11 CETA.

The recent PTAs cover the institute of intermediary service providers also in the section devoted to the electronic commerce (e.g. *Association Agreement between the EU and Moldova*). In particular, the electronic commerce chapter covers the principle of ‘*mere conduit*’, ensuring that the service provider is not liable for the information transmitted upon given conditions (does not initiate the transmission, does not select the receiver and does not select or modify the information contained in the transmission¹⁰⁰). Secondly, it covers the so called ‘*caching*’, representing the automatic, intermediate and temporary storage of that information.¹⁰¹ Thirdly, the electronic commerce chapter may regulate the so called ‘*hosting*’, ensuring that the service provider is not liable for the information stored at the request of a recipient of the service, upon fulfilling the given conditions.¹⁰² Lastly, the PTAs may incorporate the principle of no general obligation to monitor.¹⁰³

5.2.5 Other

Other specific provisions related to copyright include government use of software, so called *camcording*, artists' resale right in works of art (‘*droit de suite*’), ‘*making available*’ right or cooperation of collective management of rights.

Camcording means making a copy of a cinematographic work in a motion picture exhibition facility open to the public without authorisation of the theatre manager or the holder of the copyright. The camcording is expressly mentioned in the CETA, however, this PTA does not provide for an enforceable provision, as it leaves the decision of a possible regulation up to the parties, stating that the parties may provide for applicable criminal procedures and penalties.¹⁰⁴

Regarding the artists' resale right in works of art, a resale right is defined as a right to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.¹⁰⁵ This royalty traces its origins back in France in 1920s and is common in the European legislation. On the other hand, it is not part of the current United States copyright law (*in* U.S. Copyright Office 2017). The resale right shall apply to all acts of resale involving any art market professionals including salesrooms, art galleries and any dealers in works of art. The right is defined as inalienable right, which cannot be waived, even in

¹⁰⁰ Art. 257 *EU-Moldova Association Agreement*.

¹⁰¹ Art. 258.

¹⁰² Art. 259.

¹⁰³ Art. 260.

¹⁰⁴ Art. 20.12 CETA.

¹⁰⁵ Art. 163 of *Georgia's EU Accession Agreement*.

advance. The procedure for collection and the amounts shall be a matter of determination by domestic law.

The making available right is an exclusive right for authors, performers and phonogram producers to authorise or prohibit the dissemination of their works and other protected material through interactive networks such as the internet. It is considered as an important innovation of the copyright law reflecting the trends of the dissemination of music over the internet and as such was introduced in the relevant international conventions - *WIPO Performances and Phonograms Treaty* (WPPT)¹⁰⁶; *WIPO Copyright Treaty* (WCT)¹⁰⁷ (in IFPI, 2003).

The making available right has been incorporated also in some of the PTAs.¹⁰⁸ The *EU-Ukraine Association Agreement* incorporates the right of communication to the public of works and other subject-matter for performers, of fixations of their performances, for phonogram producers of their phonograms, for the producers of the first fixations of films, of the original and copies of their films, and for broadcasting organisations, of fixations of their broadcasts. In addition, the agreement stipulates that these rights shall not be exhausted by any act of communication or making available to the public.¹⁰⁹

With regard to the cooperation on collective management of rights, the parties may decide to agree in a PTA to endeavour to promote dialogue and cooperation among their respective collective management societies. The contribution should lead to the easier transfer of royalties arising from the use of works or other copyright-protected subject matter.¹¹⁰ The US FTAs usually do not cover collective management societies, while the US-Colombia TPA “recognizes the important role that collective management societies with voluntary membership can play in appropriate cases by facilitating, in a transparent manner, the collection and distribution of royalties.”¹¹¹

The AUSFTA and KAFTA explicitly prohibit any hierarchy among copyright and related rights: should consent of both an author and either of performers, producers of phonograms and broadcasting organisations be required, none of the requirements ceases to exist based on the consent of the other party.

Interestingly, the CETA stipulates that to the extent permitted by the specific articles of the international treaties incorporated therein, the agreement “shall not restrict each Party's

¹⁰⁶ Articles 10, 14 and 16.

¹⁰⁷ Article 8, 10 and *Agreed Statement concerning Article 8*.

¹⁰⁸ Art. 174 of the *EU-Ukraine Association Agreement*; Art. 237 of the *EU-Central America association agreement*.

¹⁰⁹ Art. 174 of the *EU-Ukraine Association Agreement*.

¹¹⁰ E.g. Art. 11.8 EU-Singapore FTA.

¹¹¹ Art. 16.7.7.

*ability to limit intellectual property protection that it accords to performances to those performances that are fixed in phonograms.”*¹¹²

5.3 Patents

Patents represent the category of the intellectual property rights designed to protect inventions in all fields of technology. In order to classify for a patent, the invention must fulfil the conditions of patentability: to be new, to involve an inventive step and to be capable of industrial application. Due to differences in national legal systems, the TRIPS expressly confirms that the terms “*inventive step*” and “*capable of industrial application*” may be deemed to be synonymous with the terms “*non-obvious*” and “*useful*” respectively.¹¹³ There are two types of patents – product patents and process patents protected under the TRIPS Agreement.¹¹⁴ The term of patent protection available shall not end prior to the expiration of a period of twenty years counted from the filing date.¹¹⁵

Patents are meant to provide for an incentive to innovate and therefore allow for the limited monopoly rights awarded to the inventor. However, there are other social interests that might be negatively affected by the awarded monopoly rights. Therefore, the patent regulation incorporates the exemptions from patentability. Under the TRIPS Agreement, the WTO Members are allowed to exclude from patentability inventions in case it is necessary to protect *ordre public* or humanity.¹¹⁶ Secondly, Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals, and plants and animals other than micro-organisms.¹¹⁷ However, the Members are obliged to protect plant varieties and that either by means of a patent protection or by means of a *sui generis* system (further addressed in *Plant breeders’ rights and new plant varieties* below) or a combination thereof.

The patent confers exclusive rights on its owner to prevent any unauthorised third parties from making, using, offering for sale, selling, or importing of a product patented and in case of a process patent, the same sum of rights related to at least the product obtained directly by that process¹¹⁸. The TRIPS Agreement expressly highlights that these rights conferred based on a patent are subject to Article 6 addressing exhaustion¹¹⁹. However, as highlighted above, there are certain situations that require allowing for use without authorisation of the right holder. The

¹¹² Article 20.7.2.

¹¹³ Footnote 5.

¹¹⁴ Art. 27 and 28 TRIPS.

¹¹⁵ Art. 33 TRIPS.

¹¹⁶ Art. 27(2) TRIPS.

¹¹⁷ Art. 27(3) TRIPS.

¹¹⁸ Art. 28 TRIPS.

¹¹⁹ Footnote 6.

TRIPS Agreement distinguishes between the limited exceptions to the exclusive rights conferred which the Member may allow for in its legal system, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner¹²⁰, and so called other use without authorisation of the right holder. In the latter case, the Member may allow for the use of the subject matter of a patent without the authorization of the right holder, provided that the conditions under Article 31 are met. Article 31 incorporates conditions for granting compulsory licences. Among others, other use without authorisation of the right holder might be allowed for only if the proposed user has made unsuccessful efforts to obtain authorization from the right holder on reasonable commercial terms and conditions¹²¹, the use is non-exclusive¹²² and the right holder shall be paid an adequate remuneration¹²³.

According to J. Watal (2014), the US did not succeed in incorporating the following provisions in the final wording of the TRIPS Agreement: explicit, mandatory protection for new uses for known substances or for plant and animal inventions or for genes and gene sequences as well as patent term extension to compensate for regulatory delays.

With regard to the TRIPS-plus provisions, patents are often discussed in connection with pharmaceuticals. Therefore, the specific provisions related to pharmaceuticals and public health regulations are addressed in a separate chapter below. As far as patents in general are concerned, developing countries are deemed to emphasize local working requirements, the allowance of parallel imports (discussed above in the section *Exhaustion*), and a greater scope for compulsory licensing in the absence of the local working (A. A. Yusuf *in* Correa & Yusuf 2008).

Other provisions than those related to pharmaceuticals and to the protection of public health are not common in the PTAs. If there is a special section related to patent rights, PTAs often limit themselves to the referral to the TRIPS provision or to the WIPO-administered treaties. The PTAs often refer to the Patent Law Treaty, done at Geneva on 1 June 2000¹²⁴, or to the *Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure* (1977, amended in 1980)¹²⁵.

¹²⁰ Art. 30 TRIPS.

¹²¹ Art. 31(b) TRIPS.

¹²² Art. 31(d) TRIPS.

¹²³ Art. 31(h) TRIPS.

¹²⁴ E.g. CETA, Art. 258 EU-Central America Association Agreement.

¹²⁵ Art. 258 EU-Central America Association Agreement.

5.4 Health-related provisions

The health-related provisions represent an area which has been often discussed in relation to the TRIPS provisions. The patent as well as the trademark protection of drugs is crucial for doing business in the pharmaceutical industry. In general, results of the timely and financially intensive pharmaceutical research are further challenged by the requirements of necessary clinical trials and marketing approvals. On the other hand, patent protection in pharmaceuticals is a highly sensitive question in the discussions concerning the availability of drugs in developing countries. Analysts argue that the international patent negotiations take place in a context of asymmetrical power and interests between developed and developing countries (Maskus 2000). Therefore, special attention from both governments and academic scholars have been devoted to the TRIPS-plus provisions limiting the governments' playfield for regulating its public health policy, namely narrowing down the exemptions provided for by the TRIPS Agreement with regard to public access to affordable medicines.

The patent protection in pharmaceuticals is an especially sensitive issue debated in the WTO. Consequently, the discussions resulted in the adoption of *the 2001 Doha Declaration on TRIPS and Public Health* as well as in changes to the TRIPS regime on compulsory licensing.

*The 2001 Doha Declaration on TRIPS and Public Health*¹²⁶ was adopted on 14th November 2001 and the declaration has been often expressly referred to in individual PTAs. The decision of the General Council of 30th August 2003 entitled *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health (in WT/L/540 and Corr.1)* introduced changes to the regime of compulsory licensing by means of a waiver of Article 31(f). Article 31 allows for the use of a patented invention without an authorization of the right holder that is, however, allowed subject to the condition that *i.a.* this use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use. The “*Paragraph 6 Waiver*” provides for a system allowing for manufacturing pharmaceutical products under a compulsory licence intended for exportation into an eligible importing Member. The Amendment to the TRIPS Agreement through the Protocol of 6 December 2005 entered into force on 23 January 2017. The amendment inserted the new Article 31bis into the Agreement as well as an Annex and Appendix (*WTO – TRIPS Agreement, as amended on 23 January 2017*; 2017).

¹²⁶ In WT/MIN (01)/DEC/2.

Even though the patent protection in pharmaceuticals remains the most often discussed issue, most of the below analysed regulation applies also to other industries, namely agricultural and chemical products.

As observed for example by L. Hsiu (2015), international agreements, be it either BITs¹²⁷ or PTAs, increasingly contain provisions which have a direct or indirect impact on the public health regulation. Previously, these international agreements have not included a specific reference to health-related issues, nevertheless, mostly in reaction to real investor disputes, the growing number of PTAs as well as BITs include general exceptions for public health regulation and allow for possible departures from other treaty commitments (Hsiu 2015). When drafting the exceptions, some PTAs or BITs incorporate the wording of *Article XX (b) GATT 1994*, some of them amend or adjust the wording (Hsiu 2015).

P. Roffe (2014) argues that the historically strict model towards the IP provisions in the US trade policy has been relaxed with respect to health-related questions, as illustrated by the agreements concluded by the USA with Peru, Colombia and Panama.

In the CETA, parties recognize the importance of the *Doha Declaration* and ask for consistency in the interpretation of the CETA. Furthermore, the parties stipulate to contribute to the implementation of and respect the *Decision of the WTO General Council of 30 August 2003 on Paragraph 6 of the Doha Declaration*, as well as the *Protocol amending the TRIPS Agreement, done at Geneva on 6 December 2005*.¹²⁸ Furthermore, with regard to the specific health-related provisions, the CETA provides for a definition of a pharmaceutical product¹²⁹ and subsequently for the regulation of the sui generis protection for pharmaceuticals (*see below*).

With regard to other players in international trade, China's treaties do not include any special regulation referring to pharmaceuticals. On the other hand, China's PTAs often expressly refer to public health-related documents negotiated within the WTO, recognising the principles established in the *Doha Declaration on the TRIPS Agreement and Public Health* and the *Decision of the WTO General Council of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration*.

¹²⁷ *Bilateral Investment Treaty*, referred to as *International Investment Agreement* above.

¹²⁸ Art. 20.3 CETA.

¹²⁹ Art. 20.6 of the CETA: 'Pharmaceutical product means a product including a chemical drug, biologic drug, vaccine or radiopharmaceutical, that is manufactured, sold or represented for use in: (a) making a medical diagnosis, treating, mitigating or preventing disease, disorder, or abnormal physical state, or its symptoms, or (b) restoring, correcting, or modifying physiological functions.'

Currently, there have been discussions on health-related provisions on pharmaceuticals in the on-going negotiations of the “mega trade deals”, namely the TTIP¹³⁰, TPP¹³¹ or the RCEP¹³² negotiations. As highlighted by L. Hsiu (2015), the TPP negotiations include states with varying levels of economic development, healthcare policies and IPRs priorities such as Brunei, Malaysia, Singapore or Vietnam. Singapore was, apart from the USA, who previously participated to the negotiations, considered as the strongest proponent of IPRs protection and enforcement strengthening, as the country introduced its plan to become an “*IP hub*” and a centre for the development of biomedical products and services in April 2013 (IP Hub Master Plan 2013).

5.4.1 Patentability criteria and exclusions

The general patentability criteria and the subsequent exclusions are stipulated in Art. 27 TRIPS. As recalled by J. Watal (2014), it was within the agenda of the developing countries to exclude expressly from the TRIPS Agreement the biotechnological inventions, including microorganisms. Under Art. 27(3) TRIPS, it remained a *possibility* for the WTO Members to exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals and plants and animals other than micro-organisms, and essential biological processes for the production of plants or animals other than non-biological and microbiological processes. However, the TRIPS Agreement expressly states that Members *shall* provide for the protection of plant varieties either by patents or by an effective sui generis system or by a combination thereof.¹³³

In trade agreements, parties may agree to voluntarily *reduce* the scope of the non-patentable subject matter provided for in Arts. 27(2) and 27(3) (a) TRIPS.¹³⁴

With regard to patentability, discussions concern the institute of a new use of a known product. As highlighted by J.-F. Morin (2001), the TRIPS Agreement leaves unclear the question of whether a new use of a known product qualifies as a patentable invention. J. F. Morin argues, based on the wording of Art. 27(1) TRIPS that a WTO may exclude a new use of a substance from patentability. Such a flexibility is, however, expressly ruled out in free trade agreements concluded by the USA with Australia, Morocco, Bahrain or South Korea. The US-Australia FTA states that “*patents shall be available for any new uses or methods of using*

¹³⁰ Transatlantic Trade and Investment Partnership.

¹³¹ Trans-Pacific Partnership.

¹³² Regional Comprehensive Economic Partnership.

¹³³ Art. 27(3)(c) TRIPS.

¹³⁴ KORUS, USSFTA.

a known product”¹³⁵ and the USA-Morocco and USA-Bahrain FTAs stipulate that the patentability of new uses of known product includes those for the treatment of humans and animals¹³⁶ (further in J.-F. Morin, 2001 or J. Watal 2014).

5.4.2 Patent linkage

The patent linkage is a mechanism which establishes a link between a marketing authorisation for generic pharmaceutical products and the status of patents of the originator's product.

The US FTAs leave patent linkage as an option and regulate the consequences if a government decides to allow for it. Each party may provide for limited exceptions to the exclusive rights conferred by a patent and if, consistent with this rule, the government permits a third person to use the subject matter of a subsisting patent solely to support an application for marketing approval of a pharmaceutical product, that government is obliged to provide that this is solely in order to meet the requirements for marketing approval and the product, if approved, may not be placed on the market prior to the expiry of the patent. Exportation might be permitted only for purposes of meeting marketing requirements.¹³⁷

The patent linkage does not appear in many of the EU's PTAs. The CETA does not tackle the regulation of the patent linkage directly and only states that if a signatory relies on this mechanism, it shall ensure that all litigants are afforded equivalent and effective rights of appeal.

5.4.3 Data exclusivity

Data exclusivity is expressly governed by the TRIPS Agreement. Under Article 39(3) TRIPS: *“Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”*

However, as observed for example by J. Watal (2014), the US negotiations requirements were not met with regard to a period of market exclusivity for the test data, *“leaving*

¹³⁵ Art. 17.9.1; the same provision in Art. 18.8.1. of the US-Korea FTA.

¹³⁶ Art. 14.8.2.

¹³⁷ E.g. Art. 14.8 US-Bahrain FTA, Art. 17.9 US-Australia FTA.

considerable ambiguity in this provision.” As further highlighted by L. Hsiu (2015), the origin of the undisclosed data is of an importance in this case, as it must pass a threshold test of involving *a considerable effort*. Secondly, the “*unfair commercial use*” is not defined in the TRIPS Agreement. Thirdly, the provision lacks clarity regarding the length of the data exclusivity period.

As highlighted by C. C. Correa (2014), “[*t*]est data for pharmaceutical and agricultural products is one of the areas where the EU typically requires its potential partners to provide TRIPS-plus obligations.” Pursuant to C. C. Correa (2014), differing opinions on data exclusivity might constitute one of the most controversial issues in the PTAs negotiations, such as in the case of India or EU-MERCOSUR FTA negotiations.

The protection of undisclosed data related to the pharmaceutical products is addressed for example in the CETA. Firstly, it reiterates the TRIPS Agreement, but adds further details concerning the time limits during which the third parties may not rely on the data (six or eight years)¹³⁸. The EU-Korea FTA ensures the protection of results of clinical trials for ten years. The KORUS FTA stipulates data exclusivity for five years for pharmaceuticals and ten years for agricultural products.¹³⁹

As highlighted by P. Roffe (2014), the EU-Central America FTA does not include provisions on data exclusivity, because these were already incorporated into national laws following the obligations under an earlier FTA concluded with the USA. Similarly, the EU-CARIFORUM FTA does not cover an explicit provision on data exclusivity. On the contrary, C. C. Correa (2014) analyses the impacts of the regulation of test data protection in the EU-Peru-Colombia FTA, concluding that the more stringent system introduced in the FTA *contravene* the provisions in the TRIPS Agreement, which are, moreover, to be interpreted in light of Articles 7 and 8 of the TRIPS Agreement, that is, through a pro-development lens.

Related thereto, but opposing the data exclusivity provisions, the PTA may stipulate that there shall be no limitation to implement abbreviated authorization procedures on the basis of bioequivalence and bioavailability studies.¹⁴⁰

The US FTAs are not univocal when it comes to data exclusivity. While the US-Australian FTA governs the data exclusivity, referring as oppose to the TRIPS Agreement generally to a “*product submitted to a government entity, or entity acting on behalf of a government for the purposes of obtaining marketing approval*”, the US-Bahrain FTA fails to

¹³⁸ Art. 20.29 CETA.

¹³⁹ Art. 18.9.1 KORUS.

¹⁴⁰ Art. 20.29 CETA.

regulate this provision. Under the US-CAFTA-DR FTA, the government is obliged to protect such information from unfair commercial use even in case that the information has been disclosed by the disclosing entity. As argued by P. Roffe (2013), the EU-Central America FTA which does not include provisions on data exclusivity, because these were already incorporated into national laws following the obligations under an earlier FTA concluded with the USA¹⁴¹. This is also a crucial element in establishing the relationship between the most-favoured nation principle and the national treatment principle.

5.4.4 Term extension of patent protection for pharmaceutical products

The term extension of patent protection going beyond the minimum standard of twenty years is sometimes included in the PTAs in the context of pharmaceuticals. The argument in favour for the prolonged protection stems from the highly regulated nature of the pharmaceutical products. Since the safety of the product is of the utmost importance, prior to its first entry into the market, the pharmaceutical products are subject to the administrative procedures allowing for their market authorization. The regulatory procedures might be lengthy, requiring clinical trials proving the safe usage. Consequently, the patent owner is not able to benefit from its patent rights until the product is available on the market. The extension of the patent protection beyond the general limit applicable to all patents aims to offset such a loss. The same mechanism might be applied to plant protection products.

The terminology employed in order to refer to the extension of the term of patent protection differs. For example, the TPP uses the term “*patent term adjustment for unreasonable curtailment*”¹⁴². In the EU, the institute is known as *supplementary protection certificates* (SPCs). The SPCs represent currently the only substantive patent-related provisions of harmonized EU legislation (*in* EC: DG Trade: Protection of Intellectual Property in Free Trade Agreements, 2012)¹⁴³. The SPCs are available for pharmaceutical and plant protection products and can extend up to five years, with additional six months in special cases of medical products for children.

The US FTAs differentiate between compensation for unreasonable delays that occur in granting the patent and a specific case of pharmaceuticals, where the patent term might be restored as a compensation for unreasonable curtailment as a result of marketing approval

¹⁴¹ Article 15.10 CAFTA-DR (Dominican Republic-Central America FTA).

¹⁴² Art. 18.48.

¹⁴³ Council regulation (EEC) No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products (codified as Regulation (EC) no 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products), and Regulation (EC) No 1610/96 of the European Parliament and of the Council concerning the creation of a supplementary protection certificate for plant protection products.

process. The unreasonable delay is defined as more than four years from the date of filing the application and the delays attributable to the applicant or a third party are not included¹⁴⁴.

The EU-Korea FTA provides for the extension of the duration of the rights conferred by the patent protection for pharmaceutical products and plant protection products¹⁴⁵ and for the supplementary protection certificates¹⁴⁶. Those are meant to compensate patentees for the time spent on obtaining marketing approval of pharmaceuticals and are awarded for a period of five years in extension of the patent above the twenty-year patent duration.

The term extension of patent protection for pharmaceutical products is governed by the CETA as a “*sui generis protection for pharmaceuticals*”. The agreement stipulates conditions under which the governments shall allow for the extended protection of pharmaceuticals. The extension shall compensate for a period equal to the period which elapsed between the date of the application and the first marketing authorization, reduced by a period of five years.¹⁴⁷ The extension is limited to precise conditions which has to be met by the patent owner, such as the first application for the marketing authorization submitted within a reasonable time limit.

Some PTAs introduce the extension of the term of the patent protection of the pharmaceutical products as an option only. The *Trade Agreement between the European Union and Colombia and Peru* states it as an option for the parties who may, „with respect to any pharmaceutical product that is covered by a patent, each Party may, in accordance with its domestic legislation, make available a mechanism to compensate the patent owner for unreasonable curtailment of the effective patent term resulting from the first marketing approval of that product in that Party.”¹⁴⁸

5.4.5 Compulsory licensing

As explained above in relation to the international investment law, a compulsory licence represents an institute of the IP law that is meant to balance monopoly rights awarded to an owner of a patent. Subject to the conditions stipulated in Article 31 TRIPS, governments may decide, primarily in cases of national emergency, to grant a compulsory licence to a patented product or a process without the consent of a rights owner. A government may also use the patented invention on its own.

¹⁴⁴ Art. 17.9.8.

¹⁴⁵ Article 10.36.

¹⁴⁶ Art. 10.35.

¹⁴⁷ Art. 20.27 CETA.

¹⁴⁸ Art. 230(4).

The compulsory licensing is not often the subject-matter of the analysed EU's PTAs. Among the analysed PTAs concluded by the EU, the subject-matter is tackled by the *EU-Ukraine Association Agreement* with the focus on the relationship between patents and plant variety rights. The Agreement obliges the parties to provide for compulsory cross-licensing in cases where a breeder cannot acquire or exploit a plant variety right without infringing a prior patent. In the second case, if the holder of a patent concerning a biotechnological invention cannot exploit it without infringing a prior plant variety right, he/she may apply for a compulsory licence for a non-exclusive use of the plant variety.¹⁴⁹ The compulsory license is subject to the payment of an appropriate royalty. It is referred to as a cross-license, since the holder of the patent, respectively the plant variety right, is entitled to a cross-license on reasonable grounds to use the corresponding patent or a plant variety right which could not have been exploited or acquired without the compulsory license.¹⁵⁰ The concept of the compulsory cross-license is meant to balance the rights of all parties involved.

On the other hand, provisions on compulsory licensing appear in the US PTAs. P. Ranjan (2007) analyses in detail his reading of the compulsory license related TRIPS-provisions on the example of US-Jordan FTA that contains provisions limiting the use of compulsory licensing, beyond the conditions of Art. 31 TRIPS, to a limited number of narrow-defined situations covering national urgency, anti-competitive practices, national emergency or other forms of extreme urgency, and failure to meet working requirements of patents.¹⁵¹ Consequently, P. Ranjan (2007) poses a question whether a signatory could state in its domestic law that the “*government can issue a compulsory license on any ground that it deems fit, except for patent holders of the other signatory of the agreement, where the compulsory license would be issued only in the cases enumerated in the given PTA*”. As these conclusions concern the overall conclusions of the present research, they are further discussed in general below. However, besides the legal question on whether the proposed regulation would or would not contradict the most-favoured nation principle, it is to be concluded that, as long as the preferential treatment was not applied to the nationals, it would not contradict the national treatment principle.

¹⁴⁹ Art. 221.

¹⁵⁰ Art. 221.

¹⁵¹ Art.4.20 US-Jordan FTA.

5.5 Utility models

The utility models are not expressly regulated by the TRIPS Agreement. The utility models fall within the category of the industrial property. As recalled above, the term “*industrial property*” shall be, according to Ch. Heath (*in* Kamperman Sanders 2014) interpreted as in Article 1(2)-1(4) of the Paris Convention and is thus wider than the catalogue of IPRs in the TRIPS Agreement, as it includes utility models, trade names and unfair competition.

Currently, a limited but significant number of countries provide for their protection, including the Czech Republic, Australia, Austria, China (including Hong Kong and Macau), Germany, the Russian Federation or Turkey.¹⁵² In cases where a utility model is not available, the protection might be sought under a patent, or alternatively, the inventor may decide to keep the information as a trade secret (*in* WIPO – Utility Models 2017).

5.6 Trademarks

Trademarks are expressly governed by Section 2 of the TRIPS Agreement. A trademark is a sign or a combination of signs capable of distinguishing the goods or services of one undertaking from those of other undertakings.¹⁵³

The regulation of trademarks under the TRIPS Agreement leaves expressly several issues open for the WTO members to decide. Firstly, members may make registrability dependent on the distinctiveness acquired through use. Secondly, as a condition of registration, WTO members may require that signs are visually perceptible.¹⁵⁴ Thirdly, members may make registrability dependent on use. However, the TRIPS balances this option with binding requirements that the actual use shall not be a condition for filing an application for registration. Similarly, failure to use may not be a reason to refuse an application for registration within a period of three years from the date of application. Open issues, if addressed by PTAs, would fall within the category of the TRIPS-plus provisions restricting the TRIPS flexibilities.

The TRIPS also addresses the registration procedure of trademarks. Under Art. 15 (5) TRIPS, “*Members shall publish each trademark either before it is registered or promptly after*

¹⁵² The full list according to the WIPO – Utility Models (2017): Albania, Angola, Argentina, ARIPO, Armenia, Aruba, Australia, Austria, Azerbaijan, Belarus, Belize, Brazil, Bolivia, Bulgaria, Chile, China (including Hong Kong and Macau), Colombia, Costa Rica, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Malaysia, Mexico, OAPI, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Russian Federation, Slovakia, Spain, Taiwan, Tajikistan, Trinidad & Tobago, Turkey, Ukraine, Uruguay and Uzbekistan.

¹⁵³ Art. 15 TRIPS.

¹⁵⁴ Art. 15 TRIPS.

it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.” The publication may happen either before or promptly after the registration. Such a petition to cancel the registration is obligatory under the TRIPS Agreement. In addition, members may decide to introduce a system of an opposition to the registration.

The registration procedure may be further addressed by the PTAs to further determine the details of the procedure. For example, the CETA stipulates that a refusal to register a trademark is to be communicated in writing to the applicant. Consequently, the applicant shall have the opportunity to contest the refusal and to appeal a final refusal to a judicial authority.¹⁵⁵ In addition, both EU and Canada agreed to provide a publicly available electronic database of trademark applications and trademark registrations.

With regard to the regulation of so called well-known trademarks, the TRIPS Agreement refers to the Article 6bis of the Paris Convention. As recalled by J. Watal (2014), “*the US and EU wanted easier standards and enforcement for well-known marks even without the registration requirements.*” The regulation of well-known trademarks foresees to refuse or cancel registration and prohibit the use of a trademark which is liable to create confusion with an existing trademark (or its essential part), and that in a minimum of five years and with no time limit in case of trademarks registered in bad faith. The protection applies to identical or similar goods. The TRIPS Agreement extends the same protection, mutatis mutandis, to services as well as to goods or services which are not similar in case that use of that trademark would indicate a connection between these goods or services.

The TRIPS Agreement does not address directly the licensing and assignment, leaving it expressly for the members to determine the conditions. However, it expressly prohibits compulsory licensing of trademarks.¹⁵⁶ This is important in relation to the pharmaceutical industry and the regulation of compulsory licensing of patents.

With regard to multilateral international IPRs Agreements in the field of trademarks, the PTAs refer to the *Singapore Treaty on the Law of Trademarks*, done at Singapore on 27 March 2006 or to the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, done at Madrid on 27 June 1989, such as in the case of the CETA¹⁵⁷. The EU-Singapore FTA refers to the *Singapore Treaty and to the Trademark Law Treaty* (done at Geneva on October 27, 1994).

¹⁵⁵ Art. 20.14 CETA.

¹⁵⁶ Art. 21 TRIPS.

¹⁵⁷ Art. 20.13 CETA.

The PTAs may provide for the explicit protection of sound and scent trademarks (e.g. the EU-Colombia-Peru FTA on the Registration requirements: “*Such signs may be constituted particularly by words, including combinations of words, personal names, letters, numbers, figurative elements, sounds and combinations of colours, as well as by any combination of such signs.*”¹⁵⁸). Under the KORUS FTA, “[n]either Party may require, as a condition for registration, that signs be visually perceptible, nor may either Party deny registration, that signs be visually perceptible, nor may either Party deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound or scent.”¹⁵⁹

A separate and highly discussed issue related to trademarks is the relationship between trademarks and geographical indications. This topic is addressed in detail in the section devoted to the geographical indications.

5.7 Undisclosed information, including trade secrets

The protection of undisclosed information is also expressly regulated by the TRIPS Agreement (Section 7). Art. 39 TRIPS again refers to the Paris Convention (1967). In this case, however, the TRIPS employs an interesting wording of the referral, stating that “[i]n the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967)”, the Members shall fulfil additional obligations. In this case, Article 10bis of the Paris Convention has been already incorporated in Art. 2 TRIPS (discussed above in Part I), therefore, Art. 39 builds upon these incorporated obligations and further stipulates additional obligations related thereto.

The PTAs usually fail to cover any additional provisions devoted to the general protection of the undisclosed information, including trade secrets. There are PTAs which address the issue of the protection of undisclosed data related to pharmaceutical products, also addressed specifically in Article 39(3) TRIPS, which represents a special case of the protection of the undisclosed information dealing with data protection in case of pharmaceutical products, or possibly agricultural chemical products. This institute is therefore analysed separately in the section devoted to the *Health-related provisions* above.

¹⁵⁸ Art. 203.

¹⁵⁹ Art. 18.2 US-Korea FTA.

5.8 Industrial designs

Industrial designs are governed by Section III of the TRIPS. The TRIPS sets it obligatory for the WTO Members to provide for the protection of independently created industrial designs that are new or original.¹⁶⁰ The duration of protection available shall amount to at least 10 years.¹⁶¹ The industrial designs are not to be confused with the utility models.

The international multilateral treaty governing the designs is the *Hague Agreement Concerning the International Registration of Industrial Designs of 1999*. Selected PTAs refer to the *Geneva Act* of the Hague Agreement. While the CETA states that the parties shall make all reasonable efforts to accede to the Geneva Act, the *EU-Moldova Association Agreement* is significantly stronger, stipulating that the parties shall comply with the Geneva Act¹⁶².

The CETA addresses the relationship between the designs and copyright, stating that the subject matter of a design may be protected under copyright law if the conditions for the protection are met.¹⁶³ This general provision builds upon and goes further than the provision of the TRIPS, which refers to the copyright law with regard to the protection for textile designs, which might be an option for protection in order to ensure that requirements for securing protection does not unreasonably impair the opportunity to seek and obtain the protection.¹⁶⁴ On the other hand, the *EU-Moldova Association Agreement* stipulates that a design shall also be eligible for protection under the copyright law.¹⁶⁵ This provision thus stipulates a potential duality of the protection.

The EU-Moldova Association Agreement regulates the protection of designs in more detail. It prescribes obligatory rules for assessing the requirement of novelty and originality for a component part of a complex product (component part remains visible during normal use of the product, and those visible features fulfil in themselves the requirements as to novelty and originality¹⁶⁶). Furthermore, the PTA defines in detail the rights of the holder of a registered design, i.e. “*right to prevent third parties not having the owner's consent from, at a minimum, making, offering for sale, selling, importing, exporting, stocking or using a product bearing or embodying the protected design when such acts are undertaken for commercial purposes,*

¹⁶⁰ Art. 25 TRIPS.

¹⁶¹ Art. 26 TRIPS.

¹⁶² Act. 307 EU-Moldova Association Agreement.

¹⁶³ Art. 20.25 CETA.

¹⁶⁴ Art. 25(2) TRIPS.

¹⁶⁵ Art. 311.

¹⁶⁶ Art. 308 EU-Moldova Association Agreement.

*unduly prejudice the normal exploitation of the design, or are not compatible with fair trade practices”.*¹⁶⁷

Lastly, the PTAs may prolong the duration of the protection. While, in general, some of the countries apply the minimum standard of 10 years as stipulated in the TRIPS Agreement, some countries offer the protection of 25 years, usually subject to the payment of the renewal fees (WIPO – Industrial Designs, 2017). For example, the *EU-Moldova Association Agreement* sets forth that “[t]his duration of protection available shall amount to 25 years from the date of filing of the application for registration“.¹⁶⁸

The PTAs may also provide for the detailed rules governing the protection conferred to unregistered designs. The TRIPS Agreement does not regulate the issue of registration. The general TRIPS obligation states that Members shall provide for the protection of independently created industrial designs that are new or original. The regulation of unregistered designs thus goes beyond the TRIPS Agreement, but remains within its wording. The *EU-Moldova Agreement* governs the prevention of unregistered designs, if the contested use results from copying the unregistered appearance of the product. The duration shall amount to at least three years from the date on which the design was made available to the public.¹⁶⁹

The *EU – Central America Association Agreement* also governs the protection of industrial designs which shall be provided by registration. The agreement foresees also the option of protecting the unregistered designs, but only if the contested use results from copying the protected design¹⁷⁰. In addition, the *EU-Central America Association Agreement* provides details for the invalidity or refusal of registration of an industrial design.¹⁷¹

Lastly, the provisions on the PTAs on industrial designs may provide for exceptions and exclusions. The allowed limited exceptions shall not unreasonably conflict with the normal exploitation of protected designs and shall not unreasonably prejudice the legitimate interests of the owner of the protected design, taking into account the legitimate interests of third parties¹⁷².

5.9 Geographical indications

Geographical indications (GIs) are indications identifying goods as originating in the territory, or a region or locality in that territory, where a given quality, reputation or other

¹⁶⁷ Art. 308(4) EU-Moldova Association Agreement.

¹⁶⁸ Art. 308(5).

¹⁶⁹ Art. 309.

¹⁷⁰ Art. 252(2).

¹⁷¹ Art. 256.

¹⁷² Art. 310 EU-Moldova, Art. 253 EU-Central America.

characteristic of the goods is essentially attributable to its geographical origin.¹⁷³ Under the TRIPS Agreement, there are two distinct modes of the protection of GIs – the general one under Art. 22 and additional protection for GIs for wines and spirits under Art. 23 TRIPS. Prior to the TRIPS Agreement, the related legal issues were partially regulated by the agreements concluded under the auspices of the WIPO including the Madrid and Lisbon Agreements.

There is no unique system of the protection of GIs in the world; the WTO members are only bound to provide legal means to prevent a misleading use or a use that constitutes unfair competition. Therefore, GIs might be afforded protection under a combination of trademark, consumer protection and unfair competition laws, whereas existing international treaties do not limit country's choice of regulatory system (Caenegem, Cleary and Drahos 2014). On the multilateral level, generally speaking, the “*Old World*”, i.e. European countries, has a rich agricultural heritage, and argues in favour of a separate GIs protection, whereas the “*New World*” – foremost the USA and Australia – favours the trademark protection (Shimizo 2011; Blakeney 2012). The reasons for the distinction are historic, as immigrant settlers brought along the originally European trademarks and territorial names. The described dichotomy is obvious also in bilateral negotiations and subsequent PTAs. On the other hand, the geographical indications are becoming an interesting tool also for developing countries „*because of their potential to add value and promote rural socio-economic development*”, with an example of Basmati rice or Darjeeling tea (EC Trade: Geographical indications, 2017).

During the TRIPS negotiations, the EU wanted stronger protection of GIs and narrowing down any exceptions. However, the oppositions against the strong protection came from the United States, Australia, Chile and others (J. Watal, 2014). The EU continues to be one of the principal supporters of negotiations on geographical indications in the WTO's Doha Development Agenda, focusing on the establishment of a multilateral Register for geographical indications and the extension to all products of the level of protection currently granted to wines and spirits. (EC Trade: Geographical indications, 2017; *further also in* Nadde-Phlix 2014). However, given the above characterized split between the WTO Members, the GIs represent a contentious topic on which there has been no substantive progress (*three proposals within the WTO described and compared in detail in* Nadde-Phlix 2014).

In general, bilaterally, the GIs protection is negotiated either under specific Stand Alone agreements on GIs (e.g. EU-China) or it is covered by broader trade agreements (e.g. CETA, EU-Vietnam FTA, Deep and Comprehensive FTA negotiations with Moldova and Georgia; *in*

¹⁷³ Art. 22 TRIPS.

EC Trade: Geographical indications, 2017). Moreover, the stand alone agreements may focus exclusively on a part of GIs, in particular on wine and spirits, e.g. the *Agreement between the USA and the European Community on Trade in Wine*.

Given the historical background presented above, the relationship between GIs and trademarks is addressed by EU's PTAs, effectively exporting the European GI system to EU's trade partners. P. Roffo (2014) observes that the EU treaties concluded with Peru and Colombia and Central America extend the protection of GIs for '*agricultural and foodstuffs products, wines, spirit drinks and aromatized wines.*' In addition, the CARIFORUM agreement seeks protection regardless of the class of the product on which it is used. F. M. Abbott (2014) concludes that "*the EU has obtained more in the EU-Colombia-Peru EPA than it even envisages in a multilateral context in the WTO*".

The CETA provides for a limited exception to the rights conferred by a trademark for the fair use of descriptive terms, including terms descriptive of geographical origin. In this context, the interpretation of this exception will rely upon the interpretation of the term "*fair use*". The CETA includes an interpretative rule that account shall be taken of the legitimate interests of the owner of the trademark and of third parties.¹⁷⁴ In its sub-section expressly devoted to the Geographical Indications, the CETA defines a GI as an indication which identifies an agricultural product or foodstuff as originating in the territory, region or locality of a signatory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin.¹⁷⁵ The CETA combines this definition with a list of product classes and a list of geographical indications listed in its Annexes. The list may later be amended through a decision of a special committee.¹⁷⁶

The protection of GIs itself stems from a principle that the government shall provide legal means for interested parties to prevent the use of a geographical indication for products that do not originate in the place of origin of the GI. In addition, the CETA stipulates the same level of protection against the use of GIs which does originate in the place of origin, but was not produced or manufactured in accordance with the laws and regulations that would apply for the consumption within the country of origin. This rule should prevent the authorised production of goods manufactured for export which have different characteristics compared to goods intended for the domestic consumption. In case of the former, i.e. in case of produce originating outside of the defined location, the CETA foresees the extended level of protection

¹⁷⁴ Art. 20.15 CETA.

¹⁷⁵ Art. 20.16 CETA.

¹⁷⁶ The *CETA Joint Committee* acting by consensus and on a recommendation by the *CETA Committee on Geographical Indications*.

covering also the indications used in translation or accompanied with an addendum such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.¹⁷⁷ Nevertheless, a long list of exceptions (e.g. for the identified GIs in case they are marketed with such an accompanying expression provided that the real geographical origin is legibly and visibly indicated or in case of the product class of cheeses preceding the date of October 2013, or in case of trademarks acquired in a good faith) illustrates that the negotiations between the EU and Canada on the topic of GIs were complex.

The CETA also foresees a separate regulation of homonymous geographical indications. In such a case, a Party shall determine the practical conditions to differentiate the homonymous GIs. This provision also addresses future negotiations with third countries. If the Party is about to conclude with a third country a protection for a homonymous GI, the other Party shall be informed and shall be given the opportunity to comment beforehand.

With regard to the other players in international trade, the AUSFTA and KAFTA set out that GIs shall be eligible for trademark protection, whereas the AANZFTA opted for “may”, the JAEPA and the MAFTA recognise that geographical indications are eligible for protection through a trademark system or other legal means. Apart from including them in their general definition of IPRs, the TAFTA and the SAFTA do not provide for a substantive regulation of GIs. Consequently, under the AUSFTA and the KAFTA rights of the owner of the trademark shall prevail over the GIs. After having signed the AUSFTA, Australia introduced an amendment which permitted cancellation procedures for GIs and the ability for a trademark and GI to co-exist (Blakeney 2012). Under the AANZFTA “[e]ach Party shall protect trademarks where they predate, in its jurisdiction, geographical indications in accordance with its domestic law and the TRIPS Agreement”. The KAFTA envisages further exchange of views and possible revision of the regulation in five years after entry into force. The majority of China’s RTAs include an explicit regulation of geographical indications.

The Economic Partnership Agreement between the EU and the Southern African Development Community (SADC) also regulates the geographical indications. “*The Parties recognise the importance of GIs and origin-linked products for sustainable agriculture and rural development.*”¹⁷⁸ The protection is awarded for example to the honey bush and rooibos infusions from South Africa.

As recalled above, the GIs have been governed not only by means of PTAs negotiations but also in terms of separate negotiations. China and the EU have initially established a project

¹⁷⁷ Art. 20.19 CETA.

¹⁷⁸ Art. 16(3).

devoted to the protection of GIs called “10 plus 10” that was completed on November 30th, 2012 (EC 2012).¹⁷⁹ Australia concluded with the EU a special agreement on protection of GIs in wine - the *Australia-European Community Agreement on Trade in Wine* entered into force in September 2010. It replaced the previous agreement signed in 1994 (EC: EU-Australia wine trade agreement, 2010).

The US approach towards the GIs can be characterised through the US-Australian FTA. The GIs are subsumed under the trademarks, stipulating that “*each Party shall (...) provide that geographical indications are eligible for protection as marks.*”¹⁸⁰ The rights of the trademark owner shall prevail over the rights stemming from the protection of the geographical indication, stipulating that “*the owner of a registered mark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs, including geographical indications.*”¹⁸¹ Moreover, “*in case of the use of an identical sign, including a geographical indication, for identical goods or services, a likelihood of confusion shall be presumed.*”¹⁸² As for the regulation of the GIs itself, the US-Australian FTA foresees that parties shall make available the application or petition for recognition process.¹⁸³ Interestingly, an application for a GI protection shall be refused also in case it is likely to cause confusion with a mark that is the subject of a good-faith pending application or registration.¹⁸⁴

Apart from provisions on the trademark-GIs distinction, the PTAs prevalingly govern the following issues: expanded definitions of GIs, wider scope, incorporation of exclusive rights, and simplification of formalities, transparency regulations, GIs and trademarks registration and mutual recognition of protection (D. Vivas-Eugui and Ch. Spennemann in Correa & Yusuf 2008).

¹⁷⁹ Based on this project, both parties agreed to protect ten selected GIs nominated by their counterpart. The list includes also the often highlighted Pinggu peaches grown seventy kilometres northeast from Beijing (WIPO Geographical Indications for Development 2015). The list of the EU’s GIs protected in China covers five kinds of cheese (two French – *Comté* and *Roquefort*, Italian – *Grana Padano* and *West Country Farmhouse Cheddar* and *White Stilton Cheese/Blue Stilton Cheese* from the United Kingdom), Italian *Prosciutto di Parma*, two kinds of Spanish olive oil, French dried fruit and Scottish Farmed Salmon. The Chinese list of products protected on the entire EU’s market includes a wide range of food products ranging from fruit (peach, apple and honey pomelo) to vegetables (asparagus, garlic, and yam) to tea, crayfish, and a type of noodles or rice vinegar (EU 2012). Simultaneously, the EU has launched a marketing campaign ‘*Tastes of Europe*’ promoting the EU’s GIs on the China’s market (EC 2015). The initiative was launched in July 2007 and administered by the European Commission and the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), an authority responsible for the administration of GIs in China. The 10 plus 10 project should have served as a basis for the negotiations of a more comprehensive and complex bilateral agreement on GIs protection between China and the EU. The subsequent negotiations are still ongoing and were believed to be concluded in the first half of the year 2015. On 02 June 2017, the EU and China formally published a list of two hundred European and Chinese geographical indications (100 from each side), that will be considered for protection through a bilateral agreement to be concluded in 2017 (EC, 02 June 2017).

¹⁸⁰ Art. 17.1.2.

¹⁸¹ Art. 17.1.4.

¹⁸² Art. 17.2.4.

¹⁸³ Art. 17.2.10.

¹⁸⁴ Art. 17.2.10 (v).

J. Watal (2014) highlights that the nature of interest in GIs is asymmetric which he illustrates with the comparison of the total volume of produce covered by the protection. “*For example, the EU has obtained this level [i.e. the higher level of protection as under Art. 23 TRIPS] of GI protection for 150 of its products, while Peru and Colombia have obtained this in the EU for only three of their products.*” The comparison in volumes of protected GIs apply also in case of the EU-Korea FTA, nevertheless, there are relatively more Korean products covered: EU has 60 agricultural products and more than 100 wines and spirits and Korea has 63 agricultural products and 1 spirit. However, the geographical scope and the population should be taken into account, the EU being a diverse and large market. As also highlighted by J. Watal (2014), the economic impact in the respective parties to the agreement will depend on the cultural and dietary differences and as such should be subject to an empirical verification product by product. As another example, even though Colombia and Peru have been sympathetic toward the GIs protection in both WTO and in bilateral arrangements, mainly due to their coffee sector, F. M. Abbott fears that Colombia and Peru may face displacement of local producers, and potentially higher consumer prices. In case of the negotiated EU-China bilateral agreement on GIs, both EU and China will be represented by an equal number of GIs – 100 for each party (EC, 02 June 2017).

From the business perspective, F. M. Abbott (2014) summarizes the arguments claiming that enhanced protection of GIs would be favourable to economic and social development of developing countries, such as through allowing local agricultural producers to obtain higher prices and better market penetration in export markets or protecting local consumers against poor-quality imitations. The arguments against stress possible displacement of local producers and subsequent higher prices. In addition, the protection and foremost enforcement in a foreign country might be costly and therefore unattainable for an entrepreneur from a developing country (regarding the development potential of GIs *see also in detail* K. E. Maskus 2014).

5.10 Layout-designs (topographies) of integrated circuits

The protection of layout-designs (topographies) of integrated circuits is expressly governed by the TRIPS Agreement (Section 6). Primarily, the TRIPS refers to the *Treaty on Intellectual Property in Respect of Integrated Circuits* (the IPIC Treaty). Pursuant to Art. 6 TRIPS, Members agree to provide protection in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty. Based on this wording, the above mentioned articles of the Treaty have been incorporated in the TRIPS Agreement and are thus, inter alia, subject to the WTO enforcement. The scope of the protection

is defined in a slightly different manner to the patent protection, as Members shall consider unlawful the acts of importing, selling, or otherwise distributing for commercial purposes (Art. 36 TRIPS). The layout-designs (topographies) of integrated circuits might be protected either upon registration or in a system not requiring registration as a condition for protection. The term of protection shall be at least 10 years counted from the date of filing an application or no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs, respectively. Additionally, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.¹⁸⁵

The protection of layout-designs (topographies) of integrated circuits are sometimes referred to as topographies of semiconductor products. It appears rarely in the provisions of PTA treaties. Among the analysed treaties, the subject-matter is regulated only by the *EU-Ukraine Association Agreement*. Thereunder, the parties shall provide for the protection of the topography of a semiconductor which is the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry.¹⁸⁶ The provided protection covers the rights to authorise or prohibit its reproduction or its commercial exploitation or the importation of a topography or of a semiconductor product manufactured by using the topography. These exclusive rights shall be protected for at least 10 years.

5.11 Plant breeders' rights and new plant varieties

The institute of plant variety rights is not covered by the TRIPS Agreement. However, the provisions on the patent protection, in particular the patentable subject matter¹⁸⁷ states that “Members may exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.”¹⁸⁸ The TRIPS therefore foresees the option of introducing the plant breeders' rights. In addition, the given provision is supplemented by the information that this provision shall be reviewed four years after the date of entry into force of the WTO Agreement.

Plant breeders' rights and new plant varieties are governed by the *International Convention for the Protection of New Varieties of Plants*. The Convention was adopted in Paris

¹⁸⁵ Art. 38 TRIPS.

¹⁸⁶ Art. 225.

¹⁸⁷ Art. 27.

¹⁸⁸ Art. 27(3) (b) TRIPS.

in 1961 and was revised in 1972, 1978 and 1991 (*in* UPOV Online 2011) and served as a basis to establish *the International Union for the Protection of New Varieties of Plants* (UPOV).

The PTAs often refer to the rights and obligations under the UPOV Agreement and do not provide for any substantive regulation going beyond this international agreement.¹⁸⁹ Even the mere referral to the UPOV might constitute an important TRIPS-plus provision. The provision in the TRIPS Agreement states it as an obligation to introduce some kind of protection. As argued by P. Cullet (2001), plant variety protection is a new concept for many developing countries. His research focuses on the African countries and argues that “*African states should take advantage of the opportunity they have to devise a property rights system adapted to their needs and conditions and they should avoid any system involving the introduction of monopoly or exclusionary rights, such as patents or plant breeders’ rights.*” The mere referral to the UPOV Convention in a PTA thus binds the country to introduce the system of breeder’s rights built upon a structure of exclusive rights. P. Cullet (2001) argues that “*the introduction of such rights in agriculture does not seem to provide the conditions necessary to ensure the fulfilment of basic food needs for all individuals and the sustainable management of biological resources in African countries.*”

The UPOV Convention has currently 72 contracting parties (WIPO: UPOV 2015). The breeder’s rights towards the protected variety under the UPOV Convention covers production or reproduction, conditioning for the purpose of promotion, offering for sale, selling or other marketing, exporting, importing and stocking for any of the purposes.

Some PTAs include an express obligation to accede thereto (e.g. KORUS) or supplements the mere compliance with the UPOV treaty with additional political statements. The latter is the case of the CETA, which states that parties shall co-operate to promote and reinforce the protection of plant varieties on the basis of the *1991 Act of the International Convention for the Protection of New Varieties of Plants, done at Paris on 2 December 1961*.¹⁹⁰

On the contrary, the *EU – Central America Association Agreement* does not include any referral to the UPOV Convention. The agreement reiterates the TRIPS wording referring to patents or an effective sui generis system. Secondly, the treaty states that “*the Parties understand that no contradiction exists between the protection of plant varieties and the capacity of a Party to protect and conserve its genetic resources.*” However, lastly, the Agreement foresees “*exceptions to exclusive rights granted to plant breeders to allow farmers*

¹⁸⁹ E.g. EU-Korea FTA, PTAs concluded by Australia, CETA.

¹⁹⁰ Art. 20.31 CETA.

to save, use and exchange protected farm-saved seed or propagating material.”¹⁹¹ Therefore, the *EU-Central America Association Agreement* expressly refers to the breeders’ exclusive rights and thus acknowledges the existence of this system going beyond the TRIPS Agreement. However, this referral does not constitute an obligation towards the Members to establish such a system.

The PTAs may also regulate the protection of data related to plant protection products. The provision is related to the data protection of the undisclosed data of the pharmaceuticals products. The CETA stipulates that each party shall determine safety and efficiency requirements before authorising the placing on the market of a plant protection product.¹⁹² For such an authorisation, signatories shall provide a limited period of data protection for a test or study report submitted in order to obtain the authorisation which shall be at least ten years starting at the date of the first authorisation. In addition, the CETA foresees a possibility for the parties to establish data protection requirements or financial compensation requirements for tests or study reports supporting the amendment or renewal of an authorisation. In relation to the testing, the CETA further addresses the testing on vertebrate animals. Signatories agreed to establish rules to avoid duplicative testing on vertebrate animals and encourage applicants to share test and studies. Subsequently, holders of relevant authorisation shall be entitled to a compensation for a fair share of the costs incurred for the testing.¹⁹³

S. Nadde-Phlix (2014) notes that “[t]he protection of plant varieties has always been in the FTA agenda of the EU.” The EU’s legislation governs the plant variety rights in the system established by the *Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights*. The regulation was later amended by the *Council Regulation (EC) No. 15/2008 of 20 December 2007*. The amendment allowed for the national treatment of applicants for the Community plant varieties, which were previously distinguished based on the nationality. Nationals of other than the EU member states were required to obtain an opinion of a specialized Administrative Council first. Its decision *may* have been made dependent on the principle of reciprocity, depending on whether the other state affords protection for varieties to nationals of all EU Member States.¹⁹⁴ Pursuant to its amended version, an application for a Community plant variety right may be filed by any natural or legal person, or anybody ranking as a legal person under the law applicable to that body.¹⁹⁵

¹⁹¹ Art. 259.

¹⁹² Art. 20.30 CETA.

¹⁹³ Art. 20.30 CETA.

¹⁹⁴ Art. 12 in the wording of the Council Regulation (EC) No 2100/94 of 27 July 1994.

¹⁹⁵ Art. 12, as amended.

5.12 *Traditional knowledge, folklore and genetic resources*

Traditional knowledge, folklore and genetic resources represent a category which is not expressly regulated by the TRIPS Agreement. Even though they constitute three distinct topics, they are often referred to together. As recalled by J. Watal (2014), it was in the agenda of the developing countries to recognize traditional knowledge (TK) and genetic resources (GR), especially in the context of plant variety protection.

The references to international agreements include the *Convention on Biological Diversity* (CBD). The PTAs rarely include substantial regulation of traditional knowledge, folklore and genetic resources. The *Trade Agreement between the European Union and Colombia and Peru* may serve as an example of a treaty with an extensive protection. The chapter on the Protection of biodiversity and traditional knowledge recognises “*the past, present and future contribution of indigenous and local communities to the conservation and sustainable use of biological diversity*”.

Occasionally, the PTAs may foresee future cooperation in terms of exchange of best practices.¹⁹⁶ For example, under the *Trade Agreement between the European Union and Colombia and Peru*, the ‘Parties recognise and reaffirm the rights and obligations under the *Convention on Biological Diversity* (hereinafter referred to as “CBD”) adopted on June 5, 1992, and support and encourage efforts to establish a mutually supportive relationship between the TRIPS Agreement and such Convention.’¹⁹⁷

Similarly, under the EU-Korea FTA, parties undertake to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles, however, this obligation is stated subject to their respective legislation. Afterwards, the parties refer to the ongoing discussion on the topic in both the WTO and the WIPO and with regard to the CBD. In conclusion, they undertake, upon the conclusion of above referred discussions and upon a request of any party, to review this particular article in their *Trade Committee*. The provisions of the EU-Korea on this issue correspond with the EU’s endeavours on the multilateral platform within the WTO (*in* WTO: 9 TN/C/W/52, 19.7.2008).

The North-South PTAs may refer specifically to the traditional knowledge, despite being very short and general on the other topics. The *Economic Partnership Agreement between*

¹⁹⁶ E.g. the AANZFTA established the *Economic Cooperation Work Program project on Policy Workshops on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, GRTKTCEs; in MENA 2013.

¹⁹⁷ Art. 196(4).

*the EU and the Southern African Development Community (SADC) states “that Parties consider traditional knowledge as an important area and may cooperate on it in future.”*¹⁹⁸

The expressions of folklore might be also expressly included within the list of activities of a performer in the copyright section.¹⁹⁹

Among the EU’s PTAs the folklore is regulated in the EU-Ukraine Association Agreement. The Agreement contains an obligation ‘*to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.*’ In addition, the parties shall ‘*promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.*’²⁰⁰ These obligations are however, softened, as they are subject to the parties’ domestic legislation.

To conclude, the author concurs with the conclusions of J. Watal (2014) that the EU agreements “*go some way to formally acknowledge the legitimacy of long-standing demands of developing countries*”, including traditional knowledge and genetic resources.

The US trade agreements, on the other hand, do not cover the topics of traditional knowledge and folklore. An exception might have been the TPP, from which, however, the US has withdrawn. The TPP “*recognises the relevance of intellectual property systems and traditional knowledge associated with genetic resources to each other, when that traditional knowledge is related to those intellectual property systems*“. Subsequently, the signatories of the TPP undertake to endeavour to cooperate accordingly.²⁰¹

5.13 Domain names

The PTAs often fail to address the issue of domain names. Some PTAs might expect monitoring of development of international policy and guidelines (*in* SAFTA) and the most far-reaching PTAs require countries to provide appropriate dispute settlement procedure based on the *Uniform Domain-Name Dispute-Resolution Policy* (UDRP; *in* AUSFTA, KAFTA).

5.14 Enforcement

The minimum standards of IPRs enforcement are set forth in Part III of the TRIPS Agreement. The inclusion of enforcement provisions into the international standards of the IP

¹⁹⁸ Art. 16(5).

¹⁹⁹ AUSFTA, KORUS, and KAFTA, US-Australia FTA.

²⁰⁰ Art. 229.

²⁰¹ Art. 18.16.

protection represents the milestone of the TRIPS Agreement. Apart from the general obligations, the TRIPS Agreement sets the minimum standards for civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures. The detailed analyses below follow the same structure.

Some commentators have criticised the actual wording of the enforcement provisions in the TRIPS Agreement. As highlighted by J. Watal (2014), enforcement provisions “*are mostly phrased in a way that makes it obligatory to provide the ‘authority’ to courts and other enforcement agencies to take certain actions and not actually oblige certain enforcement actions.*” According to J. Watal (2014), this final wording was met with a disappointment from the US negotiators.

With regard to the EU PTAs, T. Jaeger (2014) points out that the EU seeks inspiration for international negotiations of PTAs within the standard of EU’s internal legislation – comparing the provisions with *the Enforcement Directive*²⁰², *the Border Measures Regulation*²⁰³ and *the E-Commerce Directive*²⁰⁴.

5.14.1 Civil and Administrative Procedures and Remedies

The general obligations concerning the civil and administrative procedures stress the basic procedural principles. Enforcement procedures shall be fair and equitable, shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. The TRIPS also foresees general rules for a review process of administrative, respectively judicial decisions. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.²⁰⁵ The judicial authorities shall have the authority to order that goods that they have found to be infringing, be disposed of outside the channels of commerce, without any compensations.²⁰⁶

The judicial authorities shall have the authority to order a party to desist from an infringement, by means of the so called injunctions²⁰⁷, to order the infringer to pay the right holder adequate damages²⁰⁸, in case of wrongful measures undertaken based on a request by a

²⁰² DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights.

²⁰³ Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003.

²⁰⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

²⁰⁵ Art. 42 TRIPS.

²⁰⁶ Art. 46 TRIPS.

²⁰⁷ Art. 44 TRIPS.

²⁰⁸ Art. 45 TRIPS.

party, to provide adequate compensation for the injury suffered²⁰⁹, as well as to have the authority to order prompt and effective provisional measures.²¹⁰ As highlighted by J. Watal (2014), the division regarding the TRIPS provisions on preliminary injunctions did not follow the division between developed and developing countries. While the TRIPS provision on preliminary injunctions were new to civil law countries (both developed and developing), they were already applied in common-law countries.

The PTAs govern the enforcement procedure in more detail. The CETA foresees that the applicants are entitled to seek applications for the procedures and remedies – including holders of IPRs, other persons authorised to use those rights, but also IP collective rights management bodies and professional defence bodies that are regularly recognized as having a right to represent holders of IPRs.²¹¹ In relation to the entitled applicants, T. Jaeger (2014) points out that the TRIPS Agreement leaves the term ‘right holders’ essentially open, with the only specification that federations and associations are included in the definition. On the other hand, T. Jaeger observes that the PTAs, as in the case of CETA, incorporate a broad and detailed definition, which is, in the case of the EU, inspired by the wording of the Enforcement Directive (Directive 2004/48/EC) with the effect that the board interpretation is made compulsory, beyond the requirements of the TRIPS.

Secondly, the EU PTAs focus on evidence. T. Jaeger again compares the resulting wordings of the negotiated PTAs with the similar wording of the Enforcement Directive. Importantly, in case of an alleged infringement of IPRs committed on a commercial scale, the judicial authorities shall have the authority to order the production of relevant information including banking, financial or commercial documents²¹², subject to the protection of confidential information. Secondly, each party shall have a right to order prompt and effective provisional measures to preserve relevant evidence.²¹³

With regard to the damages, the TRIPS Agreement foresees that the judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury which the right holder has suffered. The PTAs may provide for additional types of calculation of the damages, such as profits of the infringer that are attributable to the infringement. In addition, the CETA expressly refers to legal costs. Judicial authorities shall have the authority to order payment by the losing party of legal costs and other

²⁰⁹ Art. 48 TRIPS.

²¹⁰ Art. 50 TRIPS.

²¹¹ Art. 20.33 CETA.

²¹² Art. 20.35 CETA, Ar. 237 EU-Colombia and Peru FTA, Art. 10.43 Korea-EU FTA.

²¹³ Art. 20.35 CETA.

expenses, as provided for under that Party's law.²¹⁴ The *EU-Central America Association Agreement* remains on the TRIPS level, on the contrary, as stressed by T. Jaeger (2014), other EU's PTAs go beyond the TRIPS or even beyond the ACTA Agreement, when allowing for moral damages (*"elements other than economic factors"*²¹⁵).

5.14.2 Criminal procedures

The criminal procedures are binding upon the WTO members at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.²¹⁶ Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, as well as seizure, forfeiture and destruction of the infringing goods. The TRIPS Agreement leaves it open for the members to apply criminal procedures in other cases.

Generally, if governments decide to conclude provisions going beyond the TRIPS requirements in their PTAs, they usually broaden criminal procedures to cases other than wilful trademark counterfeiting or copyright piracy on a commercial scale and incorporate detailed provisions on border measures.

As obvious from the EU treaties below, the EU PTAs do not usually contain obligations that extend protection beyond the level of substantive protection within the EU. Therefore, it is to be noted that to date the EU legislation does not cover harmonisation of criminal sanctions, as the proposed so called second harmonisation directive has so far failed to find sufficient support in the EU Parliament in particular. However, interestingly, there are provisions on criminal proceedings incorporated in the EU-South Korea FTA which obliges the parties to provide for criminal procedures and sanctions at least in cases of wilful trademark counterfeiting and copyright and related rights piracy (*e.g. in Drexl 2014*).

Some PTAs incorporate details of criminal penalties available for copyright infringement on a commercial scale (SAFTA), other repeat the criminal liability for the same cases as stipulated in the TRIPS, in other cases, parties shall *endeavour* to provide criminal punishment (AANZFTA). The MAFTA concluded between Australia and Malaysia provides for a substandard provision incorporating higher criminal penalties to offences committed by corporations as oppose to those committed by individuals. Lacking any bounding regulation on enforcement, other PTAs expect cooperation in terms of information exchange and policy dialogue (TAFTA, AANZFTA).

²¹⁴ Art. 20.41 CETA.

²¹⁵ E.g. Art. 10.50(1)(a) EU-South Korea FTA, Art. 244(1)(a) EU-Colombia and Peru FTA.

²¹⁶ Art. 61 TRIPS.

5.14.3 Border Measures

Border measures are governed by Section 3 Part III of the TRIPS Agreement. This Section regulates the suspension of release by customs authorities. The mechanism allows for a right holder to lodge an application for the suspension by the customs authorities of the release into free circulation goods for which there are valid grounds for suspecting that they are counterfeit trademark or pirated copyright goods. It is in the competence of the WTO member to decide whether the written applications are to be filed with administrative or judicial authorities. Moreover, the TRIPS leaves it open for the members, based on their consideration, to extend the mechanism of the suspension also to other infringements of intellectual property rights. However, this is only an option and therefore not a part of the minimum standard. On the contrary, as highlighted by T. Jaeger (2015) the Border Measures Regulation, the wording of the ACTA Agreement or the EU-Korea FTA extend the border measures to a wide range of IP rights, including patents, designs, geographical indications and plant variety rights, or only designs and GIs in case of the EU-CARIFORUM Agreement (*in detail in Watal 2014 and Jaeger 2014*).

Under the TRIPS minimum standard, the applicant initiating the mechanism of the suspension of release by customs authorities shall be required to provide adequate evidence²¹⁷ and the competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance to prevent abuse.²¹⁸ The duration of the suspension shall be limited and shall not exceed 10 working days, extendable by other 10 working days.²¹⁹ In case of a wrongful detention, authorities shall have the right to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused.²²⁰

Additionally, Section 3 governs the right of inspection and information and that without prejudice to the protection of confidential information, as well as remedies; competent authorities shall have the authority to order the destruction or disposal of infringing goods. Lastly, the TRIPS Agreement regulates the so called *de minimis imports*, meaning that members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

²¹⁷ Art. 52 TRIPS.

²¹⁸ Art. 53 TRIPS.

²¹⁹ Art. 55 TRIPS.

²²⁰ Art. 56 TRIPS.

In case the PTAs govern the special requirements related to border management, they usually cover the same instruments as the TRIPS, possibly going in more detail. The CETA thus regulates the applications by the right holders, provision of information from the right holder and security or equivalent assurance, as well as remedies. In addition, parties to the CETA agreed to further specific cooperation in the area of border measures.

Whereas the TRIPS Agreement prescribes the border measures to importation, it leaves it as an option for Member States to apply the measures also to the exportation or transit. However, as observed by J. Watal (2014), EU and US PTAs extend the application of border measures to exportation and transit.²²¹

5.15 Dispute Settlement Mechanisms

Under Art. 64 TRIPS Agreement, selected provisions of the Dispute Settlement Understanding (DSU) apply to the settlement of disputes under the TRIPS Agreement. As highlighted by J. Watal (2014), there were initial demands during the Uruguay Round of negotiations to apply all of GATT dispute settlement procedures to the TRIPS Agreement, including the application of non-violation and situation complaints, however, due to the opposition of Canada or India, it was only left for the Council for TRIPS and a subsequent consensus decision of the Ministerial Conference.²²²

The PTAs often include a specific system for resolving any disputes between the parties to the agreement about the way in which they apply or interpret the given PTA. A comprehensive mapping of the dispute settlement provisions in the preferential trade agreements has been executed by C. Chase, A. Yanovich, J.-A. Crawford, and P. Ugaz (2016) who conclude that the majority of the analysed PTAs has adopted a quasi-judicial model of dispute settlement, rather than political/diplomatic or judicial models of dispute settlement. Furthermore, based on their conclusions, the vast majority does not include an appellate stage. C. Chase, A. Yanovich, J.-A. Crawford, and P. Ugaz (2016) further note that one of the most striking differences between the dispute settlement mechanisms (DSMs) in PTAs and under the WTO dispute settlement system is the institutional aspect, with the Dispute Settlement Body having a central role in dispute settlement under the WTO.

As explained above and illustrated by specific examples, the IPRs provisions in PTAs built upon the minimum standard of the TRIPS Agreement, often expressly referring to the TRIPS Agreement or reiterating its provisions. The TRIPS Agreement, as a multilateral

²²¹ E.g. EU-CARIFORUM FTA.

²²² Art. 64(3) TRIPS.

agreement among the WTO parties, is subject to the general dispute mechanism of the World Trade Organisation. Therefore, should a dispute arise on the ground of a provision which appears in both the TRIPS Agreement and the PTA, a question arise on what dispute settlement mechanism should apply. The concurrent dispute settlement mechanism (DSM) might result in a *forum shopping*, leaving it up to the claimant to decide what DSM route to choose based on its assessment of the probability of its success.

The CETA acknowledges the dual routes for the dispute settlement and incorporates a rule on the choice of forum. Firstly, it states that the “*recourse to the dispute settlement provisions of this Chapter is without prejudice to recourse to dispute settlement under the WTO Agreement or under any other agreement to which the Parties are party.*”²²³ However, it further follows that notwithstanding this principle, in case that an obligation is *equivalent in substance* under the PTA and under the WTO Agreement, or under any other agreement binding the parties, a Party may not seek redress for the breach of such an obligation in the two fora. The CETA relies upon the principle of *lis alibi pendens* (dispute elsewhere pending). In other words, “*once a dispute settlement proceeding has been initiated under one agreement, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement.*”²²⁴ The rules do not apply only in case that the selected forum fails to make findings due to procedural or jurisdictional reasons. The CETA itself foresees consultations and mediation at the first stage. The dispute settlement mechanism itself relies upon the arbitration. The list of potential arbitrators should be agreed by the *CETA Joint Committee* after the entry into force of the agreement and the rules of procedure for arbitration are attached to the agreement in its annex.²²⁵ As a general rule of interpretation, the arbitration panel established under the PTA shall interpret the provisions of the agreement in accordance with customary rules of interpretation of public international law and shall also take into account relevant interpretations in reports of panels and the Appellate Body adopted by the WTO Dispute Settlement Body.²²⁶

J. Flett (2015) considers the political and diplomatic connotations, suggesting that the governments may decide not to trigger the PTA dispute settlement mechanism because of a desire to foster a cooperative relationship.

With regard to the consistency of the conclusions reached within the WTO and the separate findings under PTAs, C. C. Correa (2014) questions “*the extent to which the*

²²³ Art. 29.3.

²²⁴ Art. 29.3.

²²⁵ Art. 29.16.

²²⁶ Art. 29.17.

interpretations of the TRIPS provisions that may be given by (PTA) arbitration panels may substantially differ from those of a WTO panel or Appellate Body, and whether such interpretations may subsequently influence the WTO jurisprudence.” In response, C. C. Correa (2014) refers to the WTO Panel taking into consideration the conclusions drawn under the MERCOSUR arbitration.

Consequently, further on the interpretation and possible impacts of rulings on TRIPS provision under PTA dispute mechanism, C. C. Correa (2014) states that “*differences in the legal context of (PTAs) and the TRIPS Agreement may be critical for the interpretation of a TRIPS provision under a (PTA) dispute settlement system, as (PTAs) have their clear objective the expansion and strengthening of intellectual property rights, thereby providing an inherently biased context for interpretation of substantive and enforcement obligations.*”, stating later that “[t]here is a risk of expansive interpretations of the TRIPS obligations that overlook public interests and welfare considerations.”

In addition, besides the general dispute settlement mechanism applied in the given PTA, several RTAs include a separate dispute settlement mechanism or at least a specific adjusted procedure applied in case of IPRs matters. The China-NZ FTA stipulates a separate IPRs DSM, referring to both the dispute settlement mechanism in the FTA itself and the DSM within the WTO. Parties are expected to request consultations of IPRs-related matters prior to proceeding to the DSM foreseen under the FTA. These consultations between the stipulated contact points are to a certain extent formalized, expecting their commencement within sixty days after the request. Under the China-Iceland FTA, any IPRs related concerns shall be addressed by a dialogue conducted through the Parties’ designated contact points within 60 days. Should this dialogue fail to provide for a solution, the Parties might refer the issue to the dispute settlement mechanism stipulated in the FTA.²²⁷

The US PTAs include provisions on the application of non-violation rules, e.g. in US-Singapore FTA, the dispute settlement procedures apply wherever a benefit the Party could reasonably have expected to accrue under remunerated chapters, including an explicit reference to the Intellectual Property Chapter, is being nullified or impaired as a result of a measure that is not inconsistent with the FTA (Art. 20.4; *in detail also in J. Watal 2014*).

²²⁷ Chapter 11.

Conclusions

Recently, the trade negotiations have become an increasingly political topic. There have been extreme and passionate opinions advocating both for and against further liberalisation, often without any supporting facts or evidence. This is undoubtedly the case of the negotiations of the preferential trade agreements. Governments have been accused of their failure to explain to their citizens the terms and conditions and impact of the trade treaties, often negotiated behind closed doors. The official response often tries to stress that bilateral and regional trade agreements are complex treaties and while it is generally believed that their implementation leads to a win-win situation and benefits for all parties involved, it is not easy to foresee and quantify the impact of every single provision of the pact.

Undoubtedly, it is true that the complexity of international relations require complex international agreements. However, negative voices are heard also in the academia and are even stronger with regard to the protection of the intellectual property rights, arguing that the so called TRIPS-plus provisions, obligations of protection and enforcement of intellectual property rights going beyond the minimum standards agreed on a multilateral level at the World Trade Organisation, provide for broad extensions of the protection of IP in favour of research oriented and creative industries, leaving customers behind. Specifically, research has been focusing on the impact of TRIPS-plus provisions on the access to medicines and public health.

In response, the author aimed to provide an unbiased analysis of the non-discrimination principle in the TRIPS Agreement in the context of the existing provisions of the multilateral, bilateral and regional international regulation of intellectual property, building upon the analysis of the primary sources. The section below presents the main conclusions of the research in response to the research objectives set forth in the introduction of the thesis.

Firstly, the research focused on the analysis of the principle of non-discrimination in trade-related aspects of intellectual property rights in the multilateral trading system, which is presented in Chapter 2 of the thesis. Both the national treatment principle and the most-favoured-nation principle were explained in relation to the historical developments of the regulation of the intellectual property rights on the international level. The interpretation of the principle in the TRIPS Agreement was analysed based on the historical negotiations, reflecting the disputes addressed within the World Trade Organisation and the existing academic literature.

As explained in detail, the national treatment principle has been introduced in the international regulation of IPRs as soon as in the Paris Convention in 1883. On the other hand, the most-favoured-nation principle has been previously closely connected with the international trade law.

There are two separate national treatment provisions that cover IPRs under the TRIPS Agreement: Article 3 and Article 27.1 in connection with Article II.4 of the GATT 1947. These two national treatment provisions differ in attachment. Whereas the NT principle in Art. 3 provides for national treatment of persons holding the rights, the last sentence in Article 27.1 of the TRIPS Agreement on patents in connection with Article II.4 of the GATT 1947 allows for national treatment of goods incorporating or bearing IPRs.

As highlighted by the Dispute Appellate Body in dispute DS176 – *United States — Section 211 Omnibus Appropriations Act of 1998*, “to fulfil the national treatment obligation, less favourable treatment must be offset, and thereby eliminated, in every individual situation that exists under a measure” (in WT/DS176/AB/R, para. 286). The national treatment principle is violated in case that the disputed measure “imposes an additional obstacle” or, in other words, applies an “extra hurdle” on non-nationals (in WT/DS176/AB/R, para. 268).

The author agrees that the national treatment principle in the TRIPS Agreement cover both de jure and de facto discrimination. It is in the inherent nature of the national treatment principle that the principle cannot be interpreted formalistically. De facto discrimination might cause real obstacles to the benefits of the international trade liberalisation.

As explained in detail, the international intellectual property regulation is a complex system built upon interlinkages and references between the treaties. Regarding the interpretation of the non-discrimination principle in the TRIPS Agreement, the crucial reference lies in Article 2(1) of the TRIPS Agreement. Thereunder, in respect of Parts II, III and IV of the TRIPS Agreement, Members shall comply with, among others, Article 19 of the Paris Convention (1967). As argued above, the author is of the opinion that the wording of the reference – “shall comply with” – incorporates directly the referred provisions into the TRIPS Agreement. This is in line with the interpretation of N. Pires de Carvalho (2010) who states that those provisions have become, for all purposes, provisions of the TRIPS Agreement.

Under Article 19 of the Paris Convention *on Special Agreements*, „[i]t is understood that the countries of the (Paris) Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.“ The author is of the opinion that the wording of Article 19 of the Paris Convention, incorporated into the TRIPS Agreement through Article

2(1) TRIPS, especially the emphasis given to the wording – “reserve the right to make *separately* between themselves” – is to be interpreted as an exception to the *most-favoured nation* principle in the TRIPS Agreement with regard to the industrial rights. The author concludes that, if to be interpreted otherwise, this provision only to confirm that parties may enter to other agreements than the Paris Convention, would be redundant in the light of general principles of the international law. As a side note, it is to be noted that while the TRIPS Agreement does not use the term industrial rights, it is to be understood in the sense of the Paris Convention.

The author interprets the term of *special agreements for the protection of industrial rights* extensively, covering all preferential trade agreements, including free trade agreements and any other forms and levels of the bilateral and regional trade agreements which govern to some extent also the regulation of protection as well as enforcement of intellectual property rights. In the existing scholar works, there are both opinions concurring with this broader interpretation, as well as authors who advocate a narrower interpretation, covering only agreements devoted solely to the topic of intellectual property rights. The author is of the opinion that the division of international agreements on those devoted solely to the topic of IPRs and those that cover international trade in general is rather formalistic and has been overcome by the inclusion of intellectual property into the trade liberalisation negotiations. With this respect, it can be highlighted that the TRIPS Agreement is also formally attached to the Marrakesh Treaty and as such does not constitute an independent agreement devoted solely to the topic of intellectual property. Naturally, at the time of the conclusion of the Paris Convention, it might have been foreseen as a usual practice for the future to conclude international agreements devoted solely to IP, while in the post-TRIPS area it is considered a usual practice to conclude complex trade agreements, which regulate the intellectual property among other trade related topics, but often as a separate chapter.

However, the conclusions drawn above, in connection with a broad understanding of the preferential trade agreements, would render the exemption to the most-favoured nation principle so wide that the principle itself would become empty and ineffective. The author believes that the TRIPS-plus provisions (including those arising from agreements concluded after the entry into force of the TRIPS Agreement) should be subject to a test arising from Article 4(d) TRIPS Agreement, i.e. to establish that a given provision does not ‘*constitute an arbitrary or unjustifiable discrimination against nationals of other WTO Members*’. This test should be interpreted narrowly and strictly. If a given provision is to be understood as a justifiable trade advantage, the exemption within the understanding above applies.

To summarize, the author concludes that the TRIPS Agreement incorporates Article 19 of the Paris Convention, which thereby becomes a provision of the TRIPS Agreement itself. Secondly, based on Article 19 of the Paris Convention, separate agreements expanding the scope of the TRIPS Agreement, in other words the TRIPS-plus provisions are binding only vis-à-vis their signatories rather than all WTO Members, in so far as these provisions do not contravene the provisions of the TRIPS Agreement (including all incorporated provisions of other international agreements) and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members. Thirdly, while the most-favoured-nation principle is inherent to the international trade system and as such has appeared in the context of intellectual property rights for the first time in the TRIPS Agreement, Article 19 Paris Agreement is incorporated into the TRIPS Agreement and as such constitutes an exception to all TRIPS provisions, including the most-favoured nation principle.

The Paris Convention applies to industrial property. Article 19 of the Paris Convention also refers expressly to the industrial rights. Therefore, the conclusions above are valid with regard to the TRIPS-plus provisions on the industrial rights under the TRIPS Agreement.

With regard to the Copyright and related rights, under Art. 9 of the TRIPS Agreement, Members shall comply with Articles 1 through 21 of the Berne Convention (1971). The wording of the provision incorporating the Berne Convention is thus the same as in the Paris Convention. Special agreements concluded between the Parties are governed by Article 20 of the Berne Convention. The wording of Article 20 of the Berne Convention is slightly different from Article 19 of the Paris Convention, however, the Berne Convention also uses the wording “*reserve the right*” and “*special agreements*”.²²⁸ Therefore, the author is of the opinion that in case of the copyright and related rights governed by the Berne Convention, Article 20 is to be interpreted consistently with the conclusions drawn above for Article 19 of the Paris Convention.

As a consequence, the author concludes that Article 20 of the Berne Convention and Article 19 Paris Convention in connection with Articles 2(1) and 9 of the TRIPS Agreement are to be interpreted as exemptions to the most-favoured-nation principle under the TRIPS Agreement for industrial property and copyright and related rights. In other words, the international regulation of industrial property as well as copyright and related rights as agreed

²²⁸ Article 20 *Special Agreements Among Countries of the Union*

‘The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.’

on the governmental level, bilaterally, regionally as well as multilaterally, in so far as these provisions do not contravene the provisions of the TRIPS Agreement (including all incorporated provisions of other international agreements) and do not constitute an arbitrary or unjustifiable discrimination against nationals of other WTO Members, are exempted from the non-discrimination principle in the TRIPS Agreement. The research concludes that the TRIPS Agreement represents the minimum standard of the protection and enforcement of the industrial property and copyright and related rights and all provisions going beyond the TRIPS Agreement are binding only upon and among the parties that concluded them.

However, this is the moment when the principle of the national treatment in the TRIPS Agreement as well as in the preferential trade agreements comes forward and supersedes the impact of the most-favoured nation principle.

Since usually the IP provisions of international treaties require the transposition into the legal system of the signatory state, once the signatory implements the TRIPS-plus provision in its national legal system, by means of the national treatment provision, the other negotiating country or countries that come afterwards may free-ride on the outcome of previous negotiations thanks to the national treatment principle of the TRIPS Agreement.

Theoretically, there is an option that the government implements the advantage stemming from the TRIPS-plus provision into the national law only in favour of the nationals of the other signatories, not to its own nationals (so called “*reverse discrimination*”). As explained above, the national treatment principle in the TRIPS Agreement allows for a less favoured treatment of nationals compared to other nationals of the WTO members. However, it is questionable how such a differential treatment, even though in line with the international trade principles, would be communicated to the nationals of the given country as well as to other trading partners. It is possible that such an approach, provided that sufficient transparency of the negotiations is ensured, would only encourage further discussion and may even question the initial inclusion of the provision in the given PTA. Moreover, in most of the cases, differentiated treatment would not be administratively feasible.

This analysis of the non-discrimination principle and the conclusions drawn in response to the main research objectives above have a direct impact on the subsequent conclusions of the additional research objectives.

The fifth chapter of the thesis presents a detailed analysis of the provisions often included in the concluded preferential trade agreements in response to the additional research objectives 1 and 2. For this analysis, the research consisted of the interpretation and classification of the intellectual property rights provisions of all preferential trade agreements

currently concluded by the European Union (a detailed analysis available in the Annex III and following hereto) and by the USA (a detailed analysis available in the Annex VII hereto) and of selected agreements concluded by other important players in the world economy. The IPRs provisions of the analysed agreements were compared with the corresponding provisions of the TRIPS Agreement and, where relevant, explained in the context of the trade policy of the signatories and together with possible reasons and impacts for the industry and other stakeholders.

Recently, intellectual property rights have become a standard part of the negotiated preferential trade agreements. However, they differ significantly with regard to the content of the concluded provisions. While there are agreements that are limited to general proclamations on the international cooperation, there are also agreements that provide for an extensive regulation of the IPRs going beyond the minimum standard of the TRIPS Agreement.

Some of the analysed preferential trade agreements include specific provisions on the national treatment and most-favoured-nation principles in the intellectual property rights chapter. This is a crucial finding with respect to the conclusions drawn above, because while the author concluded that preferential trade agreements are exempted from the TRIPS Agreement, if the government agrees to the MFN principle in the PTA, it is to be further analysed whether the given PTA also incorporates, similarly as above in case of the TRIPS, the relevant articles of the Paris and Berne Conventions. If not, or, if the reference to these treaties is weak and does not incorporate their provisions in a binding manner, the MFN principle would be binding under the PTA with no possible exemptions with respect to all other PTAs concluded by a given signatory.

Among the other introductory provisions of the PTAs, some of the analysed PTAs also address the issue of exhaustion. Initially, the WTO Members were not able to agree on the exhaustion principle in the TRIPS Agreement and included only a general statement that nothing in the Agreement shall be used to address the issue of exhaustion of intellectual property rights. The vast majority of the analysed treaties declare expressly that the PTA does not affect the freedom of the Parties to determine whether and under what conditions the exhaustion of intellectual property applies.²²⁹

Regarding the copyright and related rights, PTAs often expressly extend the term of duration of the protection provided for a work from the TRIPS minimum of 50 years to 70 years

²²⁹ There is only the EU-Kazakhstan Enhanced Partnership and Cooperation Agreement going against this general trend stating that *‘[e]ach Party shall apply a national or regional exhaustion regime of intellectual property rights, in accordance with its respective domestic law, in respect of copy right and related rights, designs, and trademarks.’* (Art. 64)

of protection. Other TRIPS-plus provisions often cover tools employed in order to prevent infringements of the copyright. These measures include the rights management information, providing protection to electronic information attached to the protected subject-matter to identify it, and the protection of technological measures, covering protection of technology, devices, or components that are meant to protect access to a copyright-protected subject-matter. The most far-reaching PTAs provide for the regulation of extensive liability for the circumvention of ETMs, including criminal liability. On the other hand, the interests of the industry might also be two-fold, as latest PTAs may also expressly state that *“there is no obligation for the information communication technology industry to design devices, products, components, or services to correspond to certain technological measures.”*²³⁰

In addition, the TRIPS-plus provisions on copyright and related rights also include the limitations to the liability of intermediary service providers – when acting as intermediaries, for infringements of copyright or related rights that take place on or through communication networks. Further, they include regulation of camcording, artists’ resale right (*‘droit de suite’*), i.e. a right to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author, and provisions promising cooperation on collective management of rights.

With regard to patents, the majority of the analysed PTAs restrict themselves in their general sections on patents to a reference to the existing WIPO-administered treaties. However, further attention is devoted to the regulation affecting public health. Concerning public health, there have been developments also in the multilateral forum. The Amendment to the TRIPS Agreement through the Protocol of 6 December 2005 entered into force on 23 January 2017 and inserted the new Article 31bis on compulsory licenses into the TRIPS Agreement. Development is tangible also in the bilateral and regional level. In reaction to real investor cases, a growing number of PTAs as well as bilateral investment treaties include general exemptions for public health regulation and allow for possible departures from other treaty commitments. The patent related provisions often inserted in the negotiations cover additional regulation of the patentability criteria, patent linkages, data exclusivity and term extension of patent protection for pharmaceutical products. While new uses are not expressly protected under the TRIPS Agreement, their explicit protection is in favour of research oriented pharmaceutical companies which may prolong the patent protection of the same product. The patent linkage is a mechanism which links marketing authorisation for generic pharmaceutical

²³⁰ Art. 20.9.5 CETA.

products to the status of patents of the originator's product. The term extension is often referred to as *supplementary protection certificates* (SPCs). The SPCs are currently the only substantive patent-related provisions of harmonized EU legislation and appear in many EU's PTAs.

The provisions of the PTAs devoted to trademarks often refer to the existing WIPO-administered treaties, selected treaties also explicitly refer to the regulation of well-known trademarks. A detailed attention is often devoted to the relation between trademarks and geographical indications.

The geographical indications often constitute a prominent part of the IP regulation in PTAs. The protection of GIs is an important element of the trade policy of the European Union and lists of protected GIs are often annexed to the PTAs. The GIs have also become a popular tool for other governments, including China, Colombia or Peru.

Developing countries pay further attention to the wordings of the provisions on the protection of plant varieties and traditional knowledge, folklore and genetic resources. As explained in detail in the thesis, while the TRIPS Agreement allows the WTO members to choose to provide the protection of plant varieties either by patents or by an effective sui generis system, a mere reference to the WIPO-administered *International Convention for the Protection of New Varieties of Plants* in the PTAs constitute an obligation of the contracting parties to introduce a monopoly system.

With regard to the enforcement of the IP, the PTAs often reiterate the provisions of the TRIPS provisions. While the PTAs supplement the TRIPS minimum standard with further details on the civil enforcement and border measures, the EU's treaties, as oppose to the PTAs concluded by the USA, do not cover further details regarding criminal enforcement.

While the provisions which only repeat the already binding TRIPS Agreement might appear unnecessary and only burdening the text of the lengthy and incomprehensive bilateral trade agreements, the repetition and explicit incorporation of the TRIPS provisions into the PTAs have a significant impact on the dispute settlement system. While the PTAs are often silent on this matter, the recent ones acknowledge this duality of the binding provisions in its provisions on the dispute settlement. Even though there have been discussions on the suitability and possible reforms of the dispute settlement, the arbitration remains the system employed for the dispute settlement under the PTAs. As stipulated for example under the CETA, a recourse to the dispute settlement under the PTA is without prejudice to the recourse to the dispute settlement under the WTO Agreement or under any other agreement to which the parties participate. However, notwithstanding this principle, in case that an obligation is equivalent in substance under the PTA and under the WTO Agreement, or under any other agreement binding

the parties, a party may not seek redress for the breach of such an obligation in two fora. In addition, it expressly states a general interpretation rule that the arbitration panel established under the PTA shall interpret the provisions of the agreement in accordance with the customary rules of interpretation of public international law and shall also take into account relevant interpretations in reports of panels and the Appellate Body adopted by the WTO Dispute Settlement Body. The duality of possible dispute settlement mechanisms and the nature of arbitration foreseen under the PTAs might weaken the role and impact of the WTO dispute settlement mechanism.

The conclusions of the additional research objective 2 must be also put into the perspective of the main research objectives above. In general, the US policy is often cited as an example of a long established comprehensive policy seeking a greater level of the IP protection and enforcement in general. At the same time, the number of agreements concluded by the US is smaller than those concluded by the EU and do not differ so significantly in their historic and political connotations, as in the case of the EU. With regard to the EU's policy, the analysis of the existing preferential trade agreements illustrates that the IP Chapters in EU's trade agreements reflect the role of the given treaty in a broader context of the international relations between the signatories. At the same time, the EU's PTAs show a standardized approach illustrated with the same or very similar chapters across the PTAs with countries of similar economic and historic background. The standardization may reveal to a certain extent the EU's negotiation powers. Nevertheless, there has been a distinct shift in the EU's policy, from the EU-South Korea FTA till the CETA Agreement. Importantly, the latest agreements concluded with developing countries cover references to the development role of IP.

From the analysed examples, the CETA treaty symbolizes a new approach. Negotiated between two developed economies, even though often very detailed, it shows the parties' intention to balance the impact of the PTA's provisions. Further development is foreseen in the regulation of the dispute settlement, however, in order to ensure a consistent and transparent decision-making process, it is recommended that the dispute settlement process shifts further away from discreet and ad hoc arbitration rulings, especially given the fact that PTAs incorporate the TRIPS Agreement's and subsequently other international agreements' provisions.

Considering the conclusions drawn with regard to the exemptions from the NT and MFN principles, the author concludes that bilateral achievements represent a sufficient motivation for the governments regardless of the interpretation of the scope of the MFN and NT principles. Alternatively, the uncertain scope and effects of the NT and MFN principles may serve as an

explanation for often complex IP Chapters repeating and cross-referencing provisions which might have been, under different interpretations, already binding upon the signatories. Presumably, the preceding treaties serve as an argument in the PTAs' negotiations, as signatories are later less hesitant to conclude what has been already accepted in the past. As a result, only the most contentious topics, already incorporated in the national legislation, might be intentionally left aside.

The conclusions of the preceding research objectives have also a direct impact on the conclusions of the additional research objective 3. As explained in detail above, the author is of the opinion that the TRIPS Agreement, as interpreted together with the incorporated provisions of the Paris Convention and the Berne Convention, includes the exemption from the non-discrimination principle in the TRIPS Agreement, which is not explicit, but can be construed from the wordings of Article 19 of the Paris Convention and Article 20 of the Berne Convention, which are incorporated into the TRIPS Agreement.

The presented interpretation of the TRIPS Agreement is in line with the understanding of the TRIPS Agreement as the minimum standard of the international protection and enforcement of the intellectual property. The author concludes that the bilateral, regional and plurilateral arrangements, in any form, either as dedicated chapters of trade agreements or as separate agreements dedicated solely to intellectual property, are, in the light of this interpretation, binding only upon the signatories vis-à-vis other contracting parties and the so called TRIPS-plus provisions, going beyond the minimum standard set in the TRIPS Agreement, do not extend towards other members of the WTO who are not party to the Agreement, in so far as these provisions do not contravene the provisions of the TRIPS Agreement (including all incorporated provisions of other international agreements) and do not constitute an arbitrary or unjustifiable discrimination against nationals of other WTO Members. At the same time, once the provision is implemented into the national law, the national treatment principle prevails, which, if in addition concluded also as a separate provision of a PTA, may be also triggered by means of the dispute settlement mechanism in the given PTA.

It is to be seen in the future whether the presented conclusions or other arguments will be confirmed in formal conclusions of a dispute settlement within the World Trade Organisation. Nevertheless, the author believes that the provided interpretation and conclusions concerning the most-favoured nation principle are in line with the understanding that the general standard of intellectual property protection and enforcement acceptable on a multilateral basis has been agreed in the TRIPS Agreement and that meanwhile, when the level and pace of development of the WTO members remain dissimilar, governments are able to

conclude bilateral and plurilateral arrangements, which are meant to be binding the contractual parties solely towards their counterparts, possibly serving as examples of good practices and future building blocks of the multilateral system. Together with M. M. Aleman (2014), the author may conclude that *„[w]hether the TRIPS-plus provisions of PTAs will impact current multilateral negotiations within the WTO is a matter to be seen upon conclusion of the Doha Round.“* Likewise, M. M. Aleman (2014) concludes that the same applies to the negotiations in the WIPO as well. Nevertheless, the latest developments in the WTO may imply, in concurrence with C. Correa (2014), that despite the proliferation of IP provisions in the PTAs, *„proponents of (...) higher standards [in IP protection] are likely to face great obstacles if they attempt to push for a review of the TRIPS Agreement.“*

P. K. Yu (2014) is very pessimistic about the impacts the bilateral and regional negotiations in the field of IP might have on the negotiations in the multilateral fora, stating that *“[b]y changing countries’ preference for multilateral approaches, the establishment of EPAs has therefore posed significant challenges to the stability of (...) the international trading system (...). These bilateral and plurilateral negotiations may further alienate a country’s trading partners, thereby making it more difficult for the country to undertake multilateral discussions in the future.”* Similarly, S. Nadde-Phlix (2014) concludes that *“[w]hile TRIPS MFN and NT principles are protecting the international IP system from fragmentation, TRIPS flexibilities and limitations are safeguarding it from abuse and manipulation. Problems arise, however, when countries waive their rights for flexibilities under TRIPS and when they commit to contradictory IP rules in FTAs with different parties’ (...) It is therefore time to turn back to the multilateral table before potentially conflicting bilateral or regional outcomes make future consensus in the WTO even more difficult.”*

To conclude, while the author fully agrees with the opinion that the non-discrimination principle is fundamental and its significance can hardly be overstated, implementing cosmopolitan values of moral and political philosophy and make an important contribution to the question and ideal of global justice, it is, as well as the trade liberalisation, not an end in itself – it is a means.²³¹ All the means, including the fundamental principles of the international trade, are meant to be analysed and discussed in the bilateral, regional and, most importantly, in the multilateral fora in order to reach a common understanding regarding their role in order to proceed towards the values which are to be considered as a mutually desired end in itself. In this respect, the author would recall²³² the preamble of the Agreement establishing the WTO

²³¹ Paraphrasing Cottier and Schneller in Kamperman Sanders 2014, p. 4.

²³² Similarly as for example in Cottier and Schneller 2014.

which recognized that the international relations in the field of trade and economic endeavour should be conducted with a view to “*raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*”.

In this spirit, the author believes that both multilateral and bilateral negotiations require a consistent approach, with consistent priorities which take into account all the objectives described by the preamble above, rather than individual interests of the negotiating parties, supplemented by factual educative programmes aimed at customers, innovators and creators as well as politicians, in order to ensure that the international intellectual property regime is negotiated with the intention to build the environment which encourages further creativity and innovation to flourish and enables the society to enjoy their fruits.

Annex I – Disputes within the WTO under the TRIPS

Source: WTO – Dispute Settlement (2015).

No.	Re:	Request for consultations received	Agreements cited: (as cited in request for consultations)
DS28	Japan — Measures Concerning Sound Recordings (Complainant: United States)	9 Feb 1996	Intellectual Property (TRIPS): Art. <u>3</u> , <u>4</u> , <u>14</u> , <u>61</u> , <u>65</u> , <u>70</u>
DS36	Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States)	30 Apr 1996	Intellectual Property (TRIPS): Art. <u>27</u> , <u>65</u> , <u>70</u>
DS37	Portugal — Patent Protection under the Industrial Property Act (Complainant: United States)	30 Apr 1996	Intellectual Property (TRIPS): Art. <u>33</u> , <u>65</u> , <u>70</u>
DS42	Japan — Measures concerning Sound Recordings (Complainant: European Communities)	28 May 1996	Intellectual Property (TRIPS): Art. <u>14.6</u> , <u>70.2</u>
DS50	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States)	2 Jul 1996	Intellectual Property (TRIPS): Art. <u>27</u> , <u>65</u> , <u>70</u>
DS59	Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: United States)	8 Oct 1996	GATT 1994: Art. <u>I:1</u> , <u>III:2</u> , <u>III:4</u> , <u>III:5</u> , <u>III:7</u> <u>Subsidies and Countervailing Measures</u> : <u>Art. 1, 2, 3, 6, 27, 28.2</u> <u>Trade-Related Investment Measures (TRIMs)</u> : <u>Art. 2</u> <u>Intellectual Property (TRIPS)</u> : <u>Art. 3, 20, 65, 65.5</u>
DS79	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: European Communities)	28 April 1997	Intellectual Property (TRIPS): Art. <u>27</u> , <u>65</u> , <u>70</u> , <u>70.8</u> , <u>70.9</u>

DS82	Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights (Complainant: United States)	14 May 1997	Intellectual Property (TRIPS): Art. 9 , 10 , 11 , 12 , 13 , 14 , 41 , 42 , 43 , 44 , 45 , 46 , 47 , 48 , 61 , 63 , 65 , 70
DS83	Denmark — Measures Affecting the Enforcement of Intellectual Property Rights (Complainant: United States)	14 May 1997	Intellectual Property (TRIPS): Art. 50 , 63 , 65
DS86	Sweden — Measures Affecting the Enforcement of Intellectual Property Rights (Complainant: United States)	28 May 1997	Intellectual Property (TRIPS): Art. 50 , 63 , 65
DS114	Canada — Patent Protection of Pharmaceutical Products (Complainant: European Communities)	19 Dec 1997	Intellectual Property (TRIPS): Art. 27 , 27.1 , 28 , 33
DS115	European Communities — Measures Affecting the Grant of Copyright and Neighbouring Rights(Complainant: United States)	6 Jan 1998	Intellectual Property (TRIPS): Art. 9 , 10 , 11 , 12 , 13 , 14 , 41 , 42 , 43 , 44 , 45 , 46 , 47 , 48 , 61 , 63 , 65 , 70
DS124	European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States)	30 Apr 1998	Intellectual Property (TRIPS): Art. 41 , 61
DS125	Greece — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs(Complainant: United States)	4 May 1998	Intellectual Property (TRIPS): Art. 41 , 61
DS153	European Communities — Patent Protection for Pharmaceutical and Agricultural Chemical Products(Complainant: Canada)	2 December 1998	Intellectual Property (TRIPS): Art. 27.1
DS160	United States — Section 110(5) of US Copyright	26 January 1999	Intellectual Property (TRIPS): Art. 9.1

	Act (Complainant: European Communities)		
DS170	Canada — Term of Patent Protection (Complainant: United States)	6 May 1999	Intellectual Property (TRIPS): Art. <u>33</u> , <u>65</u> , <u>70</u>
DS171	Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (Complainant : United States)	6 May 1999	Intellectual Property (TRIPS): Art. <u>27</u> , <u>39.2</u> , <u>65</u> , <u>70</u>
DS174	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant : United States)	1 June 1999	GATT 1994: Art. I, <u>III:4 Intellectual Property (TRIPS):</u> <u>Art. 1.1, 2,2.1, 3, 3.1, 4, 16, 16.1, 20, 22, 22.1, 22.2,24, 24.5, 41.1, 41.2, 41.4, 42, 44.1, 63,63.1, 63.3, 65, 65.1</u>
DS176	United States — Section 211 Omnibus Appropriations Act of 1998 (Complainant: European Communities)	8 July 1999	Intellectual Property (TRIPS): Art. <u>2</u> , <u>2.1,3</u> , <u>3.1, 4</u> , <u>15</u> , <u>16</u> , <u>16.1</u> , <u>17</u> , <u>18</u> , <u>19</u> , <u>20</u> , <u>21,41</u> , <u>42</u> , <u>62</u>
DS186	United States — Section 337 of the Tariff Act of 1930 and Amendments thereto (Complainant: European Communities)	12 January 2000	GATT 1994: Art. III Intellectual Property (TRIPS): Art. 2,3, 9, 27, 41, 42, 49, 50, 51
DS196	Argentina — Certain Measures on the Protection of Patents and Test Data (Complainant: United States)	30 May 2000	Intellectual Property (TRIPS): Art. <u>27,28</u> , <u>31</u> , <u>34</u> , <u>39</u> , <u>50</u> , <u>62</u> , <u>65</u> , <u>70</u>
DS199	Brazil — Measures Affecting Patent Protection (Complainant: United States)	30 May 2000	GATT 1994: Art. III Intellectual Property (TRIPS): Art.27, 27.1, 28, 28.1
DS224	United States — US Patents Code (Complainant: Brazil)	31 January 2001	GATT 1994: Art. <u>III, XI Trade-Related Investment Measures (TRIMs):</u> <u>Art. 2 Intellectual Property (TRIPS):</u> <u>Art.27, 28</u>
DS290	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and	17 April 2003	GATT 1994: Art. I, I:1, III, III:4 Technical Barriers to Trade (TBT): <u>Art. 2, 2.1, 2.2, Annex 1 Intellectual Property (TRIPS):</u> <u>Art. 1, 2, 3, 4, 10, 16, 20, 22, 22.2, 24, 24.5, 41, 42, 63, 63.1, 63.3, 65, 65.1 Agreement Establishing</u>

	Foodstuffs (Complainant : Australia)		<u>the World Trade Organization: Art. XVI:4</u>
DS362	China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights(Complainant: United States)	10 April 2007	Intellectual Property (TRIPS): Art. <u>3.1, 9.1,14, 41.1, 46, 59, 61</u>
DS372	China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (Complainant: European Communities)	3 March 2008	Services (GATS): Art. <u>XVI:2(a),XVI:2(e), XVII, XVIII</u> Intellectual Property (TRIPS): <u>Art.39.2</u>
DS408	European Union and a Member State — Seizure of Generic Drugs in Transit (Complainant: India)	11 May 2010	GATT 1994: Art. <u>V:2, V:4, V:5, V:7,X, V:3</u> Intellectual Property (TRIPS): <u>Art.2, 7, 8, 28, 31, 41, 42</u>
DS409	European Union and a Member State — Seizure of Generic Drugs in Transit (Complainant: Brazil)	12 May 2010	GATT 1994: Art. <u>V:1, V:2, V:4, V:5, V:7, X:3,V:3</u> Intellectual Property (TRIPS): <u>Art. 1.1, 2, 28,31, 41.1, 41.2, 42, 49, 50, 3, 50.7, 50.8, 51,52, 53.1, 53.2, 54, 55, 58, 59</u> <u>Agreement Establishing the World Trade Organization: Art. XVI:4</u>
DS434	Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant : Ukraine)	13 March 2012	Intellectual Property (TRIPS): Art. <u>1.1, 2.1,15, 15.1, 15.4, 16, 16.1, 16.3, 20, 1, 27</u> Technical Barriers to Trade (TBT): Art. 2.2 GATT 1994: <u>Art. I, III:4</u> Technical Barriers to Trade (TBT): Art. 2.1 Intellectual Property (TRIPS): Art. <u>3.1</u>
DS435	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant : Honduras)	4 April 2012	Intellectual Property (TRIPS): Art. <u>2.1, 3.1,15.4, 16.1, 20, 22.2(b), 24.3</u> Technical Barriers to Trade (TBT): <u>Art. 2.1</u> GATT 1994: Art. <u>III:4</u>
DS441	Australia — Certain Measures Concerning Trademarks, Geographical Indications	18 July 2012	Intellectual Property (TRIPS): Art. <u>2.1, 3.1,15.4, 16.1, 20, 22.2(b), 24.3</u> Technical Barriers to Trade (TBT): <u>Art. 2.1,2.2</u> GATT 1994: Art. <u>III:4</u>

	and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant : Dominican Republic)		
DS458	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant : Cuba)	3 May 2013	GATT 1994: Art. <u>III:4</u> , <u>IX Technical Barriers to Trade (TBT): Art. 2.1,2.2 Intellectual Property (TRIPS): Art. 3.1, 15.4,16.1, 20, 22.2(b), 24.3</u>
DS467	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant : Indonesia)	20 September 2013	Technical Barriers to Trade (TBT): Art. <u>2.1,2.2 Intellectual Property (TRIPS): Art. 2.1, 3.1,15.4, 16.1, 16.3, 20, 22.2(b), 24.3</u> GATT 1994: Art. <u>III:4</u>

Annex II – Disputes within the WTO related to the non-discrimination principle under the TRIPS Agreement

Source: WTO – Dispute Settlement (2015).

Disputes related to the non-discrimination principle

No.	Re:	Status
DS28	Japan	Settled or terminated (withdrawn, mutually agreed solution) on 24 January 1997
DS59	Indonesia	Implementation notified by respondent on 26 July 1999
DS174	European Communities	Implementation notified by respondent on 21 April 2000
DS176	United States	Report(s) adopted, with recommendation to bring measure(s) into conformity on 1 February 2002
DS186	United States	In consultations on 12 January 2000
DS290	European Communities	Implementation notified by respondent on 21 April 2006
DS362	China	Implementation notified by respondent on 19 March 2010
DS435	Australia	Panel composed on 5 May 2014
DS441	Australia	Panel composed on 5 May 2014
DS458	Australia	Panel composed on 5 May 2014
DS467	Australia	Panel composed on 5 May 2014

Annex III – Analysis of IPR provisions of PTAs recently negotiated by the EU

Analysis of IPR provisions of PTAs recently negotiated by the EU					
EU PTAs	Canada	East African Countries	Singapore	Vietnam ²³³	West Africa
IPR	Y	N (Rendez-vous clause)	Y	Y	N (Rendez-vous clause)
Introductory provisions	Y	N/A	Y	Y	N/A
NT and MFN principles in IPR Chapter	N	N/A	N	Y	N/A
References to IPR Agreements in general	Y	N/A	N	N	N/A
References to IPR Agreements based on the subject-matter	N	N/A	Y	Y	N/A
Exhaustion	Y	N/A	Y	Y	N/A
Copyright and related rights	Y	N/A	Y	Y	N/A
Term of duration of copyright	N	N/A	Y (70)	Y (50)	N/A
Rights management information	Y	N/A	Y	Y	N/A
Technological Measures	Y	N/A	Y	Y	N/A
Liability of ISPs	Y	N/A	Y	Y	N/A

²³³ Agreed text as of January 2016.

Analysis of IPR provisions of PTAs recently negotiated by the EU					
EU PTAs	Canada	East African Countries	Singapore	Vietnam ²³³	West Africa
Trademarks	Y	N/A	Y	Y	N/A
Undisclosed information	Y	N/A	N	Y	N/A
Industrial designs	Y	N/A	Y	N	N/A
Geographical indications	Y	N/A	Y	Y	N/A
Layout-designs (topographies) of integrated circuits	N	N/A	N	N	N/A
Plant varieties	Y	N/A	Referral to UPOV only	N	N/A
Traditional knowledge, folklore and genetic resources	N	N/A	N	N	N/A
Patents	pharma	N/A	pharma	Y	N/A
Health-related Provisions	Y	N/A	Y	Y	N/A
Patent linkage	Y	N/A	N	N	N/A
Data exclusivity	Y	N/A	Y	Y	N/A
Sui generis protection for pharmaceuticals	Y	N/A	Y	Y	N/A
Compulsory licensing	N	N/A	N	N	N/A
Enforcement	Y	N/A	Y	Y	N/A

Analysis of IPR provisions of PTAs recently negotiated by the EU					
EU PTAs	Canada	East African Countries	Singapore	Vietnam²³³	West Africa
Civil and Administrative Procedures and Remedies	Y	N/A	Y	Y	N/A
Criminal procedures	N	N/A	N	N	N/A
Special Requirements related to Border Measures	Y	N/A	Y	Y	N/A
IPR	Y	N (Rendez-vous clause)	Y	Y	N (Rendez-vous clause)
Introductory provisions	Y	N/A	Y	Y	N/A

Annex IV – Analysis of IPR provisions of PTAs negotiated by the EU in the region of Europe

Analysis of IPR provisions of PTAs negotiated by the EU in the region of Europe																			
	Albania	Andorra	Bosnia and Herzegovina	Faroe Islands	Georgia	Iceland	Kosovo	The former Yugoslav Republic of Macedonia	Moldova	Montenegro	Norway	Russia	San Marino	Serbia	Switzerland	Turkey	Ukraine		
EU PTAs																			
IPR	Y	N	Y	N	Y	N	Y	Y	Y	Y	N	Y	N	Y	N	Y	Y		
Introductory provision	Y	N/A	Y	N/A	Y		Y	Y	Y	Y		Y		Y		Y	Y		
NT and MFN principles in IPR Chapter	Y (MFN)	N/A	Y (MFN)	N/A	N		Y (MFN)	Y (MFN)	N	Y (MFN)		Y (MFN Russia only, NT enforcement)		Y (MFN)		N	Y (MFN)		
References to IPR Agreements in general	Y	N/A	Y	N/A	Y		Y	Y	TRIPS, Paris	Y		Y		Y		Y	Y		
References to IPR Agreements based on the subject-matter	N	N/A	N	N/A	Y		N	N	Y	N		N		N		N	Y		
Exhaustion	N	N/A	N	N/A			N	N	Y	N		N		N		N	N	Y	Y

Y	Y	Y	Y	Y	Y	Y	N
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General obligation
to provide similar level to the EU law

General obligation to provide similar level to the EU law							
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N	N	N	N	N	N	N	N
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General obligation
to provide similar level to the EU law

Y (similar level to EU acquis)	Y (harmonisation with EU acquis)	Y
N	N	Y
N	N	Y
N	N	Y
N	N	Y
N	N	Y
N	N	Y
N	N	Y
N	N	N

Y	N/A	General obligation to harmonize with EU law	N/A	N/A
Y	N/A	N	N/A	N/A
Y	N/A	N	N/A	N/A
Y	N/A	N	N/A	N/A
Y	N/A	N	N/A	N/A
Y	N/A	N	N/A	N/A
Y	N/A	N	N/A	N/A
Y		N		
N	N/A	N	N/A	N/A

Albania shall take all the necessary measures in order to guarantee no later than four years after the date of entry into force of this Agreement a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights.

Copyright and related rights	Term of duration of copyright	Rights management information	Technological Measures	Liability of ISPs	Resale right	Cooperation on collective management of rights	Trademarks	Well-known trademarks	Undisclosed information
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Industrial designs	N/A	N	N/A	Y	N	N	Y		N			Y
Geographical indications	N/A	Y	N/A	Y	Y	Y	Y	Y	N	Y		Y
Layout-designs (topographies) of integrated circuits	N/A	General obligation to harmonize with EU law	N/A	N	N	N	N	General obligation to harmonize with EU law	N			Y
Plant varieties	N/A	N	N/A	Referral to UPOV only	N	N	UPOV referral		N			Y
Traditional knowledge, folklore and genetic resources	N/A	N	N/A	N	N	N	N		N			Y
Patents	N/A	N	N/A	Y	N	N	Y		N			Y
Health-related Provisions	N/A	N	N/A	Y	N	N	Y		N			Y
Patent linkage	N/A	N	N/A	N	N	N	N		N			N
Data exclusivity	N/A	N	N/A	Y	N	N	Y		N			Y
Supplementary protection	N/A	N	N/A	Y	N	N	Y		N			Y

[illegible]

Annex V – Analysis of IPR provisions of PTAs negotiated by the EU in the region of Mediterranean

Analysis of IPR provisions of PTAs negotiated by the EU in the region of Mediterranean									
EU PTAs	Algeria	Egypt	Israel	Jordan	Lebanon	Morocco	Palestinian Authority	Syria	Tunisia
IPR	Y	Y	Y	Y	Y	Y	N	N	Y
Introductory provisions	Y	Y	Y	Y	Y	Y	N	N	Y
NT and MFN principles in IPR Chapter	N	N	N	N	N	N	N	N	N
References to IPR Agreements in general	Y	Y	Y	Y	Y	Y	N	N	Y
References to IPR Agreements based on the subject-matter	N	N	N	N	N	N	N	N	N
Exhaustion	N	N	N	N	N	N	N	N	N
Copyright and related rights	N	N	N	N	N	N	N	N	N
Term of duration of copyright	N	N	N	N	N	N	N	N	N
Rights management information	N	N	N	N	N	N	N	N	N
Technological Measures	N	N	N	N	N	N	N	N	N
Liability of ISPs	N	N	N	N	N	N	N	N	N
Resale right	N	N	N	N	N	N	N	N	N
Cooperation on collective management of rights	N	N	N	N	N	N	N	N	N
Trademarks	N	N	N	N	N	N	N	N	N
Well-known trademarks	N	N	N	N	N	N	N	N	N
Undisclosed information	N	N	N	N	N	N	N	N	N
Industrial designs	N	N	N	N	N	N	N	N	N
Geographical indications	N	N	N	N	N	N	N	N	N
Layout-designs (topographies) of integrated circuits	N	N	N	N	N	N	N	N	N
Plant varieties	N	N	N	N	N	N	N	N	N

Analysis of IPR provisions of PTAs negotiated by the EU in the region of Mediterranean									
EU PTAs	Algeria	Egypt	Israel	Jordan	Lebanon	Morocco	Palestinian Authority	Syria	Tunisia
Traditional knowledge, folklore and genetic resources	N	N	N	N	N	N	N	N	N
Patents	N	N	N	N	N	N	N	N	N
Health-related Provisions	N	N	N	N	N	N	N	N	N
Patent linkage	N	N	N	N	N	N	N	N	N
Data exclusivity	N	N	N	N	N	N	N	N	N
Supplementary protection certificates or similar	N	N	N	N	N	N	N	N	N
Compulsory licensing	N	N	N	N	N	N	N	N	N
Enforcement	N	N	N	N	N	N	N	N	N
Civil and Administrative Procedures and Remedies	N	N	N	N	N	N	N	N	N
Criminal procedures	N	N	N	N	N	N	N	N	N
Special Requirements related to Border Measures	N	N	N	N	N	N	N	N	N

Annex VI – Analysis of IPR provisions of PTAs negotiated by the EU with other countries

Analysis of IPR provisions of PTAs negotiated by the EU with other countries				
	South Korea			
	South Africa	Y	Y	
	Southern African Development Community (SADC)	Y	Y	N
	Papua New Guinea and Fiji		N	
	Mexico	Y	Y	N
	Madagascar, Mauritius, the Seychelles, and Zimbabwe	N (Rendez-vous clause)	N	N
	Kazakhstan	Y	Y	N
	Ivory Coast		N	
	Iraq	Y	Y	Y
	Ghana	N	N	N
	Ecuador			
	Colombia and Peru	Y	Y	N
	Chile	Y	Y	Y
	Central America	Y	Y	Y (MFN)
	CARIFORUM States	Y	Y	Y
	Cameroon	Y	Y	N
	Azerbaijan	Y	Y	Y
	Armenia	Y	Y	Y
	EU PTAs	IPR	Introductory provisions	NT and MFN principles in IPR Chapter
				References to IPR Agreements in general

Analysis of IPR provisions of PTAs negotiated by the EU with other countries											
EU PTAs	South Korea										
	South Africa	N									
	Southern African Development Community (SADC)	N	N	N	N	N	N	N	N	N	N
	Papua New Guinea and Fiji										
	Mexico	N	N	N	N	N	N	N	N	N	N
	Madagascar, Mauritius, the Seychelles, and Zimbabwe	N	N	N	N	N	N	N	N	N	N
	Kazakhstan	N	N	N	N	N	N	N	N	N	N
	Ivory Coast										
	Iraq	N	N	N	N	N	N	N	N	N	N
	Ghana	N	N	N	N	N	N	N	N	N	N
	Ecuador										
Central America	Colombia and Peru	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Chile	N	N	N	N	N	N	N	N	N	N
	CARIFORUM States	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
	Cameroon	N	N	N	N	N	N	N	N	N	N
	Azerbaijan	N	N	N	N	N	N	N	N	N	N
	Armenia	N	N	N	N	N	N	N	N	N	N
	References to IPR Agreements based on the subject-matter	N	N	N	N	N	N	N	N	N	N
	Exhaustion	N	N	N	N	N	N	N	N	N	N
References to IPR Agreements based on the subject-matter	Copyright and related rights	N	N	N	N	N	N	N	N	N	N
	Term of duration of copyright	N	N	N	N	N	N	N	N	N	N
	Rights management information	N	N	N	N	N	N	N	N	N	N
	Technological Measures	N	N	N	N	N	N	N	N	N	N
	Liability of ISPs	N	N	N	N	N	N	N	N	N	N

Analysis of IPR provisions of PTAs negotiated by the EU with other countries												
EU PTAs	South Korea											
	South Africa	N	N									
	Southern African Development Community (SADC)	N	N									
	Papua New Guinea and Fiji											
	Mexico	N	N	N	N	N	N	N	N	N	N	N
	Madagascar, Mauritius, the Seychelles, and Zimbabwe	N	N	N	N	N	N	N	N	N	N	N
	Kazakhstan	N	N	N	N	N	N	N	N	N	N	N
	Ivory Coast											
	Iraq	N	N	N	N	N	N	N	N	N	N	N
	Ghana	N	N	N	N	N	N	N	N	N	N	N
Ecuador												
	Colombia and Peru	Y	Y	Y	Y	N	Y	Y	Y	N		
	Chile	N	N	N	Y	Y	Y	N	Y	N	N	N
	Central America	N	Y	Y	Y	N	N	N	Y	N	N	N
	CARIFORUM States	N	Y	Y	Y	N	Y	N	Y	N	N	N
	Cameroon	N	N	N	N	N	N	N	N	N	N	N
	Azerbaijan	N	N	N	N	N	N	N	N	N	N	N
	Armenia	N	N	N	N	N	N	N	N	N	N	N
Resale right												
	Cooperation on collective management of rights	N	N	N	N	N	N	N	N	N	N	N
	Trademarks	N	N	N	N	N	N	N	N	N	N	N
	Well-knowns trademarks	N	N	N	N	N	N	N	N	N	N	N
	Undisclosed information	N	N	N	N	N	N	N	N	N	N	N
	Industrial designs	N	N	N	N	N	N	N	N	N	N	N
	Geographical indications	N	N	N	N	N	N	N	N	N	N	N
	Layout-designs (topographies) of integrated circuits	N	N	N	N	N	N	N	N	N	N	N

Analysis of IPR provisions of PTAs negotiated by the EU with other countries												
EU PTAs	South Korea											
	South Africa	N	N									
	Southern African Development Community (SADC)	N	N									
	Papua New Guinea and Fiji											
	Mexico	N	N									
	Madagascar, Mauritius, the Seychelles, and Zimbabwe	N	N									
	Kazakhstan	N	N									
	Ivory Coast											
	Iraq	N	N									
	Ghana	N	N									
Ecuador												
	Colombia and Peru	Y	Y									
	Chile	N	N									
	Central America	Y	N									
	CARIFORUM States	Y	Y									
	Cameroon	N	N									
	Azerbaijan	N	N									
	Armenia	N	N									
EU PTAs	Plant varieties	N										
	Traditional knowledge, folklore and genetic resources	N										
	Patents	N										
	Health-related Provisions	N										
	Patent linkage	N										
	Data exclusivity	N										
	Supplementary protection certificates or similar	N					Y (option)					
	Compulsory licensing	N					N					

Analysis of IPR provisions of PTAs negotiated by the EU with other countries								
EU PTAs	South Korea							
	South Africa	N	N					
	Southern African Development Community (SADC)	N	N	N	N			
	Papua New Guinea and Fiji							
	Mexico	N	N	N	N			
	Madagascar, Mauritius, the Seychelles, and Zimbabwe	N	N	N	N			
	Kazakhstan	N	N	N	N			
	Ivory Coast							
	Iraq	N	N	N	N			
	Ghana	N	N	N	N			
	Ecuador							
	Colombia and Peru	Y	Y	N	Y			
	Chile	N	N	N	N			
	Central America	Y	Y	N	Y			
	CARIFORUM States	Y	Y	N	Y			
	Cameroon	N	N	N	N			
	Azerbaijan	N	N	N	N			
	Armenia	N	N	N	N			
	Enforcement	N	N	N	N			
	Civil and Administrative Procedures and Remedies	N	N	N	N			
	Criminal procedures	N	N	N	N			
	Border Measures	N	N	N	N			

Annex VII – Analysis of IPR provisions of the US PTAs

Analysis of IPR provisions of PTAs negotiated by the USA														
USA PTAs	Australia	Bahrain	CAFTA-DR	Chile	Colombia	Israel	Jordan	KORUS	Morocco	NAFTA	Oman	Panama	Peru	TPP ²³⁴
IPR	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Introductory provisions	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
NT and MFN principles in IPR Chapter	NT	NT	NT	N	N	Y	NT	NT	NT	NT	NT	NT	NT	NT
References to IPR Agreements in general	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
References to IPR Agreements based on the subject-matter	N	N	N	N	N	N	N	N	N	N	N	N	N	N
Exhaustion	Y (patent)	N	N	N	N	N	N	N	N	N	N	N	N	Y (TRIPS)
Copyright and related rights	Y	Y	Y	Y	Y	N	Y	N	Y	Y	Y	Y	Y	Y
Term of duration of copyright	Y	Y	Y	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y

Analysis of IPR provisions of PTAs negotiated by the USA														
USA PTAs	Australia	Bahrain	CAFTA-DR	Chile	Colombia	Israel	Jordan	KORUS	Morocco	NAFTA	Oman	Panama	Peru	TPP ²³⁴
Rights management information	Y	Y	Y	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y
Technological Measures	Y	Y	Y	Y	Y	N	Y	Y	Y	N	Y	Y	Y	Y
Liability of ISPs	Y	Y	Y	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y
Resale right	N	N	N	N	N	N	N	N	N	N	N	N	N	N
Cooperation on collective management of rights	N	N	N	N	Y	N	N	N	N	N	N	N	Y	N
Trademarks	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	Y
Well-known trademarks	Y	Y	Y	Y	Y	N	Y	Y	Y	N	Y	Y	Y	Y
Undisclosed information (general)	N	N	N	N	N	N	N	N	N	Y	N	N	N	Y
Industrial designs	Y	N	N	N	N	N	N	N	N	Y	N	N	N	Y
Geographical indications	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Layout-designs (topographies) of integrated circuits	N	N	N	N	N	N	N	N	N	Y	N	N	N	N

Analysis of IPR provisions of PTAs negotiated by the USA														
USA PTAs	Australia	Bahrain	CAFTA-DR	Chile	Colombia	Israel	Jordan	KORUS	Morocco	NAFTA	Oman	Panama	Peru	TPP ²³⁴
Plant varieties	N	N	N	N	N	N	N	Y	N	Y	N	N	N	UPOV only
Traditional knowledge, folklore and genetic resources	N	N	N	N	N	N	N	N	N	N	N	N	N	Y
Patents	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Health-related / Pharma Provisions	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Patent linkage	Y	Y	Y	Y	Y	N	Y	Y	Y	N	Y	Y	Y	Y
Data exclusivity	Y	N	Y	Y	Y	N	Y	N	N	Y	N	N	N	Y
Supplementary protection certificates or similar	Y	Y	Y	Y	Y	N	N	Y	Y	Y	N	Y	Y	Y
Compulsory licensing	N	N	N	Y	N	N	Y	N	N	Y	N	N	N	N
Civil and Administrative Procedures and Remedies	Y	Y	Y	N	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Criminal procedures	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y

Analysis of IPR provisions of PTAs negotiated by the USA														
USA PTAs	Australia	Bahrain	CAFTA-DR	Chile	Colombia	Israel	Jordan	KORUS	Morocco	NAFTA	Oman	Panama	Peru	TPP ²³⁴
Special Requirements related to Border Measures	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y

²³⁴ The Office of the U.S. Trade Representative (USTR) issued a letter to signatories of the Trans-Pacific Partnership Agreement that the United States has formally withdrawn from the agreement per guidance from the President of the United States. The letter emphasizes the commitment of the United States to free and fair trade, and encourages future discussions on “measures designed to promote more efficient markets and higher levels of economic growth. (Office of the United States Trade Representative: Trans-Pacific Partnership, 2018)

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- Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Done at Brussels on May 21, 1974
- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of April 14, 1891
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013.
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- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Done at Rome on October 26, 1961
- Singapore Treaty on the Law of Trademarks adopted at Singapore on March 27, 2006
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- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, as revised at Stockholm on July 14, 1967, and as amended on September 28, 1979
 - o Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications adopted by the Diplomatic Conference on May 20, 2015
- Madrid Agreement Concerning the International Registration of Marks of April 14, 1891, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.
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- Locarno Agreement Establishing an International Classification for Industrial Designs Signed at Locarno on October 8, 1968 as amended on September 28, 1979

- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (as amended on September 28, 1979)
- Strasbourg Agreement Concerning the International Patent Classification of March 24, 1971, as amended on September 28, 1979
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks Done at Vienna on June 12, 1973 as amended on October 1, 1985.

Trade Agreements concluded by the EU reflected in the analysis

- Albania - Stabilisation and Association Agreement, 22 May 2006
- Andorra - Customs Union, 1 July 1991
- Bosnia and Herzegovina - Stabilisation and Association Agreement, 1 June 2015
- Faroe Islands - Agreement, 1 January 1997
- Georgia – Association Agreement, 1 July 2016
- Iceland - Agreement, 1 April 1973
- Kosovo - Stabilisation and Association Agreement, 1 April 2016
- The former Yugoslav Republic of Macedonia - Stabilisation and Association Agreement, 1 April 2004
- Moldova - Association Agreement, 1 July 2016
- Montenegro - Stabilisation and Association Agreement, 29 April 2010
- Norway - Agreement, 1 July 1973
- Russia - Partnership and Cooperation Agreement, 1 December 1997
- San Marino - Customs Union, 1 December 1992
- Serbia - Stabilisation and Association Agreement, 1 September 2013
- Switzerland - Agreement, 1 January 1973
- Turkey – Customs Union, 30 December 1995
- Ukraine- Deep and Comprehensive Free Trade Agreement, 1 January 2016 / Association Agreement, 29 May 2014
- Algeria - Association Agreement, 1 September 2005
- Egypt - Association Agreement, 1 June 2004
- Israel - Association Agreement, 1 June 2000
- Jordan - Association Agreement, 1 May 2002
- Lebanon - Interim Agreement, 1 March 2003

- Morocco - Association Agreement, 1 March 2000
- Palestinian Authority - Association Agreement, 1 July 1997
- Syria - Co-operation Agreement, 1 July 1977
- Tunisia - Association Agreement, 1 March 1998
- Algeria - Association Agreement, 1 September 2005
- Egypt - Association Agreement, 1 June 2004
- Israel - Association Agreement, 1 June 2000
- Jordan - Association Agreement, 1 May 2002
- Lebanon - Interim Agreement, 1 March 2003
- Morocco - Association Agreement, 1 March 2000
- Palestinian Authority - Association Agreement, 1 July 1997
- Syria - Co-operation Agreement, 1 July 1977
- Tunisia - Association Agreement, 1 March 1998
- Canada - Comprehensive and Economic Trade Agreement (CETA), end of negotiations 14 September 2016
- East African Countries (EAC) – Interim Economic Partnership Agreement , end of negotiations, 16 October 2014
- Singapore – Free Trade Agreements, initialled on 17 October 2014
- Vietnam – Free Trade Agreement, negotiations concluded on 1 February 2016
- West Africa – Economic Partnership Agreement, initialling, 10 July 2014

Trade Agreements concluded by the USA

- USA-Australia FTA
- USA-Bahrain FTA
- USA-CAFTA-DR (Dominican Republic-Central America FTA)
- USA-Chile FTA
- USA-Colombia FTA
- USA-Israel FTA
- USA-Jordan FTA
- USA-South Korea FTA
- USA-Morocco FTA
- North American FTA
- USA-Oman FTA
- USA-Panama FTA

- USA-Peru FTA
- USA-Singapore FTA
- Trans-Pacific Partnership²³⁵

Other Preferential Trade Agreements

- Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)
- Australia-United States FTA
- Japan-Australia Economic Partnership Agreement
- Korea-Australia FTA
- Malaysia-Australia FTA
- Singapore-Australia FTA
- Thailand-Australia FTA
- China-ASEAN FTA
- China-Pakistan FTA
- China-Chile FTA
- China-New Zealand FTA
- China-Singapore FTA
- China-Peru FTA
- Mainland and Hong Kong Closer Economic and Partnership Arrangement
- Mainland and Macau Closer Economic and Partnership Arrangement
- China-Costa Rica FTA
- China-Iceland FTA
- China-Switzerland FTA.

Other International Agreements

- AGREEMENT BETWEEN AUSTRALIA AND THE EUROPEAN COMMUNITY ON TRADE IN WINE.
- Agreement between the USA and the European Community on Trade in Wine

²³⁵ The USA has withdrawn its signature during the ratification process.

- Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

EU Legislation

- Council regulation (EEC) No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products (codified as Regulation (EC) no 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products)
- DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)
- DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights ('Enforcement Directive').
- Regulation (EC) No 1610/96 of the European Parliament and of the Council concerning the creation of a supplementary protection certificate for plant protection products
- REGULATION (EU) No 608/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003

Geographical indications

- Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89, and its implementing rules.
- Council Regulation (EEC) No 1601/91 of 10 June 1991 laying down general rules on the definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails, and its implementing rules.
- Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and its implementing rules.
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