

Session 7B

1

Emily C. & John E. Hansen Intellectual Property Institute**TWENTY-SEVENTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

*Fordham University School of Law
Skadden Conference Center, Costantino C
150 West 62nd Street
New York, New York
Friday, April 26, 2019 – 11:59 a.m.*

SESSION 7: ENFORCEMENT AND MULTILATERAL LAW**7B. Multilateral Developments*****Moderator:*****Stevan Mitchell**

*Office of Intellectual Property Rights,
International Trade Administration, U.S. Department of Commerce
Washington, D.C.*

Speakers:**Annabelle Bennett**

Bond University, Robina, Queensland; 5 Wentworth, Sydney

Judges: Another Way to Harmonize the World for IP

Shira Perlmutter

*U.S. Patent and Trademark Office, Alexandria
WIPO Broadcast Treaty*

James Love

Knowledge Ecology International, Washington, D.C.

***Trade, IP, in the Short Term in
Bilateral and Regional Trade Agreements***

Antony Taubman

*World Trade Organization, Geneva
Centripetal Rules in Centrifugal Times:
Where Is Multilateralism Heading?*

Chomwan Weeraworawit

*Mysterious Ordinary LLC, Bangkok; The Standard Hotels, Bangkok
Geographical Indications and the Textiles Industry in Developing Countries —
the Case for Multilateral Protection*

Panelists:**Evelyn Montellano***Leal Cotrim & Jansen Advogados, Rio de Janeiro***Irene Calboli***Texas A&M University School of Law, Fort Worth; Nanyang Technological University, Singapore*

* * *

MR. MITCHELL: Good morning, everyone, and thank you for attending our panel on multilateral developments.

We have a lot of ground to cover between now and 1:00 p.m., so I plan to hold our speakers to their intended timeframes, as well as discussion to planned timeframes, because we really don't want to be the panel that stands between you and the 1 o'clock lunch.

Allow me to get right to speaker introductions. We are privileged to have Judge Annabelle Bennett, a Chancellor of Bond University in Sydney, who is also Chair of the World Intellectual Property Organization (WIPO) Advisory Group of Judges; Shira Perlmutter, Chief Policy Officer and Director of the Office of International Affairs at the U.S. Patent and Trademark Office; Jamie Love from Knowledge Ecology International; Tony Taubman, Director of Intellectual Property in the Government Procurement and Competition Division of the World Trade Organization (WTO); and Chomwan Weeraworawit, Vice President of Brand Creative for the Standards Hotel and also Founder of the Consultancy Mysterious Ordinary LLC, headquartered in Bangkok. We are also privileged to be joined by two panelists this morning: Evelyn Montellano, a Partner in the firm of Leal Cotrim & Jansen Advogados in Rio de Janeiro; and Professor Irene Calboli, Professor at Texas A&M University School of Law in Fort Worth, a Visiting Professor at Nanyang Business School, Nanyang Technological University in Singapore, and also a Fellow in Geneva, at Stanford, and in Cambodia as well.

Let me make a couple of very broad introductory remarks.

There seem to be two natural groupings for our discussion today. One is traditional multilateral venues for addressing IP, which include of course World Intellectual Property Organization (WIPO), World Trade Organization (WTO), bilateral regional agreements; but there is also an opportunity to talk about nontraditional or emerging venues that increasingly address IP issues, some of which see IP as an instrumentality for advancing the underlying objectives of those agreements and some of which tend to view IP as an impediment, and it's my hope that we'll have an opportunity to touch on both of those threads.

We have speakers with diverse experiences across those fora, and we'll turn right to them, starting with Judge Bennett, who is going to speak about judges talking to judges under the auspices of the World Intellectual Property Organization; whether that forum, which was I understand from this morning, created about a year and a half ago, is good, bad, or indifferent; and how it might affect judgments ultimately.

MS. BENNETT: Thanks, Stevan.

It is actually quite interesting because some of these topics that I've been looking at have actually come up here at Fordham in different ways. We have heard people talking about harmonization. We have heard people talking about what is left with TRIPs.¹ We

¹ TRIPs: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15,

have had a lot of discussion about where the problems are with IP — is there an issue about the public's perceptions of IP; are there strengths and weaknesses now in countries in enforcing the IP system? And we have heard a lot of discussion about what judges are doing and the different approaches of judges in different countries.

There are two things I want to say about the introduction. The first is that I would not consider what we are doing now with the WIPO as nontraditional; it's not a classic attitude about it. And I want to make one correction: Bond University is not in Sydney; it is on the beautiful Gold Coast, which is like the Riviera of Australia, so it's not a bad place to study.

Let me talk about what we are doing with WIPO. There are a few things that are interesting for me here at Fordham, and I've been coming for a long time.

One is: Look at the countries that are represented here. They are the main IP jurisdictions; there's no doubt about that. You've got a lot of people from the United States, from Europe, from Australia; some from Canada and Japan. I don't know if there is anyone here from Korea. And some other countries have quite well-structured IP systems — Thailand has its own IP court, although not everyone knows about that.

But the fact is that there are a lot of judges out there, a lot of judges all over the world, who are being faced with IP cases, and they have no idea what to do with them because they have not had any experience with IP cases.

When you are a judge and you are sitting up there and someone presents you with a case, you've got to make the decisions. And you don't always have lawyers. There was a discussion before about how the judges depend upon the lawyers — yes, they do — and in a sophisticated economy and a sophisticated system, the judges get help from the lawyers.

But what happens if you are a judge in a country where you don't get that help; and what happens when you don't have a well-understood IP system in that country? Well, that's what we are trying to address now through the WIPO Advisory Group of IP Judges.

The advisory group consists of judges from twelve countries around the world. Some of them are developed and sophisticated in the IP sense. Some of them are not.

The concept is judges will talk to judges. Judges are not necessarily prepared to admit that they have no idea what they are doing to the administrators in their country, certainly not to the lawyers; but yet they have uncertainties and they don't always know how to deal with the legal issues. So the idea is you have judges speaking to judges in groups.

We have different fora. There's the Building Respect for IP Division where experienced people go out and talk to groups, but also specifically to judges, in other jurisdictions on various topics.

How many of you think that when you go and talk to judges in developing countries in Asia and in Africa and in Eastern Europe that their first interest is standard-essential patents?

[Show of hands]

How many of you think that their second interest is patents?

[Show of hands]

I am a patent person; I come from patents. I have had to deal with other IP areas as a judge and as an IP practitioner.

But most of the developing world is not interested in patents. They are more interested in copyright and trademark, because those are the issues that they are facing. They

1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

are interested in the Internet and what's happening with the Internet. They are interested in how to dispose of tons of product that have been seized. They are interested in how to run an IP case. They are interested in how they deal with experts, how they run these cases, how do you get the evidence, and what are the issues.

We are running a few different ideas here.

For example, we did a master class last year. The first master class was done in China, which has an unbelievably sophisticated system. The Chinese Supreme People's Court was totally supportive. Even in China we had judges from all over. We had a terrific faculty. Klaus Grabinski did a wonderful demonstration about standard-essential patents (SEPs) that was excellent. I learned a lot, and I had sat on SEP cases, and I thought it was terrific. And it was good for the judges, even if they were never going to do an SEP case, to get an idea of what that is about.

Now we are doing another master class, as I think I mentioned earlier in the judges' session, in Washington, D.C. The U.S. judges are saying, "We only want to come if it is going to be really high-level. We want to get the latest developments all over the world, including in SEPs." And then you are going to have a lot of the other judges who say things like, "No; we want more basic stuff in copyright and trademark. What do we do with takedown orders? What do we do with copyright infringement on the Internet? What do we do with trademark infringement on the Internet?" So we are going to run a couple of streams.

And then there's a big conference in Geneva at the end of the year.

What is coming out of all of this is that there are various groups of judges. There are probably forty or fifty in the Master Class, and the one at the end of the year will have over a hundred, many of whom are from countries not represented here at Fordham because they are not sufficiently familiar with the IP world to know to come to Fordham. We do mention Fordham every now and then in some of these programs because it is a terrific conference. So I do say to people, "You should think about going to Fordham as a way of picking up on some of these things." But in the meantime they're not here.

So what happens? It's a classic situation. In each of these groups bonds are formed between the participants.

The Europeans have the European patent judges' meeting. Everyone loves to go to San Servolo and they have a great time and enjoy it and they have very sophisticated discussions. However, that is only for the European judges.

What is happening with these groups of judges who meet together? They are forming WhatsApp groups. You have a group of forty judges who they have lived together for three or four days, and they bond like a family, they're not frightened of each other, and they have WhatsApp groups. I'm part of these WhatsApp groups.

And what happens? No, don't laugh. It's a really good system. You get a judge saying, "Does anyone have a case about *X*? Is there any decision you know of?" and they get to have a look at that. This is not for the purpose of coming to the same decision but to understand how another judge has dealt with it.

One other thing that WIPO is planning, which hopefully will work, is to have a platform within WIPO where judges from all over the world can lodge decisions of importance in their countries, hopefully with a summary in English, because that would be the best way for it to go, so that judges from all over the world can find a decision, the decisions from each of their countries and some of the decisions of their own if they think that they are important.

It is a great initiative because in the end how are we going to really get harmonization? You can't wait for governments to do it — we'll be dead. I mean look how long

even the Unified Patent Court has taken to come through. You want to try to amend TRIPs? Talk to your grandchildren. Maybe they'll get it through.

But the way you can get effective harmonization perhaps — not harmonization where you are forcing the same decision on everybody, but the ability of people to listen to the decisions made in other countries and consider if they apply to their own laws — you can get that effectively through the judges because they can look at each other's reasons and, if they like them, they can take them onboard. But at least they know that those decisions are there.

It is a question of overcoming that lack of experience and lack of knowledge, and I think that it is a good idea and it is becoming quite an effective system.

Thank you.

MR. MITCHELL: Thank you, Judge.

Let me first ask our panelists if anyone has had specialized experiences with programs involving judges and any perspectives on those?

PROF. CALBOLI: I really enjoyed your presentation. Thank you very much.

I've been living in Asia and doing a lot of technical assistance in the past few years. I think one thing is to remember that the sophistication, as you mentioned, of some of these folks is not as developed, just because of lack of experience.

While these projects are all very relevant, a risk is that one size doesn't fit all. There is a tendency in the developing world to look at the developed world to say *This is the law you should take*. To have these be transplanted successfully sometimes we need to make sure they cannot become an irritant. It's really important that the special interests of developed countries that are very different, and especially dangerous for developing countries, need to be carefully assessed by individual judges.

I agree that harmonization is relevant, but I agree with what you said, that it is important to have decisions based on similar rules applied differently based on the cases, because the interests of a developing country, and each developing country differently as well, might vary and they will change over time and with their sophistication and level of development.

I think that is really something that we have to consider very carefully because it is very common. I don't want to call it a new type of colonization, but it is almost. We need to be very careful and very respectful. I know your group of judges in WIPO is very careful about that.

MS. BENNETT: Yes.

There's a number of answers to that. The first is that it is not a group of judges from developed countries laying down rules for developing countries. The faculties that we bring come from a range, including developing countries that are actually going through it.

Secondly, a lot of the format is small-group discussions where each judge brings the views of that judge's own country into the mix. It is not a colonial approach of people from the more sophisticated countries coming in and laying down the rules. It is a discussion among equals.

And of course, WIPO being a UN organization, always has to make sure that they include a range of countries. So the advisory group of judges includes judges who have almost no experience in IP but who are interested in it, and that forms the basis of it. For example, there are judges from Africa and other parts of the world that don't have the same experience in IP. We are very, very careful to do that.

We try not to structure it as a lecture program. There might be a presentation, but then they break out into small groups for discussion.

So we're very conscious of that. And that's not only on the substantive law but also the procedural aspects. For example, a judge from the Philippines is in one of our panels. She has been instrumental in introducing some of these methodologies within the Philippines and has experience in how to deal with them. It's likely that she will talk about the experience of starting from scratch.

You're absolutely right, because otherwise it would be a disaster.

MR. TAUBMAN: Very briefly, that's certainly our experience in the WTO as well where we are bringing judges together. The interest is in mutual learning, and learning, as Annabelle stressed, the tradecraft, the methodology, sharing the experience, rather than replicating the outcome.

MS. BENNETT: Exactly.

MR. TAUBMAN: That has become very clear. They are independently minded judges who are interested in what their colleagues are doing and want to learn from them in a collaborative manner.

MS. PERLMUTTER: I would add something very similar. We at the USPTO do a lot of training of judges internationally. We work a lot with the Federal Judicial Center. Our training is tailored to the interests in each country and the requests they have for what they would like to learn about. It is very much a matter of judges sharing with others their experiences and the techniques that they have used more than it is any type of lecture.

MS. BENNETT: Just one other quick thing. We don't always do it in big centers either. Not all the teaching is done in Europe or the United States. A lot of it is done in the other countries themselves.

MR. MITCHELL: We have time for one question.

PARTICIPANT [Paul Maier, European Union Intellectual Property Office, Alicante]: We have been doing training for judges for many years in the EUIPO. More than 900 individual judges have come to some of our sessions. Some judges come on a regular basis, depending on the subject dealt with. The format is that the judges talk among themselves and they learn from each other rather than being trained by outside speakers.

We usually prepare a theoretical case that touches on a number of issues and we distribute it to them two weeks beforehand. The judges prepare before coming to the session and then during the session they present what their solution would be and they talk among themselves. There are almost exclusively judges in such sessions.

Additionally, we organize specific trainings from time to time. We do this mainly on technical subjects that judges are likely to be confronted with. A typical example is the functioning of the Internet. We also taught a number of these judges how to go to the Dark Net and make searches as well, just to help them understand how it works and to alleviate their fear.

They are almost always judges talking to other judges.

MR. MITCHELL: Thank you very much.

We are going to shift topics a bit. Our next speaker is Shira Perlmutter, the Chief Policy Officer and Director of International Affairs at USPTO. She is going to speak about the WIPO proposed Broadcasters Treaty and its implications for the multilateral system.

MS. PERLMUTTER: Thank you. What I'm essentially going to do on this panel is describe a case study in multilateralism, which is the proposed WIPO Broadcasters Treaty. This is now the longest-running WIPO treaty negotiation, as the Director General pointed out at the last meeting of the Standing Committee on Copyright, suggesting that it was time to get on with it. I will give a little bit of a window into the process in the current environment and provide some takeaways.

The genesis of the treaty dates back to the mid-1990s. It was founded on a desire to update the by then very venerable existing multilateral conventions, Rome and Berne,

to address new technologies, particularly digital technologies. The idea was to make sure that broadcasters had protection against signal piracy using new technologies, in particular signal piracy over the Internet.

First, we got a little bit sidetracked. In 1996 we concluded the WIPO Copyright Treaty (WCT)² and WIPO Performances and Phonograms Treaty (WPPT),³ so that took some time. But fairly soon thereafter we started discussing broadcasters, and it has now been more than twenty years that we have been discussing this topic.

I do have to say in our defense that there are very good reasons why it has taken so long. I've worked on a fair number of treaties at this point and this is the most difficult one from a technical perspective. You may ask, "Why is that?" There are at least four reasons that I'm going to give you, and I think there are more.

- One is the conceptual difficulty of separating out legal protection for a broadcast signal from legal protection for the programs that are being broadcast.

- Second, in this area there are different bodies of law involved, primarily communications law and copyright or related rights law. There are different experts in both fields, and they are not always in the same place and they are not always at WIPO.

- Third, there are very diverse landscapes from country to country both in the nature of broadcasting organizations, how they function and how they relate to the state; and also in how they are regulated and how they are protected, under what bodies of law and in what ways.

- Fourth — and this has been particularly difficult over the last twenty years — there are rapidly evolving facts on the ground. The nature of what a broadcaster is has been changing, and the technologies that are used by both broadcasters and what you might call the pirates have been changing very quickly.

I will say that, despite all of this, there has been some progress in the last year or so and I do think there is some basis for more optimism that we might be moving toward an acceptable treaty.

The kickoff was the mid-1990s, as I've said. By the early 2000s we had multiple text proposals on the table from different countries, mostly based on their own domestic systems.

I will mention the U.S. proposal at that time, which I'm calling here a "casting treaty." The United States proposed a treaty that would cover not just traditional broadcasters but anyone who invested time and money and skill in developing and coordinating programming and bringing it to the public. This proposal met a lot of resistance. Essentially, the question was: "What is a webcaster? We don't know what this is. Who are you trying to protect here?" So at the end of the day it did not move forward.

Three years later, in 2006, there was a mandate to the Standing Committee on Copyright from the General Assemblies that narrowed the scope of the potential treaty in two respects. First of all, the treaty was to cover only broadcasting and cablecasting organizations in a traditional sense; so the repudiation of the "casting" idea. Also the treaty was to proceed on a signal-based approach, making it clear it protected only signal and not content.

We then went through a period of about five years where we were essentially running in place. There were a lot of proposals made. There were presentations and semi-

² World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.

³ World Intellectual Property Organization Performance and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

nars. What we had on the table was everything but the kitchen sink, there were so many proposals being discussed.

Move to 2013. The United States came to the table and said: “Look, we have so many different proposals on the table, realistically the only way we will be able to achieve international consensus is if we focus on a narrow treaty. Let’s talk about a single right that would target the main concern of broadcasters and avoid what you might call “post-fixation rights” that seem to protect the content more than the signal.” We didn’t make this as a formal proposal, but we proposed language establishing a single right giving broadcasting organizations the exclusive right to authorize the retransmission of their signal to the public by any means.

Then there were another five years of discussion, mostly technical, that were very useful but didn’t change much.

In 2018 we came to the table with a formal proposal. We said: “Look, the United States could actually join this treaty, we can move forward, if we have that single-right approach combined with providing flexibility to countries in how they provide that right.”

If you look at the language we proposed — and this flexibility language is very similar to language found in the WPPT — it says, in addition to the single right, which is the exclusive right to authorize retransmission to the public, “any contracting party may in a notification deposited with the Director General declare that it will apply those provisions [the exclusive right] only to certain retransmissions, or that it will limit their application in some other way, provided that the contracting party affords adequate and effective protection overall against the retransmission of signals to the public, through a combination of the exclusive right and copyright or related rights.”

This was intended to say: “Every country has to provide an exclusive right to broadcasters, but they can limit it in certain respects if they make up for the limitations by giving broadcasters the ability to assert copyright rights in the content.”

That’s how we do it in the United States. That works here. Our broadcasters feel they have adequate protection. There is retransmission consent under our Communications Act, which has some limitations; and then, in addition broadcasters are able to assert copyright rights either as exclusive licensees, as owners of the copyright in the compilation of the entire broadcast day, or as owners of the copyright in the programs they originate.

Let me just say the reaction to the U.S. proposal was a lot of interest but a lot of questions and concerns about whether there is enough specificity. The ultimate question, I think, is whether there is enough here to satisfy those countries that want a list of more rights. The question is: If the alternative is not to have an international treaty, is this proposal something that will move us forward?

The SCCR has now made a fairly contingent recommendation, which is to continue work toward convening a Diplomatic Conference aiming for 2020–2021 without setting an actual deadline, and with contingencies built in so that this is only if we reach consensus on fundamental issues.

I do think this shows the continued important role of multilateral negotiations at WIPO, because this kind of difficult technical work can at this point only take place in that kind of environment.

One other point: you really see in this discussion that the traditional sharp divisions between developed and developing countries are no longer as clear-cut. There are a lot of developing countries very interested in this treaty. So, at least on certain issues, things are becoming more fluid and more interesting.

I will stop here.

MR. MITCHELL: Thank you, Shira.

Are there any questions?

QUESTION [Christian W. Liedtke, acuminis PC, Costa Mesa]: A question mainly for Shira but perhaps also for the other panelists. Sir Robin yesterday during the morning session mentioned the possibility of harmonization when it comes to exhaustion of intellectual property rights. Having listened to your presentation, and noting the rocky road that the Broadcasters Treaty seems to have taken, what do you think is the likelihood of something like the “Robin Jacob rule” actually coming to fruition?

MS. PERLMUTTER: A good question, and it is difficult to move toward harmonization. I’m still optimistic that on certain issues where there is a clear need and a clear will we can do it.

I think the twenty years for broadcasting was not so much — this is an unusually difficult area to harmonize because of the reasons I gave. It’s not a classic IP issue.

But I do recognize that we go through different periods. We went through a period of a lot of harmonization. It is more difficult now, but I do think that on particular issues there will be moments of opportunity to move forward — and we may still get there to some extent with broadcasters.

MR. TAUBMAN: If I can mention the TRIPs point of view, we all know that this is expressly left open in Article 6 of TRIPs.⁴ I would say that the really surprising thing is not that there has been agreement towards any kind of multilateral deal, but there has been no conversation about the policy implications, about experiences with different exhaustion regimes. It is important, it is very significant, it is very trade-related by the way. Whether or not harmonization is desirable or achievable, we don’t even have that conversation. That is what we need. I think that is urgently needed.

MS. PERLMUTTER: Yes. And I will just add one point, which is that if you look at the Marrakesh⁵ and Beijing treaties,⁶ those are examples not that long ago of narrow issues where there was sufficient consensus to move forward.

MR. MITCHELL: Professor Calboli?

PROF. CALBOLI: I cannot not talk about exhaustion.

MR. TAUBMAN: She wrote the book.

PROF. CALBOLI: Yes, I wrote multiple books about it. In fact, I was talking with Robin Jacob a few weeks ago in the United Kingdom and we might try to design some sort of guidelines.

But these types of specific agreements are already there. I think what you mentioned is precisely an example.

But even in physical goods, the Philippines and Indonesia have special treatment for pharmaceutical products, interestingly different. Some have international exhaustion and national exhaustion just for pharma. Others have national exhaustion in general and international exhaustion for pharma. Even Singapore has a special regime just for pharmaceutical products after the U.S. free trade agreement.

So you can segment by products based on certain reasons. So far, we have really not seen this certain good reason being applied, in my view looking at more of the consumer interests and access, but you can. I think it is going to be impossible to find a conclusion under TRIPs, but I would like to find it.

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 3.

⁵ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013.

⁶ Beijing Treaty on Audiovisual Performances, World Intellectual Property Organization, June 24, 2012, AVP/DC/20.

I like the two U.S. Supreme Court decisions — and I know you don't — but what is interesting is in a world where the U.S. administration is bashing international trade, the Supreme Court of the United States, even with a more conservative majority, is actually in favor of more international trade for exhaustion.

Now, does that matter because of the contractual prohibition of exhaustion? That really remains a question, I think.

MS. BENNETT: I have not participated a lot in international trade or international treaties. All I can say is that some twenty years ago I participated in a discussion about the reciprocal enforcement of foreign judgments issue and whether IP should be included. All I know is that it's happening again, I think this year, and decisions are being made once more about whether or not and to what extent IP should be included in the reciprocal enforcement of the Foreign Judgments Convention.⁷

If that history is anything to go by — I should say, by the way, my country is against it — but even there you see no consistency among countries on that narrow issue: should IP be included in that Convention and to what extent should you have automatic reciprocal enforcement? And yet, that discussion has been going on for a couple of decades and is still ongoing. So I don't have any great faith in something that has been, in effect, a judge-made philosophy or principle that is being taken up to a greater or lesser extent around the world.

MR. MITCHELL: We are going to shift gears yet again and introduce the next speaker, Jamie Love from Knowledge Ecology International in Washington, D.C., who will deliver his perspectives on the short-term future of IP in bilateral and regional trade agreements.

MR. LOVE: I think the short term is pretty much what most people talk about all the time, so there's nothing unique about that.

The first thing that I think is worth mentioning is that there are elections coming up next year in the United States. For example, if Bernie Sanders becomes the president of the United States, we might anticipate a different trade policy than if Joe Biden becomes the president of the United States or if Donald Trump continues or if Elizabeth Warren — there is a deep field in the United States and it is exciting to see what is going on. But it does raise questions. There is at least a significant possibility that there could be a fairly dramatic change in the United States if some of the people in the Democratic Party, some of whom I advise — so I could end up working for the government even; who knows? — that has never happened in the past. I'm just giving you an idea of how crazy it could be.

In the European Union they will have elections for the Parliament. One thing that we see happening within Europe is a stronger movement to push back on high drug prices. It is complicated, as you would expect. Some countries that have strong domestic pharmaceutical industries take a different position than others do. Italy, for example, is really stepping up right now in a number of areas, led by a populist party, sometimes described as being on the right — Spain, Greece, other countries.

One thing that I think will be significant in the Parliament is that Julia Reda — who is a force like I have never seen before in the Parliament — will not be standing for reelection. I think that will change a bit the way that things are debated in the European Parliament.

India is having elections. South Africa is having elections. Many countries are having elections. I think that makes you stop and think about what could happen.

⁷ 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019.

In United States the Democrats have kind of thrown down the gauntlet on the United States-Mexico-Canada Agreement (USMCA),⁸ the revision of the North American Free Trade Agreement (NAFTA),⁹ around the pharmaceutical issues, which is the primary thing they are really talking about. They have at least had some pretty tough talk about this. The suggestion is that they may ask the USTR¹⁰ to walk back some of the provisions, with the feeling that Canada and Mexico would be very comfortable in walking back some of the provisions on pharmaceuticals. That could happen. We'll have to see.

There is one issue in the United States that is becoming more important in the political debate particularly around biologic drugs. There is a lot of frustration that the monopolies on biologic drugs don't end in the same way that they do in small molecules and that the evergreening problems are part of the issue. A proposal that is gaining traction is the idea that is sometimes referred to as the "one and out idea," the idea that there would be some term that is a cap on exclusivity, whether it's twelve years or a different number, and that after that period of time the compulsory license would be issued across-the-board on whatever kind of exclusivities are out there.

Under the TRIPs Agreement, if you issue a compulsory license, exports are restricted in most cases. If the United States wants to have a domestic manufacturing industry in the area of biologic drugs, the compulsory license could be implemented as a limitation on remedies, liability rules. That actually permits exports; you don't have the same kind of restrictions. There are provisions in the USMCA that are problematic because they say that you cannot put caps on what damages might be, which is what you would have to do to implement this other policy.

It is very difficult to get some of our trade officials — I'm talking about you, Steve, but your colleagues mostly — to pay attention to these things because they think their job is to essentially promote a small number of right owners' point of view without paying attention to some of the nuances that are out there, unfortunately. Actually I should talk about Shira too, because this is under her as well, so I shouldn't let her off the hook.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is now being ratified and that is coming into effect. So the question is going to, I guess, in a way depend on the election: does the United States rejoin that agreement or not? If the United States does agree, to what extent do the provisions of that Agreement, which are much longer than the TRIPs Agreement and much more complicated and nuanced, is that something that China ends up doing, and things like that? We don't really know what is going to happen there, but certainly if some people in the Democratic Party get elected, the odds of the United States rejoining the Agreement are probably fairly significant.

US/EU: There's a big difference. People mentioned that things are happening with the Broadcasters Treaty. The Broadcasters Treaty is about a related right that would be given to people who do not create, own, license, or pay for content; it would be automatically granted to them. That is really not something that I think is a good idea. It is something that the copyright owners used to object to back before they all got more or less coopted by really big companies. That is one issue.

But it is not the only related rights issue that comes up in these kinds of negotiations. As you know, the European Union has related rights in areas like databases, and much more recently in terms of news of the day and quotations. These two exceptions to

⁸ Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018.

⁹ North American Free Trade Agreement, Can-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289.

¹⁰ Office of the United States Trade Representative.

copyright, which are required and mandated by the Berne Convention¹¹ to protect the production of information and quotations and news of the day, are essentially being overwritten by a related right in the European Union because they hate Facebook and they hate Google. I think that could be a source of some trade tension, although I haven't seen much evidence that the U.S. government is doing much on behalf of the big technology companies in this area.

There are going to be some significant differences in the safe harbor approaches. The Hague Convention¹² is quite important whether you knock out IP or you keep it.

And there is going to be an emerging issue about the interpretation of whether cell and gene treatments, like CAR-T, come under the exception in the TRIPs Agreement or in regional agreements or in national laws relating to whether they are determined to be medical procedures as opposed to products. Particularly relevant in that respect in Europe would be the European Patent Convention provisions and the EU Directive on Medicinal Products for Human Use¹³ as regards to advanced therapy medicinal products.

Thank you.

MR. MITCHELL: Thank you, Jamie.

If you don't mind, I may exercise the moderator's privilege for just a second to talk about the CPTTP. Jamie had mentioned the possibility of U.S. reentry.

I will just point out as a factual matter that the CPTTP (or TTP-11) is not, particularly with respect to IP, the same agreement that the United States had negotiated in the Trans-Pacific Partnership (TPP). Upon the United States leaving the group there were a number of provisions that were suspended — I believe it was twenty-one or twenty-two across the Agreement, nine of which came from the IP text. The question of whether the United States would be reentering particularly into the intellectual property commitments is one that the government would take a very close look at.

Any other perspectives from the panel?

MS. MONTELLANO: Actually opening the floor to the next presentation, I would like to offer a few comments.

I think the last topic raises the question: will the TRIPs Agreement survive after all we have seen and been observing? I hope so. I will provide very shortly some perspective about the situation in Latin America. Whenever we are faced with a bill of law or a regulation that tries to subvert the patent system, such as a recent oil and gas regulation that tried to really ruin the patent system in Brazil, I like the idea of referring back to the TRIPs Agreement, the WTO Agreement that was signed by 140 countries back in 1994, as a consensus of how we should address IP rights, minimum standards portrayed, etc.

As far as regional agreements and the importance of keeping the multilateral system, I want to mention the Escazú Agreement, a United Nations agreement that was just signed by fifteen countries in Latin America.¹⁴ I don't know if most of you have heard of it. It was signed on September of last year. This Agreement basically provides for disclosure of environmental information, which, as you may guess, might ultimately conflict with IP rights. For instance, regulatory data packages containing confidential information might

¹¹ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, Sept. 28 1979, S. Treaty Doc. No. 99-27.

¹² Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216.

¹³ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community Code Relating to Medicinal Products for Human Use.

¹⁴ Escazú Agreement, Mar. 4, 2018.

be subject to those disclosures, violating IP rights secured by local and international law. This document was signed as a regional agreement, and a minimum of eleven countries still need to ratify it so that it comes into force. We need to monitor adoption.

Environmental democracy is getting momentum more than ever and may conflict with IP rights at some point. That's why I like to go back to TRIPs and reinforce its importance twenty-five years later. I think it's time.

I'm still a big, big believer in multilateralism for IP. That's the message I want to leave you with.

MR. MITCHELL: Thank you.

We have just about a minute for questions on this general topic. Anyone?

[No response]

All right. Let's claim our minute back then and turn to our next speaker, Tony Taubman from the World Trade Organization will speak on "Centripetal Rules in Centrifugal Times: Where Is Multilateralism Heading?" — indeed, taking on the topic of twenty-five years of TRIPs and what is particularly its future relevance.

MR. TAUBMAN: Thank you very much. Wonderful to be here.

I am very grateful to Evelyn for the perfect introduction which renders part of my presentation less important. I think she phrased it very well.

Certainly you would expect me to say something in favor of multilaterals. I think it is important to remember why it is there.

Literally, embedded in the foundation of our building is the maxim "*Si vis pacem, cole justitiam*" (if you want peace, cultivate justice). WTO was the first endeavor after the First World War to build a world on a framework of multilateral law. We can recall what happens when it doesn't work out. It's a serious matter.

Tension was in the background of the conclusion of the TRIPs Agreement. It's there in the Preamble. It's the only part of the WTO legal system that refers explicitly to the reduction of tensions. That was very much the situation that led to the conclusion of TRIPs. And indeed, we know that intellectual property, whatever your take on it, is a source of tensions today.

Let's go back "Through the Looking Glass" and consider what twenty-five years of TRIPs really does amount to.

I am a great fan of the White Queen in *Alice in Wonderland*.¹⁵ She boasted of being able to believe in as many as six impossible things before breakfast. I am going to try six impossible things before lunch.

First of all, TRIPs itself is in a sense an impossible thing. The range of ideas against it before, during, and after its conclusion included those opposed to globalization, those opposed to the trade dimension of intellectual property, and those opposed to the intellectual property dimension of trade.

There is a conceptual difficulty that, frankly, I think we are still trying to bridge even in the heart of the WTO: what are those trade-related aspects of IP and why do they matter?

That trade-relatedness, I think, has come into focus over those twenty-five years. The negotiators weren't thinking of the online economy; they weren't thinking even of the tradability of IP as distinct tradable rights. But that is what has happened. That is what we see today. We see the emergence of trade in IP as such.

¹⁵ LEWIS CARROLL, *ALICE IN WONDERLAND*, 1865.

The very day that TRIPs entered into force nearly twenty-five years ago, Nick Negroponte was writing a think-piece in *Wired* about shouldn't we be talking about trade in bits and not trade in atoms.¹⁶

Well, we have that today. The app economy is the most obvious example of that. The numbers are quite extraordinary.

The access to this trade and the benefits from this trade are not necessarily shared equitably. But one of the troubles is that this trade in IP — it's largely trade in IP licenses don't forget — doesn't enter into trade statistics. And yet it is enormously significant.

It's enormously significant for an economy such as the United States, and when there are concerns about trade deficits, when this is driving policy and driving negotiations, this is in fact missing from the trade numbers. This is something that we do need to turn to from a trade policy point of view.

That \$30 billion payouts to developers that Tim Cook is gloating about there, we don't know who they are. We don't know if they're in Addis Ababa or in Minneapolis — they're probably in both. But it is very important, and our developing country members are very concerned about the development dimensions of those issues and the practical possibilities for their unemployed geeks — let me put it that way — who are well distributed across the globe.

When it comes to the meta trade policy, if you like, it is a reminder that even in the intellectual property trade that we can count the United States has a massive surplus, and I believe that this really does underreport the situation as it is.

Let's consider TRIPs as a legal agreement. There is a great deal of concern about coherence and policy balance. The jurisprudence, I think, has emphasized the need for a sober approach to treaty interpretation.

The appellate body agrees with Humpty Dumpty, who said, "If I meant that, I'd have said it." That's what the appellate body concluded the first time it turned to TRIPs: "The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself."¹⁷ An important recognition of the need for a stable and predictable legal system.

Likewise, coherence. There were concerns that there would even be divergence between WIPO and WTO — Tweedledum and Tweedledee — when it comes to approaches to, say, the Berne and Paris Conventions. Dispute settlement has resolved that, and indeed there is a much broader coherence agenda at the level of policy, at the level of values, and in an inclusive approach to outreach and technical assistance under the broad aegis of TRIPs.

Likewise, the TRIPs Agreement has been understood to be flexible, but not necessarily flexible for its own sake. Adaptable is another way of looking at it, responsive to changing needs, responsive, for example, to the emergence of global value chains and the significance of IP in an iconic new economy trade such as that in smartphones.

When it comes to implementation of TRIPs, we literally are sitting on mounds and mounds of legal notifications from 138 different countries. There is enormous regulatory diversity and some innovation in this regulatory material, in the legislation and enforcement mechanisms that are reported upon. We have barely scratched the surface in this.

The point I would make here is that this is an important resource for us when it comes to understanding intellectual property and the policy dimensions today.

¹⁶ Nicholas Negroponte, *Bits and Atoms*, *WIRED* (Jan. 1, 1995), <https://www.wired.com/1995/01/negroponte-30/>.

¹⁷ WT/DS50/AB/R.

Likewise, when it comes to the practical impact of TRIPs — here's a very obvious example, patent filings in India. The two arrows there mark significant points in the implementation of TRIPs.

While indeed I understand policy issues about compulsory licenses and so on, we should also bear in mind the large number of industrial property filings, in particular, that can be directly attributable to TRIPs implementation.

TRIPs, for the first time in multilateral law, tells why we should have an IP system at all, the policy purposes for it, and I would say that twenty-five years of practical experience at the domestic level since TRIPs implementation gives us thousands of answers to the question of how to implement that “should” of the IP system.

A reminder also that TRIPs implementation for many developing countries has been a generational process. It is not simply a matter of updating laws. Developed countries had it quite easy implementing TRIPs. For many developing countries it was a fundamental process of developing institutions, creating an IP judiciary that simply did not exist, and we are seeing now, only twenty-five years later, in some cases the fruits of that in, for example, the emergence of an independently minded and very capable judiciary in those jurisdictions where there was simply none twenty-five years ago.

There is still a lot to be learnt from the TRIPs Agreement.

This highly sophisticated analysis on Google Scholar demonstrates there has been almost half a million scholarly articles writing about TRIPs. But we in fact have much more to learn.

I would like to focus on the practical experience of the over 130 jurisdictions that have tried to put TRIPs to work, that have tried to deliver on that “should” of the IP system. We are trying to do this in the WTO by putting this material online, by providing in effect the “missing manual” for the TRIPs Agreement.

We are seeing the TRIPs Council, in particular, emerge as a forum for policy ideas. It is not going to deliver new norms, but it is going to help us understand how to put the existing norms to work in an effective way.

Developing countries also have taken greater ownership of the TRIPs Agreement. It is no longer seen in very simplistic North/South terms. I would argue in discussion later that dispute settlement has been much more balanced and less about legal harassment. There was concern in the early days of TRIPs that it would be the North beating up on the South. We haven't seen that in the dispute settlement.

Finally, too, we have the challenge of bilateralism, of regional norms. There remains a question of whether the multilateral system is going to remain relevant. Fortunately, I'm out of time so I can't answer that question.

Thank you.

MR. MITCHELL: We have about three minutes to consider the future of TRIPs, so let me turn quickly to the panel.

PROF. CALBOLI: Thank you, Tony, for a very excellent presentation and giving us data — and I think Shira's review of the Broadcasting Treaty also shows this — that makes me feel more optimistic now about the international multilateral system. I think we are working through pockets where when it gets highly technical perhaps this becomes more an avenue.

The mega-regionals do remain an avenue. The European Union has done interesting work with many countries just one by one by one, with the bloc of twenty-eight negotiating at once. But I think what we are seeing is that even though we are maybe not making that many advances in substantive provisions, a lot of the administrative provisions at WIPO at least have been adopted.

I think the discussion with TRIPs, and different types of harmonization that happened through the DSU as well — how you interpret that and then how that spills over into national domestic jurisprudence.

We do have political elections coming next year and we are seeing some changes. While a few years ago I felt much gloomier about the multilateral system, I think now we are probably on a more stable situation and not a negative one necessarily. Geopolitics has changed, but not necessarily for the bad. It will actually be very interesting to see what is going to happen.

MR. MITCHELL: Thank you.

I think that's a good opportunity to roll into our final presenter for the morning. We are delighted to introduce Chomwan Weeraworawit from Standards Hotel in Bangkok and Mysterious Ordinary LLC consultancy to talk about geographical indications, particularly, their potential use by the textiles industry in developing countries, and to make a case for their multilateral protection.

MS. WEERAWORAWIT: Thank you very much, Stevan. Hi, everyone. I am really happy to be here. I do not want to be the person who stands between you and lunch, so I will keep this relatively brief.

I have been working with artists, filmmakers, villagers, and designers in Thailand for the last couple years based upon research that I did some years back looking at how IP could be used as a tool for the textiles industry in developing countries.

The blue chunk on this are developing countries, most of which still make things by hand. Cottage industries, craft, are still a really big deal.

The premise for this was that we will not be able to compete on price because we are not price-competitive anymore post the end of the 2005 Multifibre Agreement.¹⁸ Therefore, I wanted to see whether IPRs — in particular copyright, trademark, and geographical indications — could be used as a tool.

I was looking at actually who the users would be. To some extent there was a little bit of a gap between villagers who were weaving textiles in the northeast of Thailand and the notion of branding — what are trademarks, what are copyrights anyway?

Whereas Professor Cornish said, “market power may grow out of branding,” I started looking at what branding could really mean for a group of people who are not well versed in IP, where IP is something totally removed from their everyday existence, but yet could have an impact on their lives if it is managed properly.

If we look at the idea of the trademark as the brand, the all-encompassing thing, and then everything that copyright represents going into branding, this idea of storytelling was something that I found really resonated with the people that I work with. All of these parts go into the sum — literary works, artistic works, photographic works, cinematic works.

I show this picture from a Gucci campaign a couple seasons ago. In that picture alone you are looking at all of the elements that make up the brand. The perception that the market has for this brand is fantastic. I think Gucci made however many billion last year in revenue.

Stories communicated to the market = increased brand equity.

Copyright + trademarks + marketing and communications = brand equity.

¹⁸ The Multifibre Arrangement and subsequent Agreement on Textiles and Clothing governed textiles from 1974 until 2005, when it was phased out. See *Textiles: back in the mainstream*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm (last visited Apr. 6, 2020).

The Ministry of Commerce was fully supportive of taking Thai designers, usually not necessarily working with Thai textiles or anything traditional, abroad doing these fantastic shows and whatnot. My question was always: if we are already producing things, usually in the rural villages outside of Bangkok, what is the platform for them?

Along came geographical indications (GI). That was something that it took a really long time for Thailand to get a grasp of. I think now the Department of Intellectual Property has been really quite progressive. We have the GI being used as something that can protect goods that originate from a place that are possible really through the passing on of knowhow throughout generations.

I want to show this photograph. The textiles that were protected as a GI were from Ponchampally Ikat, near Hyderabad in Andhra Pradesh, in 2005. India has huge textiles exports and they have a Ministry of Textiles. So India has this infrastructure.

Thailand, on the other hand, has a lot of potential. If we look at what a successful GI story could mean and why does it matter, the question for me that is really prevalent is: What is the point? If the group of people that are ultimately the designated users, the ones who should be protected, the communities, don't know what this is, what's the point?

One case study is Sakon Nakhon Indigo. When people think of indigo, they don't often think of Thailand. It's something that the Japanese in a way have claimed — you know *France denim*; even the Americans over the last centuries.

Sakon Nakhon Indigo was granted its GI in 2015. I work with a couple villages from this province. Only seven of the sixty-three villages in Sakon Nakhon have been granted a GI. They are all very excited, mostly grandmas, and aunties who still weave and dye. Basically, indigo harvested from the land goes through a natural process to create this paste. This paste then eventually creates what I'm wearing.

In order to get any value beyond this as an ethnic artisanal product, a lot goes into the marketing and branding of it. I work with a brand in Thailand that works closely with these villages.

What we found is, because there's a university in Sakon Nakhon and a training center, there is a platform for these grandmothers to really understand how the GI can work for them. We are finding that Sakon Nakhon Indigo is becoming a brand in itself. The GI is ultimately a marketing tool.

Why should there be multilateral protection for GIs? I think the answer is that the trade for these goods should be international. Local demand alone cannot sustain these industries. It takes going abroad and coming back for that value to be enhanced. That's the reality of international trade. So the question is: Why shouldn't there be multilateral protection for GIs?

The Geneva Act of 2015,¹⁹ which I believe the European Union acceded to in March, gives broad multilateral protection for GIs in much the same way as Article 22(2) of TRIPs and Article 16(3) which looks at well-known marks.

If someone in Japan decides to make Sakon Nakhon indigo in Japan, that would not be valid; whereas at this point in time, because Thailand is not a party to the Geneva Act, there is that risk.

I want to end with this screenshot of the WIPO explanation of what the Geneva Act is: "In today's crowded global marketplace, product differentiation is crucial. That makes branding crucial too."

I conclude from that that branding and GIs are somewhat related.

¹⁹ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations Under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, May 21, 2015.

Thank you very much.

MR. MITCHELL: Are there any closing thoughts, comments, or questions?

MS. MONTELLANO: Remembering that today is WIPO World IP Day, maybe we should also come up with World TRIPs Agreement IP Day. How about that? I just came up with this idea.

MR. MITCHELL: Thank you all very much and do enjoy your lunch.