1 The unique position of small market economies

> IP for Development is an emphatic articulation of the notion that IP is not an end in itself but rather is a tool that could power countries' growth and development. WIPO, as the lead United Nations agency mandated to promote the protection of intellectual property through cooperation among states and in collaboration with other international organizations, is committed to ensuring that all countries are able to benefit from the use of IP for economic, social and cultural development. Implied in this are the notions of balance, accessibility and reward for creativity and innovation.[1]

> [T]he principle of proportionality is one of the more basic principles underlying the multilateral trading system, although there is no explicit reference to it in WTO law. However, the basic idea of proportionality, i.e. the due balancing of competing rights, is reflected several times in WTO agreements.[2]

How should a country use intellectual property for its own development? How should a country ensure its local publishing industry can produce high-quality literature, works of art and creative products and that its consumers have access to such goods from overseas at affordable prices? How can a country ensure that it has a local film industry or a local sound-recording industry and that its citizens have good access to movies and music from Hollywood and London? How can a country ensure that its own authors and copyright owners are able to thrive and produce works for the local culture? How can the environment be favourable to creating works of authorship that are both unique to that culture and have the potential to, but not necessarily need to, transcend national boundaries? How should a country ensure that its citizens can purchase high-quality pharmaceuticals even when they are not manufactured locally? How can a country retain its publicly funded health service and

[1] WIPO, 'Intellectual Property for Development', available at www.wipo.int/ip-development/en/agenda/.
[2] M. Hilf, 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?', *Journal of International Economic Law*, 4 (2001), 111–130, at 120–121.

subsidised pharmaceutical systems? How can a country encourage research and development within its borders and also ensure that technology is transferred from overseas? How can local businesses ensure that their brands and trade marks help them achieve a competitive edge in the global marketplace? How can businesses be structured so as to achieve optimum gains from intellectual property when the local market is of a small scale and the international market may give better returns?

These are but a few questions that many nations' intellectual property policy makers and lawmakers may ask. These are not easy questions to answer and the answers will not be the same for all countries, or even for all intellectual property issues within a single country or regional grouping of countries. The relationship between protecting intellectual property and using intellectual property for economically, culturally and socially desirable outcomes, both within a country and across national borders, is at the heart of global issues in intellectual property.

In much of the literature, and in the political arena, the debate over the parameters of intellectual property is characterised as a contest between the intellectual property 'haves', predominantly developed countries, and the intellectual property 'have-nots', some developing countries and least-developed countries.[3] Such characterisation has many flaws. Of course, a degree of generalisation may be necessary, but in reality the 'have-nots' are not without intellectual property. They may lack access to developed world intellectual property and its related products because of both availability and cost, but they may have their own intellectual property, which may or may not be recognised at the international level. One such example is the protection of traditional knowledge, which is discussed in Chapter 9 in this book. In addition, large developing countries also compete in certain industries with large developed countries. The generic pharmaceutical industry is an example. The picture is not simple.

Small market economies

In this global intellectual property debate, there are groups of countries that wield very little international political power but often display ingenuity in balancing competing interests in the intellectual property field

[3] These terms are used by the United Nations. There is no general rule for the designations 'developed' or 'developing' country. Usually Europe, Canada and the United States in North America, Singapore and Japan in Asia and Australia and New Zealand in Oceania are considered 'developed'. For international trade purposes, Israel is a developed country. See United Nations, 'Standard Country or Area Codes for Statistical Use', Series M, No. 49, Rev. 4 (United Nations Publication, Sales No. M.98.XVII.9), available at http://unstats.un.org/unsd/methods/m49/m49regin.htm.

and consequently have sometimes demonstrated a unique approach in their intellectual property laws. These are the small market economies. These economies exhibit unique features which are relevant to how they balance competing interests in intellectual property. They are developed but small, so import much intellectual property, have consumers who can pay high prices and are pockets of innovative activities that are fed into the global value chain. The following three 'political' quotes are illustrative.

> Another outstanding feature . . . is to note that Israel is spending more money on research and development (as a percentage of GDP) than any other country. The success of the Israeli high-tech sector is well-known. Those of us who use Skype may recall that the VoIP technology (the Voice over the Internet Protocol) was invented in Israel. Israel has also highly-developed desert agriculture with a lot of expertise in irrigation and water conservation. The drip irrigation that we all know was developed on an Israeli kibbutz. In short, there is probably a lot that Members can learn from Israel when it comes to innovation. So may I put the question to you, what is the Israeli recipe for stimulating innovation and growth, and what benefits do you see for trade?[4]

> In 2007, P&G chose Singapore as the location for its first perfume manufacturing facility in Asia. As a plant which would lead the implementation of new process workflows and technologies for P&G worldwide, it plays a prominent role in driving the company's global perfume business. The Singapore facility is P&G's most technologically-advanced plant, with state-of-the-art innovations such as advanced real-time inventory and production control systems that monitor the production process and reflect changes instantly.[5]

> Ingenuity and innovation are characteristics Kiwis are renowned for, and the tourism industry in New Zealand is no exception. The Hamilton Jet, the ski plane, bungy, blokart and Zorb are all examples of Kiwi inventions that have pushed traditional boundaries of travel and embody the Kiwi sense of adventure. These examples have provided more unique ways to experience some of New Zealand's most scenic locations. New Zealand continues to push innovation in a range of other fields, from its traditional export industries such as agriculture and dairy, to newer growth areas such as fresh cuisine and award-winning wine.[6]

This book is concerned with how small market economies balance competing interests in intellectual property law and what the approach of such economies shows about global issues in intellectual property law. The book does not suggest that small market economies always come up with the perfect solution or can solve global intellectual property issues.

[4] Summary of Israel Trade Policy Review (WT/TPR/M/272), available at www.keionline.org/node/1576.
[5] Future Ready Singapore, 'Proctor & Gamble Innovating for Asian Consumers', available at www.edb.gov.sg/content/edb/en/case-studies/pg.html.
[6] 'Kiwi Innovation', available at http://media.newzealand.com/en/story-ideas/great-kiwi-inventions/.

Rather, an examination of how small market economies deal with intellectual property issues reveals some techniques and legal innovations that are effective experiments in balancing global issues.

Small market economies take international commitments seriously. They are not at liberty to ignore their international obligations and they do not do so. Such 'luxuries' can be the vice of large economies. Indeed, small market economies are critically aware of their international obligations and seek to comply with them. Much of this is because these countries cannot go it alone. They make up for what they lack in size, and the consequent issues of scale, by utilising the experience and where possible the marketplaces of the world. These countries are highly dependent on international trade.

Policy makers and lawmakers in small market economies often pay considerable attention to the detail of international law. New Zealand, for example, has brought disputes to the World Trade Organization (although not about intellectual property) and has participated as a third party in many disputes. It has never, however, had a dispute brought against it. This could be for any number of reasons, but the domestic approach shows significant concern with complying with international trade agreements. Singapore's record at the World Trade Organization is also that it has never had a dispute brought against it.[7] Small market economies are good global citizens and in varying degrees are highly dependent on international trade for their economic survival. This attention to the detail of international obligations is also found in small market economies' approach to intellectual property. This makes them good test tubes for finding the balance between competing interests because, from the outset, balancing national interests with global commitments is an integral part of the policy- and law-making process. To understand the process of weighing and sometimes accommodating the competing interests involved in intellectual property, it is necessary to consider some aspects of the 'developed versus developing countries' debate and the international intellectual property law framework.

Developed versus developing interests

Global issues in intellectual property law are many. There are issues about both the level of protection and the detail of protection. While the United States and the European Union, as substantial producers of intellectual

[7] New Zealand has been the complainant in eight cases, the respondent in none and participated as third party in over 30 disputes. Singapore has once been a complainant, never a respondent and a third party in over ten disputes, see World Trade Organization, 'Disputes by Country/Territory', available at www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

property and related products and services, are often in agreement that relatively high levels of intellectual property protection are desirable, there are many areas in which they disagree over what that protection should entail. Two examples are whether exclusions should be allowed from the scope of what is otherwise patentable[8] and whether databases that are not original creations should be protected.[9]

Although these disagreements[10] between the EU and the United States give rise to significant disputes, these large economies are frequently allies in the push for increased intellectual property standards globally. That allegiance is seen in regard to the major international agreements, such as negotiation for the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),[11] and the EU and US approaches to negotiating TRIPS-plus free trade agreements (FTAs),[12] or in the case of the EU's so-called economic partnership agreements (EPAs).[13]

[8] The EU, for example, excludes patents which are contrary to *ordre public* and 'plant or animal varieties or essentially biological processes for the production of plants or animals' and 'methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body', see European Patent Convention, art 53, as amended by the Act revising the European Patent Convention of 29 November 2000. Such exceptions are compliant with the WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; 33 ILM 1197 (adopted on 15 April 1994, entered into force 1 January 1995), 'TRIPS Agreement', arts 27:2 and 27:3.

[9] The TRIPS Agreement, above n 8, art 10.2 provides that members shall protect databases that are original creations. In addition, the EU provides a right to prevent databases from unfair extraction, see Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. Disagreement exists over whether this is a TRIPS–plus or a sui generis right which is separate from TRIPS. Some commentators have argued that such protection is intellectual property and ought to be subject to the national treatment obligations of the TRIPS Agreement. See P. B. Hugenholtz, 'Implementing the European Database Directive', in Jan J. C. Kabel and Gerard J. H. M. Mom (eds.), *Intellectual Property and Information Law – Essays in Honour of Herman Cohen Jehoram,* (Kluwer, The Hague/London/Boston, 1998), pp. 183–200 and J. H. Reichman and P. Samuelson, 'Intellectual Property Rights in Data?', *Vanderbilt Law Review*, 50 (1997), 49–166 at 51.

[10] The difficulties over agreeing to a framework for the protection of audio-visual works make an example. The dispute at the WTO over exceptions to copyright is another example. See WTO Panel, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000.

[11] See discussion of the Uruguay Round of negotiations leading to TRIPS, D. J. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 4th edn (Sweet & Maxwell, Croydon, UK, 2012), paras 1.19–1.22.

[12] The United States has openly stated that its policy is to use bilateral FTAs in order to increase intellectual property standards. For a discussion of the strategic use of bilaterals, see S. K. Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (Cambridge University Press, 2003), at Chapter 6, 'Life after TRIPS Aggression and Opposition', at 121.

[13] The European Commission states that EPAs 'between the EU and African, Caribbean and Pacific (ACP) regions are aimed at promoting trade between the two groupings – and

Developing countries, particularly China, India and Brazil, have generally been against this push for increased standards because high standards of intellectual property protection can hinder development of local industry and local research.[14] There are, however, an increasing number of intellectual property owners in these countries. China topped some aspects of the World Intellectual Property Office (WIPO) patent statistics in 2012 and 2013.[15] As countries become less intellectual property users and more producers and creators of intellectual property, their approach to protection may change.[16]

One central example of the developed versus developing country debate is the numerous issues over pharmaceutical patents, including the availability of patents for second and subsequent uses of known pharmaceuticals[17] and the general affordability of and access to medicines. Underlying this sort of developed versus developing country debate is a series of tensions which may be presented as broad questions. These include:

- How should the frequently competing interests of developed and developing countries be balanced, or accommodated in a way that allows certain flexibilities, in international intellectual property law so that

through trade development, sustainable growth and poverty reduction'. See 'Economic Partnerships', available at http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/.

[14] See R. C. Dreyfuss, 'The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking' (30 July 2009), IILJ (Institute for International Law and Justice) Working Paper 2009/5, NYU School of Law, Public Law Research Paper No. 09–53, available at SSRN, ssrn.com/abstract=1442785 or dx.doi.org/10.2139/ssrn.1442785.

[15] See 'Patent Statistics', available at www.wipo.int/ipstats/en/statistics/patents/.

[16] This has certainly been the experience of the past, where countries such as the United States have had low protection until they developed their economies. One commentator has said, for example, 'In the nineteenth century in the US and on the continent, infringement and unauthorized borrowing were an important part of American industrial development. The British were the authors of much copyright piracy because they prohibited the sharing of British technological patents with American infant industries. US entrepreneurs borrowed, adapted and stole British patented processes whenever they could.' See D. Drache, 'Trade Development and the Doha Round: A Sure Bet or a Train Wreck?', Centre for International Governance Innovation, Working paper no 5 (March 2006), at 25, available at https://www.cigionline.org/publications/2006/3/trade-development-and-doha-round-sure-bet-or-train-wreck; Professor Gervais discusses the stages of development and their relationship with the movement from accessing intellectual property, to imitation, to developing local intellectual property in D. J. Gervais, 'IP Calibration', in D. J. Gervais (ed.), *Intellectual Property, Trade and Development*, 2nd edn (Oxford University Press, 2014), pp. 86–114.

[17] Under the TRIPS Agreement, above n 8, art 27.1 members must make patents available in all fields of technology. The TRIPS Agreement does not define this any further. In some countries, when a new use of a known pharmaceutical is found, it may be patentable. Other countries reject this approach. New Zealand, Singapore and Israel protect new uses of known pharmaceuticals. For a general discussion, see S. Frankel, *Intellectual Property in New Zealand*, 2nd edn (Lexis Nexis, Wellington, 2011), at 412–416.

countries can appropriately adjust their domestic law to meet their economic and social needs?
- How should the players in the global system, whether they are large or small, or developed or developing countries, maximise their ability to produce and use intellectual property?
- Does the global intellectual property system make it possible for all to utilise intellectual property or does the system disadvantage intellectual property users and those more heavily reliant on importing intellectual property?
- Does the system favour those whose economy is involved substantively in the initial development of patented inventions and copyright creations?
- Does the international regime encourage innovation or is international patent law a stumbling block for some aspects of innovation?
- Does the international copyright regime support authors or does it hinder much creativity, ensuring that mostly only large creative industries flourish?

These issues are very contentious and not likely to be easily resolved. They have even evoked the suggestion that intellectual property law's existence is, or aspects thereof are, under threat.[18] There are perhaps threats to the ability of the international system for the time being to reach agreement on some core matters, but those threats do not extend to the foreseeable demise of the intellectual property system. The system may be on shaky ground in some areas and the multilateral negotiations have come to a standstill. This has meant that in recent years the international system has only addressed parts of the law that need change rather than the broader intellectual property picture. At the core of these tensions, however, lies a very strong and well-established international intellectual property regime and at the centre of that regime is the World Trade Organization (WTO) TRIPS Agreement[19] and the WIPO agreements, particularly the Berne Convention for the Protection of Literary and Artistic Works[20] and the Paris Convention for the Protection of Industrial Property[21] (both have also been incorporated into the TRIPS Agreement).[22]

[18] See, for example, R. C. Denicola, 'Mostly Dead? Copyright Law in the New Millennium', *Journal Copyright Society USA*, 47 (2000), 193–208, at 207 and G. S. Lunney Jr., 'The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act', *Virginia Law Review*, 87 (2001), 813–920, at 815.
[19] TRIPS Agreement, above n 8.
[20] Berne Convention for the Protection of Literary and Artistic Works (Paris text), 1161 UNTS 3, 24 July 1971 ('Berne Convention').
[21] Paris Convention for the Protection of Industrial Property, 828 UNTS 303 (adopted on 20 March 1883, entered into force 16 April 1970), as revised at Stockholm (14 July 1967) ('Paris Convention').
[22] TRIPS Agreement, above n 8, art 9.

An introduction to the international intellectual property law framework

The TRIPS Agreement is a formidable collection of minimum standards supported by the WTO and its dispute settlement regime.[23] The TRIPS Agreement is in many ways unique within the body of WTO agreements. It is the only WTO agreement structured around agreed minimum standards to be implemented in domestic law.[24] The TRIPS Agreement has, perhaps remarkably, been amended since it first came into being.[25] Also, members of the WTO have added to their international intellectual property obligations in many ways outside of the TRIPS Agreement framework, including through other multilateral agreements and by way of FTA commitments between two or sometimes more parties.[26]

At the time of its creation in the mid-1990s, the TRIPS Agreement was the international high water mark in intellectual property protection. Yet, in a relatively short period of time, it has become the baseline for intellec-

[23] The WTO dispute settlement regime applies to all WTO agreements and is incorporated into the TRIPS Agreement, above n 8, art 64. The procedure of dispute settlement is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (1994) 1869 UNTS 401, 15 April 1994 ('DSU').

[24] The TRIPS Agreement is an instrument that members agree will have an impact on behind-the-border regulation. In other words, the mere act of signing up to TRIPS is a recognition that some degree of autonomy over intellectual property regulation is given up. The degree of autonomy is limited by the requirement of compliance with the agreement; see TRIPS Agreement, above n 8, art 1.1. For a discussion of the 'TRIPS story' and the narratives of 'coercion', 'ignorance and bargaining' and 'self-interest', see Gervais, above n 16.

[25] The amendment was the introduction of Article 31 bis, which allows members of the TRIPS Agreement to manufacture and import, under compulsory licence, certain pharmaceuticals in specified circumstances. This amendment followed the Doha Declaration on Public Health; see WTO Ministerial Conference, Fourth Session, Doha (9–14 November 2001), *Declaration on the TRIPS Agreement and Public Heath*, WT/MIN(01)/Dec/2 and Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, 2 September 2003, WT/L/540 and Amendment of the TRIPS Agreement, 8 December 2005, WT/L/641. Implementation required that two-thirds of the WTO members ratify the Article by 1 December 2007, which did not happen. The deadline was extended to 31 December 2009, 31 December 2011, 31 December 2013, and the latest General Council decision of 26 November 2013, WT/L/899, extended the deadline to 31 December 2015. Until then, a 'waiver' has been in place since 2003; WTO General Council, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health' (WTO Doc. WT/L/540 and Corr.1, 2003). See also C. M. Correa, 'Supplying Pharmaceuticals to Countries without Manufacturing Capacity: Examining the Solution Agreed Upon by the WTO on 30 August 2003', *Journal of Generic Medicines*, 1 (2004), 105–119.

[26] See Chapter 2 for further discussion of FTAs.

tual property protection globally.[27] The twentieth-century opponents of the TRIPS Agreement have now become its twenty-first-century advocates (the exception are least-developed countries that have extended time-frames to comply with TRIPS).[28] Even if some developing countries still regard TRIPS compliance as problematic, its demanding standards are closer to their interests than the TRIPS-plus standards that are settled or are on the negotiating agenda in bilateral or plurilateral FTAs.

There are some broad effects of the TRIPS Agreement and other international intellectual property agreements. One, as mentioned above, is that there are minimum standards of intellectual property protection globally. However, it is important to appreciate that global intellectual property standards are far from uniform. The standards are minimum requirements for national intellectual property protection. Countries will enact those standards in different ways.[29] Some countries will maximise flexibilities of and exceptions to those standards which other countries may have limited or no flexibilities for. Some countries will have increased standards. Others still will have a mix of increased standards and increased flexibilities and exceptions.

There are broadly three ways in which the minimum standards can result in different laws in different countries. First, because the terms used in the agreement in many instances are not defined, they are open to differing interpretations by national legislatures and courts and can be implemented in different ways. An example is the scope of 'inventive step' in patent law.[30] Apart from 'inventive step' meaning something consistent with the TRIPS Agreement's object and purpose, no definition is found in that agreement or any other multilateral agreement as to its parameters.[31] Therefore, it has different meanings in different legal systems. The second way in which different countries may have differing levels of protection, despite the existence of minimum standards, is that those standards may be increased by some, but not all, members of TRIPS. The TRIPS Agreement expressly states that its members may

[27] It seems likely that if discussion returns to the multilateral level, the baseline for that discussion will be the norms created through FTAs rather than the agreed multilateral norms.

[28] Least-developed countries do not have to fully comply with the TRIPS Agreement until at least 2015; see 'Extension of the Transition Period under Article 66:1 for Least Developed Country Members', IP/C/64, 12 June 2013.

[29] TRIPS Agreement, above n 8, art 1.1.

[30] TRIPS Agreement, above n 8, art 27.1 requires that patents are available for invention provided they are new, have an inventive step and are capable of industrial application. No definition of 'inventive step' is given.

[31] Some level of inventive step must be required to comply with the agreement. See also Chapter 5.

provide more extensive protection than what is found in the agreement.[32] The third mechanism that results in different national laws is that many international intellectual property agreements allow for carve-outs from some protections.[33] Fair use for research or parody, for example, may be legitimate carve-outs from the scope of copyright's exclusive rights. Experimental use of an invention may be a legitimate exception from patent rights, and descriptive use is a legitimate limitation on the exclusive rights of a trade mark owner.[34] But such exceptions are mostly optional and therefore not uniform in national laws.[35] In addition, in some FTAs, the ability to utilise the TRIPS Agreement flexibilities has been curbed.[36]

Balancing and calibration techniques: increased protection and flexibilities

Creating more extensive protection and framing exceptions to intellectual property protection involves a careful assessment of the interests of owners and users, other third-party interests and the overall public good. The ultimate result may balance those interests (in the sense of something for everyone) or choose one interest over the others so as to calibrate[37] the

[32] TRIPS Agreement, above n 8, art 1.1.

[33] Carve-outs in the form of exceptions and limitations are for the most part optional and must comply not only with the framework for the carve-out but also with the minimum standards of any agreement. In the case of the TRIPS Agreement, above n 8, carve-outs for patents are found in arts 27.2, 27.3 and 30. Article 30 is also known as a three-step test, which also provides the framework for exceptions for copyright in art 13 and art 9(2) of the Berne Convention (which is incorporated into the TRIPS Agreement) and art 17 for trade marks. Versions of the test are also found in the WIPO Copyright Treaty (WCT), 36 ILM 65 (1997) (adopted 20 December 1996, entered into force 6 March 2002), and the WIPO Performers and Producers of Phonograms Treaty 36 ILM 76 (1997) (adopted 20 December 1996, entered into force 20 May 2002). For a general discussion, see C. Geiger, D. J. Gervais and M. Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (18 November 2013), available at SSRN, ssrn.com/abstract=2356619 or dx.doi.org/10.2139/ssrn.2356619.

[34] This is expressly mentioned as an example in the TRIPS Agreement, above n 8, art 17.

[35] Although the exceptions are not uniform, many copyright laws, for example, incorporate exceptions for research and private study, education, libraries and archives.

[36] See, for example, the Australia–United States Free Trade Agreement (signed 18 May 2004, entered into force on 1 January 2005), where the parties agree to limit parallel importing in art. 17.9:4, which provides that 'Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory, at least where the patentee has placed restrictions on importation by contract or other means.' In the leaked text of the Trans-Pacific Partnership Agreement (TPP), there are proposals for limiting exceptions. The leaked texts are available at tppinfo.org/resources/leaked-texts-country-info/.

[37] For discussion of the 'calibration phase' of the TRIPS Agreement, see Gervais, above n 16.