

Edited by
Anselm Kamperman Sanders

The Principle of National Treatment in International Economic Law

TRADE, INVESTMENT
AND INTELLECTUAL
PROPERTY

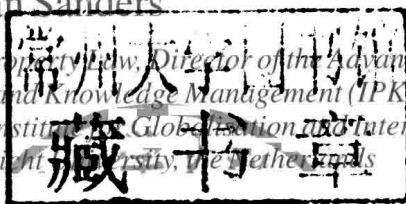
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Anselm Kamperman Sanders

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EUROPEAN INTELLECTUAL PROPERTY INSTITUTES NETWORK
SERIES

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The Principle of National Treatment in International Economic Law

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Trade, Investment and Intellectual Property
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Christopher Heath studied at the Universities of Konstanz, Edinburgh and the London School of Economics. He lived and worked in Japan for three years, and between 1992 and 2005 headed the Asian Department of the Max Planck Institute for Patent, Copyright and Competition Law in Munich. Christopher, who wrote his PhD thesis on Japanese unfair competition prevention law, is a Member of the Boards of Appeal at the European Patent Office in Munich, co-editor of Intellectual Property and Competition Law (IIC) and editor of the Max Planck Institute's Asian Intellectual Property Series published by Kluwer Law International.

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Abbreviations

AB	Appellate Body of the WTO
ADR	Alternative Dispute Resolution
ASEAN	Association of Southeast Asian Nations
BCBerne	Convention for the Protection of Literary and Artistic Works, 1886
BIT	Bilateral Investment Treaty
BoA	Board of Appeal
CDR	Community Design Regulation
CJEU	Court of Justice of the European Union (until December 2009: the Court of Justice of the European Community)
CTMD	Community Trade Mark Directive
CTMR	Community Trade Mark Regulation
DSU	Dispute Settlement Understanding of the WTO
EPC	European Patent Convention
EPO	European Patent Office
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services (GATS Agreement)
GATT	The General Agreement on Tariffs and Trade (GATT Agreement)
GDP	Gross Domestic Product
GSP	General Systems of Preferences
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
IP	Intellectual Property

IPIC	Treaty on Intellectual Property in Respect of Integrated Circuits, Washington, 1989
ISDS	Investor-State Dispute Settlement
MFN	Most-Favoured Nation Treatment Principle
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development
OHIM	Office for the Harmonization of the Internal Market (trade marks and designs)
OJ	Official Journal of the European Union
PC	Paris Convention for the Protection of Industrial Property, 1883
PCT	Patent Cooperation Treaty, Washington, 1970
PLT	Patent Law Treaty, Geneva, 2000
PTA	Preferential Trade Agreements
RC	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961
RCEP	ASEAN-Australia, China, India, Japan, New Zealand, Korea Regional Comprehensive Economic Partnership Agreement
RTA	Regional Trade Agreement
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)
TBT	Agreement on Technical Barriers to Trade (TBT Agreement)
TFEU	Treaty on the Functioning of the European Union
TPP	Transpacific Partnership
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)
TTIP	Transatlantic Trade and Investment Partnership
UDRP	Uniform Domain Name Dispute Resolution
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCT	WIPO Copyright Treaty, Geneva, 1996

WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty, Geneva, 1996
WTO	World Trade Organization

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The EIPIN Series places the research output of the annual Congresses on display. As each Congress is assembled around a central theme, the EIPIN Series serves to collect the various academic contributions of the annual Congress in one edited volume. Individual contributions to the EIPIN Series are delivered by IP scholars from around the globe.

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Edited by Christophe Geiger

Being the first in the European Intellectual Property Institutes Network (EIPIN) Series, the book provides a comprehensive assessment of intellectual property legislation in Europe and analyses perspectives for further actions necessary for construction of a true European intellectual property system that would ensure sustainable and innovation-based economic growth and its balance with desired circulation of ideas and cultural expressions. Most of the papers included in this book were presented at the second part of the 12th EIPIN Congress organised at the European Parliament in Strasbourg by the Centre for International Intellectual Property Studies (CEIPI).

Intellectual Property, Unfair Competition and Publicity

Convergences and Development

Edited by Nari Lee, Guido Westkamp, Annette Kur and Ansgar Ohly

Dealing with rights and developments at the margin of classic intellectual property, this fascinating book explores emerging types of regulations and how existing IP regimes inform and influence the judicial and legislative creation of 'substitute' IP rights. The editors have carefully structured the book to ensure that there is a thorough analysis of how commercial values arising at the margins of classic IP rights are regulated. As new regimes of regulations emerge, the question of how

existing IP regimes inform and influence the judicial and legislative creation of 'substitute' intellectual property rights is explored.

The Principle of National Treatment in International Economic Law

Trade, Investment and Intellectual Property

Edited by Anselm Kamperman Sanders

Combining perspectives from practitioners, academics and members of the judiciary, this book is the first to cover the national treatment principle across the whole field of international economic law – including not only the domain of WTO law, but also in treaty and contractual settings involving investment and in intellectual property law. It also provides practical insights regarding the application of the principle relevant to inter-state relations, state-investor relations and in the context of intellectual property protection.

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Introduction

Anselm Kamperman Sanders

This volume comprises contributions presented at or inspired by the first leg of the XIV EIPIN Congress, which was held at Maastricht University on 31 January and 1 February 2013, hosted by the IPKM in Maastricht for the very first time.

The topic covered at this conference was ‘The National Treatment Principle in an EU and International Context’, which enabled the participants to discuss one of the most fundamental non-discrimination principles in international economic and intellectual property law in an interdisciplinary setting. Speakers were invited from the worlds of international trade, international investment and intellectual property law to shed light on the communalities and differences in the application of the principle of national treatment.

It has to be understood from the outset that the principle of national treatment that is enshrined in a number of international treaties is a very generous principle in that foreign nationals, goods, services or investments are not treated on a reciprocal basis, which would invariably result in a fragmented landscape for cross-border trade, but rather equal to (or no less favourable than) domestic nationals, goods, services or investments. In awarding national treatment, governments agreed to reduce the tailor-made reciprocal advantages that they could offer to one trading partner over another, but also not to favour one’s own industry over foreign interests (IP, goods, services, investment). In the process greater certainty in trade was established, irrespective of the nationality of a right holder of industrial or intellectual property, or the provenance of goods, services or investments. The principle of national treatment has therefore been expressed in different guises in order to be applicable in relation to the subject matter covered.

The first expression of the principle of national treatment in the context of international economic law can be found in the sphere of the protection of industrial property. The Paris Convention for the protection of industrial property of 1883 is perhaps the most concise and elegant expression of non-discrimination in intellectual property law. Subsequent

expressions can be found in the Berne Convention (1886), the General Agreement on Tariffs and Trade (1947) (GATT) and the World Trade Organization's (WTO's) Uruguay Round Agreements (1994); the General Agreement on Trade in Services (GATS); the Agreement on Technical Barriers to Trade (TBT); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Paris Convention for the Protection of Industrial Property (1883)

[National treatment for nationals of countries of the Union]

Article 2

- (1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoyed in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.
- (2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the union for the enjoyment of any industrial property rights.
- (3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, which may be required by the laws on industrial property are expressly reserved.

Article 2(1) of the Paris Convention clearly guarantees 'nationals' of any country of the Paris Union the enjoyment of 'advantages' and of the 'same protection' in relation to the protection of industrial property granted by Members to its own nationals. The national treatment extends to nationals of countries that are not party to the Paris Convention, if they are domiciled in a Member country or if they have a real and effective industrial or commercial establishment in the country where protection is claimed. In doing so it almost anticipates the inception of the Most-Favoured Nation Treatment Principle. Nationals of Member countries may, however, not face conditions as to establishment in the country where protection of an industrial property right is claimed. An exception to the national treatment principle pertains to certain requirements of a mere procedural nature relating to judicial and administrative procedures, to jurisdiction and to requirements of representation. Examples involve the deposit of security or bail for the costs of litigation, the designation of an address for service, or the requirement to appoint an agent in the country where protection is sought.

Berne Convention for the Protection of Literary and Artistic Works (1886)
[National Treatment; Formalities forbidden] (Paris Text 1971)

Article 5

- (1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.
- (2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.
- (3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.
- (4) The country of origin shall be considered to be
 - (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
 - (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
 - (c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:
 - (i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and
 - (ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

The Berne Convention for the Protection of Literary and Artistic Works of 1886 relies on three basic principles: 1) national treatment, 2) no formalities and 3) independence of protection. The principle of national treatment ensures that works originating in one of the Member states receive the same protection in each of the Member states as offered to works of their own nationals. The Berne Convention also ensures the protection of literary and artistic works without any need of the formality