

# Preface

This book brings together 14 contributions that developed from presentations and discussions during a workshop organized by the Max Planck Institute for Intellectual Property and Competition Law (MPI) with the title: *Economic Partnership Agreements of the EU: A Step Ahead in Reforming International IP Law?* The workshop was held in Frauenchiemsee (Germany) in June 2011 and gathered leading academics, practitioners, and trade negotiators from the EU and its trading partners.

As the title suggests, the main focus of the workshop and previous research at the MPI concerned a new generation of bilateral and regional agreements pursued by the European Union (EU) which have emerged after the adoption of the European Commission's Strategy for the Enforcement of Intellectual Property Rights in Third Countries in 2004 and the launching of the Global Europe Strategy in 2006. Examples are the Economic Partnership Agreement (EPA) signed in October 2008 between the then European Community (EC) and the group of CARIFORUM countries (EU-CARIFORUM EPA) and the trade agreement the EU signed with Colombia and Peru in June 2012. At the core has been the question whether the intellectual property (IP) provisions found in this new generation of EU agreements actually live up to the development rhetoric and take into account the specific developmental needs of the EU contracting partners. This question becomes particularly acute in the framework of redefined trade relations between the EU and the group of African, Caribbean and Pacific (ACP) states which includes a large number of very poor countries in Africa.

However, the workshop presentations and discussions indicated a need to go beyond the agreements the EU is negotiating with developing countries. International agreements which include IP and set standards beyond those of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) have proliferated since the early nineties. This proliferation has gained such speed in the last five years that the IP standards found in these agreements, the implications for various areas of international law, and the implementation of their IP obligations demand for a broader perspective which goes beyond critically analysing potential elements for reforming the international IP system.

This broader perspective is expressed in the four parts of the book. Part I provides an overview on IP protection and enforcement standards in various types of economic partnership- and free trade agreements. It covers not only the historical context in which they need to be understood and the main substance of the IP-related obligations to be found in these agreements, but also their systemic implications and their role in the wider context of international IP norm-making. Part II then focuses on the impact IP provisions in bilateral and regional agreements have on the multilateral IP system and on various other areas of international law. Addressed are areas where the impact appears profound—such as the law of- and the on-going negotiations in the World Trade Organization (WTO) and international human rights law.

In Part III, several contributions examine the original core research question: Do especially provisions in the new generation of EU agreements take a distinct, more development-oriented and integrated approach that contains elements for a reform of the international IP system? Some provisions especially in the EU-CARIFORUM EPA on the role of sustainable development and on the flexibility to design domestic IP systems in accordance with the level of development sound promising. Their development, promise, however needs to be judged against obligations, for example on IP enforcement, that go significantly beyond the standards of TRIPS. The last part (Part IV) finally turns to an often neglected area on IP law and policy in the context of trade agreements: the questions that surround the implementation of IP provisions in the domestic law and institutional setting of the contracting parties. Here, the contributions not only analyse problems that developing countries may incur, but they also place significant emphasis on implications and problems of implementing IP provisions in the EU.

Part I starts with a contribution by *Daniel Gervais* in which he tries to situate current issues in the development of international IP norms and how this might affect bilateral IP negotiations between the EU and its trading partners. *Pedro Roffe* then draws eight lessons from recent US and EU FTAs negotiations with TRIPS-plus obligations and highlights the impact of these FTAs on the international system and the multilateral process in general. One major lesson he underlines is the asymmetry that exists between FTAs partners in different areas and levels which frequently allows stronger countries to transplant IP rules without the built-in checks and balances to their developing trading partners. In her contribution, *Jayashree Watal* focuses on the deficiencies in TRIPS negotiations for strengthening IP protection and subsequent gains made in FTAs in the form of TRIPS-plus obligations from the perspective of both developed and developing countries. In light of the asymmetries discussed by *Pedro Roffe* and the developmental concerns about strong IP protection and enforcement, she addresses the question why developing countries seek and accept FTAs with TRIPS-plus IP chapters and what effect FTAs could have in multilateral IP negotiations on the positions of developing countries that are party to FTAs.

Part II starts with a debate on the impact of TRIPS-plus obligations in FTAs on various areas of international law. At first, *Marco Alemán* measures the influence of TRIPS-plus obligations on other international IP Law by using different tools and

yardsticks—such as the general principles of international law, the WTO dispute settlement bodies' decisions and IP negotiations in international fora. *Carlos Correa* then analyses in his contribution the extent to which TRIPS-plus obligations influence WTO law, particularly through treaty interpretation adopted by panels under the dispute settlement mechanism. In their conclusions, *Correa* and *Alemán* agree that the interaction between FTAs TRIPS-plus provisions and WTO Law is significant, but the impact of the former on the latter may be rather limited. On international human rights law, *Peter Yu* gives a comprehensive picture of the problems arising from the interface between intellectual property protection and human rights, in particular impediments to greater protection of human rights caused by FTAs TRIPS-plus provision, before offering a set of normative and systemic adjustments that aim to resolve such problems. The debate of Part II ends with a contribution by *Souheir Nadde-Phlix* on IP protection in EU FTAs vis-à-vis IP negotiations in the WTO. Her analysis of FTA commitments on geographical indications (GIs), plant varieties, biodiversity and traditional knowledge (TK)—contrasted with related IP negotiations at the WTO—suggests that the EU is taking advantage of the stagnancy of the Doha round of trade negotiations: In order to improve its position in the multilateral negotiations, it appears to be using the negotiated outcomes in FTAs as a means for generating a critical mass of supporters in the WTO. This IP bilateralism is a 'disguised multilateralism'—which suggests that all WTO Members may be better off in getting back to the multilateral table before potentially conflicting bilateral or regional outcomes make future consensus in the WTO even more difficult.

Part III places a spotlight on the provisions in EU FTAs and scrutinises whether they may serve as elements for reforming the international IP system. It starts with a contribution by *Frederick Abbott* in which he argues that some 'development-friendly' provisions in these agreements (such as having sustainable development as treaty objective, enhanced protection of GIs, adherence to the Madrid system and rules on the transfer of technology) may provide certain benefits to developing countries. However, they must be judged against the costs developing countries incur by accepting standards of IP protection and enforcement that primarily serve the interests of their trading partner. He is overall sceptical whether this approach or the individual provisions can serve as models for the progressive development of international IP law. In his contribution, *Keith Maskus* adds an economic dimension to the discussion by offering a qualitative exploration of two recent EU FTAs with regard to their abilities for promoting or impeding economic development, in particular by focusing on how certain IP provisions in these agreements might affect prospects for promoting innovation and development in the developing country partner. This is followed by an analysis by *Thomas Jaeger* of the IP enforcement chapters in recent EU FTAs and EPAs which shows that these chapters mirror enforcement rules in the EU and sometimes go beyond the Anti-Counterfeiting Trade Agreement (ACTA). Only the Association Agreement with Central American countries follows a more moderate approach which to some extent adopts a level of enforcement closer to the one found in TRIPS.

Part IV starts with a contribution by *Christian Pitschas* who analyses the relationship between EPAs and the EU trade policy by addressing the three main issues that affect this relationship: the objectives of EU trade policy, the EU competences in the area of trade policy and the implementation of EPAs within the internal legal order of the EU. The analysis points to the limits of the EU's Common Commercial Policy (CCP) competence and highlights the areas where—despite the development rhetoric—the EU is asking for 'WTO-plus' commitments outside IP. In his contribution *Josef Drexler* questions the general assumption that EU FTAs with TRIPS-plus standards merely oblige the EU's trade partners to take implementation measures and change their IP laws, while no such implementation requirements or changes are needed on the EU side. A close analysis of the obligations in these agreements on criminal sanctions, genetic resources, transfer of technology, competition law and concerning the general principle of sustainable development suggests that in cases where changes are required, the EU seems to overlook the need for implementation. *Tuomas Mylly* then shows how the EU's exclusive CCP competence covering "commercial aspects of intellectual property" can be used to regulate IP law *within* the EU through EU FTAs. In analysing the constitutional functions of the EU trade treaties and their rules on IP, he notices that—compared to TRIPS which generally lacks direct effect in the EU—the IP chapters in new EU FTAs could have significant effects on the landscape of EU IP law. Finally, *Xavier Seuba* highlights that the exportation of IP standards from the EU to developing countries through FTAs raises various implementation issues. He discusses several examples where such issues play out in the areas of politics (power asymmetries), economics (direct costs and welfare implications) and law (legal challenges, possible interpretations).

Overall, the careful reader will notice a sceptical tone in most, if of all, contributions about how regional and bilateral trade (and development) agreements in general and the EU ones in particular push the international IP system and its domestic implementation in national IP laws further. In our view, this should not be understood as paternalistically teaching those who negotiate these agreements about what is in their best interest and whether the overall negotiated outcome—including trade and other benefits—represents a good 'deal'. We live now in a post-TRIPS era where international IP rules commonly emanate from agreements where those rules are simply one bargaining chip that is traded off against other, in substance unrelated rules and commitments. Maybe, however, these 'deals' should not be taken for granted as the default route of international IP norm-setting. In light of the findings of this book, maybe we should reconsider whether they really lead to 'good' international IP norms. Given the political economy of international trade negotiations, the most difficult part of course then is to envision realistic alternative ways towards a reform of the international IP system.

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Josef Drexl  
Henning Grosse Ruse-Khan  
Souheir Nadde-Phlix

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