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# Strong Intellectual Property Protection, Weak Competition Rules – or the Other Way Around to Accelerate Technology Transfer to the Global South? Ten Considerations for a "Prodevelopment" IP-Related Competition Law

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## Reneging on the technology transfer promise of TRIPS

Technological solutions are instrumental to securing basic subsistence rights. However, investment in these solutions will often be beyond the resources of developing countries. Securing human rights in these countries will, therefore, require a transfer of technology from countries of the North to those of the South.[1] The United Nations Conference on Trade and Development's (UNCTAD) draft Code of Conduct on the Transfer of Technology of the first half of the 1980s had sought to justify such a claim of developing countries by reference to "the right of all peoples to benefit from the advances and developments in science and technology in order to improve their standards of living."[2] However, the Code was never adopted. Yet, grounded in notions of international justice and solidarity, the demands of developing countries in this regard were repeated in the process of negotiating the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Hence, the political consensus underlying TRIPS was that, in exchange for intellectual property (IP) rights protection, a transfer and dissemination of technology benefiting the global South would occur. IP-related competition law was identified as an instrument that could play a central role in achieving such international transfer and dissemination of technology.[3] Never-

**Abstract**

Competition law provisions relating to intellectual property (IP) rights should play an enhanced role in facilitating the domestic and international transfer and dissemination of technology. IP-related competition rules in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) create an obligation for Member States to apply competition law in the IP context. TRIPS competition rules should be read in a "prodevelopment" fashion – IP rights need to be read reductively, IP-related competition law expansively. Ten considerations for a "prodevelopment" IP-related competition law are formulated.

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*Las disposiciones del derecho de la competencia relativas a los derechos de propiedad intelectual (PI) deberán desempeñar una función más destacada a la hora de facilitar la transferencia y difusión de la tecnología a nivel nacional e internacional. Las normas de competencia relacionadas con la PI del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual Relacionados con el Comercio (ADPIC) de la Organización Mundial del Comercio (OMC) imponen una obligación a los Estados Miembros de aplicar el derecho de la competencia en el contexto de la PI. Las normas de competencia del Acuerdo sobre los ADPIC deberán interpretarse de un modo "favorable al desarrollo", esto es, los derechos de PI deben interpretarse con un enfoque reduccionista, y el derecho de la competencia relacionado con la PI, ampliamente. Se formulan diez consideraciones en aras de un derecho de la competencia relacionado con la PI "favorable al desarrollo".*

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*Il devrait davantage être recouru aux dispositions relatives au droit de la concurrence applicable aux droits de propriété intellectuelle pour faciliter le transfert et la diffusion des technologies aux niveaux national et international. Les règles de concurrence applicables à la propriété intellectuelle dans l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC) de l'Organisation mondiale du commerce (OMC) créent une obligation pour les États membres d'appliquer les principes du droit de la concurrence à la propriété intellectuelle. Ces règles doivent être interprétées de sorte à favoriser le développement, autrement dit une interprétation étroite des droits de propriété intellectuelle doit être privilégiée en même temps qu'une interprétation large du droit de la concurrence qui s'applique à la propriété intellectuelle. Le présent document présente dix considérations en faveur d'un droit de la concurrence appliqué à la propriété intellectuelle propice au développement.*

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theless, this transfer and dissemination has not taken place so far.

There is no international competition law that controls the anticompetitive use of IP rights. As it were, there exists no international competition law whatsoever. There are, however, three provisions in TRIPS dealing with IP-related competition law. Article 8(2) accordingly stipulates that "[a]ppropriate measures … may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." This clearly covers the taking of measures of competition law. Article 8(2) adds the proviso though that such measures be "consistent with" TRIPS. For this proviso not to effectively amount to a contradiction in terms, it can only mean that competition law must not undermine the *core* of IP rights protection under TRIPS – or, as the respected *Resource Book on TRIPS and Development* explains it, "the consistency requirement represents a reservation made to prevent an excessive application of national competition rules, which would bring the regular exercise and exploitation of IPRs, as they are assumed by TRIPS standards, within the ambit of and control by antitrust authorities."[4]

Article 40, a fairly long provision, more concretely envisages the control of anti-competitive practices in contractual licences. Article 31, finally, recognises the validity of compulsory licences in the sphere of patent law, *inter alia* to correct anticompetitive practices. While Articles 8(2) and 40 use the language of "technology," thus implying a special nexus with patent law, there is no reason not to hold the provisions applicable to any kind of IP rights. Ultimately, Article 8 applies to TRIPS as a whole. Similarly, Article 40 is contained in a section following the systematic elaboration of all the various IP rights protected by TRIPS. Technology should, therefore, be read more broadly as "knowledge."

These TRIPS competition provisions allow WTO Members – as long as IP rights as recognised under TRIPS are not undermined in their essence – to accord a prominent role to competition law in addressing anticompetitive practices covering abuses of (also collective) dominance in the form of, for example, refusals to license, restrictive licence terms, or the charging of excessive prices for IP-protected products – in other words, practices impeding (*inter alia*) the transfer and dissemination of technology. A doctrinal analysis also makes it quite clear that the *international* transfer of technology is most certainly encompassed by these provisions. Most scholars opine, however, that, since TRIPS included IP-related competition rules as a mere concession to developing countries, they do not create an obligation to act, that is, any duty to apply competition law in the IP context.[5] This perspective focuses too much on the "historic will" of WTO Members. A holistic, integrated approach to interpretation looks different.

As pointed out, a transfer and dissemination of technology benefiting the global South has so far not taken place – in fact, we are receding from this goal further and further. The economy (in developed countries at any rate) has moved away from being based on a multiplicity of independent innovators to one characterised by cross-licensing and innovators pooling IP rights. With IP rights becoming ever more interdependent, this strategy facilitates easier access to needed technology, reduces transaction costs, and promotes combined efforts at further innovation. In combination with the reality that IP rights protection increasingly relates to whole technologies, the situation thus arises where various economic actors acting together attain positions of significant market power.

Such market power has come to be seen as the foundation for innovation. A natural consequence of this strategy is a restrictive approach to traditional bilateral licensing. Licensors these days are allowed to hold positions of significant power, to impose arrangements in terms of which ensuing innovation opportunities and profits will substantially promote their own advantage. This induces licensees to rather "join in" and co-operate with licensors' projects. In this scheme of things, competition law will therefore only (be allowed to) address the most excessive exercises of market power. This paradigm emphasises the innovation at the expense of the dissemination rationale of IP and competition law. In the process, it is forgotten that Article 7 of TRIPS requires of WTO Members that they maintain a balance between the two.

Developed countries exert pressure on developing countries not to adopt technology transfer-friendly competition rules: "[C]ountries possessing market power will have considerable leverage to push other countries to abandon dissemination-oriented competition rules as an impediment to investment, in exchange for access to markets."[6] The advantage for the developed world is that it can retain control over markets in knowledge products in the developing world and, in this way, continue benefiting from the revenues produced. This creates a vicious circle. The developing country with the lowest competition law standards will set the example that other developing countries will follow, fearing that they will otherwise "lose out," with firms in developed countries seeking their licensees in countries with minimal competition law protection. Stronger IP rights and weaker competition law protection benefits developed countries.[7] The effects for developing countries, however, are quite devastating.

What is needed is a "prodevelopment" reading of IP-related competition law, starting with the TRIPS competition rules. If a famous competition law scholar in 2005 had lamented "expansionist IP protection" and "reductionist competition rules,"[8] a "prodevelopment" approach requires an inversion of the formula: IP rights need to be read reductively, IP-related competition law expansively. Where licences are unreasonably refused, restrictive or onerous licence terms applied (exclusive grant-back, exorbitant fees, etc.), pay-for-delay negotiated, or excessive

prices for IP-protected products charged, countries must enjoy ample leeway – through resolute ex ante or ex post control, by administrative agencies or courts, in terms of administrative, tort, and/or criminal law – to rely on remedies such as injunctions, damages, fines, and/or compulsory licences, to intervene in the interest of effective competition. Inverting the formula could be viewed as a demand of the rule of law at the international level.

On the one hand, there is the "*pacta sunt servanda*" maxim. Treaties (here TRIPS) must be performed in good faith,[9] that is, an implementation of a treaty that gives effect to its object and purpose must be preferred to any other implementation that does not. If the global IP regime does not, in accordance with Article 7 of TRIPS, lead to a transfer of technology as envisaged, one may have to "revisit" and "complement" TRIPS obligations.[10] An "honest" approach therefore requires attention being given to the status of competition rules. "*Pacta sunt servanda*" could be described as an element of the rule of law in a more structural sense at the global level. On the other hand, an enhanced, more social status of competition law is also a matter of obeying the rule of law in a more normative sense at the global level. The latter approach will be explored further below. The obligations within and outside TRIPS embodying public interest and human rights considerations referred to here, apply with equal force to safeguard IP-related competition law against potential reductionism under bilateral and plurilateral free trade agreements (FTAs) beyond TRIPS.

## Articles 7 and 8 of TRIPS

In interpreting a treaty, its terms must be read in the light of the object and purpose of that treaty.[11] The object and purpose of TRIPS is clearly reflected in Articles 7 and 8. The overarching aim of Article 7 is to achieve "balance" in IP law – as seen, including between the creation and the dissemination of technology. The "rights and obligations" in respect of which "a balance" is to be attained under Article 7 encompass those which WTO Members have assumed in terms of other international regulatory frameworks, also international human rights regimes. Article 8(1) allows TRIPS countries to adopt measures to protect the public interest in socio-economic and technological development. Article 8(2) allows measures to prevent the abuse of IP rights and other harmful practices.

Articles 7 and 8 express binding public policy, one could even say human rights-inspired, considerations. They "confirm … the broad and unfettered discretion that Members have to pursue public policy objectives,"[12] also by a reliance on IP-related competition law. From a "prodevelopment" perspective, Articles 7 and 8 confirm that "policy space" with regard to the application of competition law does exist, that it may be used without interference by other WTO Members, and that it may indeed be construed boldly. As long as the core of IP rights as recognised under TRIPS is not undermined, competition law may be accorded a prominent role in addressing what a Member considers anticompetitive practices in IP rights exploitation. It should be added that TRIPS, as a system, does not permit individual Members to contract out of Articles 7 and 8 through FTAs.

## Systemic integration in international law

TRIPS, even if part of the WTO system as a "self-contained" regime, forms part of "the comprehensive universe of international law."[13] The rules of treaty interpretation of international law, as codified in the Vienna Convention on the Law of Treaties of 1969, require, when interpreting a treaty – even if its terms are (ostensibly) unambiguous – that a contextual approach be adopted, which takes into account "any relevant rules of international law applicable in the relations between the parties."[14] This gives expression to the principle of "systemic integration" in international law. TRIPS must accordingly be understood in the light of all other relevant (including potentially conflicting) norms of general international law and those of other "self-contained" regimes applicable between the parties.[15]

Hence, obligations under international human rights law (IHRL), such as those laid down in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, would have to be considered too. It should also be remembered, as Martti Koskenniemi emphasises, that a "harmonious reading" is to take into account the "normative force" of contending norms.[16] This approach must add weight to human rights norms, as these express a transnational community interest (obligations *erga omnes*).[17]

## Right to Development

A "prodevelopment" approach to IP-related competition law finds notable support in the (group) right to development. The United Nations's (UN) 1986 Declaration on the Right to Development proclaims the right to development to be "an inalienable human right."[18] The right to development is a right to "a process of development" centred around the concept of equity and justice progressively leading to improved levels of realisation of human rights – in other words, it covers both achieving the objectives of development and the way they are achieved.[19] A significant feature of the right is that it (also) accrues to "nations" vis-á-vis other States, encompassing claims to "joint, mutually agreed action by States," amongst others within international organisations.[20] This means that WTO Member States, notably all developing Member States, are holders of the right to development vis-à-vis other, notably developed WTO Member States. Even though the Declaration constitutes soft law, many aspects of the right to development have become binding law by virtue of their inclusion in binding treaties. For example, the ICESCR includes the collective right to self-determination, the obligation of international co-operation, and, of course, all economic, social and cultural rights, all of these being part of the right to development.[21]

In what can be read as an assertion of the link between

Articles 7 and 8 of TRIPS and the right to development, the WTO recognised in the Doha Ministerial Declaration of 2001 that "the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."[22] Similarly, the World Intellectual Property Organization's (WIPO) Development Agenda of 2007, specifically referring to Article 7, emphasises that IP rights enforcement must take into account "broader societal interests and especially development-oriented concerns" with a view to, *inter alia*, contributing to the transfer and dissemination of technology.[23] The Agenda goes on to underline the importance of "pro-competitive" licensing practices, to foster creativity, innovation, and the transfer and dissemination of technology to developing countries.[24] The great value of the right to development in the international IP rights system is that it normatively supports an approach recognising the needs of developing countries in respect of "maximum flexibility" in the design of national IP (and thus also competition) systems.[25] Consequently, TRIPS must be read to preserve the freedom of WTO Members to legitimately decide that competition law may further social goals, be based on notions of fairness, focus on consumer protection, be designed to ensure IP rights promote human development, and be directed at serving a development agenda that promotes technology transfer.

## From right to science to (international) technology transfer as a human right

The realisation of human rights, specifically economic, social and cultural rights, depends on access to technologies. In giving effect to the rights under the ICESCR, States Parties will, therefore, have to secure enjoyment of the various welfare entitlements covered by economic, social and cultural rights *inter alia* through a transfer and dissemination of technology which benefits the local population. One of the Covenant provisions, however, addresses technology transfer and dissemination more explicitly and holistically. This is Article 15(1)(b). It stipulates that States Parties recognise the right of everyone "[t]o enjoy the benefits of scientific progress and its applications" (REBSPA). This should be read together with Article 15(2), which obliges States Parties to achieve the realisation of the rights in Article 15(1) through, *inter alia*, "the conservation, the development and the diffusion of science."

Specifically referring to Article 15(2), the UN Committee on Economic, Social and Cultural Rights (CESCR) – the independent expert body supervising implementation of the ICESCR – in its recent General Comment No. 25 on Science and Economic, Social and Cultural Rights of April 2020, explains that realising the REBSPA requires "creating an enabling and participatory environment for the conservation, the development and the diffusion of science and *technology*."[26] The General Comment explicitly states that the "benefits" of science include the "material results" of the application of scientific research in the form of technology.[27] In effect, the REBSPA requires access to technologies for producers ("licensees") and final consumers. However, as pointed out, developing countries depend on the technologies produced in developed countries. Does Article 15 also cover the *international* transfer of technology? This depends on whether the rights of the ICESCR apply *extraterritorially*, that is, whether they create obligations for States Parties to respect, protect, and fulfil the Covenant rights with regard to those beyond their borders in countries of the global South (in certain cases, at least).

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011, drafted by international law experts, state that "[a]ll States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially."[28] Extraterritorial state obligations (ETOs) cover, *inter alia*, ETOs of "a global character," that is, ETOs which seek to protect indefinite persons in countries around the globe, through conduct that may broadly be subsumed under the banner of international solidarity or co-operation.[29]

As to their legal status, the Maastricht Principles are reflective of the teachings of the most highly qualified publicists as a subsidiary means in determining rules of international law.[30] Hence, they go to confirm that extraterritoriality as encompassed by treaties such as the ICESCR is a hard law obligation. Article 2(1) of the ICESCR emphasises that Covenant rights are to be implemented by measures taken "individually and *through international assistance and co-operation*."[31] This, in turn, has a basis in Articles 55 and 56 of the UN Charter. Article 56 lays down the "pledge" of UN Members "to take joint and separate action in co-operation with the Organization" for the achievement of the goals of Article 55. Article 55 mentions the promotion of "universal respect for, and observance of, human rights" as a UN goal in the sphere of socio-economic development. Interestingly, Oscar Schachter had already in 1951 described Article 56 as giving rise to a *legal* obligation.[32]

While ETOs to provide concrete international assistance (as a species of obligation to fulfil) may still be disputed by some, the CESCR has authoritatively held that these are "an obligation … particularly incumbent upon those States *which are in a position to assist others*."[33] Less contentious are ETOs to respect, protect, and facilitate. The obligation to respect (negative in nature and requiring States to refrain from infringing human rights), in our context, would include ETOs of developed States not to engage in anticompetitive conduct that impedes the international transfer of technology. The obligation to protect (positive obligations to protect individuals against private actors) would cover ETOs of developed States to regulate the conduct of "their" companies operating abroad to prevent them from engaging in anticompetitive conduct there which jeopardises international technology transfer. ETOs to facilitate (another species of obligation to fulfil), though

positive in character, do not really require international resources or aid. These are ETOs of a "constitutional" nature, envisioning the creation of an international enabling environment conducive to the universal fulfilment of human rights. States, acting uni-, bi-, pluri-, or multilaterally, for example, in WIPO or the WTO, could thus be held obliged to create, interpret, and apply national and international law and policy in a way that promotes human rights in developing States through IP -related competition law that facilitates technology transfer to the global South.

In its General Comment No. 25, the CESCR, specifically using the term "extraterritorial obligation," points out that States Parties, when negotiating international agreements in the IP field (TRIPS, relevant FTAs, etc.), must ensure that IP regimes foster the enjoyment of the REBSPA (which, as seen, includes access to technologies). States Parties must also exercise their voting powers in international organisations (WIPO, WTO, the World Health Organization (WHO), etc.) in a way as to respect, protect, and fulfil the REBSPA. Similarly, they must regulate the conduct of multinational companies over which they can exercise control, in order for the companies to respect the REBSPA, also when acting abroad.[34] This supports a clear recognition of the role of competition law as a highly suitable instrument that may help secure the international transfer of technology.

## Ten considerations for a "prodevelopment" IP-related competition law

IP-related competition law should play an enhanced role in facilitating the domestic and international transfer and dissemination of technology. International transfer should specifically benefit countries of the South. This presupposes that TRIPS competition rules – Articles 8(2), 31, and 40 – be read in a "prodevelopment" fashion. It requires a clear identification of the obligations of States in this context under TRIPS (in the light of notably Articles 7 and 8), but also as participants in other regimes of international law, and a "wise" manner of establishing a balance between various norms. It is submitted that this wise compromise could be expressed in the form of the following ten considerations for a "prodevelopment" IP-related competition law, applicable to TRIPS countries, also in as far as FTAs negotiated beyond TRIPS are concerned.[35] In particular points 6 and 7 make it quite clear that a reliance on IP-related competition law to achieve dissemination cannot be regarded as merely discretionary. There is a duty to act, for all States.

1. Articles 7 and 8 of TRIPS emphasise that IP rights protection must achieve a balance between contributing to the promotion of innovation and the transfer and dissemination of technology. This balance must be established in the context of an overall "balance of rights and obligations" in international law. Especially the dissemination rationale justifies a clear role for competition law. "Technology" should be read to include all types of knowledge.
2. "The transfer and dissemination of technology" – also in its international dimension – is a human right under IHRL.[36] It is a component of most economic, social and cultural rights, notably the REBSPA.[37] Also the right to development encompasses such a claim. Competition law constitutes a suitable instrument to facilitate realisation of this right. Articles 7 and 8 of TRIPS provide a link to IHRL in this context, reinforcing operation of the principle of "systemic integration" applicable to treaty interpretation in international law.
3. Economic efficiency, innovation, transfer and dissemination, socio-economic welfare, consumer protection, human development, and fairness all constitute legitimate goals of competition law.
4. While there are no WTO or other international disciplines on competition law, both TRIPS and IHRL, including the right to development, support substantial "policy space" for WTO Members in the design of national IP law and, as an instrument of control, the application of IP-related competition law, so as to take account of national development and access needs. However, competition law and measures should (as far as possible) not undermine the essence of IP rights as recognised under TRIPS. This follows from the consistency requirement of Articles 8(2) and 40 of TRIPS, which must be read in the light of IHRL.[36]
5. Developed WTO Members must fully respect this "policy space" of developing Members and may not exert pressure on the latter compelling them not to utilise IP-related competition law in their pursuit of development and access goals.
6. Developing WTO Members are obliged under IHRL (notably the REBSPA) to rely on competition law as a means of securing (also international) flows of technologies to, and within, local markets and, generally, of securing the diffusion of technology locally for the ultimate benefit of consumers. The specific context (development, transfer needs, other suitable measures adopted, etc.) will determine the scope of the obligation.
7. Developed WTO Members are obliged to exercise restraint in broadly relinquishing reliance on competition law as a tool for purposes of contributing towards dissemination. This flows from the REBSPA,[37] and it is a duty of solidarity in terms of IHRL, aimed at ensuring that technology transfer remains a realisable goal globally. There would seem to be an obligation requiring States to seek a limited international harmonisation of (IP-related) competition law standards by way of an international legal instrument, directed at securing "a minimal floor" of competition law protection that may not be subverted.

8. Without prejudice to the right of the host State of an agent, branch, or subsidiary of a foreign home/parent company to apply its own competition law, anticompetitive conduct by the home/parent company that produces effects abroad, or anticompetitive conduct by the local agent, branch, or subsidiary, must be proscribed by the home State insofar as the latter may be considered to be "in a position to regulate" the actor or its conduct concerned.[38] At a minimum, relevant conduct should be required to comply with the same standards that are prescribed by the home State for conduct that produces effects at home. This is based on a principle of morality, effective law enforcement, non-discrimination, and human rights.
9. Developed WTO Members that are able to assist developing Members in this regard are obliged under IHRL, separately and jointly, to provide financial or material aid in the field of the international transfer of technology. They must also incentivise the transfer of technology by other actors within their jurisdiction to developing Members (this duty also exists under Article 66 (2) of TRIPS). They must further promote collaboration between their science and R&D sectors and those of developing Members.
10. WTO Members are obliged under IHRL, separately and jointly, to create an enabling environment within and beyond the WTO conducive to competition law being applied to facilitate the transfer and dissemination of technology in the endeavour of realising human rights universally. This may be achieved by following human rights -supportive interpretative practices (e.g. in WTO dispute settlement procedures), adopting "safeguard" TRIPS declarations,[39] or strengthening the TRIPS technology transfer reporting mechanism,[40] and so on.

**Endnotes:**

[1] Stephen Humphreys, "Perspective: Technology Transfer and Human Rights: Joining Up the Dots", *Sustainable Development Law & Policy*, vol. 9, No. 3 (Spring 2009), pp. 2–3.

[2] Draft International Code of Conduct on the Transfer of Technology, preamble, recital 2 (slightly adapted).

[3] See Hanns Ullrich, "Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective", in *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, K.E. Maskus and J.H. Reichman, eds. (Cambridge, Cambridge University Press, 2005), pp. 730, 733–734, 739.

[4] United Nations Conference on Trade and Development (UNCTAD) and International Centre for Trade and Sustainable Development (ICTSD), *Resource Book on TRIPS and Development* (Cambridge, Cambridge University Press, 2005), pp. 551–552.

[5] See, e.g., Ullrich, "Expansionist Intellectual Property" (see footnote 3), pp. 733–734.

[6] Ibid., p. 753.

[7] It benefits the overall gross national product (GNP) of developed countries even though it actually impedes access by users in these countries too.

[8] Ullrich, "Expansionist Intellectual Property" (see footnote 3), p. 726.

[9] Vienna Convention on the Law of Treaties (1969), art. 26.

[10] Keith E. Maskus, "Encouraging International Technology Transfer", Issue Paper, No. 7 (Geneva, UNCTAD-ICTSD, May 2004), p. 30.

[11] Vienna Convention on the Law of Treaties, art. 31(1).

[12] Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford and New York, Oxford University Press, 2007), p. 108.

[13] Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", *European Journal of International Law*, vol. 17, No. 3 (2006), pp. 483–529.

[14] Vienna Convention on the Law of Treaties, art. 31(3)(c).

[15] See Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 April 2006), specifically Part F of the report (on "systemic integration").

[16] Ibid., paras. 473–474.

[17] See Ian D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Antwerp, Intersentia, 2001), p. 145 ("human rights obligations generally … a class of *erga omnes* obligations").

[18] United Nations General Assembly, Declaration on the Right to Development, 4 December 1986, UN Doc. A/RES/41/128, art. 1 (1).

[19] Arjun Sengupta, "On the Theory and Practice of the Right to Development", *Human Rights Quarterly*, vol. 24, No. 4 (2002), pp. 848–852.

[20] Koen De Feyter, "Towards a Framework Convention on the Right to Development", Dialogue on Globalization (Geneva, Friedrich-Ebert-Stiftung, April 2013), p. 5.

[21] International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), Arts. 1, 2(1), and 6–15, respectively.

[22] World Trade Organization, Ministerial Declaration, Doc. WT/MIN(01)/DEC/1 (20 November 2001), para. 19.

[23] World Intellectual Property Organization, 45 Adopted Recommendations under the WIPO Development Agenda (2007). Available at https://www.wipo.int/ip-development/en/agenda/recommendations.html. Recommendation 45.

[24] Ibid., Recommendation 23.

[25] See also WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994), preamble, recital 6 ("maximum flexibility" for "least-developed countries").

[26] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 25: Science and Economic, Social and Cultural Rights (Art. 15(1)(b), (2), (3), and (4) of the ICESCR), UN Doc. E/C.12/GC/25 (30 April 2020), para. 46 (emphasis added).

[27] Ibid., para. 8.

[28] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), Prin-

ciple 3. For a reproduction of, and commentary to, the Maastricht Principles, see Olivier De Schutter *et al*., "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 34, No. 4 (2012), pp. 1084–1169.

[29] Maastricht Principles (see footnote 28), Principle 8(b).

[30] Statute of the International Court of Justice, art. 38(1)(d).

[31] Emphasis added.

[32] Oscar Schachter, "The Charter and the Constitution: The Human Rights Provisions in American Law", *Vanderbilt Law Review*, vol. 4, No. 3 (1951), pp. 650–651.

[33] CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2(1) of the ICESCR), UN Doc. E/1991/23 (14 December 1990), para. 14 (emphasis added).

[34] General Comment No. 25 (see footnote 26), paras. 83, 84.

[35] The ten considerations, as rendered here, have undergone slight "fine-tuning" compared to their initial rendering in Beiter, "Reductionist Intellectual Property" (see asterisk footnote), pp. 264–265.

[36] It should be remembered that human rights can be restricted within defined limits. The ICESCR, for example, contains a general limitation clause in Article 4. The consistency requirement of Articles 8(2) and 40 of TRIPS (in terms of which the essence of IP rights as recognised under TRIPS is not to be undermined) will benefit from this fact, but the demands of human rights may in various cases be more extensive than what the consistency requirement permits. For that reason, the phrase "as far as possible" has been added in brackets here.

[37] See Olivier De Schutter, "The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity", *Human Rights Quarterly*, vol. 33, No. 2 (2011), p. 349 (the REBSPA must mean (for all States) "a more systematic use of antitrust legislation").

[38] This will be the case where there exists a reasonable link between the home State and the actor or its conduct concerned: see Maastricht Principles (see footnote 28), Principles 23–25.

[39] E.g., akin to the Doha Declaration on the TRIPS Agreement and Public Health of 2001.

[40] See the reporting mechanism created by the TRIPS Council in 2003 to help assess compliance by WTO Members with their technology transfer obligations under Article 66(2) of TRIPS.

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