

INTELLECTUAL PROPERTY RIGHTS AND CLIMATE CHANGE

As the world confronts global warming, there is a growing consensus that the TRIPS Agreement could be a more effective instrument for mitigating climate change. In this innovative work, Wei Zhuang systematically examines the contextual elements that can be used in the interpretation of the TRIPS Agreement with a view to enhancing innovation and transfer of environmentally sound technologies. Zhuang proposes a balanced and pro-competitive interpretation that could be pursued by policy makers and negotiators. This comprehensive multidisciplinary study will help academics and policy-makers improve their understanding of the contemporary international legal regimes governing intellectual property rights and innovation and transfer of environmentally sound technologies. It also offers practical guidance for further developing a legal system capable of responding to the challenges posed by climate change.

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Intellectual Property Rights and Climate Change

INTERPRETING THE TRIPS AGREEMENT FOR
ENVIRONMENTALLY SOUND TECHNOLOGIES

WEI ZHUANG

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Contents

<i>List of Figures</i>	<i>page</i> xiii
<i>Foreword by Professor Carlos Correa</i>	xv
<i>Acknowledgements</i>	xix
<i>List of Abbreviations</i>	xxi
<i>Table of Cases</i>	xxv
<i>Table of Treaties, Declarations, Resolutions and Others</i>	xxxi
1 Introduction	1
1.1 The Importance and Purpose of This Study	1
1.2 The Scope and Structure of This Study	5
PART I INTELLECTUAL PROPERTY RIGHTS, INNOVATION AND TRANSFER OF ESTS	9
2 Concepts and Context: IPRs, Innovation and Transfer of ESTs	11
2.1 Innovation and Transfer of Technology as Part of the Solution to Climate Change	11
2.2 Describing Innovation and Transfer of Environmentally Sound Technologies	13
2.2.1 Defining Environmentally Sound Technologies	13
2.2.2 Describing Technology Transfer	16
2.2.2.1 Definition of Technology Transfer	16
2.2.2.2 Channels of Technology Transfer	18
2.3 Fundamental Issues in Innovation and Transfer of ESTs	25
2.3.1 ESTs as “Global Public Goods”	25
2.3.2 Failures in the Markets for Technology and IPRs as a Policy Response	26
2.3.3 The Concept of IP Rights and Their Justification	28

2.4	The Global Distribution of Innovation and International Transfer of ESTs: Evidence to Date	32
2.4.1	Literature Review: Who Owns ESTs and Who Are the Major EST Transferees?	32
2.4.2	Empirical Study: Global Distribution of Innovation and International Transfer of ESTs	38
2.4.2.1	High Concentration of EST innovations as Indicated by Patent Filing under PCT	38
2.4.2.2	The Direction of International Technology Transfer – Which Countries Are Deriving Income from IPRs?	41
2.4.2.3	The Strengthening of IPRs and the Rise of Revenue Transfer	43
3	International Legal Framework Governing IPRs, Innovation and Transfer of Technologies, Including ESTs	47
3.1	Introduction	47
3.2	The NIEO Approach to Regulate Innovation and Transfer of Technology	49
3.2.1	The Revision of the Paris Convention	50
3.2.1.1	Introduction to the Paris Convention	50
3.2.1.2	The Demand for the Revision of the Paris Convention	51
3.2.1.3	The Unfinished Negotiations for the Revision	53
3.2.2	The Unsuccessful Creation of an International Code of Conduct for the Transfer of Technology	55
3.2.2.1	The Major Characteristics of the Latest Draft	55
3.2.2.2	The Failure of the Code and Its Implications	57
3.3	Intellectual Property Rights and Technology Transfer under the TRIPS Agreement	60
3.3.1	The Emergence of the TRIPS Agreement	60
3.3.2	Global Minimum IPR Standards and Their Implications	65
3.3.2.1	Commitments to Global Minimum IPR Standards	65
3.3.2.2	The Implications of Global Minimum IPR Standards	69
3.3.3	Technology Transfer-Oriented Provisions of the TRIPS Agreement	74

Table of Contents

vii

3.4	Technology Transfer and Intellectual Property Rights in International Climate Framework	78
3.4.1	Technology Transfer under the UNFCCC Agreements	79
3.4.1.1	The Principle of Common but Differentiated Responsibilities	79
3.4.1.2	EST Transfer Commitments under the UNFCCC	82
3.4.1.3	The Kyoto Protocol	87
3.4.1.4	Technology Transfer in the Post-Kyoto Climate Regime	91
3.4.1.5	The Adoption of the Paris Agreement	94
3.4.2	Intellectual Property Rights in the International Climate Change Regime	96
3.4.2.1	Technology Transfer and IPRs at the 1992 Rio Summit	96
3.4.2.2	Divergent Proposals or Unilateral Actions on the Road to Copenhagen	98
3.4.2.3	The Copenhagen Negotiations and Afterwards	104
3.5	Conclusion	106
4	The Effects of Minimum IPR Standards Shaped by TRIPS on Innovation and Transfer of ESTs	109
4.1	Introduction	109
4.2	Mandatory Minimum IPR Standards Under TRIPS	110
4.2.1	Patents	111
4.2.2	Trade Secrets	114
4.2.3	Enforcement of IPRs	118
4.2.4	Controversy over the Effect of Minimum IPR Standards on Technology Transfer	119
4.3	The Positive Role of Minimum IPR Protection in Facilitating Innovation and Transfer of ESTs	121
4.3.1	IP Rights as an Enabling Factor for Innovation of ESTs	122
4.3.1.1	The Incentive Effects of IPRs on Innovation of ESTs	123
4.3.1.2	The Role of Patent-Induced Information Disclosure in Innovation of ESTs	128

4.3.2	Strong IP Rights as a Prerequisite for IP Holders to Transfer ESTs	132
4.3.2.1	IPRs and FDI, Licensing and Trade	133
4.3.2.2	IPRs as an Important Factor Influencing the Transfer of ESTs	137
4.4	The Potentially Negative Effects of Strong IPR Protection on Innovation and Transfer of ESTs	139
4.4.1	The Exclusive Effects of IPRs on Innovation of ESTs	140
4.4.2	IP Rights and Abusive or Anti-Competitive Practices in EST Transfer	143
4.4.2.1	Patent Blockage	145
4.4.2.2	High Licensing Fees	148
4.4.2.3	Refusal to License	150
4.4.2.4	Other Abusive or Anti-Competitive Practices	153
4.5	Concluding Remarks	155
	PART II INTERPRETING THE TRIPS AGREEMENT FOR FACILITATING INNOVATION AND TRANSFER OF ESTS	157
5	Rules Governing Treaty Interpretation and the Elements against Which the TRIPS Agreement Should Be Interpreted	159
5.1	Introduction	159
5.2	Rules Governing Treaty Interpretation	162
5.2.1	The Principle of Good Faith	164
5.2.1.1	The Principle of Effectiveness	166
5.2.1.2	The Link Between Good Faith and Legitimate Expectations	168
5.2.2	Determining Ordinary Meaning under Article 31	170
5.2.2.1	Ordinary Meaning	170
5.2.2.2	“In the Light of Its Object and Purpose”	172
5.2.2.3	“In Their Context”	174
5.2.2.4	“Elements to Be Considered Together with the Context”	176
5.2.3	Supplementary Means of Interpretation under Article 32	186
5.3	The Object and Purpose of WTO and TRIPS	192
5.3.1	The Sustainable Development Objective of the WTO	193
5.3.1.1	Sustainable Development as an Objective of the WTO	194

Table of Contents

ix

5.3.1.2 The Role of Sustainable Development in Interpreting TRIPS	197
5.3.2 The Object and Purpose of the TRIPS Agreement	203
5.3.2.1 Article 7: “Objectives”	205
5.3.2.2 Article 8: “Principles”	207
5.3.2.3 Interpreting the TRIPS Agreement in Light of its Objectives and Principles	211
5.4 Contextual Elements for Interpreting the TRIPS Agreement	214
5.4.1 Subsequent Agreement: The Doha Declaration	215
5.4.1.1 The Doha Declaration as a Subsequent Agreement under Article 31(3)(a) of the VCLT	215
5.4.1.2 The Doha Declaration: Its Context and Content	219
5.4.1.3 The Implications of the Doha Declaration	224
5.4.2 Relevant Subsequent Practices in the Interpretation of the TRIPS Agreement	226
5.4.3 Article 4.5 of the UNFCCC as Relevant Rules of International Law	229
5.5 Conclusion	231
6 Interpreting Patent-Related Flexibilities in the TRIPS Agreement for Facilitating Innovation and Transfer of ESTs	233
6.1 Introduction	233
6.2 Patentable Subject Matter Under Article 27	236
6.2.1 Non-Discrimination (Article 27.1) and ESTs	237
6.2.1.1 The Principle of Non-Discrimination under Article 27.1	237
6.2.1.2 “Non-Discrimination as to the Field of Technology” and ESTs	239
6.2.2 Patent Eligibility Requirements	246
6.2.2.1 Interpretation of the Patentability Requirements	246
6.2.2.2 The Relevance of the Patentability Requirements for WTO Members to Facilitate Innovation and Transfer of ESTs	250
6.2.3 Permissible Exclusions for ESTs?	253
6.3 Limits to Patent Rights in the TRIPS Agreement	256
6.3.1 Introduction	256

6.3.2	Limited Exceptions to Patent Rights under Article 30	258
6.3.2.1	Conditions in General	259
6.3.2.2	Interpretation of the “Three-Step” Test	262
6.3.2.3	Examples of Relevant Exceptions under Article 30 for ESTs	270
6.3.2.4	Conclusion	272
6.3.3	Exhaustion of Rights and Parallel Imports	273
6.3.3.1	Exhaustion of Rights	273
6.3.3.2	Parallel Imports for Patented ESTs	276
6.4	Compulsory Licensing under Article 31	278
6.4.1	The Concept of Compulsory Licensing	278
6.4.2	Grounds for Granting Compulsory Licences	282
6.4.2.1	Grounds for Granting Compulsory Licences in General	282
6.4.2.2	Local Working Requirements and Non-Discrimination under Article 27	283
6.4.2.3	Enumerated Grounds for Compulsory Licences under Article 31	289
6.4.3	Conditions for the Grant of Compulsory Licences	291
6.4.3.1	Procedural Requirements	291
6.4.3.2	Substantive Requirements	293
6.4.4	Compulsory Licensing as a Policy Lever for EST Transfer	297
6.4.4.1	The Case of Improved Access to Medicine and Compulsory Licences	298
6.4.4.2	Compulsory Licences for Transfer of ESTs: Feasibilities and Opportunities	300
6.4.4.3	Compulsory Licences for Transfer of ESTs: Challenges	304
6.5	Conclusion	307
7	Interpreting Competition-Related Flexibilities in the TRIPS Agreement for Facilitating Innovation and Transfer of ESTs	311
7.1	Introduction	311
7.2	Article 8.2: Basic Principle	314
7.2.1	Scope of Application	315
7.2.1.1	Abuse of IP Rights	316

<i>Table of Contents</i>	xi
7.2.1.2 Practices That Unreasonably Restrain Trade	318
7.2.1.3 Practices That Adversely Affect the International Transfer of Technology	320
7.2.2 The Requirement That Appropriate Measures Be TRIPS-Consistent	322
7.2.3 Relevance of Article 8.2 for EST Transfer	325
7.3 Article 40: Control of Anti-Competitive Practices in Contractual Licences	326
7.3.1 Legal Effects of Article 40.1	327
7.3.2 Members' Sovereign Power to Regulate Anti-Competitive Licensing Practices under Article 40.2	329
7.3.2.1 A Competition Approach to Regulate IPR-Related Abusive or Anti-Competitive Licensing Practices and Conditions	330
7.3.2.2 Examples of Anti-Competitive Practices	333
7.3.3 Relevance for EST Transfer	335
7.4 Article 31(k): Compulsory Licensing as a Remedy to Anti-Competitive Practices	337
7.4.1 Interpretation of Article 31(k)	337
7.4.2 Relevance for the Innovation and Transfer of ESTs	339
7.5 Conclusion	343
8. Conclusions and Recommendations	346
8.1 Introduction	346
8.2 Problems Identified	347
8.2.1 Global Asymmetries in the Innovation and Transfer of ESTs	347
8.2.2 The Role of IPRs as a Contentious Issue in International Climate Change Negotiations	348
8.2.3 The Mixed Effects of Minimum IPR Standards Shaped by TRIPS on Innovation and Transfer of ESTs	349
8.3 A Balanced and Pro-Competitive Interpretation of the TRIPS Flexibilities	350
8.3.1 The Methodology of Legal Interpretation	350
8.3.2 Interpretation of Patent-Related Flexibilities	352
8.3.3 Interpretation of Competition-Related Flexibilities	354

8.4 The Insufficiency of Treaty Interpretation and Possible Remedies	355
8.4.1 Factors Affecting the Sufficiency of Treaty Interpretation	356
8.4.2 A Doha-Type Declaration on Intellectual Property Rights and Climate Change	358
8.4.2.1 Potential Elements of the Declaration	359
8.4.2.2 Potential Challenges and Solutions	361
8.4.3 International Guidelines for Licensing of IPR-Protected ESTs	364
8.4.3.1 The Need for International Guidelines for Licensing of IPR-Protected ESTs	365
8.4.3.2 Potential Elements for Guidelines on Licensing IP-Protected ESTs	366
8.4.3.3 Potential Benefits and Challenges of the Licensing Guidelines	368
Appendix	371
Bibliography	373
Index	411

Figures

2.1	Share of claimed priority patents of ESTs vs. all technologies under PCT (1999–2011)	<i>page 39</i>
2.2	The patenting trend as measured by annual share of claimed priority patents filed under the PCT in the EST fields from 1999 to 2011	40
2.3	Share of charges for the use of intellectual property, payments (BoP, current US\$) (2005–2011)	42
2.4	Share of charges for the use of IP, receipts (BoP, in current US\$) (2005–2011)	43
2.5	The trend of annual net incomes from licensing fees and royalties of all technologies (1986–2012, in current billion US\$)	44

Foreword

The implications of intellectual property have been extensively studied in some areas, such as those relating to public health and, to a lesser extent, food security. A large number of books, journal articles and other documents have been published on issues relating to access to medicines, and on modalities of intellectual property protection for seeds. There is also a growing number of scholarly contributions and other studies on such protection as applied in the field of environmental technologies, including on the role that patents may play as incentives for innovation or as potential obstacles for the dissemination of those technologies.

Despite the global consensus about the need to address the effects of climate change, the North-South divergences that have characterized the debates on intellectual property, public health and food security have also emerged in relation to environmental technologies. There is great disagreement on the best ways in which the development and diffusion of the required technologies will be encouraged. Thus, in the negotiations conducted in the context of the United Nations Framework Convention on Climate Change (UNFCCC), some developing countries submitted proposals aiming at the exclusion from patent protection of environmentally sound technologies (ESTs) or subjecting them to compulsory licenses. One developing country submitted to the Council for TRIPS in WTO a proposal to carve out an exception under the TRIPS Agreement for such technologies. Not surprisingly, these proposals have encountered a strong opposition from developed countries, which account for an overwhelming share of the granted patents relating to ESTs worldwide.

The impact of intellectual property in relation to ESTs also became an important issue in the debates leading to the adoption of the Sustainable Development Goals (SDGs). In its Synthesis report on the Sustainable Development Goals, UN Secretary General called upon governments to

“make substantial progress in the development, transfer and dissemination of such technologies and knowledge to developing countries on favourable, concessional and preferential terms”, and to “ensure that our global intellectual property regimes and the application of the flexibilities of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are fully consistent with and contribute to the goals of sustainable development”.

The subject of development and diffusion of ESTs is particularly complex, because – unlike the case of medicines and seeds – ESTs comprise a wide range of technologies including, inter alia, solar photovoltaic, geothermal, wind, and carbon capture technologies. The modes of production and exploitation of ESTs vary significantly, as well as the extent to which patents and other forms of intellectual property rights may prevent competition and, in particular, the transfer of technology to developing countries to deal with the effects of climate change. Despite the progress made in some fields in countries such as China and India, the North-South technological asymmetry is, overall, deep and limitations to the access to protected technologies may not only undermine national and regional but also global efforts regarding adaptation to and mitigation of climate change.

This book contains what is perhaps the first comprehensive study on the characteristics and possible implications of the international intellectual property and technology transfer regime as applied to ESTs. To this end, the author delves into the foundations of intellectual property and reviews the historical developments that have led to the current international system, including the failed initiative to adopt an International Code on Transfer of Technology. As a starting point for characterizing the problem existing in this field, the book presents an exhaustive literature review and explores which countries are major ESTs creators, which countries derive income from intellectual property rights associated to those technologies, and how the TRIPS Agreement influences the trends of technology transfer. Valuable insights on the available empirical information are provided in this respect. Importantly, this book is the outcome of an interdisciplinary research combining economics and various disciplines of national and international law, including law of the treaties, WTO law and competition law.

Although the study of international intellectual property rules is the core of the book, it also examines the EST transfer obligations under the UNFCCC Agreement, and the extent to which they have been complied with. The author explores who the obligation-bearers are, whether EST transfer commitments are binding on Parties, what kinds of mechanisms exist for the implementation of EST transfer and whether they are adequate. This analysis

is of particular importance to understand the failure of the current system to ensure a wide dissemination of climate change mitigation and adaptation technologies.

As noted, the author undertakes a thorough analysis of the minimum standards incorporated into the TRIPS Agreement and the room they leave for innovation through imitation and technology transfer to developing countries. This study is particularly relevant for ESTs. But the discussion of the main interpretive issues presented by the TRIPS Agreement and the positions taken by WTO panels and the Appellate Body provide useful elements to consider the extent of obligations under that Agreement in any field of technology. The same comment applies to the detailed analysis of the patent- and competition-related provisions of said Agreement. Without losing its focus on ESTs, the careful interpretation (based on the principles of the Vienna Convention on the Law of Treaties) offered by the author is relevant and useful beyond the field of ESTs.

Based on the analysis carried out, the author confirms a number of “TRIPS flexibilities” allowed by the TRIPS Agreement. Although there is a vast literature on the subject, she specifically explores how to make the TRIPS Agreement a more efficient and effective instrument for facilitating innovation and transfer of ESTs through legal interpretations.

Among other important contributions made by this book, it is worth mentioning the empirical study on the global distribution of innovation and international transfer of ESTs based on the latest available data; a comprehensive study of the effects of the minimum standards contained in the TRIPS Agreement on innovation and transfer of ESTs to developing countries; a thorough exploration of the contextual elements for interpreting the TRIPS Agreement for facilitating innovation and transfer of ESTs; and concrete recommendations on how relevant TRIPS provisions could be interpreted to that end. The author proposes in this respect a Declaration on intellectual property and climate change (similar to the Doha Declaration on the TRIPS Agreement and public health) with a view to confirming a balanced and pro-competitive interpretation of the TRIPS Agreement. Given the limited guidance provided by competition-related provisions in the Agreement, the author also briefly recommends international guidelines for licensing of intellectual property protected ESTs.

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Abbreviations

ALBA	Bolivarian Alliance for the Peoples of Our America
AWGLCA	Ad Hoc Working Group on Long-Term Co-operative Action
BASIC	Brazil, South Africa, India and China
BRIC	Brazil, India, China and Russia
CBD	Convention on Biological Diversity
CBDR	Common but differentiated responsibilities
CCS	Carbon capture and storage
CDIP	Committee on Development and Intellectual Property
CDM	Clean Development Mechanism
CETs	Clean energy technologies
CFI	Court of First Instance
CIEL	Centre for International Environmental Law
CISDL	Centre for International Sustainable Development Law
CJEU	Court of Justice of the European Union
CO ₂	Carbon dioxide
COP	Conference of the Parties
CSP	Concentrated solar power
DOC	Document
DSU	Dispute Settlement Understanding
EC	European Community
EGTT	Expert Group on Technology Transfer
EPO	European Patent Office
ESTs	Environmentally sound technologies
EU	European Union

FDI	Foreign direct investment
FRAND	Fair, reasonable and non-discriminatory
FTA(s)	Free Trade Agreement(s)
G77	The Group of 77
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GHGs	Greenhouse gases
GPRS	General packet radio service
GSP	Generalised System of Preferences
HFC-134a	Tetrafluoroethane
ICC	International Chamber of Commerce
ICTSD	International Centre for Trade and Sustainable Development
IDEA	Innovation, Development and Employment Alliance
IGCC	Integrated Gasification Combined Cycle
ILC	International Law Commission
ILO	International Labour Organisation
IP	Intellectual Property
IPC	International Patent Classification
IPCC	Intergovernmental Panel on Climate Change
IPRs	Intellectual property rights
IUCN	International Union for Conservation of Nature
LED	Light-emitting diode
MEAs	Multilateral Environmental Agreements
MFN	Most favoured nation
MNCs	Multinational companies
NGOs	Non-governmental organisations
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of the Petroleum Exporting Countries
PATSTAT	Patent Statistical Database
PCT	Patent Cooperation Treaty
PV	Photovoltaic
R&D	Research and development
SAIC	State Administration for Industry and Commerce
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice

List of Abbreviations

xxiii

SIDCs	Small island developing countries
SMEs	Small and medium enterprises
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Technical Barriers to Trade Agreement
TEC	Technology Executive Committee
TOT Code	International Code of Conduct for the Transfer of Technology
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCSD	United Nations Conference on Sustainable Development
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organisation
UNU-MERIT	United Nations University-Maastricht Economic and Social Research Institute on Innovation and Technology
US	United States
USC	United States Code
USD	United States dollars
USPTO	United States Patent and Trademark Office
VCLT	Vienna Convention on the Law of Treaties
WCED	World Commission on Environment and Development
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Table of Cases

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xxxiii

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