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THE ROLE OF THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS) IN THE SYSTEM INTELLECTUAL PROPERTY PROTECTION

Abstract:

The Agreement on Trade Related Aspects of Intellectual Property Rights is one of the recent treaties in the system of intellectual property protection. This agreement represents an annex to the Agreement Establishing the World Trade Organization and is not in the system of the World Intellectual Property Organization. According to the TRIPS Agreement, protection of intellectual property should contribute to the promotion of technological innovation, transfer and dissemination of technologies for the mutual benefit of producers and users of technological knowledge in ways that incite social and economic development, as well as balancing the rights and obligations. TRIPS contains some of the principles and clauses that are specific to international trade agreements, such as most-

favoured-nation clause and it gave the definition of each of the industrial property rights. These definitions will contribute to the harmonization of national legislation in this field. Unlike earlier treaties, TRIPS contains detailed provisions relating to the enforcement of intellectual property rights. Thanks to the mechanism of sanctions under the World Trade Organization, TRIPS became an umbrella agreement in the system of intellectual property protection.

Keywords:

TRIPS, intellectual property, non-tariff barriers, international trade, mechanism of sanctions

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Introduction

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

[1] was created out of the system of the World Intellectual Property Organization (WIPO). Specifically this agreement is an annex to the Agreement Establishing the World Trade Organization (WTO) and this fact gives it a specific role in the system of intellectual property protection. The subject of analysis is a place and role of TRIPS in the system of intellectual property protection within the context of other international and national regulations in this field. Methods predominantly used in this paper are normative, comparative and axiological. Considering the topic itself and the fact that TRIPS is a legal document, application of experimental, statistical and other exact methods is not possible. Result of the application of earlier mentioned methods should be an analysis of the place and role of TRIPS in the system of intellectual property protection. Equally, the subject of analysis is the influence TRIPS has had on other international documents in this field, as well as the value judgment of it and of treaties and legislation that have been created under its influence. Also, from methodological perspective, availability of all primary sources, such as international treaties and national legislation, has made the research easier, plus there are hundreds of articles and publications released on the subject. The very selection of relevant literature always carries the risk that the most relevant sources will not be selected. In this respect, we hope that balanced selection has been made, both of the literature which represents official positions of the World Trade Organization and that which is critical in this respect. This research has a lasting value

because TRIPS is one of more stable international documents in the field of intellectual property.

The question is what led to the situation that the protection of intellectual property rights is governed by an agreement which is part of the World Trade Organization when within the United Nations system there is a specialized agency responsible for the area of intellectual property. The process of multilateral regulation of intellectual property and international trade relations until the start of the Uruguay Round negotiations within the framework of GAT, was completely separated. The group of most developed and economically most powerful countries in the world has become aware that because of the lack of adequate and effective intellectual property rights protection system, it suffered huge economic damage and during the start of the Uruguay Round negotiations within the framework of GAT, has succeeded that the lack of effective protection of intellectual property for products in which value is incorporated certain intellectual well, gets the status of non-tariff barriers for import of goods. [2] The main objective which proclaimed by the World Trade Organization is precisely the free flow of goods and services between Member States. As instruments to achieve this goal designed are precisely customs tariff reduction and elimination of non-tariff barriers for the free flow of goods. In the broadest sense under non-tariff barriers meant are measures regulating the flow of goods across the borders that do not have customs. These measures include contingents and quotas for the import and export of goods, currency controls, licenses, excise taxes, deposits and anti-dumping measures, as well as various technical barriers to trade such as standards, health and sanitary regulations and the like.

A glance at the structure of non-tariff barriers in international trade and the goals that should be achieved shows that intellectual property is something that is in this structure embedded in a rather artificial way. This has given some kind of legitimacy to the idea that under the auspices of the World Trade Organization multilaterally fixes also the area of trade-related aspects of intellectual property rights. Onto this process in the World Intellectual Property Organization was not looked at, at all sympathetically and with the emergence of TRIPS they were literally surprised. It seems that within the same organization and among the majority of Member States there was no will to join a radical reform of the organization. According to Prof. Slobodan Markovic "It turned out that the whole system of previously signed international conventions is not sufficient for ensuring the level of intellectual property protection in the world that developed countries consider necessary. The reason for this is twofold. First, countries that were not willing or ready to take over certain international obligations regarding the protection of intellectual property simply did not approach a specific international convention. Second, sanctions for a country that does not respect the commitments were non-existent and absolutely inefficient. For example the Universal Copyright Convention does not provide for any sanction for a country that violates its provisions. Other conventions as the main sanction predict termination of membership, whereby the mechanism of deciding is so complicated that such sanction has almost never been applied ". [3] This is why the initiators of the TRIPS Agreement have decided that this agreement be located in the World Trade Organization as an organization that has an effective system of sanctions.

Main part

Developers of TRIPS were of course aware that without the assistance of the World Intellectual Property Organization, which has exceptional resources, especially human resources, they could hardly control its implementation. This is evident from the preamble to the TRIPS Agreement in which it is emphasized that the goal of the World Trade Organization is to together with the World Intellectual Property Organization and other relevant international organizations, establishes a relationship of mutual support. With this in mind, on December 22, 1995, between the two organizations signed was an agreement on cooperation. [4] This agreement enabled the World Trade Organization and the Member States access to regulations from the collections of WIPO, including access to databases. This assistance in practice is not just about the delivery of the applicable regulations of the Member States but also in the analysis of the same, including the analysis of legal projects. This assistance is of particular importance when it comes to countries that have yet to accede to the World Trade Organization. Tips for Trade-Related Aspects of Intellectual Property Rights practically function thanks to technical support provided to it by WIPO.

Although the creators of TRIPS used experience gained in the framework of the World Intellectual Property Organization, this agreement in relation to the WIPO agreements is specific. These specific characteristics are due to the fact that it is outside the system of the World Intellectual Property Organization as specialized organization in the United Nations system. Membership in TRIPS is enabled only to Member States of the WTO, namely with the admission to the World Trade Organization states automatically become members of this Agreement. However in addition to the States,

members of TRIPS can be separate customs territories, as well as regional integrations, which have established a customs union. This right is already used by Chinese region Hong Kong.

TRIPS contains some principles and clauses that are specific to international trade agreements such as for example the status of most favored nation. Due to this clause, all rights and privileges attributed to one state are automatically extended to all member states of TRIPS. That provides for a mechanism of the periodical revision of TRIPS, commonly referred to as TRIPS-plus. TRIPS is the only international treaty in this field which is self-renewable. Revision of other treaties presumes much more complex mechanisms such as international conferences followed by complicated ratification procedures in member states. That is why most favoured nation clause represents a great innovation in the intellectual property law. In addition to traditional intellectual property rights TRIPS defines so-called new types of intellectual property rights such as integrated circuit topography. Yet, although the whole area of intellectual property is covered by this Agreement, TRIPS does not contain any provision relating to the moral rights of authors and inventors. This is mainly justified with the argument that moral rights are not relevant to international trade. Unlike other treaties on intellectual property TRIPS in detail explains obligations of the Member States relating to the enforcement of intellectual property protection in civil and criminal proceedings, and measures of administrative bodies, in particular customs. TRIPS also establishes specific mechanisms for resolving disputes.

TRIPS has a somewhat more flexible approach towards the less developed Member States. It is anticipated that they, bearing in mind

their economic, financial and administrative constraints, and their need for flexibility, while creating a viable technological base, will not be obliged to apply its provisions for a period of 10 years with the exception of the provisions relating to the national treatment and most favored nation treatment. Council for TRIPS, to the reasoned proposal of the under-developed country, may extend this deadline further. Bearing in mind that almost all the underdeveloped countries are from Africa and Latin America, TRIPS stipulates that the developed member countries will encourage investment and transfer of technology to enable the creation of a healthy technological base in these countries. However, this provision is purely declarative in nature and does not represent a legal obligation of developed Member States to invest and transfer technology in underdeveloped countries.[5]

It is evident that the creators of the TRIPS envisioned that this agreement gets the status of the roof (umbrella) international instrument in the field of intellectual property. Bearing in mind that from the chronological point of view, it appeared quite late, "constitutional power" could be obtained only thanks to its own terms which lean on the mechanism of sanctions in the framework of the WTO. It is interesting that the TRIPS Agreement in Article 4 proclaimed that the protection of intellectual property rights should contribute to the promotion of technological innovation, transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge in a manner that promotes social and economic development, as well as balance of rights and obligations. In general it can be said that the TRIPS establishes high standards of intellectual

property protection and effective control mechanisms for their implementation.

TRIPS has built a specific relationship with WIPO conventions and other agreements in the field of intellectual property. The text of the Agreement refers to by name only four conventions and to those that are themselves 'umbrella': Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Washington Agreement on Intellectual Property in relation to the topography of integrated circuits. These conventions are often referred to in such a way that the TRIPS directly refers to some of their provisions, although there are some situations where the TRIPS directly took their provisions. But TRIPS does not bind the Member States to accede to any of the above conventions but an obligation to implement in their legislation their substantive provisions that are precisely specified. In theory a state may become a member of TRIPS even if it has not become a member of any of the Conventions administered by WIPO. Bearing in mind that more or less all the Member States of the United Nations are Member States of some of the conventions in the field of intellectual property, it is difficult to imagine that in reality it would come to this situation. The meaning of this provision is in fact to allow special customs territories which are not sovereign states and therefore not members of any of the conventions, become members of the TRIPS. At the beginning of the Article 2 of the TRIPS formulation which is standard in international contract law gives the apparent advantage of the Paris, Berne, Rome and the Washington Convention. It is anticipated that nothing in parts I to IV of the Agreement shall

derogate from existing obligations that member states have among each other on the basis of these four conventions. This formulation is essentially a mask because it is not possible in reality for the conflict of this type to actually occur. Although protection standards established by the TRIPS are above standards that have been established by these conventions, TRIPS has only confirmed their provisions stipulating that all substantive provisions of these conventions Member States of the TRIPS, must implement. Given the above it is evident that implementation of the obligations of any of these four conventions in fact represents the realization of obligations under TRIPS.

The basic principles of TRIPS are the principle of national treatment and most favored nation treatment. The principle of national treatment provides for the obligation of Member States to, with regard to the protection of intellectual property rights with its citizens equalizes the citizens of other Member States of TRIPS with the exceptions provided by the Paris, Berne, Rome and the Washington Convention. This principle which in theory is also called the principle of assimilation is not new in relation to the WIPO Convention. Even more in this case the TRIPS applies a more restrictive approach since it obliges Member States to apply it only in respect to nationals of other Member States. Under the citizens of customs territories WTO members, considered are to be individual and legal entities residing or carrying on a real and effective industrial or commercial activity (with their companies) in that customs territory. For example Article 2, paragraph 1 of the Paris Convention reads: "The citizens of each country of the Union shall enjoy in other countries of the Union when it comes to protection of industrial property privileges that the relevant laws provide for their

nationals or shall be ensured subsequently provided that they do not violate the rights specifically provided for in this Convention ". However, bearing in mind that Article 1 of the TRIPS Agreement stipulates that nationals of other Member States are considered as those individual or legal entities who meet the criteria for obtaining protection provided by the Paris, Berne, Rome and the Washington Convention provided that all members of the WTO are signees of those conventions, we can conclude that according to TRIPS there is an obligation for the nationals to equalize with non-nationals to which these Conventions apply.

The second principle on which the TRIPS is based, is the most favored nation principle. This principle provides that any advantage, privilege and immunity given by the Member State to nationals of other countries immediately and unconditionally applies to nationals of other Member States. The principle of most favored nation is characteristic for international trade agreements and represents a novelty in international law of intellectual property. Editors were certainly aware that the consistent application of this principle would lead to legal chaos and that would ultimately be a counterproductive effect. This is why they provided significant exceptions to this principle, especially in relation to international agreements on intellectual property rights that were in effect prior to the signing of TRIPS, provided that such agreements are notified to the TRIPS Council and that they do not constitute arbitrary or unjustifiable discrimination against nationals of other Member States.

Likewise, Article 5 of the TRIPS Agreement provides that the national treatment and most favored nation treatment shall apply to the procedures set by multilateral agreements concluded under the auspices of WIPO and are

related to the acquisition and maintenance of intellectual property rights. This is understandable because it is about technical agreements that generally do not contain a clause of national treatment of foreigners and are aiming to help the national offices for intellectual property protection in a way that the logon process of patents, trademarks, or industrial designs is done by filing one international application and in that way provide protection in all designated States.

In relation to the Berne Convention for the Protection of Literary and Artistic Works [6] TRIPS has taken a very simple approach. It is anticipated that the members of the TRIPS Agreement comply with the provisions of Article 1-21 of the Berne Convention and its Annexes. The provisions of the TRIPS Agreement pertaining to the copyright laws are governing the relations that are not regulated by the Berne Convention and provide interpretations of its provisions. This means that Member States of the TRIPS are required to, through its legislation implement all the substantive provisions of this Convention. The remaining provisions of the Berne Convention are of legal and technical nature, and are not relevant to the TRIPS Agreement. They relate to the establishment of the Berne Union, and the process of ratification of or accession to this Convention. To this rule in the same article is provided an exception which provides that Member States of the TRIPS do not have the rights and obligations under this Agreement in relation to the moral rights that are recognized under Article 6 bis of that Convention or rights from it. Article 6 bis of the Paris Convention regulates the question of moral rights of authors. It is anticipated that regardless of their ownership rights, and even after the transfer of these rights the author reserves the right to recognition as the creator of the works and the right

to object to any distortion, mutilation, or other modification of the work or any other violation of this act, which would go on damaging his honor or reputation. According to the Berne Convention these rights remain in force after the death of the author until at least the expiration of property rights and will be able to be performed by persons or institutions authorized under the national law of the country where protection is sought. This is practically the only substantive provision of the Convention, which has not been taken over by the TRIPS. It is interesting that the United States which have ratified the Berne Convention 100 years after the signing (1989)[7] now through the World Trade Organization most insisting on respect for its substantive provisions. To this most definitely contributed the participation of industries that rely on copyright and related rights in the overall US economy, especially exports. This branch of economics has long assumed primacy in the total US exports ahead of the chemical industry and the automotive industry.

In the chapter relating to copyrights and related rights of the TRIPS, due to these rights being regulated in detail by the Berne Convention, minimum attention is given to copyrights. It is anticipated that the protection of copyrights be applied to achievements but not the ideas, procedures, methods, operations, or mathematical solutions as such. This provision, although representing a standard in national legislation, did not exist in Bern or in other conventions in the field of copyrights. Most attention TRIPS has given to the protection of computer programs and databases. It is clear in itself because "wealth creation and supporting social and cultural well-being increasingly depends on the creation and management of three <&> "categories of

innovation, information, and ideas and the use of another <&> -the internet." [8] It is anticipated that the computer programs in either their source or object code, be protected as literary works under the Berne Convention. It turned out that a key provision of the Berne Convention which defines these issues is sufficiently flexible to include new technologies such as computer programs. This provision stipulates that authors of literary and artistic works protected by the Berne Convention enjoy the exclusive right of authorizing the reproduction of these works, regardless of which way and in any form. Although editors at the time could not have foreseen that reproduction of the works can come in digital form, it is fully applicable to this situation.

In the seventies, in fact, conducted was a debate on the legal nature of protection which needs to be provided to the computer programs. There were three variants, namely: copyright and legal protection, patent and legal protection and special sui generis protection. At the end, at the joint meeting of expert groups of WIPO and UNESCO, concluded was that the software is essentially a written or printed content similar to literary works and that should be protected as a literary work. [9] However in order to adapt the protection of the rights of authors to the digital era, within WIPO, concluded was the WIPO Copyright Treaty (WCT)[10], which is an enhancement to the Berne Convention. This agreement, together with WIPO Performances and Phonograms Treaty[11] popularly is called Internet Contract. Protection standards established by them are far beyond the standards of TRIPS. Member States are obliged to protect databases or other materials whether it is about machine readable or in other form, which due to the choice and arrangement of their contents constitute intellectual creation and are protected as such.

Members of the TRIPS Agreement are obliged to ensure to authors and their heirs, the right to approve or ban public commercial rental of the original or copies of their works where copyright exists. In terms of the duration of protection is provided that that this duration may not be shorter than 50 years from the calendar year in which was permitted authorized disclosure, and in the event that such authorization does not exist, within 50 years from the date of the creation. Member States of the TRIPS may within their legislation foresee the limitation of copyrights relating to cases which are not in conflict with a normal exploitation of the work and which do not constitute an unreasonable damage to the legitimate interests of the rights holder.

In relation to industrial property rights TRIPS has taken a somewhat different approach. Provided are definitions of each of the industrial property rights which is not case with the Paris Convention for the Protection of Industrial Property and some other contracts. These definitions with some deviations represent standard in national legislation. They reduced the scope for defining each of the industrial property rights in national legislation. These definitions have contributed to the harmonization of industrial property rights in the Member States and have a positive effect on the international registration of these rights. In relation to the Paris Convention for the Protection of Industrial Property^[12] TRIPS usually applies the same methodology as in relation to the Bern Convention referring to relevant provisions of this Convention and sometimes directly takes over its provisions. In the field of industrial property TRIPS governs the area of trademarks, geographical indications, industrial patterns and models, patents, layout designs of integrated circuits,

protection of unpublished (confidential) information and control of unfair competition in the license agreements.

What makes the TRIPS essentially different from other agreements in the field of intellectual property is that it contains a lot of detailed provisions relating to the enforcement of intellectual property rights. It is anticipated that Member States are obliged to provide in their legislation effective measures against any actions which violate the intellectual property rights as well as resources that prevent further injury. These procedures should be fair and equal for all and not be complex and expensive. They are to be applied in a manner not representing an obstacle to international trade. Member States are obliged to provide judicial review of final administrative decisions; however they are not obliged to introduce a parallel judicial system for enforcing intellectual property rights that would be different from the general system of law enforcement. However due to the complexity of these processes some countries have introduced special courts which are solely responsible for the field of intellectual property.

The Agreement in detail covers civil and administrative procedures and remedies in these procedures, interim measures to be taken in these procedures and measures of customs authorities. The provisions relating to the protection during civil court proceedings are mostly taken from comparative law specifically from the law of civil procedure with the introduction of certain specific features which are characteristic for this area. States are obliged to allow the use of civil judicial proceedings concerning the enforcement of any right regulated by the agreement.

States are required to provide also the criminal legal protection of intellectual property

rights in cases of willful trademark counterfeiting or copyright piracy. Member States were given a wide range of remedies including imprisonment and a fine high enough to serve as a preventive measure. There is a possibility that the criminal proceedings may impose the measure of confiscation, seizure and destruction of goods that violate the right including the materials and resources that are predominantly used in the commission of the offense. One gets the impression that when it comes to the issue of legal protection, TRIPS took quite a flexible approach. It is certainly in the spirit of the preamble of the agreement in which it is noted that the intellectual property rights are private and best protected in civil court proceedings. The provisions relating to criminal legal protection are certainly not redundant in TRIPS, especially in a situation where piracy and counterfeiting receive a form of organized crime. In addition, in countries that traditionally did not have an effective system of implementation of intellectual property rights, criminal legal protection does not only chronologically "precedes" civil legal protection.

Conclusion

Generally speaking TRIPS establishes high standards of intellectual property protection and effective control mechanisms for their implementation. It is evident that the creators of the TRIPS imagined that this agreement gets the status of the roof (umbrella) international instrument in the field of intellectual property. Bearing in mind that from the chronological point of view it appeared quite late, "constitutional power" could only receive thanks to its terms which lean on the mechanism of sanctions in the framework of the WTO. TRIPS has built a specific relationship with other agreements in this area. In the text of the agreement mentioned

by name are only four that are themselves roof (umbrella) agreements (Paris, Berne, Rome and Washington Agreement). The provisions of TRIPS are usually of the blanket nature and they refer to the relevant provisions of the four conventions or serve as their complement. But TRIPS does not bind the Member States to accede to any of these conventions but an obligation to implement in their legislation their substantive provisions that are precisely specified. TRIPS unlike previous contracts gave the definition of each of the industrial property rights. These definitions will contribute to the harmonization of national legislation in this area. In relation to specific contracts which have been concluded in accordance with the relevant provisions of the Berne and Paris convention TRIPS has taken a completely different approach. TRIPS is the only international treaty in this field which is self-renewable. Revision of other treaties presumes much more complex mechanisms such as international conferences followed by complicated ratification procedures in member states. That is why most favoured nation clause represents a great innovation in the intellectual property law.

It is anticipated that the national treatment and most favored nation treatment shall not apply to the procedures specified by multilateral agreements which are under the auspices of WIPO and concluded before the TRIPS Agreement and which relate to the acquisition and maintenance of intellectual property rights. This is understandable because it is about technical agreements that do not contain the most favored nation clause. In the end we can say that the TRIPS established a pyramid relationship to other international instruments in the field of intellectual property. If we take that on top of this pyramid is exactly the TRIPS, then its four edges consists of four conventions that are

mentioned by name and which substantive provisions the TRIPS Agreement confirms and gives them a specific form of sanctions (Paris Convention, Berne Convention, Rome Convention and the Washington Agreement). The so-called special agreements; meaning Berne and Paris Convention (universal, regional, general and special) in which provisions the TRIPS Agreement does not impinge, but which implementation it supports can be allocated to the four sides of an imaginary pyramid. Some contracts that are concluded later by the World Intellectual Property Organization such as the so-called Internet contracts cannot be accommodated in this creation because protection standards established by them are far beyond the standards of TRIPS. The most important drawback of the TRIPS is that it does not contain provisions on the moral rights of the author to his creations. Intellectual property tends to encompass human creativity as a whole, its moral and material aspects are inseparable and it cannot be reduced to non-tariff barriers in international trade.

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