PRINCIPLES FOR INTELLECTUAL PROPERTY PROVISIONS IN BILATERAL AND REGIONAL AGREEMENTS

PREFACE

For several years, research at the Max Planck Institute for Intellectual Property and Competition Law (MPI) – in collaboration with experts from all over the world – has examined the trend of bilateral and regional agreements that include provisions on the protection and enforcement of intellectual property (IP) rights.

By building on this research, the following PRINCIPLES

- *express core concerns regarding the use of IP provisions as a bargaining chip in international trade negotiations, the increasing comprehensiveness of international IP rules and the lack of transparency and inclusiveness in the negotiating process; and*
- *recommend international rules and procedures that can achieve a better, mutually advantageous and balanced regulation of international IP.*

These principles emanate from several consultations within the MPI and especially from a workshop that was held with external experts in October 2012 in Munich, Germany. They represent the views of those first signatories and are open to signature by scholars who share the objectives of the Principles.

Part One – Observations and Considerations

I. IP as a Trade-off in Bilateral and Regional Agreements

1. Since the early 1990s, the world has witnessed an unprecedented inclusion of IP provisions in trade and other agreements that are outside the traditional domain of international IP law. Those agreements cover a wide range of issues and allow for deals in which IP provisions are agreed in exchange for trade preferences and other advantages. On both sides, these deals are driven by export interests and other objectives external to the IP system rather than the common goal to achieve a mutually advantageous, balanced regulation of IP among the parties. While these agreements may pursue an overall balance of concessions, they usually do not lead to international IP rules that address the interests of all countries affected.

2. Most of these agreements in which IP serves as a trade-off are negotiated on the bilateral or regional level. They are subsequently referred to as *bilateral and regional agreements*. These agreements increasingly contain provisions on the protection and enforcement of IP that are more extensive than the multilateral standards contained in the Paris and Berne Conventions as well as the WTO TRIPS Agreement.

3. Continuous extension of IP protection and enforcement increases the potential for law and policy conflicts with other rules of international law that aim to protect public health, the environment, biological diversity, food security, access to knowledge and human rights. At the same time, such extension often counters, rather than facilitates, the core IP goal of promoting innovation and creativity.

II. Relevance of the Multilateral Framework

4. The multilateral framework, in particular the TRIPS Agreement and the Berne and Paris Convention rules it incorporates, does not only contain minimum standards of IP protection. It also includes norms that provide for policy space in domestic implementation ("flexibilities") and obligations that place limits on IP protection ("ceilings"). The TRIPS Agreement can be

understood to pursue a certain balance between those elements. This balance forms part of the negotiated consensus of all WTO Members. It is reflected in the object and purpose of the Agreement, as embodied in Articles 7 and 8 TRIPS. These provisions guide the interpretation and implementation of the TRIPS Agreement.

5. As a multilateral agreement, TRIPS establishes a framework that IP provisions in bilateral and regional agreements amongst WTO Members may not contravene. Based on the safeguards general international law contains against *inter se* modification, IP standards in such agreements should not affect core TRIPS flexibilities, derogation from which is incompatible with the effective operation of the object and purpose of TRIPS, as embodied in its Articles 7 and 8. Flexibilities crucial for the balance that Article 7 establishes should not be restricted. These are flexibilities that support designing domestic IP systems to be "conducive to social and economic welfare" (Article 7 TRIPS).

III. Eroding Multilateral Policy Space

6. IP protection and enforcement rules in bilateral and regional agreements tend to erode the policy space inherent in the TRIPS Agreement. States bound by such rules are less able to tailor their IP laws to fit their domestic environment and to adapt them to changing circumstances. These trends also affect current and future multilateral initiatives in international IP law.

7. IP provisions in bilateral and regional agreements have become increasingly detailed and prescriptive. They often transplant specific protection and enforcement standards from the domestic IP system of the IP-demanding country, while disregarding the exceptions, limitations and other checks and balances from that same system. Implementing these transplants will often not suit domestic needs and will further constrain policy space.

8. Given the difficulty to amend or withdraw from international treaties, agreeing to detailed IP obligations in bilateral and regional agreements has far-reaching consequences. Countries risk that these obligations will be cast in stone – with few options to adapt to changing economic, technological or other societal needs on the domestic level.

9. Implementing IP obligations from bilateral and regional agreements often requires the re-allocation of financial and human resources and places additional burdens on the legislative, administrative and judicial infrastructure. It may affect the ability of the implementing country to protect the public interest.

IV. Transparency, Inclusiveness and Equal Participation

10. The current process of negotiating bilateral and regional agreements frequently lacks transparency, inclusiveness and equal participation of stakeholders and the public. These deficits cannot be corrected by parliamentary ratification or implementation processes without a meaningful option to influence the treaty text or its implementation. This is especially acute if detailed and prescriptive transplants are included in these agreements.

Part Two – Recommendations

I. Negotiation Mandate and Strategy

11. Countries demanding additional IP protection should take international principles of development cooperation, the recommendations of the WIPO Development Agenda and the

level of development of their negotiating partner into account and adjust their demands accordingly.

12. The text of the negotiation mandate should be openly available to the public in the negotiating countries. There should be a meaningful opportunity to raise concerns and influence the negotiation process.

13. Countries facing IP demands should aim to develop their own pro-active agenda on IP issues in a consultative and participatory domestic process. This may include identifying limits for additional IP protection and enforcement, especially limits motivated by the protection of public interests.

II. Negotiation Process

14. The negotiations should be conducted, as far as their nature makes it possible, in an open and transparent manner. They should allow for participation by all stakeholders in the negotiating countries that are potentially affected by the agreement in an open and non-discriminatory manner. In particular, right-holder and industry groups should not enjoy preferential treatment over other stakeholders.

15. All stakeholders from the negotiating countries should have meaningful and equal opportunities to comment on draft texts. Publicly elected bodies that have to approve a final text should be consulted during the negotiating process.

16. Each negotiating country should evaluate, for example in the form of impact assessments, the IP demands they face in terms of their implications for public interests, the realization of human rights, and the financial burdens and implementation costs they entail.

17. No country should demand or agree to any IP provision that has not been subject to a public negotiation process in which a full range of stakeholders has had the opportunity to review and comment on the wording of the provision.

III. Negotiated Outcome

18. If parties agree on IP provisions containing stronger protection or enforcement obligations, these provisions should nevertheless be sufficiently flexible to take into account the socio-economic situation and needs of both parties.

19. Countries should consider the long-term consequences for the public interest and their domestic IP system in case they accept IP demands in exchange for obtaining trade preferences or other benefits. They should also be aware that such benefits are progressively eroded whenever their trade partners offer equivalent or greater benefits to third countries.

20. The negotiated outcome should respect all international obligations of the parties, in particular those relating to the protection of human rights, biological diversity, the environment, food security and public health. It should allow countries to adopt exceptions and limitations necessary for giving effect to such concerns.

21. The negotiated outcome should not undermine the ability of WTO Members to rely on the public-interest-related flexibilities in the TRIPS Agreement, including those mentioned in the Doha Declaration on TRIPS and Public Health.

22. IP obligations in bilateral and regional agreements should allow for appropriate transition periods and include a review clause whereby the impact of their implementation is

comprehensively assessed. These assessments should focus on the effect on all stakeholders and take their comments into account. Bilateral and regional agreements should include an option for re-negotiating IP provisions in light of an impact assessment.

IV. Interpretation and Implementation

23. IP provisions in bilateral and regional agreements have to be interpreted and implemented in the context of other relevant rules of international law, such as those on the protection of public health, the environment, biological diversity or human rights, applicable in relation between the parties.

24. The interpretation and implementation of bilateral and regional agreements should further be based on the balancing objective and public interest principles embodied in Articles 7 and 8 TRIPS. Accordingly, IP provisions in bilateral and regional agreements should be constructed to provide sufficient policy space to implement the balance that these Articles call for. When implementing specific provisions serving the interests of right-holders, the implementing country maintains the right to draft exceptions and limitations necessary for restoring the balance of Article 7.

25. The notion of protection and enforcement of IP should be understood to encompass also exceptions, limitations and other rules that balance the interests of right-holders against those of users, competitors and the general public. This wider notion allows for an equally wider understanding of national treatment and most-favoured-nation treatment in international IP law.

26. Countries facing IP demands would then be able to rely on concessions regarding exceptions and limitations obtained by other countries in similar situations: When a country has agreed to a specific exception or limitation to IP protection or enforcement in a bilateral or regional agreement, it should make this available to any other country with which it has concluded a bilateral or regional agreement, if that other country is at a similar stage of development as the country to which the exception or limitation is granted.

27. IP-demanding countries should provide unconditional financial and impartial technical support for implementing IP obligations. This support should in no way attempt to reduce the policy space in deciding how to implement IP provisions.

28. Countries should consult all interested parties through open and transparent processes in order to implement international IP provisions in the light of their domestic needs. To achieve this, they should take into account all available flexibilities to the fullest possible extent.

29. IP-demanding countries should not employ unilateral certification or other assessment processes in order to influence the implementation of IP obligations; nor should those countries unilaterally withhold or withdraw benefits unless an independent process has established a breach of obligations of the bilateral or regional agreement.

30. Countries should consider re-negotiating existing bilateral and regional agreements whose IP provisions do not conform with these recommendations; in particular those which undermine recognised TRIPS flexibilities or in which the contracting party makes concessions to other countries at a similar stage of development for additional exceptions and limitations to IP protection and enforcement.