September 5th 2017

THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INFORMATION OF THE CONFERENCE AND CALL PAPER

This Conference And Call Paperwas held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

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"LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM** from SebelasMaret University, **Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discus views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,

Dr. AnisMashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THEDEANOF FACULTY OFLAW

As-*salamu'alaikum Wr. Wb.*

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: "**Legal Development in Various Countries**" which is held by Faculty of Law, Sultan AgungIslamic University (UNISSULA) Semarang, on September5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.

Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme " Legal Development in Various Countries" focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

Was*salamu'alaikum Wr. Wb.*

Semarang, September5th 2017

Dean,

Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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IS RICH AND POOR UNIFORM IN PATENT LAW?*

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ABSTRACT

One of the purposes of the Trans-Pacific Partnership (TPP) is to harmonize standards and crea te a uniform climate for trade and investment. As lawmakers deliberate the terms of the deal, they must consider what the long-term impact of agreeing to its sweeping provisions will be. As they do so, they should keep in mind that the gaps between the agreed-upon principles and local implementation, and the differences between local implementationsome of them by desi gn are often quite great. Drawing upon the existing literature, this short essay provides a surve y of the extent of harmony and disharmony in the 23 years that have passed since ratificationo f the TRIPS agreement, with a focus on its patent provisions. In 1994, the U.S. passed the Uruguay Round Agreement Act, legislation that implemented several changes to domestic patent law required by TRIPs. Although opinions, especially those of developing nations, debate the fairness of TRIPs, the Agreement represents an effective balance among competing interests and a major step towards world patent law harmonization.

Keywords : Rich, Poor, Uniform, Patent Law

A. Introduction

Today, much of the debate regarding the harmonization of international patent laws revolves around the willingness and preferences of nations to change their respective patent laws to conform to foreign systems in attempt to advance the common good. Naturally, harmonizing patent laws, or a globally unified patent system, would solve this problem. However, such uniformity, although conceptually ideal, might create more problems than it would solve. In addition, dissimilar ideological beliefs and economic disparity among nations may present barriers that no patent law legislation in the near future can overcome.

This article will discuss and highlight the benefits and problems associated with harmonizing U.S. and foreign patent laws, including potential problems with uniform legislation, both abroad and in the U.S. The organization of this article is as follows: Part I discusses the dissimilarities between U.S. patent laws and foreign patent laws. Part II discusses the benefits and problems associated with harmonization and the development of a global patent system. Finally, section III discusses recent attempts by the United States to harmonize its patent laws with those of other countries.

The protection of a nation's intellectual property rights (hereinafter IPRS) abroad can be a critical issue in the development of that nation's economy.[1] Lack of international protection for the products of IP can result in the loss of millions of dollars in profits as a result of

*This paper presentation on "The 3rd International Conference and Call for Paper" with the Theme "Legal Development in Various Countries" by Fakultas Hukum Universitas Islam Sultan Agung (UNISSULA) Semarang on September 5th 2017. ** Lecturer of Post Graduate of Law Study, Islamic Riau University (LLB & S. H), Faculty of Law, Islamic Riau University, Indonesia; (M. C. L.), Faculty of Law, Delhi University, India; (Ph. D), Faculty of Law, Malaya University, Malaysia.

[1] Marshall J. Welch (1992), International Protection of Intellectual Property, 1 Tex. Intell. Prop. L.J. 41, 41.

international piracy.[2] Aware of the need to protect these valuable assets from piracy, the nations of the world sought to provide clear guidelines for IP protection.[3]

It is not easy, however, to persuade a country to alter its IP laws in order to protect the assets of its international trading partners.[4] With the concerns of both developed (hereinafter DC) and developing countriess (hereinafter DCs) in mind, the signatory nations[5] of the General Agreement on Tariffs and Trade (GATT) signed the Agreement on TRIPs on April 15, 1994, at the conclusion of the Uruguay Round of negotiations.[6]

B. The Main Questions

This study explores two questions from a utilitarian point of view: 1) When is patent harmonization well-founded? 2) The role of international institutions – the WTO - in furthering such harmonization? The general argument developed in this study in centered around the following three propositions: First examines the U.S.' implementation of these obligations under domestic patent laws. Second seeks to answer whether the U.S. has implemented its international obligations under the TRIPs Agreement. Finally, Third identifies relevant obstacles to world patent law harmonization and suggests methods whereby full harmonization may be possible. This article analyzes harmonization and cooperation in the international patent regime and the international institutional features which could help to facilitate international cooperation.

C. Methodological Discussion

Study patent harmonization from a welfarist and institutional point of view. It is hoped that considering the welfarist motivations that underlie harmonization, and the institutions that inevitably affect the specific outcomes of harmonization efforts, will shed light on important issues related to these complex efforts.[7]

This work is in a sense complementary to works such as those of Sell, Ryan, and Braithwaite and Drahos that discuss the complex politics and history behind the signing of the TRIPs Agreement.[8]

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[2] See Lara E. Ewens (2000), Seed Wars: Biotechnology, Intellectual Property, and the Quest for High Yield Seeds, 23 *B.C. Int'l & Comp. L. Rev.* 285, 305.

[3] See id.

[4] Owen Lippert (1998), One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas, 9 Fordham Intell. Prop. Media & Ent. L. J. 241, 243.

[5] For a listing of the countries that have accepted the Uruguay Round of GATT negotiations, see International Treaties on Intellectual Property, more detailed see International Treaties on Intellectual Property 1 (Marshall A. Leaffer ed., 2d ed. 1997) (providing that the first international agreements concerned with the international protection of intellectual property were the Union of Paris for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886)).

[6] Id. at 585.

[7] There are also philosophical arguments for harmonization that will not be dealt with in this study. J. Bhagwati, "The Demands to Reduce Diversity among Trading Nations" in J.N. Bhagwati and R.E. Hudec (1996), eds., Fair Trade and Harmonization: Prerequisites for Free Trade? Vol. 1: Economic Analysis (Cambridge: The MIT Press) 9 at 9-20 identifies a number of philosophical arguments for harmonization: a notion of obligation to people in other countries; an obligation to humanity as a whole; distributive justice; and fairness, defined as "the implied norm of fairness seems to imply simply that, no matter what the economic or other justifications for the existence of such differential standards may be ... they evidently constitute a lack of symmetry in the environment faced by competing firms in the industry of different nations and hence ipso facto are unacceptable." (at 19).

[8] J. Braithwaite and P. Drahos (2000), Global Business Regulation (Cambridge: Cambridge University Press) [hereinafter GBR]; P. Drahos and J. Braithwaite (2002), Information Feudalism: Who Owns the Knowledge Economy? (New York: The New Press); M.P. Ryan (1998), Knowledge Diplomacy (Washington: The Brookings Institution) at 94. ; S. Sell (1998), Power and Ideas: North-South Politics of Intellectual Property

In Analyzing the political and economic implications of a patent-generated profit flow between states, it should be remembered that the actual extent to which a country such as the U.S. focuses on such profit flows in its international relations depends as much upon the efforts of concerned companies, lobbyists and other policy entrepreneurs as on strict welfare calculations.

Normatively, this study takes an instrumental view that international law should maximize or at least improve global welfare, subject to realistic constraints. These constraints – which may be described as institutional constraints – involve three positive assumptions:[9]

(1) that the preferences of the world population are heterogeneous;
(2) that governments try to maximize the welfare of their citizens and ignore the welfare of non-citizens; and
(3) that international legal organization and enforcement are constrained by collective action problems.

D. Analyzes

1. Domestic Implementation of International Obligations

TRIPs established international obligations for its signatories, are made binding upon WTO Member States through the force of international law. In the U.S., the implementation of TRIPs faced certain obstacles because patent is an area delegated to the U.S. Congress.[10] TRIPs was not self-executing and required implementing legislation. Furthermore, under the U.S. Constitution, any treaty provision that is inconsistent with the laws of the U.S is void.[11]

The Uruguay Round Agreement Act of 1994 (URAA)[12] approved TRIPs and began the modification of domestic patent law in order to execute the U.S.' international obligations.[13] This act was signed by President Clinton on December 8, 1994, included the required changes to U.S. IP law in order to implement GATT and TRIPs.[14] GATT, was not intended to trump domestic legislation.[15] Section 102(a) of the URAA reinforces the premise that, "No provision . . . that is inconsistent with any law of the U.S. shall have effect." Thus, where a conflict arises, domestic, not international, law binds the courts of the US.[16]

The URAA implemented several changes to domestic patent law. Among these were: (1) expansion of the scope of infringement [*PG381]actions to include offers to sell;[17] (2) the use of inventive activity abroad to satisfy the date of invention criteria for patent applications;[18]

(Albany: State University of New York Press); S. Sell (2003), Private Power, Public Law: The Globalization of Intellectual Property Rights (Cambridge: Cambridge University Press).

[9] E.A. Posner (2006), "International Law: A Welfarist Approach", 73(2) U. Chi. L. Rev. 487 at 499.

[10] See U.S. Const. art. I, ❡ 8, cl. 8.
[11] See U.S. Const. art. VI, ❡ 1, cl. 2; see also 19 U.S.C. ❡ 104 (1999).
[12] Uruguay Round Agreement Act, Pub. L. No. 103–465, 108 Stat. 4809, 4814 (1994) [hereinafter URAA].
[13]Andres Moncayo von Hase, The Application and Interpretation of the Agreement on TRIPs, in Intellectual Property and International Trade:The Trips Agreement, However, the TRIPs Agreement fails to define "invention." Although patents traditionally are available for useful inventions, advances in biotechnology are blurring this line. Carlos M. Correa, Intellectual Property and International Trade: the Trips Agreement 198 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998), at 109-110.
[14] Melvin Simensky (1999) et al., Intellectual Property in the Global Marketplace at. O.6.
[15] Suramerica de Aleacuiones Laminadas, C.A. v. United States, 966 F.2d 660, 668 (Fed. Cir. 1992).
[16] See von Hase, note. 13, at 111.
[17] 35 U.S.C. ❡ 271(a) (1984), amended by 35 U.S.C. ❡ 271(a) (Supp. I 1994); see also URAA, supra note 13, ❡ 533(a).
[18] 35 U.S.C. ❡ 104(a)(1) (1984), amended by 35 U.S.C. ❡ 104(a)(1) (Supp. I. 1994); see also URAA, supra note 13, ❡ 531(a).

(3) the extension of patent protection to a term of twenty years;[19] (4) the publishing of patent applications eighteen months after filing;[20] and (5) the creation of a provisional application.[21] Only changes one, two, and three are discussed herein, as these are the modifications specifically required by TRIPs.[22]

(1). Offers to Sell

Prior to TRIPs, the U.S stood apart from its developed peers in limiting suits for infringement to cases in which actual sales of patented inventions were alleged.[23] Thus, prior to the 1994 amendments, the holder of a U.S. patent only had the right to exclude others from "mak[ing], us[ing] or sell[ing] the patented invention in the U.S."[24] This language was construed strictly so that neither intent nor preparation to sell would constitute infringement.[25]

The U.S.' trading partners, on the other hand, favored an expanded cause of action for infringement that included offers to sell patented inventions.[26] For example, in the English case Gerber Garment Tech, Inc. v. Lectra Sys. Ltd.,[27] the Patents Court held that mere advertising provided a cause of action for the infringement of a patented product.[28] Moreover, countries such as France and Belgium also allowed a cause of action for offers to sell in their domestic patent laws prior to 1994.[29]

Thus, as a result of pressure from the U.S.' trading partners, TRIPs required the implementation of domestic legislation that encompassed offers to sell.[30] In 1994, Congress amended 35 U.S.C. § 271(a) to include offers to sell as an additional basis for infringement.[31] Today, a court may find infringement when the first element of contract formation, the offer, is satisfied.[32]

Proponents of the expanded protection assert that including offers to sell strengthens patent protection by giving the patent holder increased protection from a wider array of infringing activity.[33] The goal of this expanded cause of action is the reduction of international patent piracy.[34] Despite this expansion, however, the courts of the U S, while acknowledging that common law offers to sell would suffice for infringement,[35] have

[19] 35 U.S.C. § 154(a)(2) (1984), amended by 35 U.S.C. § 154(a)(2) (Supp. I 1994); see also URAA, supra note 13, § 532(a).
[20] 35 U.S.C. § 122(b)(1), amended by 35 U.S.C. § 122(b)(1) (Supp. I. 1996).
[21] 35 U.S.C. § 111(b)(1) (1994).
[22] See John G. Byrne (1995), Changes on the Frontier of Intellectual Property Law: An Overview of the Changes Required by GATT, 34 Duq. L. Rev. at 131–33.
[23] Rotec Indus. v. Mitsubishi Corp., 215 F.3d 1246, 1251 (Fed. Cir. 2000).
[24] 35 U.S.C. § 271(a) (1984).
[25] See Eli Lilly & Co. v. Medtronic, Inc., 915 F.2d 670, 673 (Fed. Cir. 1990).
[26] See, e.g., International Protection of Intellectual Property, at FRA 11, BEL. 9, see CAMPBELL, Dennis ed. (1996), Structuring International Contracts, Kluwer Law International.
[27] 13 R.P.C. 383, 411–12 (United Kingdom Patents Ct. 1995), cited in Rotec Indus., 215 F.3d at 1251.
[28] Id.
[29] International Protection of Intellectual Property, note 26, at FRA. 11, BEL. 9.
[30] Agreement on TRIPs, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, preamble, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY Round vol. 31, 33 I.L.M. 81 (1994), see at http://www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm (last visited Dec. 24, 2016), art. 28(1).
[31] 35 U.S.C. § 271(a) (Supp. I 1994).
[32] A.K. Stamping Co. v. Instrument Specialties Co., 106 F. Supp. 2d 627, 665 (D.N.J. 2000) (holding that the "norms of traditional contract law should be the basis for" determining whether an offer to sell has been made); Robert Ryan Morishita, Patent Infringement After GATT: What is an Offer to Sell?, 3 Utah L. Rev. 905, 909 (1997).
[33] See Morishita, note 32, at 912.
[34] See id. at 912.
[35] See generally Rotec Indus., 215 F.3d at 1246.

construed some aspects of the amended statute narrowly.[36] Although the statute fails to define "offer to sell,"[37] the courts have interpreted the statute to require the offer to sell to have occurred within the U S.[38] In Rotec Indus. v. Mitsubishi Corp.,[39] for example, the Federal Circuit held that infringement could not be predicated upon acts or offers that occurred wholly in a foreign country. There, the court denied the plaintiff's request for relief because the defendant had made offers to sell a U.S. patented invention in China.[40]

(2). The Twenty Year Term

Prior to the passage of TRIPs, a patent issued in the U S was valid for seventeen years from the date of issuance.[41] TRIPs extended this period to twenty years from the date of filing the application.[42] This change was implemented by the 1994 Amendments to the Patent Act, 35 U.S.C. § 154.[43]

This modification has been controversial for several reasons, including the fact that the extension actually may result in shortened enjoyment of patent protection because the time period begins to elapse from the time of filing.[44] Since TRIPs requires the patent term to commence at the date of filing, rather than the date of issue, the [*PG384]period of patent protection may actually decrease because of lengthy time delays commonly incumbent upon patent prosecution.[45]

2. Has the U S Fulfilled its Obligations in Patent Protection and Harmonization?

There is little doubt that the TRIPs Agreement and the U.S.' implementation thereof represent positive steps towards the harmonization of world patent law.[46] Much of the legislative activity that resulted from TRIPs has helped to reduce international piracy of patented inventions.[47] In addition, many of the TRIPs provisions effectively balance the concerns of the diverse GATT signatories, including DC and non-DCs, as well as among the U S, Europe, and Asia.[48]

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[36] See generally id.

[37] Congress did not provide much guidance on what constitutes an offer except to say that the sale should "occur before the expiration date of the term of the patent." 35 U.S.C. § 271(i).

[38] Rotec Indus., 215 F.3d at 1249 (citing Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U.S. 641, 650 (1915)).

[39] Id.

[40] Id. Lower courts have followed this holding. In Ecological Sys. Tech., LP v. Wildlife Ecosystems, LLC, the court held that "offer to sell liability under the patent infringement statute is interpreted according to its ordinary meaning in contract law." 142 F. Supp.2d 122, 125 (D. Mass. 2000). "In analyzing whether a defendant's conduct [amounts] to an offer to sell, [the courts look] for evidence that the relevant parties discussed price, quantity and delivery dates." Id. at 126. Compare with 3 D Systems, Inc. v. Aarotech Lab., Inc., 160 F.3d 1373 (Fed. Cir. 1998), where the defendant was held liable for patent infringement when he sent numerous letters listing the price and describing merchandise for sale to companies in California. Id. at 1379. These activities infringed the plaintiff's patent because they constituted a common law offer to sell within the territory of the United States See id.

[41] Byrne, supra note 22, at 129.

[42] TRIPs Agreement, supra note 30, art. 33. The term of protection may be in excess of twenty years. Id.

[43] 35 U.S.C. § 154(a)(2) (Supp. I 1994); Reichman, supra note 43, at 30 n.43.

[44] See Byrne, supra note 22, at 129–30.

[45] Id. Patent prosecution is the process of obtaining a patent from the U.S. Patent and Trademark Office. Robert P. Merges (2000)et al. Intellectual Property in the New Technological Age 134. The time and effort required to prosecute a patent varies immensely, ranging from two years in average cases, to decades in cases where several inventors claim they were the first to invent a particular invention. Id.

[46] See supra notes 18–22 and accompanying text.

[47] See Morishita, supra note 32, at 912.

[48] See G. Bruce Doern (1999), Global Change and Intellectual Property Agencies 93. at. 94.

Not all GATT Member States whole-heartedly supported the WTO and TRIPs, however.[49] DCs initially supported TRIPs predecessor, the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations dedicated to promoting the protection of IP, because its policies favored reduced adherence to international IP laws, and thus promoted progressive growth and development.[50] These countries argued that TRIPs is an instrument of the West created to assert unilateral property claims because products originating from the Third World do not meet the criteria for protection.[51]

In contrast, the U S and Europe favored a stronger WTO and the TRIPs Agreement because of their desire to effectively and judiciously enforce patent rights through the WTO's dispute settlement procedures, particularly in key DCs that had not rigorously enforced IPRs.[52] Proponents of international (IPRs) assert that strengthening [*PG385] (IPRs) creates only a transitional loss for DCs while promising long-term gains of enhanced employment, economic development, and new innovations.[53]

Arguably, TRIPs struck an effective balance among these competing concerns. In exchange for the pledge of DCs to commence harmonization of their patent laws, those countries were given additional time in which to comply with TRIPs. This compromise reassured the DC of GATT that all signatories would be required to protect their lawfully held patents over time, while DCs were assured that their economic development would not be suppressed. At present, however, several DCs that were required to be in full compliance by 2000 have indicated that they were not able to implement their TRIPs obligations as required.

In addition to providing equitable treatment for signatories, the TRIPs Agreement succeeded in harmonizing the criteria for patentable subject matter. Although Members do have some flexibility in determining what matters can be excluded from patentability,[54] patents among all Members must be granted to any invention that is "new, involve[s] an inventive step and [is] capable of industrial application." Moreover, TRIPs allows for future flexibility by permitting Members to implement more extensive protection than is required by the Agreement. Thus, as countries further develop and recognize the need for greater IP protection, TRIPs will adapt to those needs.

TRIPs compelled the U S to equalize the protection for patents afforded by many of its European trading partners. By requiring the inclusion of offers to sell as a basis for infringement, the U S conformed to the patent laws held by [*PG386]many European nations. Thus, the European Members of WTO gained further protection for their patents within their countries and in the U S, while the U S, TRIPs' chief proponent, received similar protection.

3. Is Rich and Poor Patent Law Harmonized?

Another way of measuring the harmonizing power of international IP agreements is the degree to which agreements have been the "but-for" cause of domestic activities-compelling countries to take or not take steps, because of an agreement, and conversely, failin g to prevent the adoption of measures that, in theory at least, contravene the aims of its provisi ons. A review of the experience of the U.S provides examples of all three dynamics. For example, over the objections of a number of stakeholders including independent inventors and

[49] See id. at 93.
[50] World Intellectual Property Organization, at http://www.wipo.org./about-wipo/en/overview.html (last visited Dec. 4, 2016).
[51] See Lara E. Ewens (2000), Seed Wars: Biotechnology, Intellectual Property, and the Quest for High Yield Seeds, 23 *B.C. Int'l & Comp. L. Rev.* 285, 304.
[52] Doern, supra note 48, at 93.
[53] Lippert, supra note 4, at 247, Marie Wilson (1997), TRIPS Agreement Implications for ASEAN Protection of Computer Technology, 4 *Ann. Surv. Int'l & Comp. L.* 18, 22–23.
[54] Correa, supra note 13, at 193.

Nobel Laureates,[55]itpassedprovisions of the America Invents Act "with an eye toward harmo nization,"[56]by moving the U.S. in the direction of the rest of the world through its substantial adoption of a first-to-file system, expansion of source of prior art to all geographies, and limiti ng of the best mode requirement.[57]The U.S. has also been prevented by the provisions of the TRIPS agreement that require patent owners to receive 20-year terms[58]to be able toenact short er, say three- to five-year durations for software patents.[59] The TRIPS agreement'scommitme nt to technology neutrality, which requires patents to be "available for any inventions, whethe r products or processes, in all fields of technology,"[60]at least seemingly, has prevented the U.S . Congress from enacting laws that wouldtreat software differently than other types of technol ogical inventions.[61] However, it has not prevented the Supreme Court of the U.S. from taking significant steps to curtail the patenting of abstract inventions[62]and human genes,[63]or prevente d Congress from enacting special provisions to be developed to challenge patents over financi al inventions, specifically excluding "technological inventions"[64]to avoid running afoul of TR IPS. These "exceptions" to technology neutrality in patents join pre-existing technology-speci fic provisions, for example, that prevent surgeons from being prosecuted for infringement of d iagnostic patents in the U.S.[65] and surgical methods from being patented in Japan and the UK, [66]and certain computer programs from being patented in the Europe.[67]

TRIPs has attempted to remedy this obstacle to the extent possible by requiring the most favored nation status and through compelling the U.S. to consider inventive activity abroad.[68] While not perfectly harmonized, these adaptations seek to level the playing field between these opposing systems.[69] However, further disputes may be inevitable.[70]

Another shortcoming of TRIPs that has prevented the full realization of international patent law harmonization is that the Agreement fails to mention the European Patent Office (EPO).[71] The European Patent Convention (EPC), which created the EPO, was signed on October 5, 1973.[72] The EPC sought to unify patent law [*PG387]within the European Community[73] and permitted the EPO to issue a European Patent.[74] While decisions emanating

[55] Colleen Chien (2016), Exclusionary and Diffusionary Levers in Patent Law, __ Southern Cal. L. Rev. ___ .
[56] Rochelle Cooper Dreyfuss (2012), The Leahy-Smith America Invents Act, a New Paradigm for International Harmonisation? 24 Sing. Acad. L.J. 669, __ (2012)
[57] Id.
[58] TRIPs article 33.
[59] As suggested, e.g. by Richard Posner, http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in-america/259725/
[60] TRIPs article 27.
[61] See Colleen Chien (2012), Tailoring the Patent System to Work for Technology Patents , available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176520.
[62] See, e.g. Bilski v. Kappos, 130 S. Ct. 3218 (2010), Alice Corp. v. CLS Bank Intern., 134 S. Ct. 2347 (2014)
[63] Ass'n for Molecular Pathology v. Myriad, 133 S. Ct. 2107 (2013).
[64] Pub. L. 112–29, §18.
[65] 35 U.S.C. 287(c).
[66] Described, e.g. in Toshiko Takenaka, et al., (2010), GLOBAL ISSUES IN PATENT LAW 73-74.
[67] See EPC Article 52.
[68] See TRIPs Agreement, art. 3(1).
[69] Id; Alice Macandrew (1995), It's Boom Time for New York's IP Lawyers, 52 Managing Intell. Prop. 5, 5.
[70] Byrne, note 22, at 135.
[71] See T935/97 IBM/Computer Programs, [1999] E.P.O.R. 301, at II.
[72] International Treaties on Intellectual Property, supra note 5, at 673. The following states are party to the European Patent Convention: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Portugal, Spain, Sweden, Switzerland, and United Kingdom. Id. at 674.
[73] Id.
[74] European Patent Convention, Oct. 5, 1973, art. 2(1), 13 I.L.M. 268 (1974).

from the EPO indicate that there is a desire to apply the EPC in conformity with TRIPs, it is not clear whether TRIPs is binding on the EPC.[75] In IBM/Computer Programs, the EPO's Technical Board of Appeals, while accepting TRIPs with reservations, indicated that, "it [was] not convinced that TRIPs may be applied directly to the EPC."[76] Thus, because the EPO is not a Member of the WTO and did not sign the TRIPs Agreement, only Member States and not the EPO itself are legally bound by TRIPs.[77]

Although the EPO gives deference to TRIPs,[78] the failure of TRIPs to reference the EPO represents a hurdle to the harmonization of world patent law.[79] One might wonder how world patent law could ever be harmonized if the EPO, the body that issues patents for an entire continent, is not bound by the same standards as its Member States and their trading partners.[80]

The WTO has a challenging task at hand, for it must continue to secure compliance with TRIPs provisions.[81] Some analysts assert that TRIPs implementation by DCs will have a devastating impact upon them.[82] One feared impact is that TRIPs, in its promotion of patent right protection, will make pharmaceuticals more expensive in DCs.[83]

E. Conclusion

TRIPs has been criticized as the direct result of a coercive strategy on behalf of the U.S. to force DCs to pass laws that would protect U.S. patents. In spite of these criticisms, TRIPs remains an effective compromise that, while imperfect, has taken unprecedented steps towards the harmonization of world patent law.

One must remember in analyzing TRIPs that the Agreement foremost represents a compromise. As with any compromise, it balances the needs and desires of all Members in order to fulfill a common goal. Despite its shortcomings, TRIPs has led to a realization of many of its goals. Not only has TRIPs led to the increased protection of patents by recognizing an offer to sell as a basis for infringement, but the Agreement also has sought to treat all Member States equally by implementing the most favored nation status, while at the same time making concessions to those states in need of additional compliance time due to their socio-economic positions.

[75] IBM/ Computer Programs, [1999] E.P.O.R. at VII, 2.3.
[76] Id. at VII, 2.1.
[77] Id.
[78] Id. at V.
[79] See id. at VII, 2.3.
[80] See generally IBM/ Computer Programs, [1999] E.P.O.R. at VII, 2.3.
[81] Intellectual Property Rights, supra note 5.
[82] Id.
[83] Id.

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