The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in Latin America. A patent Law Perspective[1]

by

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I.- The Development of International Instruments Governing Intellectual Property Including Patent Rights and the Latin-American Situation.

Since the arrival of the patent system in the Fifteenth Century in Venice, and its subsequent development in the Seventeenth Century when the English Statute of Monopolies was passed in 1623, the patent system grew up and progressed in the world in an environment fairly peaceful and quiet. By the early Nineteenth Century most European and Latin-American nations had adopted domestic statutes recognizing exclusive rights directed to the local exploitation of inventions in the circumstances recited in each statute whose characteristics varied from country to country depending on the way the patent system was developing in different regions of the world since the first statute was drafted in Venice in the year 1474.[3]

From the Fifteenth Century up to the early Nineteenth Century the patent system developed in the world bearing in mind mostly mechanical inventions. The need to apply the patent system to other industries that did not exist as such during the

[3] The arrival and development of the patent system in the world are discussed in BAYLOS Hermenegildo, *Tratado de Derecho Industrial*, Editorial Civitas, Madrid, pp. 159, ASCARELLI Tullio, *Teoría de la Concurrencia y de los Bienes Inmateriales*, Bosch-Casa Editorial-Urgil, 51 bis Barcelona, pp. 489 y ss., AIPPI, *La Legge Veneziana Sulle Invenzione*, Milano-Dott., A. Giuffre Editore 1974, BIER Friedrich-Karl y STRAUS Joseph, *The Patent System and its Informational _Function – Yesterday and Today*, IIC, International Review of Industrial Property and Copyright Law, Volume 8, No. 5/1977, pp. 391 y ss.

first three centuries of operation of the system triggered the need to implement certain adjustments to the laws governing patent rights, some of which were directed to the subject matter protected by patents such as chemical inventions and pharmaceutical inventions.[4]

By the mid Nineteenth Century, observers of the operation of the patent system in the world started to made proposals in various ways ranging from those who expressed the conviction that a stronger patent system was needed, to those who expressed reluctance that steps in this direction should be implemented. Economic reasons were always raised in support of each position.

The debate that took place in the second half of the Nineteenth Century ended with the implementation of steps towards the adoption of a stronger patent system in the world which materialized with the signing of the Paris Convention for the Protection of Industrial Property in the year 1883.[5] This was the first multinational instrument addressing these issues, currently in force not only in the members of the Paris Union but also in those of the World Trade Organization (WTO) by operation of a mandate in the Marrakech Agreement which was signed more than one century after the Paris Convention, specifically in Annex 1C under the heading *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*.

As part of the negotiating process by GATT members, who later became WTO members, the TRIPS Agreement provides for a transitional arrangement contained in Article 65 which allows developing nations and less developed

[4] The peculiarities of the patent system when same is put into operation in situations involving chemicals, pharmaceuticals and biotechnology are discussed in GRUBB Philip W., *Patents for Chemicals, Pharmaceuticals and Biotechnology*, Oxford University Press, , New York, 1999, pp. 1-448.

[5] The circumstances surrounding the adoption of the Paris Convention in 1883 are discussed in PLASSERAUD Yves and SAVIGNON Francois, Paris 1883. *Genese du droit unioniste des brevets*, Litec, Paris 1883, pp. 5-258. *See also* AMOR FERNANDEZ

nations to delay the application and implementation of the provisions of this international instrument. For purposes of this paper, the provision of interest is that which allows developing nations to start compliance with TRIPS by January 1st, 2000 instead of January 1st, 1996 which was the date of application for industrialized nations.

While some Latin American nations have taken steps towards a timely compliance with TRIPS standards, not all Latin American nations have proceeded in the same way to the satisfaction of the international community, specifically the United States, who has implemented the dispute settlement mechanism contemplated in Article 64 against those nations that, according to the moving party in these cases, have not met the standards contemplated in TRIPS in a timely fashion.

In most cases, the dispute settlement mechanism has been put into operation by an industrialized nation for reasons associated to what has been regarded an inadequate protection of patent rights in some Latin American nations.

It is of interest to note that the dispute settlement mechanism has not been instituted against the poor nations of Latin America who were compelled to comply with TRIPS standards by January 1st, 2000. Instead, the mechanism has been used against the largest economies of the region represented by Argentina and Brazil who, according to the moving party, were not conferring adequate protection to patent rights, specifically protection that meets the standards contemplated in the TRIPS Agreement.

At this time, all Latin American nations are members of the Paris Union,[6] but two decades ago only a few nations of Latin America were members of the Paris

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Antonio, *La propiedad industrial en el Derecho internacional*, Editorial Nauta, Barcelona 1965, pp. 11 y ss.

[6] *See* www.wipo.int

Union. This might have suggested to some observers of the situation that the Latin American region would experience serious difficulty in complying with TRIPS standards not only for reasons of an economic nature and others related thereto, but also for the apparent lack of familiarity with the handling of international instruments addressing intellectual property issues. In effect, the late arrival of Latin America to the international intellectual property scenario including the Paris Union, could have suggested that there was little knowledge about the handling of international intellectual property instruments in this region of the world, and that therefore there was little experience in the adoption of legislative, administrative and judicial mechanisms towards compliance with international standards by which Latin American nations were bound, including lack of familiarity with the tools inherent to observance of international standards as far as intellectual property rights are concerned.

With some exceptions represented by countries like Mexico who joined the Paris Convention as early as 1903, it is true that most Latin American nations did join this important international instrument only by the end of the Nineteenth Century. For this, however, does not follow that Latin American nations were unfamiliar with the adoption and enforcement of international understandings addressing intellectual property rights.

Examination of the international instruments that have existed in Latin America shows that many decades before TRIPS, Latin American nations were familiar with a vast number of international understandings in the law governing intellectual property rights. Unlike other regions of the world, Latin America is a region where members have signed regional instruments addressing intellectual property issues since the early Nineteenth Century, most of which have been substituted by other regional instruments recently adopted with a view to incorporate international standards contained in TRIPS.

II.- Regional Intellectual Property Agreements in Latin America.

Latin America has a long tradition in dealing with supranational intellectual property issues through regional and sub-regional agreements adopted between and among the State members of the Latin American community both in the industrial property field as well as in authors´ rights or copyright. The incorporation of intellectual property issues in regional trade instruments adopted in Latin America in the last two decades, is in no way the result of recent trends, but simply a continuation of domestic, sub-regional and regional policies that have existed in the Latin American nations for more than one century.

In a first stage of regional work, Latin America was a scenario of permanent efforts towards achieving uniformity in the law governing various areas of the law including intellectual property. This stage starts by the end of the Nineteenth Century and develops in the first half of the Twentieth Century. It is true that these efforts, at least in part, were originally done bearing in mind the possibility to create a customs union in the Americas: the Pan-American Union; but yet, even if such union did not materialize, the reality is that efforts towards achieving uniformity in the Americas continued for many years specially in the context of the work of the Pan-American conferences that took place during the first half of the Nineteenth Century in the Americas, particularly in Latin America.

Even if the roots of this uniformity exercise may be traced in the proposal to constitute a customs union in the American continent, the work towards achieving uniformity was in reality conducted for the sake of achieving uniformity and the practical benefits derived therefrom, as distinguished from an exercise that formed a part of an economic integration process.[7] Actually, this process towards achieving uniformity is part of a series of conferences on private international law where participants and delegates finally adopted a number of

[7] *See* RANGEL MEDINA David, *Convenciones Panamericanas* in *Tratado de Derecho Marcario*, Ed. Libros de México, Mèxico 1960 at pp. 66 *et seq*. *See also* LADAS Stephen P., *Integración económica de América Latina y propiedad industrial*, in *Revista Mexicana de la Propiedad Industrial y Artística*, No. 18, Mèxico, julio-diciembre 1971, at pp. 191 *et seq*.

regional instruments not only in areas like industrial property law and copyright law, but also in other fields of law such as international law, civil law, criminal law and procedural law.[8] The first effort was made at the Congress of International Law at Montevideo in 1889.[9]

A.- Industrial Property Regional Treaties in Latin America.

1.- Montevideo Patent and Trademark Treaties of 1889. As early as 1889, that is, six years after the adoption of the Paris Convention in 1883, two conventions were signed on January 16 concerning patents and trademarks. The contracting countries in these conventions were Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay. All ratified them except Chile and Peru. This was done in Montevideo in the context of the International Congress of South American States aimed, *i.a*., at achieving uniformity in the law governing the international relations of these states.[10] Both scholars and practitioners agreed in that the Montevideo Treaties of 1889 were of no practical help never used in actual practice, this being owed, *i.a.*, to the fact that the text of the Conventions largely reproduced domestic legislation already existing in the

[8] *See* LIPSZYC Delia, *Esquema de protección internacional del derecho de autor por las convenciones del sistema interamericano* in *La protección del derecho de autor en el sistema interamericano*, Universidad Externado de Colombia – Dirección Nacional de Derecho de Autor, Bogotá, colombia 1998 at pp. 17 *et seq.*

[9] LADAS Stephen P., *History of Inter-American Conventions* in *The International Protection of Literary and Artistic Property, volume I., International Copyright and Inter-American Copyright*, New York , The MacMillan Company 1938, at p. 635.

[10] *See* LADAS Stephen P., *Montevideo Conventions of 1889* in *The International Protection of Industrial Property*, Harvard University Press, 1930, Cambridge, Mass., pp. 756-757. *See also* DI GUGLIELMO Pascual, *Tratado de Montevido de 1889* in *Tratado de Derecho Industrial,* Tomo II, Tipográfica Editora Argentina, Buenos Aires 1951, at pp. 176-177.

national laws of members.[11] This suggesting that uniformity was largely attempted apparently in those areas where uniformity already existed.

2.- Pan-American Convention of 1902 (Mexico City).- An International Conference of American States met in Mexico City in 1902 including delegates from the Pan-American Union with some exceptions. Unlike the Montevideo Treaties of 1889 where only South American countries were represented, the Mexico City conference also included the representation of Mexico and various Central American nations whose representatives adopted a new convention on industrial property including patents, industrial designs and trademarks which was signed in Mexico City on January 27, 1902.[12] The Convention was ratified only by five Central American countries, who shortly thereafter did abrogate it.[13]

The text of the Mexico City Convention of 1902 consisted largely in the reproduction of the basic texts already read in the two Montevideo Treaties of 1889 as well as some new texts borrowed from the text of the Paris Convention of 1883 (e.g. national treatment and priority).[14]

An interesting provision authorized consular agents to act as legal representatives of foreign patent and trademark owners. Another interesting provision compelled national authorities to notify the authorities of other members the cancellation of patent and trademark rights by the national authorities of one

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[11] *See* BREUER MORENO Pedro Carlos, *Convención de Montevideo* in *Tratado de marcas*, Editorial Robis, Buenos Aires, 1946 at pp 549-550. *See also* NAVA NEGRETE Justo, *Derecho de las marcas*, Editorial Porrúa, Mèxico 1985 at p. 292.

[12] The Mexico City Convention of 1902 was signed by Argentina, Bolivia, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Haití, Honduras, Mexico, Nicaragua, Paraguay, Peru, Dominican Republic and Uruguay. *See* NAVA NEGRETE, *op. cit*. P. 293.

[13] *See* LADAS, *The International Protection of Industrial Property…op. cit*. at pp. 757-758. *See also* NAVA NEGRETE, *op. cit*. at p. 293.

[14] See LADAS, *The International Protection of Industrial Property, op. cit*. at p. 758. See also NAVA NEGRETE, *op. cit*. at p. 294.

member in order for the other members to be informed of the situation and to proceed as they deemed it appropriate.[15] This approach was indeed an invitation to depart from the principle of independence contemplated in the Paris Convention by which almost none of these nations was bound at that time.

3.- Pan-American Convention of 1906 (Rio de Janeiro).- In July 1906 a Conference of American States met at Rio de Janeiro. A new convention was signed in this meeting concerning patents, industrial designs, trademarks and literary and artistic property. That is to say, intellectual property in general including industrial property and copyright. The Rio Convention of 1906 created a Union of American states for the Protection of Intellectual Property, as well as two inter-American bureaus one in La Habana and the other in Rio where applications could be filed for the registration of the rights contemplated in the new convention. The office of La Habana would be responsible of the work involving North America, Central America and the Caribean, whereas the office of Rio would be responsible of the work involving South American countries. The provisions of the Madrid Agreement were used to draft the system of the Convention in relation not only to trademarks but also patents, industrial designs, as well as artistic and literary works. None of these two offices operated before the Rio Convention of 1906 was superseded by subsequent regional instruments adopted by members.[16]

4.- Pan-American Conventions of 1910 (Buenos Aires). In 1910 a Conference of American States met in Buenos Aires. Two conventions were adopted. One relating to patents and industrial designs, and the other relating to trademarks. The two inter-American bureaus at La Havana and Rio were

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[15] *Ibid*

[16] *See* WITTENZELLNER Ursula, *Convenios regionales* in: *Derecho de Marcas*, Ed. Abeledo-Perrot, Buenos Aires, 1987, at p. 229. *See also* LADAS, *The International Protection of Industrial Property, op. cit*. at p. 758 and NAVA NEGRETE, *op. cit*. at p. 294.

maintained. Both treaties included a provision to the effect of abrogating previous patent and trademark inter-American conventions after ratification of the Buenos Aries Convention of 1910 by members. The office of La Habana started operations in 1919, and by 1923 the office had granted 930 regional trademark registrations pursuant to the provisions of the Buenos Aires Convention of 1910. The Rio office was never established, and the La Habana office went through a process of deterioration before it reached decent standards of operation.[17]

5.- Caracas Agreement on Patents and Inventions of 1911. This agreement was signed in 1911 by Bolivia, Colombia, Ecuador, Peru and Venezuela (currently the members of the Andean Community formed in 1969). The Caracas Agreement contemplated a two-year priority for members, adopted a legal notion of invention restricted to mechanical inventions and other questions related thereto that did not include chemical patents nor processes. While formally still in force among members[18] the provisions of this instrument have been superseded by subsequent Andean Community and international legislation like Decision 486 and TRIPS.

6.- Pan-American Convention of 1923 (Santiago de Chile). As a result of an International Conference of American States in Santiago in the year 1923 a convention was signed by all American States belonging to the Pan-American Union except Mexico, Bolivia and Peru, and upon completion of the necessary ratifications, the Buenos Aires Conventions of 1910 ceased to have legal effects in the countries who ratified the Santiago Convention of 1923. The Santiago

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[17] *See* BREUER MORENO, *op. cit*. at p. 551. *See also* LADAS, *The International Protection of Industrial Property, op. cit*. at pp. 760-761 and NAVA NEGRETE, *op. cit*. at pp. 296-297.

[18] The Caracas Agreement on Patents and Inventions of 1911 has been identified by contributors to a project involving the compilation of regional industrial property legislation in force in Latin America as an instrument still in force in the year 1995 in the five member countries. *See* SONI Mariano (Editor)/ASIPI, *Tratados Internacional en Materia de Propiedad Industrial*, ASIPI, Santiago, Chile 1995 at p. 11-13.

Convention of 1923 maintained the two inter-American regional bureaus which had been created through the Rio Convention of 1906, namely the Bureau of La Habana and the Bureau of Rio.[19]

7.- Pan-American Trademark Conference of 1929 (Washington).- Two acts were signed in this conference: a General Inter-American Convention for Trademark and Commercial Protection, and a Protocol for the Inter-American Registration of Trademarks.[20] The Convention of 1929 only kept the Inter-American Bureau of La Habana.[21] The adoption of both instruments was preceded by the actual failure of the preceding conventions of 1910 and 1923, including much discussion and controversy headed by the views expressed by the delegates of Argentina and Mexico. The delegate of Argentina referred to the negative consequences that followed the presence of delegates that were not experts in trademark law, whereas the Mexican delegate suggested to forget about the Pan-American Conventions, and to start exploring the international system that Mexico had adopted years before, further confirming Mexico's resistance to ratify the Pan-American Convention. [22]

Scholars have criticized the Washington Trademark Convention of 1929 as being extremely detailed, with the evident intent to transfer domestic US law into a

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[19] *See* LADAS, *The International Protection of Industrial Property, op. cit.* at p. 766. *See also* NAVA NEGRETE, *op. cit*. at p. 298, BREUER MORENO, *op. cit*. at p. 553 and WITTENZELLNER, *op. cit*. at p. 230.

[20] *See* RANGEL MEDINA David, *Tratado…, op. cit.* at p. 67. The Protocol is not anymore in force in any country since November 18, 1946. The Inter-American Bureau created through this Protocol was terminated on November 2, 1949. The Convention of 1929 was ratified by Colombia, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru and U.S.A. NAVA NEGRETE, *op. cit*., at p. 302.

[21] NAVA NEGRETE, *op. cit.* at p. 300.

[22] *See* OFFNER Eric D., *General Inter-American Convention for Trademark and Commercial Protection* in *International Trademark Protection,* Fieldston Press, New York 1965 at pp. 234, WITTENZELLNER, *op. cit*. at p. 230, *et seq*., LADAS, *International Protection of Industrial Property, op. cit*., at p. 767, BREUER MORENO, *op.cit*. at p. 555.

regional instrument which would govern trademark law in jurisdictions with legal systems totally unrelated to U.S. law. [23] Strangely, the Washington Convention of 1929 was used as part of the basis to prepare a rough draft for a Central American convention on trademark protection more than 30 years later.[24]

The Washington Convention of 1929 was not the last attempt to harmonize trademark law in the context of the Pan-American conventions. Further attempts would continue to be implemented in the second half of the Twentieth Century. These new attempts would be implemented primarily at sub-regional and bilateral levels.

B.- Copyright Regional Treaties in Latin America.

As noted, during the first half of the Twentieth Century, several efforts were implemented towards the adoption of various regional instruments which included provisions applicable to the circumstances in which patent and trademark rights were obtained, maintained, exercised and enforced in Latin America, specifically in the Latin American countries.

Parallel --and some times simultaneous-- efforts were implemented in the region towards adopting parallel regional instruments governing author's rights. This is the case of the Treaty of Montevideo on Literary and Artistic Property of 1889, followed by the Pan-American Conventions including the Mexico City Pan-American Convention of 1902, the Rio de Janeiro Pan-American Convention of 1906, and the Buenos Aires Pan-American Convention of 1910 where members adopted regional instruments governing industrial property on the one hand, and copyright or author's rights on the other.

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[23] *See* LADAS, *The International Protection of Industrial Property… op. cit*. at p. 768 and BREUER MORENO, *op.cit*. at p. 555.

[24] See RANGEL MEDINA David, *Armonía legislativa de la propiedad industrial en América Latina*, en *Revista Mexicana de la Propiedad Industrial y Artística,* No. 6, México, julio-diciembre 1965 at p. 239.

Not all copyright conventions signed in Latin America during the first half of the Twentieth Century were adopted necessarily in the same year as those governing industrial property in the context of the Pan-American conferences. There are various Latin American copyright conventions adopted after the Buenos Aires convention of 1910, such as the Pan-American Convention of La Havana of 1928, followed by the Washington Convention of 1946. The Caracas Agreement of 1911 and the Second Montevideo Treaty of 1939 also form a part of the regional copyright treaties adopted in Latin America during the first half of the Twentieth Century and the end of the Nineteenth Century.

The regional instruments that were adopted in Latin America with an impact in the way author's rights are acquired, maintained, exercised and enforced in this region of the planet between the years 1889 and 1946 are the following: [25]

1.- Treaty of Montevideo on Literary and Artistic Property of 1889. This is not a Pan-American convention, but is the first effort towards achieving uniformity and harmonization in the law governing author's rights or copyright in Latin America. Unlike the rule followed by other subsequent Pan-American instruments access to which was restricted to countries in the Americas, the Montevideo Treaty contemplated the possibility that other non American countries joined the Treaty.[26] Countries like France, Spain, Italy, Belgium,

[25] A detailed examination of these copyright regional instruments adopted between 1889 and 1946 may be read in the works of LIPSZYC, *op. cit*. pp. 17 *et seq*., VILLALBA Carlos Alberto, *Antecedentes del Tratado de Montevideo. Berna y Montevideo constituyen la génesis del Derecho internacional privado de autor,* in *La protección del derecho de autor en el sistema interamericano*, Universidad Externado de Colombia – Dirección Nacional de Derecho de Autor, Bogotá, colombia 1998 at pp. 41 *et seq.*, UCHTENHAGEN Ulrich, *Acerca de la historia de las convenciones de derecho de autor latinoamericanas* in *La protección del derecho de autor en el sistema interamericano*, Universidad Externado de Colombia – Dirección Nacional de Derecho de Autor, Bogotá, colombia 1998 at pp. 73 *et seq.*

[26] CANYES Manuel, COLBORN Paul A., and PIAZZA Luis Guillermo, *Protección del derecho de autor en América de acuerdo con las legislaciones nacionales y los tratados*

Germany, Austria and Hungary actually joined the Treaty of Montevideo between 1989 and 1931.[27]

2.- Mexico City Pan-American Convention of 1902.- Strictly speaking, this is the fist Pan-American Copyright Convention which created the Pan-American Union for the protection of literary and artistic property. Protection is conditioned to compliance with formalities consisting in registration.[28]

3.- Rio de Janeiro Pan-American Convention of 1906.- As noted when referring to the industrial property regional treaties in Latin America, this is a n intellectual property convention that comprised both industrial property and copyright provisions, and provided for the creation of an office in Rio and another in La Habana for the registration of literary and artistic works. These offices were never created. The Rio office restricted its activities to trademark work.[29]

4.- Buenos Aires Pan-American Convention of 1910.- This convention abandoned the idea of creating a union for the protection of literary and artistic works as contemplated in the Mexico City and Rio Conventions. Protection is conditioned to publication in the territory of one of the member countries whether by a national of that country or a foreigner. Following the Berne approach, the Buenos Aires Convention abandons the registration requirement as a condition precedent to protection.[30]

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interamericanos, División de Asuntos Jurídicos, Departamento Jurídico y de Organismos Internacionales, Unión Panamericana, Washington, D.C., 1950 at p. 3.

[27] SATANOWSKY Isidro, *Congresos, convenciones y tratados americanos* in *Derecho Intelectual, I*, Tipográfica Editora Argentina, Buenos Aires 1954 at pp. 40 *et seq*., and CANYES, COLBORN and PIAZZA, at p. 90.

[28] CANYES, COLBORN and PIAZZA, *op.cit*., at p. 4.

[29] CANYES , COLBORN and PIAZZA, op. cit., at pp. 4-5.

[30] CANYES , COLBORN and PIAZZA, op. cit., at p. 5

5.- Caracas Agreement of 1911 (Bolivarian Congress).- Following the Treaty of Montevideo, this Agreement was signed in Caracas by Colombia, Bolivia, Ecuador, Peru and Venezuela, current members of the Andean Community.[31]

6.- La Habana Pan-American Convention of 1928.- A revision of the Buenos Aires Convention took place in La Habana through the Convention of 1928. One of the most notable changes consisted in the recognition of moral rights specifically when the Convention included a new provision in the sense that assignment of the rights on a work of art never included assignment of moral rights.[32]

7.- Second Treaty of Montevideo on Intellectual Property of 1939.- This Treaty abrogated the Treaty of Montevideo of 1889. Extended moral rights to the right of paternity and the right of integrity, and adopted the system of national treatment.

8.- Washington Pan-American Convention of 1946.- For the first time in the history of regional projects in Latin America, this conference meeting was attended by true copyright experts. Previous Pan-American conferences included discussions on intellectual property law and other branches of law, thus conferences were uniformity was sought was not attended by true intellectual property specialists. This was not the case in the Washington Conference attended by specialists. For the first time in regional treaty law in Latin America, unpublished works of art are subject to copyright protection. No agreement was reached on the term, and same was fixed in Convention countries according to the rule that provides protection in those countries for the same term as provided in the country of origin. Moral rights were once again adopted but subject to certain exceptions allowing third parties to make unauthorized amendments to a

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[31] LIPSZYC, *op. cit*. at p.18 and SANTANOWSKY, op. cit., at p. 93.

[32] CANYES , COLBORN and PIAZZA, op. cit., at p. 7.

work under certain circumstances contemplated in the revised Convention.[33] This was the first time that the three largest nations in Latin America, namely Mexico, Argentina and Brazil, joined a Latin American copyright convention. For Mexico this was the first time.[34]

Not unlike the industrial property situation, future attempts would continue to be implemented in the second part of the Twentieth Century but in a context other than the Pan-American Conventions. These attempts would be implemented as part of economic integration programs at sub-regional levels on the one hand, and as part of free trade agreements, on the other.

C.- The Copyright Latin American Conventions in the Twenty first Century.

While formally speaking some of the Pan-American conventions still remain in force, the reality is that, from a practical perspective, none of them is in force at this time. Apart from the fact that all of them have been abrogated or superseded whether expressly or by implication, the fact is that none of the provisions of the Inter-American conventions is raised in day to day life in Latin America largely for the reason that the provisions of these regional instruments have been surpassed and improved by the texts of other multinational instruments also in force in the region such as the Universal Copyright Convention and the Berne Convention.[35]

D.- Reasons for the Adoption of Intellectual Property Regional Instruments in Latin America.

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[33] CANYES, COLBORN and PIAZZA, op. cit., at pp. 10-15.

[34] UCHTENHAGEN, op. cit. p. 101.

[35] *See* LIPSZYC, *op. cit*., at p. 36, LADAS, *The International Protection of Literary and Artistic Property, op. cit.,* at pp. 635 *et seq*., SATANOWSKY, op. cit., at p. 40 *et seq*., and CANYES, COLBORN and PIAZZA, *op. cit*. at pp. 3-18.

During the period that runs between 1889 and 1946, Latin American nations adopted 8 regional instruments governing copyright, and 6 regional instruments governing industrial property. One has to wonder the reason for which the Latin American nations proceeded in this way when at about the same times, the world was involved in a similar process but at an international level, not only regional. One can only speculate on this. Nevertheless, examination of all sorts of materials surrounding the preparatory works for Paris, Berne and Montevideo, suggest that the adoption of the Treaty of Montevideo was preceded by little attention given by the organizers of the Paris Convention and the Berne Convention to the views and opinions of representatives of Latin America. Some believe this sentiment was a crucial factor in triggering the works that finally led to the adoption of the Treaty of Montevideo followed by the adoption of the Pan-American conventions between 1902 and 1946.[36] Regional and sub-regional legislation would continue to be adopted in Latin America during the second half of the Nineteenth Century but now in the context of economic integration as distinguished from efforts implemented for the sake of achieving uniformity.

E.- Intellectual Property in Economic Integration instruments.

In a broad sense the expression *economic integration* is used to refer to a number of situations that include the adoption of policies and laws --domestic, regional and international—towards the elimination or reduction of trade barriers including tariff and non-tariff barriers. Differences in the level of protection afforded to intellectual property rights among members of a region where economic integration is sought, have been considered as a means that may operate as a non-tariff barrier, and thus as a means to cause distortion in trade, and as a means to obstruct free trade.

[36] *e.g.* UCHTENHAGEN, *op. cit*. at pp. 74 *et seq*.

Since the mid fifties, efforts implemented towards sub-regional and regional integration in Latin America have proven to be complex and abundant. The Latin American experience shows different attempts to achieve economic integration which have been implemented in the second half of the Twentieth Century.[37] These efforts include the creation of the Latin American Free Trade Association (ALALC),[38] the Latin American Economic System (SELA),[39] the Central American Common Market,[40] the experiences in the Caribbean Region (CARIFTA and CARICOM),[41] the Andean pact,[42] and the Latin American Integration Association

[37] *See* LADAS Stephen P*., Integración económica de América Latina y Propiedad Industrial, op. cit*, at pp. 191 *et seq*.

[38] The treaty for the creation of ALALC was signed by eleven countries, in Montevideo, in 1960, with the objective to establish a free trade area and, in the long run, a Latin American common market. BARRAL Welber, *Trade Liberalization and Human Security in Mercosur,* Professor of International Economic Law, Universidade Federal de santa Catarina, Brazil barral@ccj.ufsc.br *See also* NUN DE MULLER Diana, *Licencias de marcas y tecnología en los países del Pacto Andino, in Revista Mexicana de la Propiedad Industrial y Artística*, No. 29-30, México, enero-diciembre 1977, at p. 152. It took nine years to ALALC to discuss intellectual property issues during a meeting called in 1969 attended by commissioners of patents and trademarks of Latin American patent and trademark offices. Among the issues discussed in this meeting was the proposal to draft a regional industrial property agreement to be adopted by ALALC members. RANGEL MEDINA David, *ALALC, REUNION DE DIRECTORES DE OFICINAS NACIONALES DE MARCAS Y PATENTES EN MONTEVIDEO, 1969*, in Revista Mexicana de la Propiedad Industrial y Artística, No.13, México, enero-junio 1969, at p. 131.

[39] The SELA was created in 1975 in Panama, to promote the regional cooperation and to accelerate the economic development, BARRAL , *op. cit*. *See also* NUN DE MULLER Diana, *Licencias de marcas y tecnología en los países del Pacto Andino, op. cit.,* at p. 152 .

[40] *See* NUN DE MULLER, *op. cit*. at p. 152.

[41] The Caribbean Free Trade Association (CARIFTA) was created in 1968. It was extinguished in 1972 and substituted by the Caribbean Community and Common Market (CARICOM). *See* BARRAL, *op. cit*. *See also* NUN DE MULLER, *op. cit*, at .p. 152.

[42] The Andean Pact was originally formed by Bolivia, Colombia, Chile, Ecuador and Peru who signed the Cartagena Agreement on May 1969. CORREA Antonio, *El Proyecto de Reglamento para la aplicación del régimen de propiedad industrial del Bloque Andino*, in *Revista Mexicana de la Propiedad Industrial y Artística*, No. 19, México, enero-junio 1972, at p. 11.

(ALADI)[43] which replaced ALALC. Besides, the work of the economic commission for Latin America and the Caribean (CEPAL) always envisaged the necessity to stimulate the trade exchange among Latin American countries through regional agreements. [44]

Intellectual property has been present in such efforts in ways and forms that vary from one case to another. For purposes of this discussion it is worth pointing out three of these experiences where the adoption of legal means governing integration has included regional instruments governing intellectual property as well. I am talking about

The Central American Common Market
The Andean Community and
The Common Market of the South or Mercosur

which cover the entire territory of continental Latin America.

In each of these attempts for economic integration, those involved in the drafting and adoption of the pertinent legal instruments have included a body of laws applicable to the conditions in which intellectual property rights are acquired, maintained, exercised and enforced in the territory covered by the integration understandings.

1.- The Central American Common Market and the San Jose Central American Industrial Property Convention of 1968.

[43] ALADI, the Latin American Integration Association, was created in 1980 to replace ALALC. *See ALADI* http://www.maxwell.syr.edu/maxpages/faculty/gmbonham/200-Fall-IR-Projects/Websit *also see* ALADI www.iadb.org/INTAL/tratados/aladi.htm

[44] *See* BARRAL. *op. cit*. a p.1

The Central American Common Market was a creation contemplated in the General Treaty for the Economic Integration of Central America (Treaty of Managua) signed by El Salvador, Guatemala, Honduras and Nicaragua in 1960.[45] Its text was influenced by the Washington Pan-American Convention of 1929 and by the domestic statutes of members. Eight years after the adoption of the Treaty of Managua whereby the Central American Common Market was created, members adopted the Central American Industrial Property Convention in the city of San José, Costa Rica in 1968. The preamble of the San Jose Convention of 1968 expressly indicates that this instrument is to be adopted as one of the tools to achieve the objectives of the economic integration program in Central America.[46]

The name of the San José Convention is deceiving for same dealt only with trademarks and other trade identifiers. Patents were not part of the Convention which remained in force until recently when same was substituted for a new domestic law in each Central American country drafted with a view to meeting TRIPS standards not present in the Convention. With much difficulty headed by wars in the region (Honduras-El Salvador 1969) and internal instability in the sub-region, the Central American Common Market still exists and operates.[47]

2.- The Andean Community, the Cartagena Agreement and the Intellectual Property Decisions Approved by the Commission of the Cartagena Agreement.

[45] GUIA DE LA INTEGRACIÓN, *Mercado Común Centro Americano* http://lanic.utexas.edu/~sela/AA2K/ES/books/integra/aneced.htm

[46] RANGEL MEDINA David, *El Convenio Centroamericano para la protección de la propiedad industrial*, in *Revista Mexicana de la Propiedad Industrial y Artística,* No. 11, México, enero-junio 1968, at p. 13. The circumstances in which the Central American Industrial Property Convention was adopted are discussed in RANGEL MEDINA David, *Armonía Legislativa de la Propiedad Industiral en América Latina, op. cit.,* at pp . 237-249.

[47] GUIA DE LA INTEGRACIÓN, *Mercado Común Centro Americano* http://lanic.utexas.edu/~sela/AA2K/ES/books/integra/aneced.htm

In 1969 five Latin American nations signed the Cartagena Agreement whereby the Andean Community (formerly Andean Pact) was created. The current members of the Andean community are Bolivia, Colombia, Ecuador, Peru and Venezuela.

Shortly after the foundation of the Andean Community, the Commission of the Cartagena Agreement approved intellectual property legislation proposed by the Board of the Cartagena Agreement through legal instruments known as *Decisions* which contain the law governing intellectual property and other subjects by which members are bound.

As early as 1971 the Commission approved Decision 24 which addressed general industrial property broad issues the specifics of which were addressed for the first time in Andean Community legislation in Decision 85 which was published in 1979. After Decision 85, industrial property has been governed in the Community by Decision 311 (1991-1992), Decision 313 (1992-1993), Decision 344 (1993-1999) and Decision 486 in force as from December 1st, 2000 drafted and adopted with a view to meet TRIPS standards in the sub-region.[48] As far as copyright is concerned, this subject is governed in the sub-region by Decision 351 of the Commission of the Cartagena Agreement.[49]

3.- Common Market of the South (MERCOSUR) and Mercosur Protocol on Trademarks and Trade Identifiers.

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[48] For a full study on Andean Community industrial property legislation, *see* KRESALJA ROSSELLO Waldo, *La política en material de propiedad industrial en la Comunidad Andina* in *Derecho Comunitario Andino*, Lima 2003, at pp. 221-297. *See also* ILARDI Alfredo and BLAKENEY Michael, *Andean Sub-Regional Integration Agreement (Cartagena Agreement) 1969* in *International Encyclopaedia of Intellectual Property*, Oxford University Press 2004 at pp. 711-714.

[49] INDECOPI, *Decisión 351 de la Comisión del Acuerdo de Cartagena* in *Compilación legislativa de propiedad intelectual*, INDECOPI (Lima), OMPI (Ginebra), 1996, at pp. 359-370.

In 1990 four South American countries signed the Treaty of Asuncion which creates the Common Market of the South known as MERCOSUR. The original work included only Argentina and Brazil, but MERCOSUR was created with the participation of Paraguay and Uruguay also.[50] As it happened in previous experiences of similar nature, it took members several years before a document could be produced addressing intellectual property issues. In 1995, the parties signed the *Mercosur Protocol for the Harmonization of Intellectual Property Norms in rights with Respect to Trademarks and Indications or Denominations of Origin* which addresses only issues on trademarks and other trade identifiers. The Mercosur Protocol was signed in Asuncion in 1995 and became effective on August 6, 2000 in Paraguay and Uruguay after ratification of these two countries.[51] Unlike other regional instruments which get into much detail both substantive and procedural, the Mercosur Protocol is formed by three dozens of provisions merely setting guidelines to be implemented in members under their domestic statutes and legal traditions, a system not totally dissimilar to that of the Paris Convention.[52]

F.- Intellectual Property in Free Trade Agreements and Other Trade Agreements.

In addition to the various regional treaties adopted in Latin America during the first half of the last century, in the last two decades of the last Century, that is to say, during the eighties and nineties, virtually all Latin American nations adopted

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[50] *See* http://www.guia-mercosur.com/

[51] *See* http://www.sice.oas.org/agreemts/Mercin_e.asp *See also* BAREIRO DE MODICA Gladys*, Mercosur Protocol on Intellectual Property*, ASIPINFORMA, octubre 2001 at p. 18.

[52] A study of the Mercosur Trademark Protocol shows up in RANGEL-ORTIZ Horacio, *Mercosur Protocol for the Harmonization of Intellectual Property Provisions in the Field of Trademarks,* en International Trademark Protection and Enforcement, ACI Publications, American Conference Institute, New York, 1996 y en CURRENTS: International Trade Law Journal, South Texas College of Law, Winter 1996.

one or many trade agreements with other neighboring and distant nations. Sources show that Latin American nations have entered into more than 140 trade instruments with other nations of the Americas, Europe and Asia. These trade agreements include free trade agreements, free and preferential trade agreements, preferential agreements and partial scope agreements.[53]

[53] ***Free Trade Agreement:*** Economic integration in which countries eliminate substantially all tariffs and non-tariff barriers among themselves. ***Preferential Agreement*** : Economic integration in which access to a larger market generally in a more developed country is offered without demands for reciprocity. In the Western Hemisphere we have CBI, ATPA, CARIBCAN, CARICOM-Colombia, and CARICOM-Venezuela. *See* http://www.sice.org/Glossary/GLOSSARY.ASP **Partial Scope Agreement** *See* ALADI CM/ Resolution 2, 12 August 1980, Partial scope agreements:
THIRD. **Partial scope agreements** may refer to trade, economic complementation, agriculture, trade promotion, or adopt other modalities concurring with article 10 of the present Resolution.
FOURTH. **Partial scope agreements** shall be governed by the following general rules:
a) They shall be open for accession to the other member countries prior negotiation;
b) They shall contain clauses promoting convergence in order that their benefits reach all member countries;
c) They may contain clauses promoting convergence with other Latin American countries, in concurrence with the mechanisms established in the 1980 Montevideo Treaty;
d) They shall include differential treatments depending on the three categories of countries recognized by the 1980 Montevideo Treaty. The implementation of such treatments, as well as negotiation procedures for their periodical revision at the request of any member country which may consider itself at a disadvantage, shall be determined in each agreement;
e) Tariff reductions may be applied to the same products or tariff sub-items and on the basis of a percentage rebate regarding the tariffs applied to imports originating from non-participating countries;
f) They shall be in force for a minimum term of one year;
g) They may include, among others, specific rules regarding origin, safeguard clauses, non-tariff restrictions, withdrawal of concessions, renegotiation of concessions, denouncement, coordination and harmonization of policies. Should these specific rules not have been adopted, the general provisions to be established by member countries on the respective matters shall be taken into account; and
h) Agreements calling for commitments on utilization of inputs of the signatory members themselves shall include procedures to guarantee that their application be subject to the existence of adequate conditions of supply, quality and price.
TENTH. Member countries may establish, through the corresponding regulations, specific rules to conclude other modalities of partial scope agreements, other than those foreseen in article 3.
For this purpose, they shall take into consideration, among other matters, scientific and technological cooperation, tourism promotion and preservation of the environment. http://www.aladi.org/NSFALADI/JURIDICA.NSF/1a2678176e84377103256e0100482024/630aeda1271b97f703256e010047fe7d?OpenDocument

Examination of the pertinent treaties shows that intellectual property is present in the text of the majority of them,[54] particularly in the free trade agreements whether in the form of a full chapter devoted to intellectual property or through isolated provisions addressing specific intellectual property issues related to trade.

History shows that, with varying degrees of attention and consideration, during the last century most Latin American nations have been involved in the adoption of regional or sub-regional legislation applicable to intellectual property issues. The last phase in which Latin American nations are involved includes the drafting and adoption of regional intellectual property legislation but now in the context of the adoption of broader instruments represented by trade agreements including free trade agreements.

The experience varies from country to country. There are countries like Mexico who has executed free trade agreements with 43 countries or Chile with 11, that include all type of intellectual property provisions, but there are less experienced countries in this particular area who have only adopted one or two instruments of this nature, like Bolivia or Dominican Republic. It is in this area where comparative law may be a useful tool for those who have not been sufficiently exposed to intellectual property in regional trade agreements. Those who teach international aspects of intellectual property should bring the existence of this sort of agreements to the attention of students who at different levels participate in the drafting and adoption of intellectual property provisions in trade agreements. This will never replace actual experience, but may certainly be a useful tool to expose the inexperienced to this new way in which intellectual property is used in regional and international trade agreements.

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[54] Almost 100 trade agreements signed by Latin American countries include intellectual property provisions either in the form of a full chapter or isolated provisions. Text of the 141 trade agreements may be read I www.sice.org/TRADEE.ASP

Appropriate solutions or attempts in search for appropriate solutions as implemented in free trade agreements executed and published in the Web should be taken into consideration in the drafting and adoption of regional agreements.

At times when the internationalism of TRIPS seems to prevail in all countries of the world, the Brazilian Government insists in that international intellectual property instruments should bear in mind the asymmetric economic power of the countries involved in all sort of regional and international negotiations involving intellectual property including WIPO projects, TRIPS and FTAA negotiations.[55] These realities should be borne in mind at international and regional levels by negotiators, drafters and legislators if they expect the law contained in international and regional instruments to be actually enforced in day to day life, whether punctually and quickly or in stages and gradually.

The incorporation of appropriate provisions showing the good faith of the parties to improve the way in which a particular issue is addressed in the agreement sought to be executed, should also be considered by those involved in the drafting of this sort of documents. Solutions may often be found in the text of trade agreements already executed at a regional level by different countries. Some regional instruments may even be valuable and pragmatic educational tools to address similar issues in similar situations. Professors of international aspects of intellectual property law should be aware of this and should make students aware of these new tools that may be of help in dealing with new

[55] *See* OMPI, *Propuesta de establecer un programa de la OMPI para el Desarrollo: análisis detallado de las cuestiones planeadas en el documento WO/GA/31/11*, Ginebra, 11 al 13 de abril de 2005-07-01. IIM/1/4. 6 de abril de 2005. The position of countries like the U.S.A. and U.K. shows up in the following WIPO documents OMPI, *Propuesta de los Estados Unidos de América para establecer un programa de la OMPI para el Desarrollo*, IIM/1/2, 18 de marzo de 2005 and OMPI *Propuesta del Reino Unido*, IIM/1/5 7 de abril de 2005, OMPI, *Primera Reunión Intergubernamental entre Peridos de sesiones sobre un un programa de la OMPI para el Desarrollo*, Ginera 11 al 13 de abril de 2005.

situations for which nobody in the traditional intellectual property world has been properly or sufficiently trained under conventional approaches to deal with international and regional trade issues involving intellectual property law.

G.- Free Trade Area of the Americas (FTAA-ALCA)

The project to create a free trade area comprising the American continent, that is to say, a free trade area not restricted to a specific sub-region or the Latin American region, but including North America as well, was initiated years ago on the occasion of the Summit of the Americas that took place in Miami in December of 1994 where ministers of trade of 34 nations of the American continent discussed this possibility. The preparatory work towards completion of the project was reviewed four years later in San Jose in 1998. There, the ministers agreed in completing such work by early 2005. It is late June 2005, and important work remains to be done before a final FTAA draft may be considered for a diplomatic conference.

Not unlike previous international, regional and sub-regional trade agreements adopted by the Latin American nations, the FTAA draft addresses the issue of intellectual property in a chapter devoted to this topic. At the time of this writing, the last version available to the public through the official FTAA relates back to November 2003 where a number of sensitive provisions addressing issues of relevance remains within brackets. Also within brackets one can read contradictory proposals where the parties have not reached an agreement.[56]

[56] for a study of the FTAA situation as trademark law is concerned including the topics where the parties have reached an agreement and those where no agreement has been reached and thus remain within brackets, *see* RANGEL ORTIZ Horacio, *Aspectos de propiedad industrial relativos al proyecto para un acuerdo de libre comercio de las américas (ALCA): el caso de las marcas*, in *Estudios sobre propiedad industrial e intelectual y Derecho de la competencia*. *Colección de Trabajos en Homenaje a ALBERTO BERCOVITZ RODRÍGUEZ-CANO ofrecida por el GRUPO ESPAÑOL DE LA AIPPI*, Barcelona, marzo 2005 at pp. 873-893.

Regional and sub-regional trade negotiations in the Americas have always been difficult and complex. The presence of the U.S.A. in these negotiations has made this process more complicated than previous regional trade instruments adopted in the Americas where the U.S.A. was not present. This increased difficulty is owed to the existing disproportion in the countries involved, that is to say, to the asymmetric economic power of the 34 nations participating in this process. Indeed members have contemplated this through the adoption of the GUIDELINES OR DIRECTIVES FOR THE TREATMENT OF THE DIFFERENCES IN THE LEVELS OF DEVELOPMENT AND SIZE OF ECONOMIES in the course of the negotiations.[57] Interestingly, the parties decided to make these guidelines available to the public only until November 1, 2002 when negotiations started long before. Hopefully, the parties realized the *raison d'être* of the published guidelines long before they were published. On the other hand, all countries participating in FTAA would like to have proper access to the market of the U.S.A. whether thorough FTAA or through bilateral understandings.

III.- Enforcement of TRIPS and the Dispute Settlement Mechanism of the WTO: The Latin American Situation.

A.- WTO and TRIPS.

Enforcement of intellectual property provisions was one of the main issues negotiated by members of the General Agreement on Tariffs and Trade (GATT) on the occasion of the Uruguay Round. These discussions took place in the decade that preceded the adoption of the Marrakech Agreement on April 15, 1994 whereby the World Trade Organization was created including Annex IC

[57] *See* Derestricted FTAA.TNC/18, November 1, 2002. http://www.ftaa-alca.org/TNC/tn18_e.asp

which comprised the Agreement on Trade–Related Aspects of Intellectual Property (TRIPS).[58]

B.- Disputes Arising as a Result of an Alleged Violation to the TRIPS Agreement by a Country Member.

The TRIPS Agreement addresses in an express fashion a mechanism to be implemented by members of the World Trade Organization (WTO)[59] towards settling disputes arising as a result of a member's alleged failure to observe the provisions of TRIPS. This mechanism is contained in the Dispute Settlement Understanding (DSU), the provisions of which are contained in Annex 2 of the Marrakech Agreement.

C.- Transitional Arrangements.

Since, as a rule, the provisions of TRIPS Agreement are not effective for all members as from the same date, it follows that the provisions of the Dispute Settlement Understanding cannot be used against all members at this time. With the exceptions noted in the Agreement relative to situations where certain TRIPS provisions apply to all members as from the same date, [60] use of the dispute

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[58] *See RANGEL-ORTIZ Horacio, Intellectual Property and GATT'S Uruguay Round*, Copyright World, Issue Five, Intellectual Property Publishing Ltd., 1989, at pp. 38-40. *See Also:* WATAL Jayashree*, Punta del Este to Marrakesh: The TRIPS Negotating Process* in: *Intellectual Property Rights in the WTO and Developing Countries*, Kluwer Law International, The Hague / London / Boston, 2001, at pp. 11 *et seq*.

[59] *See* Article 64.1 of TRIPS, Articles XXII and XXIII of GATT (1994) and WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) referred to in Article 64.1 of the TRIPS Agreement as the "Dispute Settlement Understanding" (DSU). This Understanding constitutes Annex 2 of the Marrakech Agreement. *See* WIPO publication No. 223 (E), World Intellectual Property Organization, Geneva 1996 at pp. 129 *et seq*.

[60] On the provisions and obligations that were not subject to extension regardless of whether the country member is an industrialized country, a developing country, an economy in transition or a less developed country *see*: CORREA M. Carlos, *Intellectual Property Rights, the WTO and Developing Countries. The TRIPS Agreement and its Options,* Zed Books Ltd., London and N.Y., TWN Third World Network, Penang, Malaysia, 2000 at p. 95. *See also* PIRES DE CARVALHO Nuno, *The TRIPS Regime of*

settlement mechanism is restricted at this time to situations involving developed and developing countries as well as countries in the process of transformation from a centrally-planned into a market, free-enterprise economy (economies in transition).[61] That is to say, to situations involving these countries, where a member has allegedly failed to observe one or more provision of the TRIPS Agreement.[62]

The TRIPS Agreement thus establishes obligations on WTO Members both to provide minimum levels of substantive protection and to provide adequate mechanisms for the enforcement of those prescribed levels of protection. In each case, the obligation of the WTO Member is enforceable by other Members proceedings under the WTO DSU.[63]

D.- Dispute Settlement Mechanism.

Patent Rights, Kluwer Law International, London/The Hague/New York, 2002 at pp. 293 et seq.

[61] In the circumstances contemplated in Article 65.3 of TRIPS. The topic of the transitional periods is discussed by CORREA Carlos M*., Intellectual Property Rights, the WTO and Developing Countries*... at pp. 9, 95, and 209.

[62] The provisions of TRIPS are effective for industrialized nations as from January 1, 1996 (Article 65.1 of TRIPS). Developing countries and countries in the process of transformation from a centrally-planned into a market, free-enterprise economy must apply the provisions of TRIPS as from January 1, 2000. Least developed country members shall not be required to apply the provisions of TRIPS for a period of ten years from the date of application as defined in Article 65.1 of TRIPS.

[63] *See* ABBOTT Frederick, COTTIER Thomas and GURRY Francis, *Dispute Settlement and Enforcement of Rights* in: *The International Intellectual Property System: Commentary and Materials*, part two, Kluwer Law International, The Hague / London / Boston / 1999, at pp. 1569 and 1570. *Also see*: ABBOTT M. Frederick, *WTO DISPUTE Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, in ABBOTT, COTTIER and GURRY, *op. cit*. at pp. 1570 *et seq*.

Three basic stages are contemplated in the Understanding with a view to settling a dispute between members concerning their rights and obligations under the provisions of the Marrakech Agreement including TRIPS,[64] namely

i. Consultations (Article 4, DSU);[65]
ii. Establishment of a panel (Article 6, DSU);[66] and
iii. Appellate review by an appellate body (Article 17, DSU)[67]

E.- Arbitration.

In addition to the dispute settlement mechanism comprising the basic stages referred to above, the Understanding contemplates the possibility that the dispute be decided through arbitration, but not as an alternative to any of the three stages previously mentioned. Instead, binding arbitration is contemplated in the Understanding in situations where neither the parties to the dispute nor the Dispute Settlement Body have been able to reach an agreement as to the period of time within which the recommendations and rulings of the Dispute Settlement

[64] A full explanation of the stages, timing and other details applicable to the implementation of the dispute settlement mechanism contemplated in TRIPS and in the Understanding is presented by WATAL Jayashree, *Intellectual Property Rights in the WTO and Developing Countries*, *op. cit*. at pp. 58-85.

[65] The subject of consultations in the context of the Dispute Settlement Understanding of WTO is discussed in JANSEN Bernhard, *Scope of Jurisdiction in GATT/WTO Dispute Settlement: Consultations and Panel Requests* in Weiss FRIEDL (editor) *Improving WTO Dispute Settlement Procedures: Issues & Lessons From the Practice of Other International Courts & Tribunals*, Cameron May, International Law & Policy, Bondway, London 2000 at pp.45 *et seq*.

[66] The establishment of a panel in the context of the Dispute Settlement Understanding of WTO is discussed in: in CAMERON James & ORAVA Stephen J, *GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement*. *See The Establishment of Dispute Settlement Panels*. FRIEDL (editor) *Improving WTO Dispute Settlement Procedures…* at pp. 210-226.

[67] Appellate review in WTO Dispute Settlement is discussed by VAN DEN BOSSCHE Peter*, Appellate Review* in *WTO Dispute Settlement.* FRIEDL (editor) *Improving WTO Dispute Settlement Procedures… at pp. 305-320*.

Body are to be implemented by the Member concerned. The resolutions of the Dispute Settlement Body, i.e. the recommendations and rulings thereof, are issued by the Dispute Settlement Body after adoption of the panel or Appellate Body report.[68] Expressed differently, arbitration is contemplated in the Understanding not necessarily as a means to settle a dispute resulting from an alleged violations to a TRIPS provision by a member. Arbitration is contemplated in the Understanding as a means to determine the time within which the member concerned should comply with the recommendations or rulings of the Dispute Settlement Body.[69]

F.- The Developing World, the Industrialized World and TRIPS.

At the time the TRIPS provisions were drafted, many believed that the dispute settlement mechanism included in the pertinent drafts and rough drafts were directed to ensure compliance primarily by the developing world, as distinguished from the industrialized world represented by developed jurisdictions like the USA, the EC and Switzerland who wanted the GATT dispute settlement mechanism, as improved in the Uruguay Round, to apply to TRIPS. This belief was reinforced by the opposition from the delegates of many developing countries not only to adopt clear and straight provisions addressing strict observance of intellectual property rights as contemplated in the original drafts and rough drafts, but also to adopt the dispute settlement mechanism proposed by delegates from jurisdictions like the USA, the EC and Switzerland.[70] It was believed in certain circles that the mechanism to actually enforce the provisions of the Dispute Settlement Understanding would not be used before January 1st, 2000 when TRIPS would become effective in the developing world.

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[68] *See* Article 21, 3, c) of the Dispute Settlement Understanding.

[69] *See Ibid*.

[70] The different proposals to settle disputes that were submitted during the Uruguay Round negotiations are discussed by WATAL Jayashree, *Dispute Settlement Under TRIPS* in: *Intellectual Property in the WTO and Developing Countries, op, cit*. at pp. 58 *et seq*.

G.- Use of the Dispute Settlement Mechanism by Industrialized Nations Who Have Filed Complaints Against Other Industrialized Nations Before January 1st 2000.

Recent history and official sources indicate otherwise. While it is true that the Dispute Settlement Understanding has been regularly used after January 1st, 2000, examination of the pertinent sources shows that long before January 1st, 2000 --when all of TRIPS provisions became effective in the developing world--, the mechanisms to settle disputes had already been used in situations involving complaints including requests for consultations on the one hand and for the establishment of a panel on the other, filed by industrialized country members against industrialized country members of TRIPS. That is to say, an instrument that was largely intended to increase the levels of protection primarily in the developing nations and less developed nations, proved to be a useful tool to settle intellectual property disputes under the Dispute Settlement Understanding contemplated in TRIPS also among nations of the industrialized world.

Before TRIPS was adopted, it was often heard that TRIPS contained minimum standards proposed by the industrialized world to the international community in the sense that TRIPS reflected standards of protection already existing in the industrialized world that should be taken as a model of intellectual property protection and enforcement by developing and less developed nations.[71]

[71] At some time the texts that were used to negotiate what later took the form of the TRIPS Agreement, were contained in a document unofficially known by participants in the negotiations as the *Dunkel document* after the name of the Director General of GATT during the Uruguay Round of negotiations, Arthur Dunkel, an able mediator in these negotiations, as the author was able to witness when attending meetings at certain stages of the negotiations including those that took place at GATT headquarters, as adviser of the Mexican Government on intellectual property matters in the Uruguay Round as Representative of the Private Sector. *See* RANGEL-ORTIZ Horacio, *Intellectual Property and GATT'S Uruguay Round, op. cit.* at pp. 38-40. Those interested in having a picture of how the TRIPS Agreement came about, specifically in having access to derestricted official documents from 1986-94 Uruguay Round trade talks may check HISTORY: derestricted Uruguay Round negotiating documents on TRIPS at: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

As early as 1996, when TRIPS became effective in the industrialized world, both the USA and the European Communities requested consultations with Japan for reasons associated to alleged violations in Japan of TRIPS standards of minimum intellectual property protection of sound recordings in Japan. The parties later notified having reached a mutually agreed solution.[72]

In 1997 the USA requested consultations with Denmark for alleged violations of the provisions related to measures affecting the enforcement of IP rights. Four years later, the parties notified having reached a mutually agreed solution. [73]

In 1998 the European Communities, the USA, Switzerland and Australia requested consultations with Canada for alleged violations to TRIPS as far as patent rights are concerned, specifically patent protection of pharmaceutical products. [74]

In the course of 1999 the USA requested the establishment of a panel against Canada for reasons associated to the term of patent protection. [75]

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[72] *See* http://www.wto.org/english/tratop_e/dispu_e/

[73] *Ibid*

[74] *Ibid.*

[75] *Ibid.* In a material published in 1999 the authors assert: "There is no direct precedent within the GATT-WTO for adjudicating claims that a Member has failed to effectively enforce positive legal norms such as those prescribed by the TRIPS Agreement." *TRIPS Agreement Enforcement Obligations,* ABBOTT, COTTIER and GURRY, (1999) *op. cit*. at p. 1570. WTO sources, however, confirm that by 1996 at least the U.S.A., the European Communities, Switzerland and Australia had already instituted dispute settlement proceedings, i.e., enforcement proceedings within WTO against other developed or industrialized nations in the terms referred to in Article 65.1 of TRIPS. Yet, WTO sources do not indicate that such proceedings that had already been instituted by 1999 had resulted in a "direct precedent within GATT-WTO for adjudicating claims that a Member has failed to effectively enforce positive legal norms such as those prescribed by the TRIPS Agreement" by 1999. As to the existing situation after the year 1999, WTO sources indicate that such precedents do exist at this time.

In the same year 1999 the European Communities, Canada, Switzerland and Australia requested consultations with the USA for an alleged violation to TRIPS, specifically by the provision contained in Article 110 (5) of US Copyright law allowing, under certain circumstances, the playing of radio and television music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.[76]

H.- Use of the Dispute Settlement Mechanism after January 1st, 2000.

WTO sources indicate that by mid 2005 the dispute settlement mechanism contemplated in the Understanding has been used in 23 times cases at the request of country members. The same sources indicate that most of these 23 cases were initiated prior to January 1st, 2000. Likewise, WTO sources show that most of the pertinent requests have been filed against industrialized nations or nations pertaining to as group of nations largely regarded as developed or industrialized as distinguished from developing nations. These are the 23 cases:[77]

Argentina, patents, test data, compulsory licensing, safeguards, etc
— *Brought by US*
Argentina, pharmaceutical patents, transition period
— *Brought by US*
Brazil, "local working" of patents and compulsory licensing
— *Brought by US*
Canada, pharmaceutical patents
— *Brought by EC*
Canada, term of patent protection
— *Brought by US*
Denmark, enforcement, provisional measures, civil proceedings

[76] *See* http://www.wto.org/english/tratop_e/dispu_e/

[77] *See* http://www.wto.org/english/tratop_e/dispu_e/

— *Brought by US*

EC, patents for pharmaceuticals, agricultural products

— *Brought by Canada*

EC, trademarks and geographical indications (agricultural products)

— *Brought by Australia*

EC, trademarks and geographical indications (beer)

— *Brought by US*

EC/Greece, motion pictures, TV, enforcement

— *Brought by US*,

EC/Ireland, copyright and neighbouring rights

— *Brought by US*

India, patents, “mailbox”, exclusive marketing

— *Brought by EC*

— *Brought by US*

Ireland, copyright and neighbouring rights

— *Brought by US*

Japan, sound recordings intellectual property protection

— *Brought by EC*

— *Brought by US*

Pakistan, patents, “mailbox”, exclusive marketing

— *Brought by US*

Portugal, term of patent protection

— *Brought by US*

Sweden, enforcement, provisional measures, civil proceedings

— *Brought by US*

US, discrimination in Patents Code

— *Brought by Brazil*

US, Section 110(5) — copyright of music in bars

— *Brought by EC*

US, Section 211 Omnibus Appropriations Act (Rum)

— *Brought by EC*

US, Section 337 of 1930 Tariff Act
— *Brought by EC*

I.- Complaints Filed Against Industrialized Country Members.

As noted, WTO sources indicate that during the time that the TRIPS Agreement has been in force, country members have filed 23 complaints. From this group of 23 complaints, it appears that the majority of them, namely 17, have been filed against country members that are generally identified as industrialized nations such as:

Canada
USA
Japan
Denmark
EC (including Greece, Ireland, Portugal and Sweden)[78]

That is to say, contrary to what was speculated in the past, the majority of the respondents in the complaints where the Dispute Settlement Mechanism has been used are not developing nations, but developed nations.

J.- Complaints Filed Against Developing Country Members Including Latin American Country Members.

The remaining 6 cases involve complaints where the respondents are identified as developing countries, namely

Argentina
Brazil
India
Pakistan[79]

[78] *See Ibid*

K.- Subjects Involved in the Disputes.

As to the subjects involved in the dispute settlement proceedings initiated within WTO, it is interesting to note that approximately half of the disputes involve patent rights, whereas the remaining half is distributed in complaints involving copyright and trademark issues as well as complaints involving procedural and substantive issues related to the enforcement of IP rights.[80]

According to WTO language, disputes related to the subject matter governed by the TRIPS Agreement are classified pursuant to any of these four specific groups namely

Patents
Trademarks
Copyright
TRIPS Enforcement

As far as the specific subject matter of the complaint is concerned, the requests for the dispute settlement mechanisms instituted between 1996 and 2003 has been classified as follows pursuant to WTO sources:

Patents

Argentina, … and test data, compulsory licensing, safeguards, etc
— *Brought by US*

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[79] *See Ibid*

[80] By mid 2005 patent-related disputes constituted half of all TRIPS-related disputes filed so far with the Dispute Settlement Body. Actually, It should be expected that patent matters might constitute the most important issue to be addressed under the Dispute Settlement Mechanisms, because negotiations on international standards of patent protection had the highest importance and priority in the TRIPS negotiations of the Uruguay Round. PIRES DE CARVALHO, *The TRIPS Regime of Patent Rights, op cit*., at p. 287.

Argentina, pharmaceuticals, transition period

— *Brought by US*

Brazil, “local working” and compulsory licensing

— *Brought by US*

Canada, pharmaceuticals

— *Brought by EC*

Canada, term of protection

— *Brought by US*

EC, pharmaceuticals, agricultural products

— *Brought by Canada*

India, “mailbox”, exclusive marketing

— *Brought by EC*

— *Brought by US*

Pakistan, “mailbox”, exclusive marketing

— *Brought by US*

Portugal, term of protection

— *Brought by US*

US, discrimination in Code

— *Brought by Brazil*

Trademarks

EC, … and geographical indications (agricultural products)

— *Brought by Australia*

EC, … and geographical indications (beer)

— *Brought by US*

Copyright

EC/Ireland, copyright and neighbouring rights

— *Brought by US*

Ireland, copyright and neighbouring rights

— *Brought by US* US, Section 110(5) — music in bars

— *Brought by EC*

TRIPS enforcement

Denmark, provisional measures, civil proceedings

— *Brought by US*

EC/Greece, motion pictures, TV

— *Brought by US*,

Sweden, provisional measures, civil proceedings

— *Brought by US*

Clearly, the complainants users of the Dispute Settlement Understanding have focused on patents more than in any other IP institutions, as the subject matter which has triggered the largest number of requests to institute a dispute settlement mechanism.

L.- Country Members Who Have Filed Complaints.

WTO sources indicate that from 23 dispute settlement proceedings initiated pursuant to the Dispute Settlement Understanding contemplated in TRIPS, the USA has initiated 14 of them. That is to say, more than half of the complaints have been filed by the USA against other countries, this presenting the USA as the number one complainant in the international community.

IV.- Conclusions.

Now, I shall attempt to draw some general conclusions.

1.- The adoption of regional intellectual property treaties in Latin America goes back to the end of the Nineteenth Century shortly after the Paris Convention and the Berne Convention were adopted in two diplomatic conferences where Latin America was represented in a symbolic way.

2.- During approximately one century, regionalism grew up in Latin America through the adoption of a number of regional and sub-regional instruments to an extent not known in other regions of the world.

3.- Since the adoption of the Paris Convention in 1883 and the Berne Convention in 1886, it took almost one century in order for the Latin American nations to accede to these two multilateral treaties.

4.- The adoption of TRIPS in Latin America and the obligation to implement the pertinent undertakings not later than the year 2000, with the exception of Haiti who benefited of the longer term for less developed nations, contributed to harmonized intellectual property legislation in Latin America.

5.- The obligation to implement TRIPS standards in the Latin American region by January 2000 led to the derogation of a number of provisions contained in domestic statutes as well as to the abrogation of certain domestic statutes. Additionally, compliance with TRIPS obligations implied the need to abrogate some regional instruments previously adopted by members either because such regional instruments did not meet TRIPS standards or because some of them were in violation of TRIPS. This seems to be the case of two important sub-regional treaties represented by the San Jose Industrial Property Central American Convention of 1968 and the Andean community Decision 344 abrogated by Decision 486 currently in force.

6.- The abrogation of sub-regional instruments in Latin America by TRIPS action, whether expressly or by implication, has not in anyway eliminated regionalism in Latin America as far as intellectual property is concerned. At about the same time when old sub-regional instruments disappeared and TRIPS becomes effective in the region, Latin American states continue to adopt an important number of regional and sub-regional trade agreements most of which include either a full chapter addressing intellectual property issues in he region or

at least a limited number of provisions addressing similar issues in a broader way. This has been achieved through the adoption of free trade agreements tending to eliminate or reduce tariff and non-tariff trade barriers.

7.- Regional treaties and trade agreements in Latin America often include provisions that are not addressed either directly or indirectly in multinational instruments governing intellectual property. This is the case of appellations of origin problems that involve countries like Chile and Peru and the business transactions that these two countries have with Mexico. The issue is addressed in the Free Trade Agreement between Mexico and Chile (Re: PISCO Appendix 15-24).

8.- Trade agreements where one of the parties is an industrialized nation, in addition to addressing issues applicable to trademarks and other trade identifiers, as a rule include provisions addressing patents, inventions and innovations issues. These type of issues rarely show up in the free trade agreements executed between and among Latin American nations where intellectual property issues focus on trademarks, trade identifiers, author's rights, and unfair competition, as well as on appellations of origin and geographical names issues not addressed in other type of multinational instruments to the satisfaction of some Latin American nations. In the end, these regional instruments are nothing more than trade agreements.

9.- From time to time, regional devices in Latin America have been disapproved and condemned by individuals who believe that the world should be regulated by one single rule. Individuals who believe the world should be standardized have some times expressed disapproval with respect to the adoption of regional agreements in Latin America, and not surprisingly have extended this opinion to other regional devices such as the constitution of a Latin American group of intellectual property lawyers forty years ago. Speaking on behalf of the Bureau of AIPPI, in the official ceremony on the occasion of the constitution of this Latin

American group, an individual as clever and intelligent as Dr. Ladas expressed disapproval on the idea of the constitution of this group raising as an excuse that AIPPI was properly doing its job in all regions of the world.[81] Forty years later few believe these words were ever pronounced by this scholar who devoted an important part of his writings to the study of regional aspects of intellectual property.

10.- Nobody should question the need of an international constitution of intellectual property represented by Paris and Berne. For this, however, may not follow that regional agreements should be discouraged in Latin America, Africa, Asia or Europe. Regional instruments are indispensable tools that include proposals and solutions for regional issues that no multinational treaty may properly address.

11.- While multinational instruments like TRIPS, Paris and Berne have significantly contributed to harmonize and to increase international standards of protection of intellectual property, and even if by so doing various regional instruments in Latin America had been sacrificed through abrogation, multilateralism has not and should not even attempt to put an end to the adoption and development of regional understandings as those currently existing in different regions of the world whether in the form of trade agreements or intellectual property treaties. This is the case of the various intellectual property *Decisions* in the Andean Community, as well as of other regional understandings in the world like Benelux, the Community Trademark, the European Patent,

[81] The text of the paper read by Dr. Stephen P. Ladas on behalf of the Bureau of ASIPI when addressing the founders of the Inter American Association of Industrial Property (ASIPI) during the session that took place in Mexico City on April 15, 1964 is reproduced in LADAS Stephen P., *Objetivos y tareas de la ASIPI*, en *Revista Mexicana de la Propiedad Industrial y Artística*, No. 3, México, D.F., enero-junio 1964, at pp. 31-36. Much more favorable to the project were the words expressed by Dr. Arpad Bogsch speaking on behalf of BIRPI. *See* BOGSCH Arpad, *Mensaje a la ASIPI*, en *Revista Mexicana de la Propiedad Industrial y Artística*, No. 3, México, D.F., enero-junio 1964, at p. 38.

OAPI, ORAPI in Africa, the Eurasian Patent, and the efforts to adapt similar patterns in the area formed by the Association of South East Asian Nations (ASEAN).

12.- The last efforts to reach regional understandings in the intellectual property field in the Americas is represented by the project to create a Free Trade Area of the Americas (FTAA-ALCA) which includes not only Latin America but also the U.S.A. and Canada. Not unlike other trade agreements of our time, the draft for a Free Trade Area of the Americas also contains a chapter devoted to intellectual property issues intended to apply in the region among members.

13.- Not surprisingly, examination of the relevant draft shows that virtually all substantive, significant or sensitive provisions in the region appear to be in the form of mere proposal within brackets, not for details where the parties have not reached an agreement, but more importantly, because the proposals are often contradictory and apparently irreconcilable.

14.- That the representatives of a region formed by 34 countries in the Americas cannot reach agreements in generalities and specifics of a topic as sophisticated as intellectual property should not surprise anyone at times when a smaller group of European nations cannot agree on broader premises like those contained in the proposed Constitution that the people of two important nations of this region of the world have decided not to ratify.

15.- In the years to come, regional treaties and regional aspects of intellectual property will continue to be an important item in the curricula and courses of study of professors who teach international aspects of intellectual property law whether in the Americas, Europe Africa or Asia.

16.- The dispute settlement mechanism contemplated in TRIPS and the Dispute Settlement Understanding referred to in TRIPS, has been used in 23 complaints filed in the period 1996-2004.

17.- The majority of the complaints, specifically 19 of them, have been filed before January 1st, 2000 when all the TRIPS provisions became effective in developed nations and developing countries.

18.- Before January 1st 2000, most of the complaints were filed by developed or industrialized nations against developed or industrialized nations. A minority of the complaints filed before January 1st, 2000 was used against developing nations where two Latin American nations are included, namely the two largest economies of the South of Latin America.

19.- While the dispute settlement mechanism has been used against developed country members and developing country members, complaints under such mechanism have been filed almost exclusively by developing nations. Only one developing country member represented by a Latin American nation has filed a complaint, namely the complaint filed by Brazil against the USA.

20.- The dispute settlement mechanism is not a mechanism that has been used by developed country members in situations involving violations to TRIPS standards primarily by developing country members. Instead, the dispute settlement mechanism is a mechanism that has been used primarily by developed or industrialized country members against developed or industrialized country members.

21.- Approximately half of the complaints filed in the context of the dispute settlement mechanism of TRIPS are related to patent rights. The remaining complaints have to do with copyright and trademark rights, as well as with other TRIPS enforcement situations.

22.- More than half of the complaints reported in the context of the dispute settlement mechanism of TRIPS have been filed by the USA (14). The remaining complaints have been filed by the EC, Australia, Canada and Brazil.

23.- While the way in which TRIPS provisions has been drafted is far from a model of legal drafting, examination of the way in which the relevant provisions have been enforced both in developed and developing nations, shows that TRIPS has contributed to increase the levels of protection of intellectual property rights in the developing world and in the industrialized world, and therefore indications exist in the sense that TRIPS has also contributed to reduce tension among the members of the international community, or at least to use it in a more productive and constructive way, including the implementation and enforcement of the dispute settlement mechanism contained in TRIPS and in the Dispute Settlement Understanding.

24.- If a contraction of tension and anxiety further contributes to reduce poverty and to improve the lives of the poor in our countries --which is what development is all about--, the international community, including the international academic community, should support all efforts directed to the improvement and advancement of the international intellectual property system.

Santiago de Compostela, October 7, 2005

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