

CHAPTER 10

Collective Management of TRIPS: APEC, New Regionalism and Intellectual Property¹

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I. Introduction: APEC and Intellectual Property

1. The Asia-Pacific Economic Cooperation forum (APEC) took up intellectual property (IP) issues in 1995, quite late in the evolution of its program of regional economic cooperation, and even then with a measure of caution and uncertainty. The way APEC has handled cooperation on IP issues shows how its priorities and modalities have shifted expediently to respond to political and economic developments, and exemplifies two broad themes in APEC's evolution:

- first, the question of scope and objectives – whether APEC is to deliver “hard” trade liberalisation outcomes of lowering or eliminating tariff barriers, or is to concentrate on softer, less precise outcomes in the field of economic cooperation, trade facilitation and regulatory and administrative convergence, conceived in a broader, less legalistic and more collaborative sense, including on areas traditionally reserved for domestic regulation; and
- second, the changeable relationship of the regional process with multilateral

¹ Based on research undertaken at the Australian Centre for Intellectual Property in Agriculture, Faculty of Law, Australian National University; this chapter expresses personal views only and does not express official views associated with the author's successive appointments with the Australian Government and with the World Intellectual Property Organization.

trade negotiations, both the Uruguay Round negotiations leading up to the World Trade Organization (WTO) package of trade agreements, and subsequent WTO negotiations – APEC has been variously viewed as a defensive hedge against multilateral failure, a decisive shift away from multilateralism to regionalism, a regional caucus on multilateral issues, a preliminary deal-making mechanism to facilitate multilateral outcomes, and other less determinate forms of regional economic integration, with suggestions even that is antithetical to free trade and provides implicit support for an Asian brand of mercantilism.

2. The very informality, flexibility and even ambivalence that make possible this range of perceptions of APEC – through such consciously pliable constructs as “open regionalism”, “concerted unilateralism”, “early voluntary sectoral liberalisation”, and “pathfinding initiatives”, and a culture of valuing consensus and soft policy convergence over hard normative outcomes – have at once been viewed as the distinctive, defining strength of APEC and as its abiding weakness. APEC is seen either an innovative experiment in “new regionalism” or an inadequate substitute for tough, binding liberalisation commitments. But APEC is at any time a consensus expression of the will and preoccupations of its member economies. Given the deliberate (almost constitutional) eschewal of institutional compliance mechanisms (apart from soft means such as peer pressure and normative lock-in), the need to react to a shifting multilateral climate, and the economic diversity and geographical extent of APEC, this uncertainty or changeability of focus and of ambition is inevitable. In fact, this very flux in APEC’s goals and focus makes it a more reliable barometer of broader climatic change in international economic relations. Yet this leaves open a debate as to the core nature of the APEC endeavour, and the suspicion that its function is to forge an Asia-Pacific regional identity as an achievement of value in itself – the process itself being the outcome.

3. In fact, the diffuse quality of regional dialogue and the intangible character of much of APEC’s cooperative processes render problematic any firm judgement as to the practical impact of APEC activities. As analysis of APEC’s cooperation on IP will illustrate, APEC may set ambitious targets for formal cooperation and harmonisation but find it difficult to give them practical expression, given the whirl of competing bilateral, regional and international processes. In turn this suggests either that, measured in terms of concrete legal outcomes comparable with other regional processes, APEC has not lived up to its promise or, more positively, that APEC should not be viewed as the traditional kind of trade bloc that features in the “regionalism” debate, but rather as a hybrid regional exercise in transgovernmental regulatory cooperation and policy development, partially seeking to find practical avenues for a kind of “positive comity”² approach to shared domestic regulatory objectives; and partially the conscious formation of epistemic communities of like-minded national regulators and policymakers as a worthwhile end in itself.

² “A principle of enduring cooperation among government agencies”, Anne-Marie Slaughter, *The Real World Order*, *Foreign Affairs*, September-October 1997, 183.

Moreover, since APEC is relatively free to evolve as an institution means that its development can map the changing environment in international trade relations. Varying approaches to the two characteristic themes identified above – relationship with multilateralism, proper scope of economic cooperation – therefore illustrate broader shifts in concerns and priorities among APEC economies. The institutional suppleness of the APEC process – its responsiveness to shifting circumstances shown for instances in response to the Asian financial crisis, the East Timor issue and the region's upsurge in terrorism – also allows for a pragmatic focus, oriented towards practical ends rather than legal-institutional means.

4. This applies to broader systemic issues, but especially to the continuing uncertain position of intellectual property (IP) issues in international trade and economic relations. Despite the incorporation of IP standards within trade rules through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), IP remains a contested element of the multilateral trade law system, and an uncertain component of regional economic cooperation. Reflecting this indefinite position of IP rules in trade and economic relations, and a background of ambivalence, APEC's work on IP issues has been less about compliance with formal obligations, and more about exploring cooperative approaches to implementing international standards for mutual benefit. In this context, TRIPS serves more as a framework for regional cooperation on IP – or a lexicon for policy dialogue – aimed at achieving regional goals for economic and regulatory cooperation, rather than as an adversarial compliance-oriented legal instrument born of trade tensions: regional cooperation as a tentative step towards the “collective management” of TRIPS. The collective management of TRIPS, consciously expressed as an ideal, would combine a collaborative, mutually supportive approach to the articulation of domestic IP policies within the TRIPS framework for optimal economic and social outcomes and the enhancement of regional economic relations, with enforcement of trading partners' IPRs undertaken collaboratively as a performance of positive comity, rather than as a grudging concession in a zero-sum trade deal struck between atomistic protagonists. This represents a potential maturing of the role of TRIPS, hitherto scarcely acknowledged, as a means of structuring common endeavours to find the most effective role for intellectual property systems in promoting social and economic welfare, through transforming bilateral zero-sum resolution of disputes into a shared lexicon of policy ideas.

5. The structural informality and the exclusion of rigorous compliance-based models of interaction within the APEC grouping may, therefore, point to more productive forms of linking international cooperation on IP issues to the shared economic benefits that, in principle, enhanced IP protection should deliver. A particular challenge is to elucidate how to advance the common IP-related interests of economies as diverse as those represented in APEC. In turn, this may strengthen the practical basis for cooperation on trade and IP more generally, as an alternative to the compliance and coercion-based models that some commentators have questioned,³

³ For instance, M. De Konig, “Why the Coercion-based GATT Approach is not the Only Answer to International Piracy in the Asia-Pacific Region”, *EIPR*, 1997, 19(2), 59-77.

and as a means of ensuring that the “powerful new institutions” produced by the “marriage of convenience between international trade law and intellectual property law”⁴ can indeed deliver their promise of more widespread benefits, to be promoted and disseminated as a collaborative task. The trajectory of work on IP within APEC illustrates this, as it evolved from wariness and hesitancy rooted in discordant trade relations, to the gradual adoption of IP as a policy tool in a wide range of APEC cooperative activities.

6. The initial proposals for APEC to take up regional cooperation on IP met apprehension and unease – at once reflecting uncertainty about IP as a trade issue and the indistinctness of the substantive scope of regional economic cooperation, as well as hesitations and political fallout stemming from the then recent incorporation of TRIPS within the WTO package. The dynamics of and political background to the TRIPS negotiations left apprehension over the potential directions of regional cooperation, recalling the concerns expressed at the time of the adoption of TRIPS at the Marrakech Ministerial Meeting, in April 1994:

“Among the new obligations which we consider as a major concession is the agreement on intellectual property. In order for us to implement the agreement fully, we require technical assistance from our developed trading partners. As we make our adjustment, what we need most is technical cooperation and not legal harassment.”⁵

7. The way that APEC work on IP has unfolded since 1995 has continued to map the position of IP as an element of international trade relations: would APEC activities on IP take on the character of technical cooperation or “legal harassment;” and what should regional cooperation on IP seek to achieve within the TRIPS framework? The subsequent conception of the “new economy” and “knowledge economy” as fields of economic cooperation, and the shock to the regional economy represented by the financial crisis of 1997, led to an intriguing suggestion that APEC cooperation on IP rights was in effect a return to its origins, as an alternative to an excessive focus on tariff reductions and hard trade liberalisation. Thus, in 1998, in the wake of the recent currency crisis, one official linked hesitation about trade liberalisation with the challenges of the “new economy” paradigm, and argued that regional cooperation on these new issues (such as on IP) was a return to the roots of APEC, after an overemphasis on trade liberalisation:

“Unless APEC draws lessons from the Asian currency crisis to return to its origin and to examine its future development, the significance of APEC will be lost . . . Pushing debate on liberalization and facilitating trade without taking into account the situation of various countries . . . is in itself dangerous. Furthermore, it’s not just a question of reacting to one’s economic crises, as the framework of

⁴ J.H. Reichman, “The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?” 32 *Case W. Res. J. Int’l L.* 441, at II.B.3.

⁵ The then Indonesian Minister of Trade, H.E. Mr. S.B. Joedono, Trade Negotiations Committee, Meeting at Ministerial Level, Marrakech, 12-15 April, document MTN.TNC/MIN(94)ST/17.

the global economy and society continues to change dramatically. The effects of any country's restructuring in a vacuum will be limited and inefficient at a time when it is instead necessary to promote economic policy under new paradigms ... APEC should return to its origins, reconstructing the debate on what issues have presented themselves under this new environment."⁶

8. This chapter discusses the relationship between the work between APEC economies on IP issues, and APEC cooperation on TRIPS in particular. It considers the implications of APEC's work for TRIPS as an international regime, and for regional and international cooperation on IP matters, within and beyond the TRIPS framework. It seeks to situate the APEC experience with cooperation on IP issues in the context of several broader theoretical and policy debates:

- The role, implications and very legitimacy of IP rules in international trade agreements and arrangements;
- The tensions, and ways of resolving tensions, between regional and multilateral systems;
- The contrast between compliance-based, reciprocity-motivated approach to international trade rules, and a view of trade rules as a framework for cooperative convergence of domestic policy and capacity-building for mutual benefit;
- Differing emphases in international economic relations between trade liberalisation and the elimination of trade barriers, and regulatory cooperation and domestic policy convergence;
- The distinction between the formal nature and legal scope of trade rules within international trade relations – trade relations construed as norm-setting and rule following, structured by a trade-off of interests in negotiations – and the effective implementation of the rules, or application of flexibilities within the rules, at the national level – trade relations construed as cooperative engagement in the advancement of mutual interest; and
- The interpretative, and thus policy and jurisprudential, tensions created by the emergence of multiple sources of law concerning international standards for IP protection, and the consequent need for a systematic, broadly-based multilateral jurisprudence of TRIPS centred on TRIPS as a convergence of international IP jurisprudence, GATT and WTO trade law, and the principles and practice of municipal laws on IP.

II. Favour-Thy-Neighbour: The Regionalism Debate

9. An initiative on IP protection by a regional trade and economic grouping immediately raises two contentious issues for the multilateral trading system (MTS):

⁶ Takeshi Isayama, "APEC Region Intellectual Property Right Protections Beyond the Year 2000", in *APEC/ABAC Joint Symposium on Intellectual Property Rights*, Japanese Patent Office, 1999, 14-15.

first, the debate about the legitimacy of regional initiatives within the MTS; and second, the remaining uncertainty over the policy and legal basis⁷ (and for some critics, the very legitimacy⁸) of the incorporation of IP standards within the international trade law regime.

10. Differing emphases on bilateral, regional and multilateral approaches have been evident in international trade relations, as the political and economic logic of quasi-universal, non-discriminatory international trade rules competes with the political and economic logic of preferential, more opportunistic or *ad hoc* regional and bilateral trading arrangements. The regional approach is seen as a tactical instrument to achieve or anticipate a broader multilateral objective, as a defensive response to or a bulwark against multilateralism, or as a strategic strengthening of vital regional and bilateral political relations.

11. Whether or not the regional and bilateral approach is more natural or fundamental (and despite its historical precedence), the extensive debate on regionalism⁹ tends to measure regional initiatives against the multilateral as the fixed benchmark. Analysts inherently privilege the multilateral framework, whether from the economic,¹⁰ political-strategic,¹¹ or strictly legal¹² perspective: under a strict reading of GATT, the "legal and conceptual primacy of multilateralism"¹³ creates an obligation to justify regional trade agreements (RTAs¹⁴) as exceptions to multilateral trade principles. In

⁷ An issue under interrogation from the beginning of the Uruguay Round negotiations on TRIPS: see for example R. Michael Gadbaw, "Intellectual Property and International Trade: Merger or Marriage of Convenience?", 22 Vand. J. Transnat'l L. 223 (1989).

⁸ See for example, "We demand the removal TRIPs from the WTO. There is no basis for inclusion of intellectual property claims in a trade agreement", in "Shrink It or Sink It, The Turn-around Agenda", *New Internationalist* 334 (May 2001); see also "Does TRIPS Belong in the WTO", Intellectual Property Rights in the Global Economy, Keith Maskus, Washington, 2000, at 238, "TRIPs and the WTO: An Uneasy Marriage", Arvind Panagariya, at <http://www.bsos.umd.edu/econ/Panagariya/cieppp.htm>, and J. Bhagwati and R. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* Vol. 1, (MIT Press, Cambridge, MA 1996).

⁹ See for instance the surveys of the debate in Alan Winters, "Regionalism versus Multilateralism", Policy Research Working Paper 1687, World Bank, Washington, 1996; and Panagariya, Arvind, "The Regionalism Debate: An Overview", July 1998, at <http://www.bsos.umd.edu/econ/Panagariya/>.

¹⁰ Stemming from classical trade theory and the consistent application of the theory of comparative advantage in the context of global trade.

¹¹ In view of the potentially corrosive effects of preferential trade blocs, and especially the decisive movement away from the destructive trade policies of the 1930s, for instance as described by Keynes in the context of the restoration of the multilateral trade system: "the bias of the policies before you is against bilateral barter and every kind of discriminatory practice. The separate blocs and all the friction and loss of friendship they must bring with them are expedients to which one may be driven in a hostile world where trade has ceased over wide areas to be cooperative and peaceful and where are forgotten the healthy rules of mutual advantage and equal treatment. But it is surely crazy to prefer that", cited in Jay Culbert, "War-Time Anglo-American Talks and the Making of the GATT", *The World Economy* 10(4): 381-408, at 395.

¹² Regional or bilateral preferences needing in general, under fully multilateral trade law, to be specifically defensible as exceptions to well-established principles of non-discrimination.

¹³ Sungjoon Cho, "Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism", 42 Harv. Int'l L.J. [2001] 419, at 451.

¹⁴ In line with common practice, this general term is used here to include both regional and bilateral trade and economic agreements, including customs unions and free-trade areas as well as other regional initiatives.

policy debate, RTAs are typically judged as to whether they are – in Bhagwati's influential metaphor¹⁵ – “building blocks” or “stumbling blocks” to the progress of the MTS towards liberalised trade. This centrality of the multilateral perspective continues despite the fact that engagement in RTAs is increasingly commonplace as a policy choice and arguably a more active area of normative development in trade law for almost a decade, the WTO Secretariat reporting in 2000 that:

“The number of RTAs in which at least one WTO Member participates has roughly doubled in less than ten years. The vast majority of WTO Members participate in at least one RTA: each Member ... is on average involved in five RTAs, though some are parties to ten or more.”¹⁶

Hence, policy uncertainty arises from the fact that the RTA is becoming an increasingly mainstream practice, yet conceptually remains subordinate to the MTS in policy and legal terms. There is deep apprehension that the proliferation of RTAs undermines the multilateral system, eroding the most-favoured-nation (MFN) principle through the creation of preferential enclaves and deflecting policymakers' attention away from the main multilateral game.

12. APEC developed the novel approach of “open regionalism” precisely to avoid the multilateral-regional dichotomy, and its work has consistently been intended to contribute to, and not substitute for, multilateral outcomes. Hence its worth tends to be assessed on its capacity to precipitate multilateral progress either by exerting leverage on other key players (such as the debate over whether the strong show of regional cohesion at the APEC Seattle leaders' meeting helped catalyse the conclusion of the Uruguay Round of multilateral trade negotiations¹⁷), or by the influence of “concerted unilateralism” initiatives which anticipate multilateral outcomes through non-preferential trade liberalisation (most strikingly, the ambitious Bogor goal of non-preferential “free and open trade and investment in the Asia-Pacific” by 2020). The GATT-WTO perspective emphasises the value of clear, predictable and binding trade law and sees less value in the vaguer, aspirational quality of such soft-law endeavours as APEC; by contrast, the prospect of binding commitments within the trade law system of “behind the border” regulatory issues (e.g. IP protection, the environment or labour standards) is seen as a dangerous step, these issues best left to soft-law cooperation and not the realm of trade negotiations.

13. The complex web of RTAs also raises concerns about practical burdens for trade, such as the “negative effects on trade” caused by differing rules of origin regimes among overlapping RTAs.¹⁸ These concerns recall the early steps towards

¹⁵ J.N. Bhagwati, “The World Trading System at Risk”, (Princeton 1991), 77.

¹⁶ *Synopsis of “Systemic” Issues Related to Regional Trade Agreements*, WTO Secretariat, Document WT/REG/W/37, 2 March 2000, 4.

¹⁷ Suggested by Bergsten, “Sunrise in Seattle”, *International Economic Insights* 5(1), January-February 1994, contested by Bhagwati, “Dissent at APEC Meeting cannot be Ignored”, *Financial Times*, 6 December 1996.

¹⁸ *Synopsis of “Systemic” Issues Related to Regional Trade Agreements*, WTO Secretariat, Document WT/REG/W/37, 2 March 2000, 5.

international harmonisation of IP laws, the negotiations for the Paris and Berne Conventions in the 1880s being partially motivated by the intricate web of bilateral agreements on intellectual property protection that had proliferated in the preceding decades – an ungainly mélange of bilateral commitments not unlike the “proliferation of RTAs” and the “crisscrossing of trade preferences” leading to the “spaghetti bowl” effect that was disparaged by critics of regionalism and bilateralism in the 1990s.¹⁹ Notwithstanding the regionalism debate, the interplay between multilateral and regional approach to trade rules has, overall, shown a trend towards non-discriminatory application of common standards, partly through the ratchet effect of the national treatment and MFN principles, by which the benefits of preferential arrangements are, as a rule, extended multilaterally to other parties. Indeed, the trend towards non-discriminatory free trade on the European continent in the 1860s was catalysed by not by multilateralism, but through the operation of the MFN principle in interlocking bilateral agreements: The use of the MFN principle in that era “demonstrated conclusively that bilateral trade negotiations are the most effective of all methods of tariff reduction, provided they aim at multilateral trade”.²⁰

14. The IP domain has seen an analogous evolution through the interplay of multilateral or bilateral towards a non-discriminatory multilateral system, progressing from the selective availability of rights and determination of their scope or duration on the basis of reciprocity towards effectively universal minimum standards granted on an MFN and national treatment basis. This process also dates back beyond the creation of multilateral IP instruments to the bilateral agreements of the mid-nineteenth century. The Paris and Berne Conventions do, as a rule, require national treatment, but not the application of MFN, even though significant differences in treatment were in practice limited. Hence, a formal milestone in this evolution was the first, explicit multilateral application of MFN to the IP system in TRIPS.²¹ Given the relatively limited pre-existing departures from MFN and the continuing exceptions permitted under TRIPS that correspond to past practice,²² this could perhaps be viewed as partly a codification of existing practice rather than strictly the construction of a distinct new norm. Indeed, a number of bilateral agreements in the mid-19th century had already explicitly applied MFN to industrial property.²³ Even so, the clear multilateral obligation under TRIPS to extend the MFN principle to IP protection substantially obviates any concern that future regional arrangements on IP could exclude the interests of non-regional players, just as it operated to promote more liberal multilateral trade through bilateral agreements.

¹⁹ J. Bhagwati and A. Panagariya, *The Economics of Preferential Trade Agreements*, American Enterprise Institute for Public Policy Research, Washington, 1997.

²⁰ A.G. Kenwood and A.L. Loughheed, *The Growth of the International Economy 1820-1990*, (Routledge (3rd edition), London 1992), 65, 67.

²¹ TRIPS Agreement, Article 4

²² Provided for in , paragraphs (a) to (d) of Article 4.

²³ Stephen Ladas, *Patents, Trademarks and Related Rights: National and International Protection*, (Harvard University Press, 1975), at 54 cites five such agreements dating from 1877 to 1883 (the year the Paris Convention was concluded).

III. “Non-trade” Issues and New Regionalism: Underpinning, Undermining or Redefining Multilateralism?

15. The resurgence of regionalism and the increasing focus on “behind the border” regulatory issues²⁴ in the new trade law paradigm (and their combination in the notion of “new regionalism”) together pose a conceptual and political challenge to the traditional conception of multilateral trade law and policy. It is therefore instructive that similar themes emerge in the parallel debates about regionalism and IP protection in the MTS: RTAs and IP protection are both construed at the technical legal level as permissible exceptions to multilateral free trade rules, and are criticised (in some cases, by the same influential critics²⁵) for potentially (or actually) undermining or diverting progress towards multilateral trade liberalisation, and generally hijacking the trade liberalisation agenda. Yet in other ways they can both be recognised as potential means of promoting the objectives of a fully multilateral trade regime. RTAs – specifically customs unions and free-trade areas – are permitted as exceptions to the universality of the non-discriminatory MFN principle through the operation of GATT Article XXIV,²⁶ provided they do not create further barriers to third parties: Indeed, they are acknowledged as potentially contributing to GATT objectives, the contracting parties recognizing “the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration”, with the proviso that “the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties”.

16. Similarly, IP protection was, in policy terms, “basically considered in the GATT context as an ‘acceptable obstacle’ to free trade”²⁷ and also, in legal terms, as an exception to GATT obligations under Article XX(d), subject to the overriding test in the chapeau of Article XX that there be no “arbitrary or unjustifiable discrimination” nor “disguised restriction on international trade”. Despite these

²⁴ “Laws ranging from corporate governance through the protection of competition, consumers, the environment, labour markets, and intellectual property rights to the promotion of specific cultural and social values . . .”, Michael Hart, “A Matter of Synergy”, in *Regionalism, Multilateralism and the Politics of Global Trade*, (University of British Columbia Press 1999), 35; cf. Bernard Hoekman, Aaditya Mattoo, and Philip English (eds.), “Development, Trade and the WTO”, World Bank, Washington 2002, 413, on “Behind the Border and Regulatory Issues”: “As tariffs and quotas became less important in OECD countries as the result of rounds of multilateral trade negotiations, differences in national regulatory regimes became more apparent. Policies that were put on the table for possible negotiation of rules included government procurement, product standards, inward foreign investment, competition law, labor standards, and environmental norms.”

²⁵ Notably Bhagwati – see, for example, J. Bhagwati, and R. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* Vol. 1, (MIT Press, Cambridge, MA 1996).

²⁶ For trade in services, the exception strictly concerns exceptions for economic integration agreements (EIAs) under Article V of the WTO General Agreement on Trade in Services (GATS), subject to distinct but analogous conditions, although no such EIAs have yet been the subject of stand-alone notifications to the WTO.

²⁷ Daniel Gervais, *The TRIPs Agreement : Drafting History and Analysis*, (Sweet & Maxwell, London 1998), 8.

parallels, the regional exception has attracted much more concern within the GATT-WTO system, since RTAs are seen as a major political and economic challenge to the MTS, both because of their sheer profusion and because of the unresolved legal issues they raise. Under GATT, there was a “most striking” absence of “due legal consideration” of the Article XXIV exception due to “judicial restraint” in dispute settlement,²⁸ while the IP exception was the subject of two adopted GATT panel reports.²⁹ In recognition of this problem, the Uruguay Round negotiators adopted the *Understanding on the Interpretation of Article XXIV of GATT 1994*, the WTO established a Committee on RTAs to consider the GATT-consistency (more than 150 RTAs having been notified to the Committee), and the Doha WTO Ministerial meeting mandated WTO negotiations on “clarifying and improving disciplines and procedures” concerning RTAs.

17. While it has presented less direct policy difficulties, there are deeper, unresolved questions about the status of the IP exception. Under GATT, it was easier for a dispute settlement panel to rule on the IP exception precisely because IP protection was seen as a “non-trade” issue, whereas RTAs were an alternative, competing policy choice for trade regulation, rendering any judgement as to their GATT-consistency a matter for Contracting Parties. The WTO single undertaking clarified the status of the RTA exception, in particular confirming that it is justiciable. But the same step brought potential problems for the IP exception, by giving IP a dramatically new status in trade law: the marriage of TRIPS and GATT in the single undertaking made IP protection both a permissible exception to and a firm obligation under the same body of trade rules. At the operational legal level this tension may be resolved because departures from the core GATT non-discrimination principles in relation to IP protection are circumscribed under the more precise corresponding TRIPS provisions: the exceptions to MFN and national treatment permitted under TRIPS Article 3 and 4 could be argued to be consistent with exceptions permitted under GATT Article XX(d) (presumably passing the “disguised restriction on trade” and “arbitrary or unjustifiable discrimination” tests in the chapeau of Article XX). Even so, there is remaining policy tension over the inclusion in the WTO system of IP protection despite its perceived non-trade status as a matter of “behind the border” regulation. This tension is exemplified in the way IP is the subject both of a GATT exception and of a positive set of trade rules. The very incorporation of the TRIPS Agreement within the WTO system is nonetheless a recognition at the broadest policy level that regulation of IP rights and the harmonisation of minimum standards of protection have a place in the MTS, the preamble to TRIPS recording WTO Members’ desire “to reduce distortions and

²⁸ See the discussion in Cho, above fn. 13, 437, of the unadopted GATT panel report on “European Community-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region: Report of the Panel, GATT L/5776, Feb. 7, 1985, 4.15, which held that consideration of Article XXIV was a matter for Contracting Parties, not the dispute settlement process.

²⁹ Article XX(d) considered in *United States – Imports of Certain Automotive Spring Assemblies* (L/6216, adopted 10 November 1987) and *United States – Section 337 of the Tariff Act of 1930* (L/6439, adopted 7 November 1989).

impediments to international trade". At this stage, however, an exclusive focus on the legal and political economy characteristics of the GATT-WTO regime is unlikely to provide a full account of the role of IP in economic and trade relations, whereas consideration of how the more fluid APEC processes have incorporated IP issues into the scope of regional economic cooperation may illustrate how this conceptual tension is resolved in practice, precisely because of the less formal nature of APEC.

18. Compared to the traditional realm of trade law, IP law has raised much less concern about the potential negative effects of regionalism, partly because of the strong roots and long evolution of multilateral rules in IP (and the relatively limited forms of bilateral reciprocity) and partly because of the general openness of regional arrangements concerning IP ("open regionalism" being less of a novelty for regional mechanisms for administration of IPRs). Many bilateral IP agreements had come about precisely because one of the parties had not adhered to the core multilateral treaties, and a bilateral agreement was an expedient way of, for instance, ensuring the right of priority or copyright protection normally extended under multilateral treaties. The strengthening of the range and effect of non-discrimination principles through TRIPS eases this concern. Even so, in new areas of IP protection established on a national or regional basis, such as *sui generis* protection of databases, it is notable that MFN and national treatment may not apply.³⁰ Resistance to the application of these core principles of non-discrimination arises in two, apparently contradictory ways – either because they remove negotiating leverage so that standards cannot be bargained upwards by insisting on reciprocity, or because their application means that any bilateral deal to increase IP standards automatically applies *erga omnes*, creating an upwards ratchet mechanism.³¹ Regional activities on IP have also been less prone to conflict with the multilateral system because their focus is often on practical implementation, administrative convergence and technical cooperation in a manner that is practically and politically not feasible on the fully multilateral level, and yet supports the broad objectives of the multilateral system. The very technical challenges of implementing multilateral IP obligations has fostered regional cooperation at the regional level, well suited for the coordination and facilitation of technical assistance. The regional level is also a potentially more productive means of giving effect to the positive obligations under TRIPS for cooperation both in relation to implementation of IP systems (Article 67) and in relation to enforcement of IP rights (Article 69).

19. The initial unease about extending APEC regional cooperation to cover IPRs was symptomatic of a general uncertainty as to the appropriate scope of regional economic cooperation. Prior to the TRIPS negotiations, IPRs were not customarily considered in the context of RTAs, other than as exceptions to regional obligations, analogous to GATT XX(d).³² Thus for APEC to take up IP as part of a much

³⁰ Notably, the recently-concluded U.S.-Singapore Free Trade Agreement extends non-discrimination obligations to all types of IP right, "Trade Facts", Office of the United States Trade Representative, Washington, 2002.

³¹ Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J.W.I.P. 6 (November 2001), 791-808.

³² For instance, Article 18 of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) of 1983.

broader economic cooperation agenda could illustrate the extent to which IPRs entered the trade mainstream:³³ was the inclusion of TRIPS in the WTO regime an aberration, a contestable precedent, or a genuine and irreversible paradigm shift? Regionalism itself was under pressure to evolve, increasingly disconnected from a traditional focus on preferential trade rules and from a geographical basis:

“‘Old’ regionalism consisted of trade-based cooperation among states in the same geographical area and with similar economic and cultural characteristics. ‘New’ regionalism, driven by global markets and technology, brings together both geographically proximate and more distant states, with varying levels of economic development and different national outlooks.”³⁴

And this shift was symptomatic of the broadening scope of regulatory interaction, and the growing pressure and policy rationale for traditionally non-trade areas of domestic regulation to be the subject of cooperation, if not specific harmonisation:

“Until recently, ... national regulatory systems [such as IP protection] operated on the assumption that most economic activity took place within the confines of the state and that the limited activity that crossed national frontiers could be adequately addressed through border regimes ... Such a balance between domestic and international regimes no longer represents today’s reality ... the national regulatory structures so carefully built up over the past century and a half may now serve as impediments to harmonious economic development rather than as adjuncts or facilitators.”³⁵

IV. Tension Between Regional and Multilateral

20. There is an extensive literature seeking to elucidate the policy linkages between regional and multilateral mechanisms, in normative, economic, trade theory and descriptive terms. The impulse towards regionalism is variously construed as a calculated step towards enhancing welfare (a functionalist analysis), promoting or expressing communal identity and common interests (a constructivist account) or as a consequence of shifting power and negotiating leverage (applying a neo-realist analysis of international relations).³⁶ In fact, the strategic or tactical choice between regional and multilateral approaches may be determined by sheer pragmatism, consolidated but not determined by closer political and commercial ties, and cultural and strategic considerations; theoretical considerations and traditional economic

³³ Or more strictly *re-entered*, positive IP obligations having been a component of many early bilateral trade agreements – see note 137 *infra*.

³⁴ Donald Barry and Ronald C. Keith, “Changing Perspectives on Regionalism and Multilateralism”, in *Regionalism, Multilateralism and the Politics of Global Trade*, (University of British Columbia Press 1999), 10.

³⁵ Hart, above fn. 24, 35-36.

³⁶ This summary draws directly on Cho, above fn. 28, 423-4.

welfare arguments are more likely to be applicable in providing a retrospective explanatory gloss than as a guide to prospective policy choices,³⁷ although making the political case for RTA initiatives may be supported by economic analysis.³⁸ Pragmatic assessments of immediate trade interest may dictate that failure to progress trade policy initiatives in the multilateral sphere will lead to interest in securing similar outcomes at a regional or bilateral level, to signal to negotiating partners the potential costs of failure of multilateral negotiations, or as a necessary evil to secure multilateral market access goals in at least some key markets. When the Seattle WTO Ministerial foundered, there was an appreciable rise in interest in regional and bilateral trade deals as a defensive fallback.³⁹ The relative lack of interest in immediately advancing new IP norms in the multilateral forum of the WTO has been attributed to a judgment that progress towards further IP standards is currently more likely to be achieved in bilateral forums, and in some cases regional trade negotiations.⁴⁰ Conversely, the failure of regional trade initiatives can be represented as a determination that these issues should be dealt with in the multilateral environment – such as the sectors identified by APEC for early voluntary liberalisation under the EVSL initiative which were effectively referred back to the multilateral arena,⁴¹ or the decision in the context of South Africa – European Community bilateral trade negotiations⁴² that consideration of standards for the quasi-IP protection of traditional expressions for wine products should be left to the multilateral arena.

21. The use of bilateral and regional negotiations to advance multilateral goals concerning IP may be a return to, or an extension of, an established dynamic for trade liberalisation – tariff reductions being negotiated bilaterally, and then applied multilaterally through the MFN mechanism – the multilateral system operating to promote expectations of “diffuse reciprocity”⁴³ – its analogue in IP terms being the progressive strengthening of available IP protection, rather than the lowering of tariff bindings, through what Drahos has described as the “global IP ratchet” effect of bilateral agreements including increased commitments on IP protection.⁴⁴ In this

³⁷ John Whalley, “Why Do Countries Seek Regional Trade Agreements”, NBER working paper 5552, National Bureau of Economic Research, Cambridge MA, April 1996.

³⁸ For example, “The Costs and Benefits of a Free Trade Agreement with Singapore”, Access Economics, Canberra, September 2001, at www.dfat.gov.au.

³⁹ Convinced trade multilateralists such as Australia and Japan making a conscious defensive shift towards more active consideration of bilateral trade agreements, evidenced for instance in the comments of a senior Japanese Finance official quoted in Davos shortly after Seattle: “We in Japan have finally been forced into pursuing bilateral agreements to free trade”, cited in J. Bhagwati, “Getting to Free Trade: Alternative Approaches and Their Theoretical Rationale”, Working Paper 121, European Institute of Japanese Studies, 2001, 22-23.

⁴⁰ See for instance the discussion of “forum-shifting” in J. Braithwaite and P. Drahos, “Global Business Regulation”, (Cambridge 2000), chapter 24.

⁴¹ See Statement of the Chair, Meeting of Ministers Responsible for Trade, Auckland, June 1999 (paragraphs 15-18).

⁴² Trade, Development and Co-operation Agreement between the European Community and the Republic of South Africa, WTO document WT/REG113/1, 7 December 2000.

⁴³ R.O. Keohane, “Reciprocity in International Relations”, *International Organization*, 1986, 40(1), 1-28.

⁴⁴ Drahos above fn. 31.

way, a regional or bilateral approach can serve as an alternative means of generating multilateral outcomes. Without the operation of the MFN principle, bilateralism or regionalism can lead to a more complex dynamic, with the multilateral system breaking down into a web of reciprocal trade-offs: "bilateralism ... segments relations into multiples of dyads and compartmentalizes them. . . . [and] is premised on specific reciprocity, the simultaneous balancing of specific quid pro quos by each party with every other at all times".⁴⁵ Bilateral and regional reciprocity in relation to IP protection has in the past had direct operational utility for IP right holders – for instance, the bilateral treaties which have established reciprocal rights of priority in the patent domain⁴⁶ or reciprocal recognition of copyright protection.⁴⁷ Since the entry of most significant economies into either or both of the Paris-Berne or WTO systems and the explicit application of the MFN principle, the more recent trend has been for bilateral and regional agreements dealing with IP to focus less on the trading of reciprocal rights than on establishing minimum standards, standards which would flow to third parties through the operation of MFN. This latter effect itself is criticised by some commentators who see it as an indirect path to giving *de facto* multilateral effect to IP standards above TRIPS requirements.

22. In fact, regional or bilateral agreements on IP standards potentially pose a greater challenge to the multilateral system by increasing the indeterminacy of interpretation of international standards for IP protection. This occurs when the same essential standards appear in different legal instruments, regional, bilateral or multilateral, with the prospect of divergent interpretations by different forums applying distinct jurisprudential traditions; or when subsequent instruments adapt, elaborate or supplement existing multilateral standards, possibly creating a regional or bilateral gloss on the original multilateral intentions, with potential influence on multilateral interpretation. The legal uncertainties that arise from bilateral and regional determinations of IP norms create theoretical unease for the legal analyst, which can translate into real uncertainty and unpredictability for the national policymaker, with a chilling effect on the exercise of national discretion within the framework of international IP law (comparable to the disincentives to trade that complex and conflicting rules of origin regimes may cause⁴⁸). For enterprises or legal practitioners, too, traversing the range of differing IP norms imposes a layer of uncertainty and a form of procedural cost that may indirectly hamper legitimate and beneficial trade and investment flows, in tension with the preambular aspiration of TRIPS to reduce impediments and distortions to trade. This underscores the legal

⁴⁵ John Gerard Ruggie, "Constructing the World Polity", (Routledge, London 1998), 110.

⁴⁶ Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of India with respect to the Mutual Protection of Priority of Patents for Inventions, New Delhi, January 1963.

⁴⁷ E.g. The Agreement between the Government of the United States of America and the Government of the Socialist Republic of Vietnam on the Establishment of Copyright Relations, Hanoi, 27 June 1997, and the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Protection and Enforcement of Copyright, Jakarta, 17 November 1992.

⁴⁸ See fn. 18 above.

and policy disadvantages if the jurisprudence of international IP law is not firmly centred in the multilateral environment, and therefore highlights the need for a comprehensive, broadly-based jurisprudence of TRIPS as a valuable safeguard to the legislator and trade negotiator alike – a comprehensive jurisprudence of TRIPS that takes account of the roots of its norms in the Paris-Berne treaty system and its diplomatic history, the conceptual bridge across to the central principles of GATT-WTO trade law, the position of TRIPS within the broader international law and policy environment, and the developments in state practice that are evidenced in bilateral and regional arrangements, as well as the law and practice of IP at the municipal level.

23. These questions are therefore at once theoretical and urgently practical. When does an assemblage of subsequent regional and bilateral agreements on IP issues reach a quantum that tips the balance and creates a *de facto* standard that supersedes or more precisely defines formally articulated international law, especially in still contested areas? International exhaustion – if not the most highly contested, surely among the most “trade-related” of IP issues at the international level – has been conspicuously unresolved in multilateral texts,⁴⁹ but has been settled in various ways in bilateral forums,⁵⁰ and is the subject of debate and negotiations⁵¹ or specific judicial determinations⁵² regionally. The question of exhaustion is a particular conundrum in the regional context, in which the goal of the free flow of goods in a single market or free trade area may conflict with negotiating goals to use bilateral and regional negotiating processes to strengthen national exhaustion and the right of importation. The possibility of a *de facto* norm of regional (but not international) exhaustion, based on the construction of a single regional market, could raise difficult questions of conformity with the MFN principle and the applicability of GATT Articles XX(d) and XXIV. A similar example is that of the scope of test data protection prescribed under TRIPS Article 39.3, another contested area, acknowledged in the notification of the mutually agreed solution to the dispute “Argentine – Certain Measures on the Protection of Patents and Test Data” that “differences in interpretation shall be solved under the DSU [WTO Dispute Settlement Understanding] rules”.⁵³ This standard has been more closely defined under various RTAs,⁵⁴ leaving open the question of whether and how these complementary legal

⁴⁹ TRIPS Agreement, Article 6.

⁵⁰ See for instance the right to prohibit or authorise the import of authorised copies of copyright works and phonograms in the Article 4.11 of the Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 2001, and the apparently similar effect of Article 4.2.A of the Agreement between the United States of America and Vietnam on Trade Relations.

⁵¹ See, for instance, draft Free Trade Area of the Americas Agreement, Chapter on Intellectual Property Rights, Part II, Section 5, Article 6 on exhaustion of patent rights.

⁵² For instance, the *Silhouette* case on parallel importation and the single market decided by the European Court of Justice (Case C-355/96 *Silhouette International Schmied GmbH & Co KG v Hartlauer Handelsgesellschaft mbH* [1998] ECR I-4799).

⁵³ WTO document WT/DS196/4, 20 June 2002.

⁵⁴ For example, under NAFTA, the U.S.-Singapore Free Trade Agreement, and the draft Free Trade Area of the Americas Agreement.

instruments might influence the interpretation of TRIPS provisions in the event of dispute settlement, even setting aside the immediate questions of choice of law and forum shopping.

24. Alternatively, parallel normative development in RTAs may simply thwart or complicate further attempts to codify and clarify international norms. As Lippoldt notes, “while increasing the degree of harmonisation and, potentially, IPR protection in the RTA area, the RTA specific provisions [on IP] may diverge in their content *between RTAs*”.⁵⁵ Hence the need for theoretical and legal clarity about the role of regional and bilateral IP norms vis-à-vis the fully multilateral raises directly practical questions as well. As noted, the Paris Convention itself was a reaction to the *mélange* of bilateral agreements that had arisen in the mid-nineteenth century,⁵⁶ and the consequent “inconveniences” arising from inconsistent access to the patent system that “can only be met by the common action of all civilized States”,⁵⁷ an inconvenience that now goes beyond the immediate practical sphere to questions of legal interpretation and the exact nature of international obligations, given the new importance for dispute settlement of comprehensive, predictable multilateral IP standards.

25. The tension between the regional and multilateral approaches depends on the extent to which the regional system functions as a set of formal legal obligations, which may compete or conflict with, or extend and reinforce the multilateral rules. The linkage between the regional and multilateral levels takes on more diverse forms, dependent also on the nature of the regional initiative itself. A free trade area or customs union granting preferential treatment to its members as a formal commitment directly triggers the question of compliance with GATT Article XXIV, and potential tension between multilateral and regional obligations. By contrast, espousal by a region body such as APEC of agreed general policies that are supportive of certain multilateral directions – such as trade liberalisation on the basis of “open regionalism” or “concerted unilateralism” – should not, on the face of it, undercut the legal and practical effect of multilateral commitments, and indeed to the contrary APEC has been planned as a means of promoting stronger multilateral commitments, and of strengthening capacity to implement those commitments. The experience of APEC work on IP points to the desirability of a regional approach that eschews competing normative development, and concentrates on policy dialogue, soft regulatory convergence and cooperation for capacity-building.

26. This underscores the need to focus less on the content and overlap of legal obligations and more on clarifying the distinct roles and legal status of multilateral

⁵⁵ Douglas Lippoldt, “The Relationship between Regional Trade Agreements and the Multilateral Trading System: Intellectual Property Rights”, OECD document TD/TC/WP(2002)28/Final, 10 July 2002.

⁵⁶ There are 69 bilateral agreements in force in 1883 concerning industrial property listed in Ladas, above fn. 23, 43-45.

⁵⁷ Letter of invitation to the First International Congress for the Consideration of Patent Protection (Vienna, 1872).

and regional processes, particularly how they function as sources of legal norms. The need to clarify the intended legal consequences of particular RTAs and the general legal character of an RTA is often overlooked in the literature on regionalism. Clarity is especially needed in non-traditional trade issues, such as IP protection the harmonisation of so-called "behind the border" regulatory standards, as well as initiatives on non-tariff barriers and investment measures. Regional initiatives may function on the policy plane to promote multilateral outcomes, or may contribute to multilateral developments by serving intentionally or fortuitously as a test bed for the development of new legal norms – bearing in mind that, depending on the direction of normative development, one person's "test bed" is another's "ratchet". A regional initiative may develop new forms of regulatory cooperation, by facilitating administration and capacity building, or may undertake necessary administration at a regional level essentially on behalf of national authorities. Regional body can act as a forum for policy dialogue, with a particular value for instance in exploring new policy challenges in an environment that is not viewed as the precursor to multilateral negotiations and where there is less resistance to the effective pooling of national sovereignty.

27. APEC activities on IP matters have indeed explored each of these regional avenues, with varying degrees of success, taking advantage of the "without prejudice" character of APEC cooperation, in contrast to formal trade negotiations which are aimed at producing binding legal commitments, and in which there is an institutional tendency to structure policy issues in terms of cross-sectoral trade-offs and request-offer transactions. In a zero-sum trade negotiation environment, even unilateral policy changes that might otherwise be taken as domestic initiatives in the expectation of economic benefits are construed as concessions, to be paid for by other negotiating parties through matching concessions (this arises, for instance, concerning negotiations on trade liberalisation: If, under orthodox trade theory, unilateral liberalisation is beneficial for an economy, how can an offer to lower tariffs be interpreted as a negotiating compromise if, according to first principles, it is in that party's self-interest?⁵⁸ Equally, if IP protection is indeed considered to be beneficial to an economy, worth implementing out of self-interest, how can it be construed or analysed as a concession in trade negotiations?) When negotiations concern intentionally binding commitments and the conscious construction of hard law, they are inevitably subjected more to this distorting artifact of the negotiation process than the soft law policy pronouncements such as those produced by APEC. This is why APEC processes may provide a more illuminating insight into shifting policy interests and potential collective interests than multilateral trade negotiations. This analysis applies notably in the realm of IP, where the observation that TRIPS was a wholesale concession on the part of developing country negotiators has tended

⁵⁸ The answers to this question lie, of course, in practical political judgements, firstly on the dynamics of international trade negotiations, and secondly on the domestic lock-in effect (use of international processes to overcome domestic opposition to reform, and to pre-empt policy reverses), rather than in the more abstract realm of trade theory.

to obscure the necessary analysis of the scope of policy options within and beyond the TRIPS framework for more strategic use of the IP system for national development. APEC partners have since 1995, through the unilateral Individual Action Plans and the regional Collective Action Plan on IP, developed, implemented and extensively reported on a range of policy, legal, administrative and developmental measures to enhance the operation and use of the IP system, with no coercion other than a mild form of peer pressure that is closer to peer interest. China offers a striking instance of this effect. The progressive strengthening of IP protection in China (by any measure a country with significant IP assets and a potentially enormous beneficiary from the international IP system⁵⁹) has, for instance, tended to be observed through the prism of compliance – both with bilateral settlements and with TRIPS in the context of WTO accession. This can obscure the long-term domestic interests of China in developing its IP systems, and overlooks China's role within APEC on IP, in which it has been an active player in a range of cooperative processes, including – as a non-Member of the WTO – joining in the APEC commitment to full implementation of TRIPS by the year 2000.⁶⁰ Curiously, then, the same set of substantive commitments embodied in the TRIPS Agreement can be at once variously construed as the consequence of a new form of gunboat diplomacy⁶¹ and as a consequence of liberalisation-shy Asian mercantilism,⁶² suggesting deficiencies in both lines of analysis. This points the way to a more nuanced and regionally-sensitive understanding of the role of TRIPS in the broader process of the development of IP systems.

V. Impact of TRIPS on Regional Cooperation

28. TRIPS is inevitably the prism through which regional and bilateral cooperation on IP is viewed. The impact of TRIPS is widely viewed as a major turning point in international trade law and the political economy of IP, and indeed potentially a revolution:

“Legal revolutions arrive quietly, often unnoticed. It is only when one tradition departs and a new one in the form of practices and principles expressing different economic and social relations is established, that one can assign to a legal event the status of turning point. [TRIPS] is a case in point . . . When the history of the globalization of property rights in information is written, the significance of

⁵⁹ A.S. Taubman, “TRIPS Goes East: China's interests and international trade in intellectual property” in Deborah Z. Cass, Brett G. Williams, and George Barker (eds), “China and the World Trading System”, (Cambridge 2003) (forthcoming).

⁶⁰ Osaka Action Agenda, 19 November 1995, Part 7(g).

⁶¹ “Horrible Hegemons: Moral Repugnance and Global IP Standards”, *Copyrites* – No. 26 (12 August 1997), www.dcita.gov.au; A. Samuel Oddi, TRIPs-Natural Rights and a “Polite Form of Economic Imperialism”, 29 Vand. J. Transnat'l L. 415 (1996), 470.

⁶² Jeffrey J. Schott, *WTO 2000: Setting the Agenda for World Trade*, Institute for International Economics, Washington, 1996, 47.

TRIPS to the constitution of a new world paradigm for property will be much better understood.”⁶³

Debate will continue actively to probe, but is unlikely to resolve, the vexed questions of whether the overall impact of TRIPS on developing countries has been positive, and whether, and how, TRIPS can be rendered congruent with the broader principles of international trade law. TRIPS has come for many to serve as an emblem of far broader political and economic processes, such as the apparent trend towards privatisation of research, technological development, and cultural and educational life. It has had a major impact on the national IP laws of many countries and radical impact on some, and it has led to decisive regulatory and economic shifts in other ways. But in strict formal terms it remains, as an international agreement, a means of governing relationships between sovereign parties. At this level, TRIPS is both a positive construction of international law and a decisive reaction against bilateralism in the settlement of IP-related trade disputes. Incorporation of TRIPS in the WTO regime is in essence a reassertion of the multilateral over the bilateral in the conduct of trade relations, and especially in the settlement of trade disputes. It has the effect of setting international relations concerning IP protection squarely in the mainstream of multilateral trade relations, and seeks to shift the focus of trade-related IP relations from *ad hoc* bilateral interactions to a rules-based multilateral sphere. The genesis of TRIPS may, therefore, lend credence to the realist analysis of trade relations, but it was also created as a defence against the determination of outcomes and pre-emption of policy choices through the exercise of unilateral bargaining power, as a safe haven of legalism in contrast to the pragmatic settlement of issues in bilateral negotiations. This finds consonance in the extensive analysis in the general debate about regionalism and the MTS of the way in which power relations and special interests are more likely to structure regional outcomes than multilateral outcomes.

29. If TRIPS is assessed in textbook terms as a set of legal standards – as a template for national laws – it is surprisingly conservative, comprising an essentially retrospective set of legal standards, not merely “not radical”, but even showing “tentativeness”:⁶⁴ it is at core a codification of the existing practice of many developed countries, its genuinely new normative departures being comparatively rare and relatively technical, at least in terms of established IP law and procedure. The global harmonising effect of TRIPS in patent law has been particularly controversial, yet the pivotal concept in patent law – “invention” – is undefined in TRIPS. This leaves some WTO Members to continue to define “invention” on the basis of the Jacobean *Statute of Monopolies* of 1623, hardly an avant-garde source of law. By contrast with the substantive conservatism of TRIPS standards, the WIPO “Internet” Treaties, adopted the year after TRIPS entered into force, constituted a conscious, distinctive and legally innovative normative response to the impact of

⁶³ Peter Drahos, “Property Rights in Information: The Trade Paradigm”, *Prometheus*, Vol. 16, No 3, 1998, 245.

⁶⁴ Christopher Arup, “The New World Trade Organization Agreements”, (Cambridge 2000), 65.

digital technology on copyright and related rights. Indeed, one critical response to the harmonizing effect of TRIPS has been to call for new normative systems that could indeed be revolutionary in terms of IP law, calls for *sui generis* protection of traditional knowledge under TRIPS being a striking example. Even the novel TRIPS provisions on enforcement are essentially a codification of existing common law procedure, their novelty consisting in that they are expressed in considerable detail within an international treaty and in that they are thereby transplanted to many jurisdictions where they would not normally take root, or would develop in different directions according to broader jurisprudential factors. Such an approach to unify legal procedures, and not merely to harmonised standards, had in fact been considered in the International Congress on Industrial Property at Paris in 1878, one delegate pointing out that “in the present state of things” it would not be possible to achieve uniformity of laws precisely because it would entail uniformity in “civil law, civil procedure, commercial law, penal law and penal procedure”,⁶⁵ TRIPS only partially achieving harmonisation relating to these areas.

30. The radical aspects of TRIPS do not, then, concern the actual standards it expresses, so much as the context in which they are expressed, their reach and binding quality in international law, and the transformation of a “best practice” model of law and practice for a developed economy into an international norm. This comes about because of the problem it was intended to solve: the unpredictability and asymmetry of dispute resolution of IP trade disputes through bilateral negotiation. The decisive shift TRIPS represents, therefore, is the novel acknowledgement (reluctant or otherwise) that standards for IP protection have a place in a multilateral trade law regime: TRIPS is in effect an agreement that intellectual property rights *are* trade-related, and that bilateral trade disputes on IP protection should be settled under multilateral trade rules. At the same time, it amounts to a pragmatic reaction to the IP component of bilateral trade disputes, choice of forum being another source of tension between bilateral and multilateral systems. The genesis of TRIPS from difficulties in resolving IP-related trade disputes bilaterally also induced a shift towards a much higher level of international transparency, scrutiny and accountability of national IP systems. With the greater stress on formal treaty compliance it led, by default rather than conscious planning, to the formation of a new, hybrid kind of international IP jurisprudence – requiring the core principles of IP law and practice, and the policy assumptions behind the IP system, to be situated within the broader stream of international trade law.⁶⁶

31. Even if TRIPS epitomises the policy goal of establishing a multilateral forum to supersede bilateral settlement of IP disputes, its conclusion and entry into force has not obviated bilateral negotiations on IP protection. Indeed, the advent of TRIPS has precipitated or consolidated the perception that IP protection is a

⁶⁵ Cited in Ladas above fn. 23, 61.

⁶⁶ For a telling instance, note the attempt of the Panel to apply the GATT notion of “legitimate expectations” in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997.

mainstream element of regional economic and trade cooperation. This is apparent in regional moves towards harmonisation, and administrative and technical cooperation, as well as the articulation of competing or complementary norms in reaction to TRIPS. In the case of APEC, while there were, objectively, sound reasons for cooperation on IP, it took TRIPS to provide the impetus for cooperation, even though the natural directions of regional cooperation arguably lay in more diverse directions.

32. The paradigm shift epitomised by TRIPS has had a wide-ranging impact on regional economic processes, even though the dynamic interplay between multi-lateral and regional levels has meant that this impact takes on diverse forms. Many RTAs have directly or indirectly endorsed TRIPS standards, and some have applied TRIPS-plus standards.⁶⁷ But other reactions to TRIPS are present in regional agreements, including technical cooperation and the articulation of competing policy interests in reaction to elements of TRIPS that are seen as inappropriate. The range of regional responses to TRIPS, discussed below, displays the common element that IP issues now form part of the regular subject matter of regional trade and economic cooperation, showing the fundamental influence of this same shift in perception of IP, either directly in response to TRIPS or ensuing from the same root causes. It is now unusual for a regional trade and economic agreement to lack an IP element, even where this is circumspect and limited, arguably otiose, such when confirming that TRIPS applies to relations between two WTO Members.⁶⁸

33. The 2001 Pacific Island Countries Trade Agreement (PICTA) is a recent example of an RTA without some form of reference to positive IP standards. Rather, following GATT XX(d),⁶⁹ PICTA cites IP protection as an exclusion to trade commitments (Article 16.1(e)). It also refers to IP in the context of rules of origin, the cost of IP royalties being one measure of the processing of goods sufficient to transfer their effective origin to a Party to the agreement. Hence, even this incidental reference does betoken an important trade-related aspect of IPRs and the embedding of the economic and commercial significance of IP rights in a traditional, "trade-in-goods" and tariff-focussed RTA. The distinct economic and technological status of PICs presumably influenced this approach, inasmuch as the licensing of imported technology may be seen as more directly significant than articulation new positive standards on IP protection. Yet this perception should be set against the parallel development of the *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*,⁷⁰ an important regional initiative in formulating positive IP norms, responding to the common regional need for harmonised IP standards in an area of greater policy, cultural and economic interest than the perceived subject matter of the mainstream IP system.

⁶⁷ See the discussion in Drahos above fn. 31.

⁶⁸ See, for example, the Singapore-New Zealand bilateral agreement referenced at footnote 74 below.

⁶⁹ Compare also ANCERTA, cited in fn. 32 above.

⁷⁰ "Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture", Secretariat of the Pacific Community, Pacific Islands Forum Secretariat, and UNESCO Pacific Regional Office, 2002.

34. This illustrates how TRIPS can have both direct and indirect influences, and has helped catalyse complementary, compensatory or balancing responses: TRIPS has, therefore, helped put the issue of IPRs on the regional agenda, without necessarily predetermining the outcome of regional responses on IP issues. The extent and diversity of the TRIPS paradigm shift may be measured by the range of regional responses to it.

a) TRIPS as a source of legal standards for RTAs

35. The most direct influence has been for TRIPS to be drawn on as a source of legal norms in regional and bilateral agreements. Several mechanisms are apparent: an agreement may embody TRIPS standards in substance without specifically mentioning TRIPS itself,⁷¹ it may adopt the implementation of TRIPS itself as an explicit commitment for regional partners,⁷² TRIPS provisions may be incorporated within an RTA directly or by reference, and an RTA may reaffirm the application of TRIPS in general⁷³ or specifically apply it to bilateral relations.⁷⁴ Broadly, TRIPS has come to serve as the *de facto* baseline of IP standards for regional agreements, even when this is technically redundant (almost all of these commitments applying to states already within the WTO). Its emblematic character, serving as a metonymy for a “modern” IP system, means that it can be invoked to fill a perceived regional need to address the question of IP in a substantive way, without necessarily engaging in distinct norm-setting or pre-empting multilateral outcomes. On the other hand, the direct incorporation of TRIPS within regional agreements with dispute settlement mechanisms may lead to the interpretative and conflict of law issues cited above.

b) TRIPS as a means of extending the effect of regional norms

36. Conversely, TRIPS itself has had the effect of promoting the extra-regional influence of existing regional norms, just as it has leveraged the influence of a set of national policy settings associated with key TRIPS proponents. For instance, the TRIPS negotiations on exceptions to patentable subject matter (Article 27.2 and 27.3) drew on the European Patent Convention (Article 53). The normative effect

⁷¹ Among the RTAs with IP provisions which largely incorporate the substantive standards of TRIPS include the North America Free Trade Agreement (negotiated in parallel with TRIPS on the common basis of the Dunkel draft) and the Free Trade Agreement between Chile and Mexico (WTO document WT/REG125/1, 27 August 2001).

⁷² E.g. APEC Osaka Action Agenda, 19 November 1995, Part 7: “APEC economies will ... implement fully the TRIPS Agreement”, www.apecsec.org.sg.

⁷³ E.g. Free Trade Agreement between Israel and Mexico, WTO document WT/REG124/1, 7 August 2001, Chapter VII, Article 7-04; EU-South Africa Agreement above fn. 42, Article 46; Agreement Establishing an Association between the European Community and the Republic of Chile, November 2002, Article 170(a)(i).

⁷⁴ E.g. Agreement between New Zealand and Singapore on a Closer Economic Partnership, WTO document WT/REG127/1, 3 October 2001, Part 9, Article 57.

may go further than the actual adoption of text from the regional instrument. For example, it is conceivable that a WTO dispute settlement panel called on to interpret the terms of Article 27 of TRIPS may be guided by European jurisprudence on the interpretation of Article 53 of the EPC,⁷⁵ as well as subsequent regional legislation.⁷⁶

c) *TRIPS as the basis for further norm-setting*

37. Since TRIPS establishes minimum standards only, which may in principle be exceeded (Article 1.1), regional processes have also built further on the normative framework established by TRIPS. This is typically characterised as the creation of "TRIPS-plus" standards,⁷⁷ but can be distinguished more specifically as elaborating and further defining existing TRIPS provisions,⁷⁸ extending the scope of TRIPS standards,⁷⁹ applying subsequent multilateral soft-law development of TRIPS standards,⁸⁰ determining that specific, individual material must be protected when applying TRIPS standards,⁸¹ or undertaking further legal harmonisation on substantive norms within the broad TRIPS-WIPO international legal framework.⁸² Each of these processes has distinct implications for multilateral dispute settlement and the interpretation of key TRIPS provisions. Some commentators have characterised this regional norm-setting as a forum-shopping tactic to raise the level

⁷⁵ For instance, the series of EPO decisions on the exclusion of plant varieties as subject matter, and on morality and *ordre public* exceptions.

⁷⁶ EC Directive on the Legal Protection of Biotechnological Inventions 98/44/EC of 6 July 1998.

⁷⁷ E.g. "TRIPS-plus' through the Back Door", GRAIN, July 2001, www.grain.org.

⁷⁸ For instance, Article 4.1(a) of the U.S.-Jordan Free Trade Agreement applies the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-known Marks, Article 19 elaborates "Bolar" exceptions relevant to TRIPS Article 30, and Article 22 elaborates (or possibly extends) test data protection under TRIPS Article 39.3.

⁷⁹ Among a host of instances: provision for patent term extension under EFTA, and broader definitions of trade mark for instance under the U.S.-Singapore Free Trade Agreement (Trade Facts, www.ustr.gov, December 2002) and under the Mercosur Harmonization Protocol of Norms on Intellectual Property, (Lippoldt, 11).

⁸⁰ For instance the incorporation of the *WIPO Joint Recommendation Concerning Provisions on the Protection of Well-known Marks* (adopted in 1999 by the Assembly of the Paris Union and the WIPO General Assembly) in a series of bilateral agreements, for instance in the European Free Trade Association-Singapore Free Trade Agreement in late 2002, the U.S.-Jordan Free Trade Agreement and the U.S.-Singapore Free Trade Agreement.

⁸¹ Notably in bilateral undertakings to grant protection as geographical indications to certain listed terms, for instance the Free Trade Agreement between Chile and Mexico (WTO document WT/REG125/1, 27 August 2001, Article 15-24 and Annex 15-24) on the protection of certain specific "designations of origin", and the Agreement Establishing an Association between the European Community and the Republic of Chile, November 2002, requiring protection for the geographical indications listed in Appendix I.

⁸² For instance, the significant new IP norms in Decision 486, Common Intellectual Property Regime, of the Andean Community, September 2002, and proposed in "Chapter on Intellectual Property Rights" of the draft FTAA Agreement, document FTAA.TNC/w/133/Rev.2. A specific instance is the protection of "traditional expressions" and "complementary quality mentions" under the Agreement Establishing an Association between the European Community and the Republic of Chile, November 2002, Annex V, Agreement on Trade in Wine.

of IP protection.⁸³ Yet the immediate effect may be to blur or render more complex the analysis and interpretation of established TRIPS standards at the multilateral level.

d) TRIPS as the basis of regional political coordination

38. Where regional bodies share political and economic interests, this can provide the basis for policy coordination on TRIPS issues, including political coordination in relation to WTO negotiations;⁸⁴ and where they span a broader range of interests, regional processes have sought to explore the elements of future multilateral consensus – either in the context of the conclusion of the Uruguay Round itself⁸⁵ or in subsequent negotiations on the TRIPS built-in agenda.⁸⁶

e) TRIPS as the focus of technical and administrative cooperation

39. The technical and logistical demands of the national implementation of TRIPS standards, coupled with the exacting schedule for compliance, led to sharply increased attention to technical cooperation and mutual support for the domestic implementation of TRIPS standards.⁸⁷ This has precipitated a range of regional initiatives for cooperation in meeting the administrative demands of TRIPS implementation, including through building regional mechanisms for IP administration,⁸⁸ and specific cooperation on IPR enforcement.⁸⁹ Technical cooperation on IP provided for in RTAs has concentrated on implementation and enforcement of TRIPS standards.⁹⁰ A recent development, pioneered within APEC, has been to focus regional cooperation more directly on the practical use of the IP system to achieve economic goals, reflecting a post-TRIPS agenda of realizing the latent economic potential of the IP system, a move from normative settlement to practical

⁸³ See Drahos above fn. 31 and GRAIN above fn. 77.

⁸⁴ See for example Joint Statement by the South Asian Association for Regional Cooperation (SAARC) Commerce Ministers on the Forthcoming Fourth WTO Ministerial Conference at Doha, New Delhi, 23 August 2001, establishing a position on a number of key TRIPS issues, including public health.

⁸⁵ Including the role of APEC in cementing political support for the Uruguay Round outcome.

⁸⁶ E.g. the APEC position on TRIPS negotiations on geographical indications in the Joint Statement of the Fourteenth APEC Ministerial Meeting, Los Cabos, 23-24 October 2002, www.apecsec.org.sg.

⁸⁷ In March 2000, the Government of Australia and WIPO signed an Agreement entitled the "WIPO-Australia Joint Statement on Cooperation for Intellectual Property Technical Assistance in Asia and the Pacific Region".

⁸⁸ E.g. The ASEAN Framework Agreement on Intellectual Property Cooperation, concluded at Bangkok on 15 December 1995, which, in a wide range of proposals, provided for technical cooperation in relation to areas such as patent search and examination, computerisation and human resource development for the implementation of TRIPS, as well as the possibility of an ASEAN Regional Trademark and Patent Filing System.

⁸⁹ E.g. the U.S.-Singapore Free Trade Agreement concluded in substance on 19 November 2002, providing for stronger cooperation on IPR enforcement such as the undertaking by Singapore to cooperate in preventing infringing goods from being imported into the U.S.

⁹⁰ For instance, Article 46.6 of the EU-South Africa bilateral agreement at fn. 42 above.

economic integration in the IP field. For instance, the recent *Agreement between Japan and Singapore for a New-age Economic Partnership*⁹¹ does not deal with IP in a norm-setting sense, but articulates a broad program of cooperation in the field of IP (Article 96), establishing a formal mechanism to carry this out (Article 97), and provides for facilitated processing by Singapore of patent applications based on Japanese applications (Article 98). This forward-looking RTA addresses the post-TRIPS agenda of cooperation and dialogue on the effective use of IP and the development of IP policy, as well as practical steps to deal with the duplication of work by patent offices and the more effective use of IP information by the public.

f) Role of TRIPS in precipitating alternative norms

40. Partly because of its actual normative content and impact, and partly because of its emblematic quality in international debate, TRIPS has either directly triggered parallel normative developments, or has catalysed the development of complementary or distinctly different rules. In some cases, these represent a conscious antithesis to the standards, and values, that TRIPS is seen to embody; in other cases, the influence may be more oblique but arguably no less powerful, stemming from the role of TRIPS in highlighting that national IP assets, broadly construed, are on the table in trade negotiations, and represent a set of interests worth either promoting actively as a source of prosperity, or defending against the threat which TRIPS is argued to represent. Hence TRIPS, or at least the shift in values it is held to symbolise, can be seen as at least one persuasive factor in precipitating the parallel expression of norms, for instance in relation to genetic resources, farmers' rights and traditional knowledge (in reaction to the extended scope of patentable subject matter under TRIPS).⁹²

41. Similarly, TRIPS has also formed the focus of community and civil society activism, serving as a well-defined symbol for a broader range of shifts in the political and economic environment, and a counterpoint to the civil society defence of the knowledge commons. The shift in values and in ownership of intellectual resources that TRIPS is seen to be representing therefore precipitated resistance expressed at a regional level.⁹³ This was evident already as TRIPS was entering into force, for example in the Suva Declaration of April 1995, which called for the Pacific to be declared a "life forms Patent-Free Zone" and urged "Pacific Governments who have not signed GATT (*sic*) to refuse to do so and encourage those Governments who have already signed to protect against provisions which facilitate the

⁹¹ Available in WTO document WT/REG140/1 of 3 December 2002.

⁹² E.g. Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources, Organisation for African Unity (African Union).

⁹³ E.g. "TRIPS gives global corporations the 'right' to claim monopoly ownership over rice through patents and similar mechanisms ... We encourage Asian governments to support the African Group proposal to ban the patenting of life forms under TRIPS", *Statement from peoples' movements and NGOs across Asia*, Masipag, Los Banos, Philippines, August 2001.

expropriation of Indigenous peoples' knowledge and resources and patenting of life forms".⁹⁴

42. TRIPS has also formed the focus of regional industry bodies' advocacy, serving in this instance as an emblem for an adequate and effective IP system sufficient to promote trade and investment. For instance, the APEC Business Advisory Council (ABAC) called for the implementation of TRIPS by APEC economies by 2000, "accompanied by credible enforcement and the conduct of public education and awareness campaigns", as well as the identification of "resource needs to fully implement" TRIPS and the provision of necessary technical assistance.⁹⁵

VI. The Role of TRIPS in Precipitating APEC Cooperation on IP

43. In principle, given its flexibility and open agenda, APEC could have pursued a number of these paths in cooperation on IP, and the "new regionalism" approach might have suggested this. But APEC was not naturally drawn to work in this area, taking its first tentative steps in this direction some six years into its life. It was, indeed, only the advent of TRIPS as a part of the Uruguay Round package that precipitated APEC activities in this area, the influence of TRIPS on the regional agenda in this instance being direct. The 1994 Bogor Declaration provided the basis for this work by confirming APEC commitment to cooperation on the implementation of Uruguay Round outcomes, but did not mention IP explicitly. Even with this political coverage, APEC still took up IP issues gingerly and with residual sensitivity. There were concerns that IP was not an appropriate subject for APEC: This was partly procedural, as it risked duplicating or undercutting other initiatives (including the ASEAN initiative, which was bearing fruit at the same time⁹⁶) and placing additional demands on national administrations that were already stretched to the limit of their resources in dealing with a flurry of activity on IP matters domestically, bilaterally, regionally and internationally; and it was partly due to political unease, given the legacy of north-south differences over the negotiation of TRIPS and the background of trade conflict and unilateralist responses that had put IP on the trade agenda in the first place. This highlighted the asymmetry of capacities and expertise in the IP field, leading to concern about domination of the issues by a few leading economies, a concern accentuated by the perception that positions on IP issues would be inherently adversarial.

44. This unease was reflected in the slow, cautious institutional beginnings – the first step was a seminar on implementation of TRIPS held in Sydney in May 1995, as

⁹⁴ "Final Statement", *UNDP Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights*, Suva, Fiji (April 1995), cited at www.icip.lawnet.com.au/info6.htm.

⁹⁵ "APEC Means Business: Building prosperity for our community", APEC Business Advisory Council (ABAC), Report to the Economic Leaders 1996, 20, at www.apecsec.org.sg.

⁹⁶ See fn. 88 above.

the third of a series of APEC seminars on implementation of Uruguay Round outcomes in line with the Bogor Declaration. While this seminar was “the first serious, sustained attempt by APEC to consider the issues involved in the protection of IPRs”,⁹⁷ it was only acceptable as part of a broader program on WTO implementation. It was therefore not due to a region-based rationale for cooperation on IP or to the identification of any natural set of issues specifically suited to APEC work, but because TRIPS was one element of the Uruguay Round package. The opening address at the Sydney seminar highlighted the apparent anomaly, dubbing IPRs “the missing link in APEC”, contrasting the work already achieved on trade facilitation, investment, trade liberalisation and the development of infrastructure, human resources and specific sectors. Among the reasons cited as to why “APEC has been largely silent” on IP issues were the political difficulties arising in and from the TRIPS negotiations, and the differing stages of development across the region and the “different ways of ensuring that intellectual property is protected so that the community as a whole benefits”.

45. Nonetheless, it was possible, by the time APEC leaders next met in November 1995, to include a substantial set of collective actions and guidelines on domestic regulation concerning IPRs, as one element of the Osaka Action Agenda.⁹⁸ Even so, the tentative mood prevailed as to institutional recognition of the need for APEC work on IPRs. There was no consensus on the proposal that an expert group be formally established to put IPRs on par with other areas of cooperation on trade and investment. The *ad hoc* informal vehicle of an “IP Get-together” was devised for the first four meetings, providing a telling instance of the pragmatic value of APEC’s constitutional flexibility in combination with a deeply-rooted consensus ethic. The work was accorded the formal status of an expert group⁹⁹ only in 1998, after four meetings as a get-together, in contrast with the earlier acceptance of APEC structures on other emerging trade issues, including “behind-the-border” issues such as standards, practical trade facilitation such as customs procedures, and “new trade” issues such as investment and services.¹⁰⁰

46. The range of subject matter to be considered by APEC experts was also deeply uncertain. There was no clear focus or natural fit of cooperative activities – the avenues considered ranged in general between TRIPS implementation, centred on the political imperative of achieving TRIPS compliance, and administrative coordination and substantive harmonisation, based on the operational interests of IP offices and the interests of APEC business representatives.¹⁰¹ The possibilities

⁹⁷ Michael Costello, “Intellectual Property Rights: The Missing Link in APEC”, Opening Address, Implementation of the World Trade Organisation’s Agreement on Trade-related Aspects of Intellectual Property Rights, 17 May 1995.

⁹⁸ Adopted through the APEC Economic Leaders’ Declaration for Action, Osaka, Japan, 19 November 1995.

⁹⁹ The Intellectual Property Rights Experts Group, established by the Committee on Trade and Investment (CTI) in 1998, formalising the IP get-together.

¹⁰⁰ APEC Sub-committee on Standards and Conformance, Investment Experts Group and Sub-committee on Customs Procedures all established by the CTI in 1994, and the Group on Services in 1997.

¹⁰¹ See the ABAC report, above fn. 95.

canvassed ranged more widely, reflecting a shared desire to respond cooperatively to the challenges posed by TRIPS, but the lack of any clear direction on how to achieve this. The Osaka Action Agenda accordingly ranged over deepening policy dialogue on IP, assembling information on IP statutes and jurisprudence in APEC economies, practical and legal facilitation of enforcement, steps towards a regional trade mark system, and the standardisation and simplification of IP administration, coupled with commitments both to implement TRIPS by 2000 and to render technical cooperation to that end. The conscious ambition that was the hallmark of APEC in this period was present in this agenda, the proposed activities covering most of the forms of interaction between TRIPS and regional initiatives discussed above. For instance, surveys of IP laws and of the jurisprudence of enforcement procedures were predicated on the possibility of a more formal legal harmonisation process, and exploration of trade mark administration issues and the law of well-known marks was directed to possible creation of region-wide administrative systems. It transpired, over time, that such “hard law” regional goals were probably either misplaced or over-ambitious – a development that led to an undercurrent of scepticism about the APEC process, but which may have rather misconstrued the inherent virtues of APEC as a diverse regional body and overlooked its “soft” strengths.

47. The potential range of interaction between regional mechanisms and TRIPS is a measure of the diversity of the differing relationships of the regional with the multilateral, and taps into the broader debate about whether regional approach undermines or supports multilateral objectives. Of course, this in turn begs the question of what is desirable in multilateral commitments on intellectual property regulation, and whether IP provisions should be part of multilateral trade rules at all. Just as debate over TRIPS tends to concentrate on the implications of compliance with the minimum standards of TRIPS, what those standards should comprise, and how they should be interpreted, analysis of regional and bilateral agreements covering IP concentrates on the degree to which they extend or conflict with the central multilateral standards. Yet to apply such compliance-based analysis to APEC would lead to loss of much information about the actual operation of the forum in relation to IP cooperation, and the changing perceptions and policy priorities in the region.

48. The APEC Osaka Action Agenda had the effect of drawing a number of significant non-members of the WTO (including China, Chinese Taipei, Vietnam and Russia) into a formal commitment (political, if not strictly legal) to implement TRIPS fully by the WTO deadline of 2000 – it thus brought about institutional lock-in and a form of soft compliance, significantly in advance of formal commitments during the WTO accession process. This is interesting from a compliance point of view, with TRIPS serving at the regional level as a political symbol of willingness to regulate IP domestically as an element of regional economic cooperation structured by multilateral standards, rather than as a compliance target in itself.

49. Yet the same Osaka agenda also had the effect of drawing these and other APEC economies into a detailed cooperative framework and into a policy dialogue of mutual cooperation centred around TRIPS, including detailed documentation

and legislative review exercises. The notification and peer review of IP laws and administration within the WTO TRIPS Council under TRIPS Article 63, was seen, by and large, as a compliance-assessment process, even though it was under the rubric of "transparency", and the objective was generally assumed to be for a Member to demonstrate conformity with TRIPS and for others to probe areas of possible non-compliance; moreover, this process did not commence for a WTO Member before it became formally bound by substantive TRIPS obligations. Yet similar information (including details of IP laws and administration, and detailed information about enforcement mechanisms) was exchanged freely within the framework of APEC cooperation, again in advance of the formal TRIPS timeline. Indeed, a checklist of TRIPS compliance was prepared and completed by many APEC economies, which involved volunteering detailed information about specific areas of non-compliance with TRIPS obligations, well in advance of the formal deadline for compliance¹⁰² a development that would be unthinkable in the more adversarial environment of the WTO. This was buttressed by technical support to ensure that the process of TRIPS notification by APEC member economies was as beneficial as possible.¹⁰³

50. Accordingly, commitment to the same substantive standards, and the conduct of similar policy discussions and peer-review transparency processes, were perceived in dramatically different terms when they took place in the WTO and within APEC, with stark differences in the degree of voluntarism and positive consensus. The different legal and political characters of the two institutions must at least partially explain this divergence: in particular, the distinctive qualities of APEC as a regional economic cooperation forum.

VII. APEC and Open Regionalism

51. The regionalism debate tends to concentrate on RTAs in the formal legal context of GATT XXIV and the economic context of their trade creation and diversion effects, with a focus on the diminution of the benefits of extending non-discriminatory market access to all trading partners. This view, centred on core GATT principles, construes regional initiatives as explicitly or implicitly preferential in nature, and focussed on exclusion of non-regional players. APEC has been drawn into the regionalism debate, despite its more mutable character and its informal legal identity, the novel conception of "open regionalism" crafted as one of the defining principles of APEC precisely to exclude discrimination against extra-regional trading partners:

¹⁰² See for example APEC IPEG document XII (5) 5 - 1, and successive reports of the APEC IPEG (meetings IX, X, XI and XII from 1998-2001) under Agenda 4 (1)(g) - "Implementation of the TRIPS Agreement and Technical Cooperation".

¹⁰³ See "Survey of the Notification & Review of National Intellectual Property Laws under the WTO TRIPS Agreement", Department of Foreign Affairs and Trade, Canberra, 1999, at www.dfat.gov.au/trips.

“Open regionalism involves a group of economies reducing impediments to international economic transactions through cooperative actions which do not seek to discriminate against non-participants. This is a relatively new approach to regional integration that challenges the traditional concepts of regionalism based on discriminatory trade barrier reductions.”¹⁰⁴

This view of open regionalism is imbued with a somewhat reductionist GATT-centric perspective of whether or not a regional arrangement is sufficiently non-discriminatory to comply with GATT XXIV. As a consequence, this conception has been derided as an oxymoron in trade policy terms, and the charge has been laid that APEC is in fact a cover for residual mercantilism, and an escape from the more rigorous commitments of a GATT-style RTA:

“The primary focus of the East Asian countries is on rapid industrialization, which is often nurtured by mercantilist policies that are antithetical to the liberalisation ethic of the WTO. Their support for APEC’s ‘concerted unilateralism’ is consistent with such an approach, since it allows each country to manage how, when and where it will liberalise – rather than committing to a fixed schedule of liberalisation negotiated in a GATT-like trading pact.”¹⁰⁵

52. Later attempts to capture the sense of “open regionalism” in a more substantial way seek to step clear of expectations about lowered trade barriers (which inevitably focuses on the possibility of a non-discriminatory free trade area), and concentrate instead on regional efforts to lower the costs of doing business within the region: Open regionalism in this reading is defined as “a strategy of international economic opening which stresses regional cooperation with an emphasis on the reduction of intraregional transaction costs, broadly defined”.¹⁰⁶ Alternatively, softer forms of economic cooperation are emphasised, so that APEC and similar regional initiatives are “less matters of reducing tariffs and eliminating non-tariff barriers along the lines of traditional free trade agreements, and more matters of technical cooperation, confidence boosting, institution building, networking, and other trade and investment facilitating and enhancing activities. Their strength lies in their capacity to accelerate, complement, and foster other, more formal, trade liberalisation initiatives”.¹⁰⁷

53. High level APEC statements have continued to reaffirm “APEC’s fundamental principles, including voluntarism, consensus-building, individual and collective actions, flexibility, and open regionalism”,¹⁰⁸ while overseeing a shifting mosaic of cooperative activities and peer-review processes. Founded with flexibility

¹⁰⁴ “Potential Gains to Australia from APEC: Open Regionalism and the Bogor Declaration”, Bureau of Industry Economics, Canberra 1995, 19.

¹⁰⁵ Jeffrey J. Schott, “WTO 2000: Setting the Agenda for World Trade”, Institute for International Economics, Washington, 1996, 47.

¹⁰⁶ C.W. Reynolds, “Open Regionalism: Lessons from Latin America for East Asia”, Working paper, Columbia international affairs online, 1999.

¹⁰⁷ Hart, above fn. 24, 48.

¹⁰⁸ APEC Economic Leaders’ Declaration, Los Cabos, Mexico, 27 October 2002.

at its very core, APEC has gone through repeated evolutions to respond to the policy exigencies of the time. Inevitably, the tangibility of clearly articulated benchmarks, such as the Bogor goals of elimination of tariffs by 2020, means that they attract more attention and analysis, rather than the woollier and essentially indeterminate and non-measurable forms of cooperation and informal, non-binding harmonisation. Hence, despite the much broader range of activities under the aegis of APEC, it is routinely assessed in terms of progress towards trade liberalisation, reducing its diverse operations to a one-dimensional focus on the reduction of trade barriers. Yet the concrete trade liberalisation goals set at Bogor in 1994 are supplemented by specific targets for trade facilitation (transaction costs within the APEC region to be cut by five per cent by 2005¹⁰⁹) and the digital divide (universal internet access by 2010¹¹⁰), and adoption of programmes on emerging regional priorities such as counter-terrorism.

54. The formal status of the regional body should also be factored in when considering what forms of cooperation are appropriate, and indeed possible. APEC cooperation, being informal in nature, between economies rather than sovereign states, is in effect barred from assuming the formal status of binding obligations under international law. From a positivist legal point of view, this may be perceived as a “weakness”, but from the practical perspectives both of policy development and indeed practical implementation of agreed standards this can be a more effective mechanism than a compliance-based model based on explicitly created international law obligations. Hence, from a legal point of view, much APEC cooperation is undertaken with the understanding that it does not have a normative basis. Yet this does not necessarily reduce its effectiveness. When WIPO made a non-binding recommendation on the protection of well-known marks,¹¹¹ there was a background assumption that this would be at least influential on national legislatures and national courts, and indeed may help shape future more explicit international norm-setting in this area.¹¹² When APEC economies reaffirmed these non-binding principles through the APEC Intellectual Property Rights Expert Group (IPEG),¹¹³ it was done with the same expectation. The same recommendation is adopted by a treaty-based, “hard-law”, norm-setting international organisation, and by a non-legal, consensus-based cooperative process; yet the effective outcome is similar, in terms of soft convergence and indirect influence on legislative processes and, potentially, judicial analysis. Hence the International Trademark Association lobbied the APEC IPEG¹¹⁴ separately to endorse the WIPO standards, even though this could not amount to a formal legal undertaking.

55. The same consideration applies in a more general sense to formal APEC

¹⁰⁹ Ibid.

¹¹⁰ APEC Economic Leaders' Declaration, Brunei Darussalam, November 2000, para. 15.

¹¹¹ Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, adopted in 1999 by the Assembly of the Paris Union and the WIPO General Assembly.

¹¹² See the incorporation of this recommendation in bilateral agreements, examples cited in fn. 80 above.

¹¹³ “Annual Report to Ministers”, Committee on Trade and Investment, 2000.

¹¹⁴ See document IPEG X 6-(3).

commitments to implement TRIPS: APEC has had no role in formulating TRIPS as a set of standards, nor any real influence in brokering the deal that led to its adoption by almost all APEC economies. It has no legal role in the monitoring of compliance, interpretation, further negotiation or dispute settlement concerning TRIPS. There are strong policy reasons for leaving such tasks to the WTO, a negotiating forum aimed at writing hard law to provide a firm basis for settlement of trade disputes, provided the kind of inclusive and systematic jurisprudence of TRIPS can be better established as a common platform. The complementary role of APEC is, rather, to provide for a more open and exploratory policy forum, to support policy and administrative convergence in the absence of explicit legal articulation of these directions, and to catalyse the exchange of practical experience and technical capacity in putting the IP system to work so as to realise its potential. The APEC IPEG is accordingly better directed towards the practical search for ways of achieving the social and economic welfare goals of TRIPS Article 7, the technical cooperation of Article 67, and the cooperation for enforcement of Article 69, as well as the implementation of enforcement measures so as not to impede legitimate trade (Article 41.1) and prompt and reasonable administrative procedures for the acquisition of IP rights (Article 62). These are the aspects of TRIPS which emphasise mutual interest and even suggest a form of positive comity, overlooked in the focus firstly on the adversarial negotiation of TRIPS standards, secondly on the compliance and dispute prevention aspects of implementation, and thirdly in the reductive account of TRIPS as a metonymy of broader trade and political trends, the negative effects of which it may actually be effective in allaying, once the challenge of establishing a secure and systematic jurisprudential and policy basis has been squarely taken up. APEC and similar regional initiatives offer a more effective vehicle for achieving these aspects of TRIPS implementation and realizing shared (if unacknowledged) interests than is possible in a multilateral trade negotiation context.

VIII. IP in APEC: Missing Link or Common Thread

56. The distinctive character of APEC has meant that its work on IP matters cannot yet move towards formal coordination and integration of the administration of IP rights, such as a regional trade mark or patent registry system. This would presuppose a closer regional fusion of technical administrative mechanisms and probably also harmonisation of the legal foundation of IP administration than is currently feasible between the diverse and geographically widespread APEC economies. Equally, proposals to harmonise enforcement procedures based on a survey of national laws on enforcement did not bear fruit in terms of firm legal outcomes. APEC is unlikely to move towards the kind of hard normative structures that have been apparent in other regional and bilateral processes. The crystallising of hard international IP norms through TRIPS was what put substantive work on IP on the APEC agenda; yet wariness over normative pressure led to a hesitant start on this work. Nonetheless the fact that TRIPS had generally been accepted as the

common framework for domestic development of IP law and administration provided over time a stronger basis for regional cooperation on IP.

57. APEC activities on IP therefore took on the character of cooperation in support of domestic regulatory and economic development issues concerning IP, centred on the implementation of TRIPS standards. The focus was on coordinating and supporting essentially domestic processes rather than creating distinct regional mechanisms. Viewed in this way, APEC cooperative processes appear less to amount to an intergovernmental entity of uncertain legal status, and function more as a transgovernmental network, defined as:

“... the repeated interaction of government bureaucrats with a common purpose. Transgovernmental networks are likely to form when bureaucrats in one country cannot fulfil their obligations under domestic law without coordinating with bureaucrats from other countries. This coordination is necessary to effectively implement what are traditionally viewed as domestic policies.”¹¹⁵

58. This view of APEC processes highlights a rationale for regional cooperation on IP that complements the compliance-based view of TRIPS implementation. Once individual countries have accepted adherence to TRIPS minimum standards as, in effect, the basis of domestic policy directions on IP protection, policymakers and bureaucrats then have an incentive to coordinate with their counterparts in other countries to implement these obligations in an effective way. This is not strictly necessary (notwithstanding formal TRIPS obligations to cooperate), but it becomes highly desirable if TRIPS implementation is to be more than a perfunctory exercise in compliance, and in particular if static compliance costs are to be reduced and dynamic welfare gains are to be optimised. Thus transgovernmental coordination can reach beyond formal legal obligations to explore more productively how IP systems work as an active instrument of public policy. Precisely because TRIPS is at the vanguard of the intrusion of “behind the border” or “non-trade” regulation into international trade law, governments are drawn by virtue of their trade law obligations into coordinating of domestic law and administration, and then into policy coordination on “behind the border” domestic policy objectives. The APEC IPEG process illustrates how this paradoxical situation can operate: what it means for domestic agencies to cooperate internationally in meeting their obligations under domestic law, when both these domestic obligations and the need to cooperate are defined as hard international legal obligations. It also illustrates the paradoxical need for transgovernmental cooperation to make effective use of national policy flexibilities under TRIPS: The effective use of the IP system, including the assessment of options within the international framework, are indeed “traditionally viewed as domestic policies” (in accordance with the above definition); yet officials must look

¹¹⁵ Marney L. Cheek, “The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime”, *33 Geo. Wash. Int'l L. Rev.* 277, 278, drawing the concept from Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *World Pol.* 39, 41 (1974) and Anne-Marie Slaughter, “The Real New World Order”, 76 *Foreign Affairs* 183, at 183-84.

to the experience of other governments to learn what the full range of options are, how most effectively to deploy them, and how to balance them in the broader domestic policy and regulatory context. It can promote a successful approach to domestic IP policy that reaches a judicious balance of all factors a government must weigh to achieve economic and social development goals through the IP system, far transcending the legal and administrative challenges of attaining formal compliance with TRIPS. Hence, once TRIPS had catalysed regional cooperation on IP, a self-sustaining rationale for transgovernmental cooperation emerges more clearly: that of cooperatively exploring regulatory diversity to achieve common goals.

59. With or without the TRIPS framework, then, the logic of transgovernmental coordination on IP should ultimately prevail within APEC, since IP policy issues have come to the forefront of the policy agenda, propelled initially by the developments that led to TRIPS but now carried by their own momentum. This can in fact be seen in a decreasing emphasis on TRIPS *per se*, and an increasing invocation of IP policy issues in relation to a widening range of domestic policy objectives in APEC work – quite apart from the solid work program of the IPEG itself, therefore, various APEC processes have now taken up IP issues when addressing readiness for electronic commerce,¹¹⁶ engagement with the knowledge-based economy, development of specific sectors such as the automotive industry,¹¹⁷ fostering a positive investment climate,¹¹⁸ improving customs procedures,¹¹⁹ practical guidance to SMEs on business regulation in export markets,¹²⁰ and domestic capacity-building for WTO participation.¹²¹ These regional processes therefore represent a clear shift away from IP as a question of nominal compliance, towards a more nuanced grasp of the role of IP in a wide range of transgovernmental regulatory cooperation.

a) *Qualitative assessment of APEC IPEG cooperation*

60. Analysis of regulatory cooperation at the regional level tends to attribute value and to assess impact on the degree of evident harmonisation, with a normative tendentiousness and determinism that suggests that closer integration is more successful: “the oldest and most ambitious of the post-Second World War examples of regional integration, the European Union, became the benchmark by which to judge regionalism elsewhere”.¹²² Analysis of regulatory cooperation can be

¹¹⁶ See IP components of the APEC E-Commerce Readiness Initiative, Version 5, 29 May 2000.

¹¹⁷ See IP enforcement activities of the APEC Automotive Dialogue, 1999–2000.

¹¹⁸ Inclusion of IP in the “Menu of Options”, Investment Experts Group, 2000–1.

¹¹⁹ Work plan on TRIPS, Sub-Committee on Customs Procedures, “Annual Report to Ministers”, Committee on Trade and Investment, 2000.

¹²⁰ Intellectual property section, www.bizapec.com.

¹²¹ IP components in the APEC Strategic Plan for WTO Capacity-Building, “Annual Report to Ministers”, Committee on Trade and Investment, 2001.

¹²² Donald Barry and Ronald C. Keith, “Changing Perspectives on Regionalism and Multilateralism”, in *Regionalism, Multilateralism and the Politics of Global Trade*, (University of British Columbia Press, 1999), 10.

conceived on an essentially linear scale, based on the degree of convergence and substantive policy-setting. For instance, reviewing policy coordination of regulatory networks in Europe, Metcalfe establishes a "uni-dimensional" scale of nine, cumulative levels of cooperation, moving from "independent organisational decision-making" to increasing levels of convergence: information exchange (level 2), consultation and feedback (level 3), avoiding divergent interpretations of international standards (level 4), building broad, long-term consensus on policy issues (level 5), creating formal mechanisms to arbitrate differences of opinion (level 6), establishing parameters that limit the discretion of individual organisations (level 7), establishing common policy priorities (level 8), and the creation of a unified policymaking apparatus where individual organisations merely carry out directives from the collective decision-making body (level 9), and concluding at the limiting case of firm normative harmonisation in which "individual organisations merely carry out directives from the collective decision-making body."¹²³

61. Even articulating such an hierarchy, and applying this linear scale, can induce a deterministic bias, and can suggest that processes of regulatory cooperation either do or should follow this path, success or value being assessed according to progress up this scale. In the field of IP law, European integration has in particular reached a high level, with close harmonisation of national laws, structures for the region-wide administration and grant of rights, and the establishment of collective decision-making establishing policy for the single regional market. In Europe, the political and economic goal of the creation of a single market creates a rationale for close regulatory harmonisation and unification of the policymaking process; where this excludes extra-regional right holders through the operation of exceptions to the MFN and national treatment principles, this in turn spurs regulatory developments in other trading partners. In these limited circumstances, TRIPS-plus IP mechanisms implemented without an APEC-style "open regionalism" framework can induce harmonising responses elsewhere. Extension of copyright term in Europe is a prime contemporary example, where loss of benefits in that market induces cascading copyright term extensions in trading partners, then in their trading partners in turn. It is this loss of capacity to influence regulatory changes elsewhere that appears to be the principal objection to the application of the MFN in the intellectual property domain, an analogue of the argument that discriminatory trade access – while contrary to optimal trade policy – is required as a means of leveraging trade concessions from third parties.

62. Against this linear benchmark, APEC cooperation on intellectual property has been barely successful at all, both in terms of a regulatory network and as a tactical measure for using the collective weight of APEC to induce policy shifts beyond the region. It has operated well at the level of information exchange (level 2), and to some extent consultation and feedback (level 3) and policy harmonisation (level 5), but on the whole has not progressed further along this scale. Consensus on

¹²³ Les Metcalfe, "The Weakest Links: Building Organisational Networks for Multi-Level Regulation", in *Regulatory Co-Operation for an Independent World*, (OECD, Paris, 1994), 59-70.

policy issues and agreement on interpretation of international standards has been only in the most general terms. This is despite the initial interest and expectations that APEC might create an integrated industrial property application process, and exploration of the possibilities for legal and procedural harmonisation that would match the “hard” cooperation achieved in the European and other regional industrial property systems. The eschewal of preferential arrangements, in accordance with the open regionalism ideal, also denies APEC any possibility of leveraging changes beyond the region. The lack of concrete regulatory convergence and the low-level transgovernmental networking seems to support the dismissal of APEC as “ambivalent regionalism”, and it is difficult to measure or assess the practical value of the intangible outcomes that have been attained.

b) IPEG as a transgovernmental network

63. IPEG and related APEC cooperation on IP therefore illustrates the strengths and weaknesses of the APEC approach to regulatory cooperation – the lack of binding legal status and deal-making capacity leads to aspirational or nebulous outcomes, and an emphasis on process and interaction between officials rather than specific negotiated settlement of issues. Yet this may be to assess it against the wrong yardstick, provided that there is a valid role for regional cooperation on IP that does not progress steadily up the policy coordination scale and does not create GATT-like legal obligations. Successive Collective Action Plans and Individual Action Plans¹²⁴ represent a solid body of unilateral and regional initiatives on IP policy and administrative reform that are at once evidence of the impact of IPEG in opening up a IP policy agenda that is far broader and richer than nominal TRIPS compliance, and a demonstration of the need for transgovernmental cooperation across this broader agenda as APEC countries seek more nuanced outcomes from domestic policy processes and administrative systems in the IP domain.

64. The basis for this work has been the creation of a transgovernmental network of officials seeking cooperative approaches to discharging domestic policy imperatives. Just as APEC more broadly has been aimed at creating a sense of regional identity and policy consensus among a politically and economically diverse set of economies, the practical consequence of IPEG work has been to promote the development of an epistemic community with the region and a sense of consensus and common purpose among national policymakers who might otherwise be fixed into adversarial positions in more formal international processes. This is distinct from the conventional view of transgovernmental networks, which generally presuppose the existence of an epistemic community and consider how these may interact towards more concrete policy outcomes;¹²⁵ in this instance, the novelty of

¹²⁴ See successive annual reports to the Committee on Trade and Investment, and details of IAPs at <http://www.apec-iap.org/>.

¹²⁵ Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, 46 *Int'l Org.* 1, 3 (1992).

the perceived need for dialogue on IP policy in the APEC region, the external impetus lent by TRIPS and the uncertainty and mutability of national policy directions on the regulatory issues all meant that, at least initially, it was the creation of an epistemic community that was in itself a valuable objective – as this means the formation both of a body of knowledge and a collectivity that did not exist before. For certain emerging issues, the IPEG was able to develop parallel processes of policy dialogue and capacity-building, reflecting the fact that national policymaking processes in these areas were confronted with new issues, highly technical and demanding in nature, on which it was difficult to formulate clear policy positions in international forums in the absence of an open debate and the pooling of national experience with regulatory options. By contrast, the lack of this form of policy coordination network in other international forums has rendered difficult necessary cooperation on IP issues that create common challenges for many states, as the dynamics of the process often require participants to commit to formal positions before there is any realistic possibility of objective assessment of the policy options, and a candid review of national experience.

65. The benefits of the IPEG approach can be illustrated in its work on biotechnology IP issues, IP enforcement, geographical indications and TRIPS implementation. In each of these cases, national policymakers and advisors in APEC economies were confronted with testing national policy demands, but a contentious international debate gave little opportunity for exploration of the background to the issues. This leads to the zero-sum assumption in the broader international environment that any progress in the debate would in itself advance the interests of perceive adversaries, as a defensive and reactive response, even before any robust and comprehensive assessment of actual interests could be formulated, ironically leap-frogging domestic policy development due to the pressure of adopting formal positions in the multilateral processes. The IPEG has facilitated an approach closer to the more complex interplay of common themes that define actual domestic interests on difficult contemporary policy challenges, for example:

- The implication of IP rights for biotechnology innovations (and associated issues such as biodiversity, access to genetic resources and traditional knowledge) has been a divisive issue in international debate. The approach of the IPEG was to work on this subject in a coordinated manner, balancing an informal policy dialogue with technical cooperation,¹²⁶ yielding a series of issues papers, information on national experience, policy discussion and capacity building, including a training programme and practical handbook.¹²⁷ This did not aim to pre-empt the direction of debate nor to broker a common

¹²⁶ “Members noted that technical cooperation should be practical in focus, and that the transfer of skills and understanding in this manner would promote policy dialogue”, Chair’s Report to APEC CTI on the Intellectual Property Rights Experts Group VII, Singapore, 25–26 August 1998, para 54.

¹²⁷ See the report in IPEG document XII 5-4(i) – 2 concerning regional training workshop, training and technical support missions, formulation of modular training package on biotechnology IPRs, and APEC IPEG issues paper.

policy position, but rather to strengthen national capacity to analyse the issues, to set them in a practical context, and to assess policy options against specific national interests.

- Enforcement was initially seen as a potential area for substantive harmonisation within APEC – and thus a candidate for promotion up the policy coordination scale – and the IPEG undertook a comprehensive survey of IP enforcement in APEC economies as the basis for this work. It became clear, however, that substantive harmonisation was not feasible, and proposals for “best practice” soft norm approaches lacked consensus owing to differences in national legal systems. Cooperation turned to the exchange of information and technical assistance and the development of capacity building tools.¹²⁸ TRIPS Article 69 requires cooperation on enforcement between WTO Members as a distinct obligation, but this has not been effectively implemented for the most part. This provision has the effect of affirming that cooperation between trading partners is essential to deal with enforcement and that it is insufficient to rely on discrete, national-level solutions to trade in infringing goods, to be administered by national governments in isolation. However, the mechanism for cooperation established under Article 69 has been used rarely, if at all, in practice. IPEG, as an informal gathering of experts from economies with close trading links, is in a stronger position to promote a productive flow of information and undertake practical coordination, and thus to give effect to the TRIPS obligations on enforcement cooperation. Building on the extensive development of proposals for regional cooperation on enforcement,¹²⁹ a framework has recently been established to coordinate the various enforcement activities of IPEG.¹³⁰

International debate on the protection of geographical indications has been characterised by strong polarisation on relatively narrow legal issues, and comparatively little discussion of the policy rationale and optimal implementation of GI standards. Again, the IPEG provided a less contentious policy forum for consideration of these issues, with a low key exchange of national experiences, leading to the development of a general policy position¹³¹ and an enhanced information exchange process.¹³²

66. TRIPS implementation was a matter of extreme sensitivity in the late 1990s, as developing country WTO Members approached the deadline for compliance of January 2000, and it was manifest that a number (including several APEC

¹²⁸ See successive documents and IPEG reports on Agenda Item 5 (6) item f: Establishing Effective Systems for IPR Enforcement, available at www.apecsec.org.sg.

¹²⁹ Reviewed for instance in IPEG document XII 5-6(iii) – 1, March 2001.

¹³⁰ Project of the Philippines on control of export of infringing products (IPEG XV 5-6(iii) –1, and endorsement of the IP Toolkit proposal “to provide a framework for IPEG IP enforcement projects”, report on IPEG for 2002, www.apecsec.org.sg.

¹³¹ Adopted by the APEC Ministerial Meeting in Los Cabos, October 2002.

¹³² See document IPEG XV-5-4-iii-2 (Mexican proposal), Protection for Geographical Indications, IPEG XV.

economies) would have significant gaps in the coverage of their laws, and thus be in principle vulnerable to a challenge under the WTO dispute settlement procedure. Notwithstanding this sensitivity, the IPEG addressed the question of TRIPS implementation with a high degree of mutual cooperation and openness. Mutual support was emphasised from the beginning and – despite the original apprehension about “legal harassment” – IPEG partners developed a TRIPS implementation checklist¹³³ that recorded gaps in TRIPS coverage, article by article, in a manner that would have been unthinkable in the WTO TRIPS Council. The IPEG also developed a practical handbook¹³⁴ and technical support¹³⁵ for the TRIPS Council transparency procedures so as to maximise APEC developing countries’ interests in promoting awareness of and confidence in their IP systems, assisting them in demonstrating the depth of applicable jurisprudence – especially in the areas of enforcement, and substantive laws on unfair competition and counterfeiting – which may be poorly documented in contrast to developed countries’ laws, but no less relevant in demonstrating comprehensive TRIPS compliance.

67. At the point when concerns about TRIPS compliance were at their height – in the immediate aftermath of the initial January 2000 implementation deadline for developing countries, when a spate of compliance-oriented litigation in the WTO was feared – the IPEG, and the meeting of APEC Trade Ministers, put the issue in a more realistic context by framing and adopting the *Joint Statement on the WTO TRIPS Implementation*.¹³⁶ This statement addressed the difficult political position in which the deadline had passed but a number of economies were still implementing TRIPS-related legislation. It acknowledged that TRIPS implementation had required major legislative and infrastructure development in a short space of time, and reaffirmed commitment to technical cooperation to ensure that implementation was in the balanced manner that brought about the economic and social welfare benefits referred to in TRIPS Article 7. While limited in its immediate effect, the statement was symptomatic of a more general shift in perception, represented also by the mode and subject matter of APEC IPEG’s continuing work program. This approach has, in fact, been the increasing focus of international debate and technical cooperation as the focus on TRIPS compliance as an immediate end in itself gives way to greater attention on forms of effective TRIPS implementation for more widespread beneficial outcomes: the collective management of TRIPS.

¹³³ See fn. 102 above.

¹³⁴ See “Survey of the Notification & Review of National Intellectual Property Laws under the WTO TRIPS Agreement”, www.dfat.gov.au/trips.

¹³⁵ See “Chair’s Report to APEC CTI on the Intellectual Property Rights Experts Group IX”, Guadalajara, 15–17 July 1999, paragraph 13.

¹³⁶ Meeting of Ministers Responsible for Trade, Darwin, 6-7 June 2000.

IX. Conclusion

68. The earliest international legal undertakings on IP actually formed part of broader bilateral commercial and economic agreements,¹³⁷ and were not quarantined from trade law as defenders of the status of GATT-WTO as true trade law can maintain. The complexity of these mutual undertakings spawned the multilateral approach of the Paris and Berne Conventions, which marked also a decisive shift towards distinct specialist agreements and cooperation on IP. TRIPS squarely put IP back onto the agenda of international trade and economic cooperation, writing IP into the trade law rulebook, but its genesis and negotiation also left an adversarial imprint on international relations on IP. For APEC, an expression of “new regionalism” judged against a GATT-centric set of assumptions about the nature of trade relations, IP might have been a natural fit. Yet IP was approached tentatively, given the lingering political unease about IP cooperation, and uncertainty about the distinct nature of APEC’s agenda and its links with the multilateral regime.

69. It was nonetheless possible to argue that IP cooperation was in fact a return to APEC’s very roots, turning on its head the trade law nostrum that “behind the border” regulatory matters were not the province of true trade law: For APEC, it became a natural component of regional economic partnership, as the conception of open regionalism itself opened further beyond non-preferential trade liberalisation towards the practical coordination and integration of domestic regulatory mechanisms, for shared economic benefit. TRIPS had put a complex and demanding set of requirements on the domestic regulatory agenda of many APEC economies, and this created the need for a transgovernmental network of officials confronting similar demands. The APEC IPEG fostered the development of epistemic communities as a valid end in itself – not only among the regulators and policymakers immediately concerned with IP, but also among circles of users of the IP system and a broader range of policymakers. The proposed directions for APEC cooperation on IP were initially ambitious in scope, and was found in time to exceed the range of political, legal and administrative capacity, but developed into a balanced and coherent package of policy dialogue, capacity building, and regulatory and administrative coordination. This entailed government officials acknowledging that they shared common challenges that were technically demanding and in need of pooled experience to address effectively, and that international cooperation on IP required a sustained policy discussion that was not structured by adversarial formal positions.

70. The regionalism/multilateralism debate, and the debate about the inclusion of IP standards into international trade law, tend to focus alike on the nature of explicit hard law outcomes. Yet on complex regulatory matters such as IP, a great deal of the potential benefits from international standards (or failure to attain benefits) arises not from the international legal framework nor even the formal content of national

¹³⁷ Ladas, above fn. 23.

legislation, but from the informed and effective use made of the possibilities within the system, including by policymakers and regulators. The intensity of international debate and negotiations on IP issues (such as IP aspects of biotechnology, the digital environment, and geographical indications) can mask the technical and theoretical difficulty of effective domestic regulation, policymaking and implementation in these areas. The epistemic, practical and policy challenges in these areas are more widely shared than international debate may allow, and do not cleave neatly into developed and developing country interests: Rather, there is considerable scope for mutual learning at the practical level, provided the crippling misconception can be set aside that interests are inherently at odds, and that the practical lessons of domestic policy development cannot be shared. The obligation to give domestic effect to new international IP standards, and the challenge of ensuring this obligation is carried out in a way that serves national economic well-being, creates a need for second-tier forms of international cooperation, which seek to strengthen national capacity to serve both international obligations and domestic needs, strengthening the links between the two, rather than addressing international standards and domestic interests as conflicting and divergent imperatives. A regional transgovernmental network may be an effective way of exploring and actualising this approach, as a vital complement to more structured and formal legal interactions between states.

71. Further, this approach opens possibilities for a broader conception of the nature of the objectives and even the specific obligations under TRIPS. Formally and in terms of its genesis, it functions as an instrument for preventing or settling trade disputes concerning IP, and is the expression of a collective wish to transfer the settlement of disputes from the bilateral to the multilateral domain.¹³⁸ Yet TRIPS is also the product of an intention to “reduce distortions and impediments to international trade” and to ensure that IP protection measures “do not themselves become barriers to legitimate trade”, and its implementation aims at the broader social and economic welfare goals articulated in Article 7. There are several clear obligations under TRIPS to engage in positive cooperation (in addition to the specific “positive comity” obligation under Article 40.3-4), and in Article 69 a recognition that individual state actors cannot tackle IP enforcement in isolation. Almost because it is “mundane”, transgovernmentalism is “rapidly becoming the most widespread and effective mode of international governance”.¹³⁹

72. Hence the transgovernmental interaction on IP issues within APEC, ranging from assembling shared information platforms for domestic policy development, over the exchange of information on domestic initiatives and cooperation in strengthening domestic capacity to profit from the IP system, to the regional facilitation of IPR enforcement, may be considered to constitute true forms of TRIPS implementation in themselves. This would require, however, moving beyond

¹³⁸ The preamble of TRIPS emphasises “the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures”, cf. Article 23 (Strengthening of the Multilateral System), WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

¹³⁹ Slaughter above fn. 2, 185.

a passive compliance-oriented model, limited to technical conformity with minimum standards, which overlooks the opportunities within a TRIPS framework to pursue mutual interests. It is a consciously idealised model to consider collective management of TRIPS as a collaborative endeavour to deal with shared policy challenges. Yet, freed of the polemics, zero-sum negotiating dynamics and confined perceptions of interests that are often apparent in other forums, APEC cooperation has sketchily illustrated the potential benefits of a collective approach, and for regional economic cooperation to respond to the deeper and broader array of domestic regulatory and policy challenges on IP than are presented, or for that matter created, by the international legal framework.