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# Intellectual Property Rights in a Globalized Digital Era: Multilateralism or Bilateralism?

by

Ymane Glaoua\*

## Abstract

*Today, intellectual property faces new challenges of a globalized economy in the digital age. On the international scene, the world's most powerful States are pushing to impose their standards of protection of intellectual property rights onto less powerful countries by an increased use of bilateralism, thereby relegating to the background former large multilateral conventions once acclaimed at the heart of international organizations. The present contribution examines the role of the European Union as a global actor in the intellectual property world. The action plan of the EU is indeed characterized by a logical and effective triple action. Firstly, by adopting a coherent regionalist approach, it tends to unify its member States' intellectual property rights through directives and regulations, flexible tools which allow to adapt quickly to the technological and digital innovations of our time. Secondly, the EU makes sure to actively participate in major bilateral negotiations, in order to defend intellectual property interests of its member States collectively against world powers like the United States of America, therefore ensuring its competitiveness in the world. Thirdly and most importantly, at the international level, the EU favors a modernized multilateralism in a connected world in which creations, innovations and imagination transcend borders. This paper argues that while bilateralism has been skyrocketing over the past few years, a return to a modernized multilateral approach must be advocated. The EU has and will play a key role in defending a coherent and equitable international framework for intellectual property.*

**Keywords:** Intellectual property; Bilateral agreements; Multilateral agreements; WIPO; WTO; European Union; United-States; Globalization; Copyright; Patent

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# Intellectual Property Rights in a Globalized Digital Era: Multilateralism or Bilateralism?

## I. Introduction

“The history of the human race is a history of the application of imagination, or innovation and creativity, to an existing base of knowledge in order to solve problems.

Imagination feeds progress in the arts as well as science.”<sup>1</sup> K. IDRIS

Intellectual property has never stopped adapting to the pace of political, commercial, industrial and technological changes in an increasingly globalized world. As an important source of profits for diverse economic actors, it has developed at the heart of a paradox between State laws circumscribed to national territories, and creation and innovation designed to transcend borders. This is why, very early, States quickly adapted and made agreements to protect and promote innovation, mostly to their own local advantage. This is where the concept of bilateralism and multilateralism came in. As James Crawford defined it<sup>2</sup>, when used in geometry, “bilateral” means two-sided, whereas “multilateral” refers to multiple sided figures. Leaving mathematics aside, in the legal vocabulary, a bilateral agreement comprises two parties, whereas a multilateral agreement includes three or more parties. In the field of intellectual property, the tendency towards bilateral or multilateral agreements and negotiations has always evolved with time.

Historically, bilateral agreements constitute the premises of international intellectual property rights (e.g. Prussia and German States from 1827 to 1829). Numerous States, especially in Europe, used this model to shape their international intellectual property rights, even if this area was usually a small part of broader treaties concerning commerce and trade. Soon enough though, multilateralism swept bilateralism, and multilateral international conventions were promulgated and adopted. The Berne Convention for the Protection of Literary and Artistic Works<sup>3</sup> and the Paris Convention for the Protection of Industrial Property<sup>4</sup> have become the pillars of multilateralism in intellectual property, as they were the first

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<sup>1</sup> K. IDRIS, *Intellectual Property: A Power Tool for Economic Growth*, WIPO Publication No 888, p.8.

<sup>2</sup> J. CRAWFORD, *Multilateral Rights and Obligations in International Law*, (Volume 319), in *Collected Courses of the Hague Academy of International Law*, “The development of multilateral law-making”, (2006), p.335.

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.

<sup>4</sup> Paris Convention for the Protection of Industrial Property of March 20, 1883.

broad international conventions ratified by more than 170 States, determining standards of protections, minimum rights and exceptions at a global level.

At the end of the 19<sup>th</sup> century, when ideologies started to make their appearance in politics, governments began aspiring towards cross-borders harmony<sup>5</sup>, resulting in large and world-wide conventions, internationalizing the legal framework of intellectual property. There were certainly many benefits: the establishment of a better regulation between States, better representation of stakeholders' interests', and the integration of smaller countries, to name a few. As WIPO Director General, Francis Gurry emphasized, "Multilateralism is the greatest source of legitimacy and inclusiveness for making rules. Through multilateral negotiations, the international community aspires to provide a system which is fair to all participating countries including smaller States. In the field of intellectual property, multilateralism is especially important because of the mobility and global application of innovation, ideas and creative works, especially in the digital age"<sup>6</sup>.

Intellectual property being a real economic and commercial tool allowing States to support their economic growth, an uptake by the WTO of this area occurred. In the 1994 Marrakesh Agreement establishing the World Trade Organization, intellectual property rights were integrated into the WTO framework as a part of trade and commerce, through the quite controversial TRIPS<sup>7</sup> agreement. For over two centuries, the philosophy of non-discrimination and equality between States and their economic operators, as promoted by international organizations had allowed multilateralism to dominate bilateralism. However, "for some years now, it has been noted that faced with the profound difficulties of implementing the multilateral ideal on a universal scale as illustrated by the stalemate of the Doha Round, commercial bilateralism is experiencing a noticeable (and dangerous) current resurgence"<sup>8</sup>.

The economic growth and speed of innovation in the digitalized 21<sup>st</sup> century has highlighted the first serious flaws of the multilateral approach: the length of debates with dozens of participating parties (States and others), the complexity of the decision-making process and difficulties to reach a consensus, the cost of implementation, or the risk of failure of negotiations. Above all, major conventions that did see the light lacked effectiveness, and even with the WTO dispute settlement body being introduced, it has not been sufficient to solve problems<sup>9</sup>. The initial success of the WTO ended with the Seattle negotiations in 1999, as the excessive success of multilateralism finally made it fall.

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<sup>5</sup> S. BADIE Bertrand, DEVIN Guillaume, *Le multilatéralisme, Nouvelles formes de l'action internationale*, Paris, La Découverte, (2007).

<sup>6</sup> WIPO, Francis GURRY *on the challenges for multilateralism in the field of IP*, WIPO Magazine No 5, October 2016, p.4.

<sup>7</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, April 15, 1994.

<sup>8</sup> CARREAU Dominique, JUILLARD Patrick, *Négociations commerciales internationales*, (March 2011), Répertoire de droit international, Dalloz, para. 16.

<sup>9</sup> Indeed, the WIPO did not have a coercing mechanism to impose its multilateralist standards. To counterweight the justiciability of bilateral conventions, the WTO introduced a dispute settlement body. To learn more about its functioning:

All of these elements as well as the economy's evolution and globalization, the speed, if not the simultaneity of Internet-enabled exchanges, confronted to intellectual property rights, brought back the return of bilateralism beyond the overrated multilateralism. With intellectual property in crisis for two main reasons: firstly, the logic of innovation sometimes against intellectual property, secondly the impossibility to agree on an international level; bilateral conventions seemed appropriate at the time, to open up to global markets and make a growing effort to liberalize services and investment flows. The TRIPS-Plus concept was born<sup>10</sup>, driven by the US as well as the EU<sup>11</sup>. Through bilateral agreements, this turnaround allowed powerful States to include more binding provisions and use their influential position to achieve and/or impose a higher level of protection than the one established by previous multilateral treaties in order to negotiate better standards of protection with countries that didn't ratify these conventions.

The current trend towards intellectual property bilateralism is not only State-based influenced<sup>12</sup>. Indeed, the European Union – before called the European Economic Community –, is a prominent vector of evolution in the globalization of intellectual property rights. However, institutional constraints<sup>13</sup> are blocking the EU in its external policy. In fact, the multiplicity of WIPO's international treaties, the territoriality of certain titles facing regionalization and European legislation, constrain the policy of the Union. Even though it is a member of the WTO<sup>14</sup> and has the power to make decisions for its 28 member States<sup>15</sup>, it is *a priori* not the case with older multilateral conventions once signed and ratified by member States themselves. Despite all this, “The European Union is gradually gaining leadership in the global governance of intellectual property by building a constructive proposition between US hegemonic activism and legitimate claims of the developing world. It would be unfortunate if institutional constraints, which no longer have any real reason to exist, would durably slow down this rise”<sup>16</sup>.

The European Union finds its competitiveness by harmonizing intellectual property on a regional level. Using the principle of free movements of goods and services, as well as

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[https://www.wto.org/french/res\\_f/booksp\\_f/dispuhandbook17\\_f.pdf](https://www.wto.org/french/res_f/booksp_f/dispuhandbook17_f.pdf). However, this arbitral settlement of the WTO doesn't seem to be effective today facing a better and intuitive justiciability of bilateral treaties, creating therefore a lack of effectiveness of multilateralism in international organizations.

<sup>10</sup> CARREAU Dominique, JUILLARD Patrick, *Négociations commerciales internationales*, para. 34. TRIPS-Plus is an international expression to qualify bilateral agreements concluded between States to increase intellectual property's levels of protection, according to the standards and minima established into the TRIPS agreement.

<sup>11</sup> C. KADDOUS, *Politique Commerciale Commune*, JCI Europe Traité, (September 2017): to learn more about the EU/WTO relationship and evolutions.

<sup>12</sup> Other regional organizations and institutions also reach for bilateralism, i.e. the OHADA (Organization for the Harmonization of Business Law in Africa).

<sup>13</sup> V. RUZEK, *Propriété intellectuelle – Communautarisation et mondialisation du droit de la propriété intellectuelle*, Revue Propriété industrielle No 4, étude 11, LexisNexis, (April 2017), para. 7.

<sup>14</sup> C. KADDOUS, *Politique Commerciale Commune*, *op. cit.*, EU is a member since January 1, 1995.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* para.13, trans. : « L'UE s'arroge peu à peu un leadership dans la gouvernance mondiale de la PI, en s'imposant en force de proposition constructive entre l'activisme hégémonique américain et les revendications légitimes du monde en développement. Il serait regrettable que des contraintes institutionnelles, qui n'ont plus véritablement de raison d'être ne viennent durablement freiner cette ascension ».

competition law, it creates bilateral treaties<sup>17</sup> tainted of multilateralism within the Union. However, with the “infamous Brexit”, the conundrum remains, whether to know if the United Kingdom will opt for a multilateral approach or will support bilateral treaties to maintain its economic attractivity thanks to its intellectual property rights. Needless to remind that bilateralism finds a major disadvantage: the multiplication of rules and standards that may hinder international trade.

Overall, nowadays, immateriality, ubiquity, territoriality... in short, the very nature of rights attached to intellectual property, at the heart of a connected, globalized society are the newest difficulties States will have to deal with. In a world marked by a knowledge economy, immersed in a new digital era, intellectual property rights face new vectors of complication. Innovation is at our fingertips, information is instantly available, ideas are endless, and the Internet changes the equation as well as previous international conclusions. From this standpoint, given the ubiquity of intellectual property, there is a real need for a harmonized response, ideally at the international level. But where stands the answer? If multilateralism promises a uniform protection, wouldn't the solution be on a regional and/or bilateral level? Looking through the prism of the European Union, a solution will be depicted to determine if, in the end, bilateralism wins over multilateralism.

But, “let's start by reasoning right by right. I mean, right by right, it's impossible because intellectual property rights are so fragmented that a complete sweep of it is impossible”<sup>18</sup>. Following this suitable remark made by Pr. André Lucas, the present study will focus on the “Multilateralism versus Bilateralism” battle through two major intellectual property rights following the elementary *summa divisio* of intellectual property: copyright/author's right, on the one hand, concerning literary and artistic property ; then, the patent system, on the other hand, for industrial property. A thorough examination of historic agreements, their evolutions, and actual strategies in copyright confronted with the one in patents will highlight different conclusions to answer these questions<sup>19</sup>.

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<sup>17</sup> See for instance: Directive 2019/790 of the European Parliament and of the Council, of 17 April 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L130/92

<sup>18</sup> A. LUCAS, *De la protection à la « surprotection » des droits de propriété intellectuelle*, in LexisNexis, I.R.P.I, « Vers une rénovation de la propriété intellectuelle, 30<sup>ème</sup> anniversaire de l'IRPI », Paris, (2014) p.18.

<sup>19</sup> We will delimit this analysis to the study of these two intellectual property rights, without deepening the new rights arising from technological developments, such as blockchain, data, domain name ... A more in-depth study could be conducted for this purpose. This paper remains general.

## II. Literary and Artistic Works: From the famous Multilateralism to a Globalized Digitalized economy

“We live in a society of innovation, be it artistic, technical, scientific, commercial ... But innovation, as a social phenomenon and a major social phenomenon, is inevitably grasped by law and more precisely the law of intellectual property which has been expanding extraordinarily for the past fifteen years. At the same time, moreover, it arouses the most lively reactions.”<sup>20</sup> M. VIVANT

Intellectual property agreements have followed the evolution of innovations and world changes. Reaching for a multilateralist approach very early (A), the promise of harmonization then ran out of breath, leaving to States many options to reach a higher level of protection using the very powerful bilateralist choice (B).

A. Earlier methods: multilateral agreements dealing with multiple national copyrights and author’s rights.

### 1. The ideal initial ambition at the global level: the Berne Convention

In a world marked by a globalized economy and a digital revolution, we must be able to go beyond borders. Very early on, States tried to harmonize principles of intellectual property protection with international standards, in a view of efficiency and security for the simultaneous protection of intellectual property rights facing counterfeiting, main issue in this field. If, some authors trace the first elements of protection of creations to Antiquity, for centuries, however, copyright was hardly recognized. Other authors<sup>21</sup> place the premises of the copyright system in 1469 when the Republic of Venice granted a personal publishing privilege of 5 years to Johan Von Speyer. Concerning the international copyright system, the first time it appeared was through the papacy privileges of the sixteenth century where protection was conferred in an extraterritorial logic, considering the Pope exercised his power with regard to a community of believers in more than one territory, therefore the protection went beyond national borders.

Subsequently, great debates emerged supporting the ideology of an international construction to protect creators and authors. It led to the conclusion of one of the main multilateral intellectual property instruments, the Berne Convention for the Protection of Literary and Artistic Works<sup>22</sup>, ratified today by 177 States. Bringing fundamental principles as well as

<sup>20</sup> M. VIVANT, *Droit et innovation – Acta ... est fabula* ?, Revue des Juristes de Sciences Po No 3, 34, LexisNexis, (February 2011), p.1.

<sup>21</sup> J. GINSBURG, *Proto-Property in Literary and Artistic Works: Sixteenth-Century Papal Printing Privileges*, in Columbia Public Law Research Paper No 14-478, (August 2015).

<sup>22</sup> The Berne Convention, September 9, 1886, *supra*.

minimum standards, it imposed, very early, the obligation to respect the national treatment principle<sup>23</sup>. In a nutshell, this principle enjoins all members of the established Union to grant to foreign authors – understood as not having the nationality of the *forum* – the enjoyment of the same rights as to their nationals. The main issue at stake in the international ambition was indeed to eliminate the discrimination of foreigners in order, for them, to obtain in another country than theirs broadly, the same treatment, and therefore, the same protection.

Following this impulse, “the GATT [General Agreement on Tariffs and Trade] really marked the advent of multilateralism as a principle of organizing trade. And who says multilateralism says liberalization, non-discrimination and reciprocity of business relations. Multilateralism is the fundamental principle around which the reconstruction of a neo-liberal international economic order was to take place at the end of World War II”<sup>24</sup>.

## 2. A first success endorsed by international bodies: from the WIPO to the WTO

The need for international organizations to follow harmonization and therefore, to administer many emerging multilateral conventions led to the creation of the WIPO, the World Intellectual Property Organization. Its objectives were to promote the protection of intellectual property rights throughout the world thanks to a performing cooperation between States, thus developing, over the years, international treaties in a multilateral logic. In 1994, intellectual property changed its location. At the international level, it stood out from the WIPO to adapt to the WTO. After a long and complex negotiation, on April 15th, 1994, the TRIPS Agreement was signed, marking the beginning of a real globalization of the intellectual property’s protection through multilateralism. This agreement embodied, in only one international instrument, the fundamental principles of the protection of intellectual property, which had emerged from pre-existing treaties. This inclusion was symbolically important since, from this moment onwards, intellectual property was no longer considered an end in itself, but a means to trade and a tool for economic growth.

Moreover, the WIPO lacked effective coercive international instruments. But with the resumption of intellectual property by the WTO, this weakness towards the multilateral approach in intellectual property disappeared. With its new mechanisms of coercion, thanks to the Dispute Settlement Body, the WTO was endowed with a real sanction system to ensure a minimum of intellectual property rights’ effectiveness. However, this coercion mechanism lacked effectiveness, which explains the scarcity of international litigation on

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<sup>23</sup> Art 5 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, [1886]: “Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”.

<sup>24</sup> *supra*, V. RUZEK, *Propriété intellectuelle – Communautarisation et mondialisation du droit de la propriété intellectuelle*, para.37.

this field; unlike the justiciability of bilateral treaties, whose litigation is more numerous, and resolved by international arbitration more quickly<sup>25</sup>.

This commercial reduction of intellectual property rights and the poor effectiveness of any coercion marks for some<sup>26</sup>, at the world level, the quintessence of the American model of copyright, imposed, with the signature of the TRIPS Agreement. To justify this, we can take the example of the peculiarity of moral rights. This right, protected in the context of the Berne Convention<sup>27</sup>, was ousted by the TRIPS<sup>28</sup> with a subtle mechanism: while reminding that all member States would have to respect previous provisions of the Berne Convention, the TRIPS Agreement defused the obligation concerning moral right; this mechanism being greeted by the US. The example demonstrates starting drifts of this excessive multilateralism in order to satisfy a great world power.

Therefore, despite this new enforcement system, the TRIPS Agreement signs the decline point of multilateralism in intellectual property, and a return to a bilateral logic formerly very used.

### 3. Breakdown of multilateralism or break free? : a need to adapt to new technologies

With the new rise in power of bilateralism, the issue of a possible decline of multilateralism in intellectual property was raised. Yet, international conventions were already considering in advance that “the Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable”<sup>29</sup>.

<sup>25</sup> This phenomenon of “de-regulation” arises particularly in this digital era, with states trying to monitor it through alternative dispute resolution such as mediation and even online dispute resolution. See more in L. TOSCANO, O. SUAREZ, “An expanding role for IP offices in alternative dispute resolutions”, in WIPO Magazine, February 2019.

<sup>26</sup> *supra*. D. CARREAU, P. JUILLARD, *Négociations commerciales internationales* ; M. VIVANT, *Droit et innovation – Acta ... est fabula ?*, para. 34 : « Le mouvement fut donné par la signature en 1994 de l'Accord relatif aux aspects de droits de propriété intellectuelle qui touchent au commerce, accord annexé à l'OMC et composante forte de la nouvelle organisation. Dans le grand jeu de la globalisation, celui-ci allait placer la propriété intellectuelle sous le signe du multilatéralisme et propager le modèle américain, ou à tout le moins américano-européen, à travers la planète ».

<sup>27</sup> Art 6bis.1 – Moral rights, Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, [1886]: “Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation”.

<sup>28</sup> Art 9.1, TRIPS Agreement – Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, [1994]: “1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom”.

<sup>29</sup> Art 20 – Special Agreements Among Countries of the Union, Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, [1886].

Today, innovation is being built in opposition to intellectual property, which seems to be a hackneyed idea of the 19<sup>th</sup> and 20<sup>th</sup> centuries, outdated by the speed of exchanges and knowledge. Thereby, intellectual property becomes a matter in crisis for several reasons. First, new technologies in a globalized and connected era call for a logic of rapid innovation, which goes against the logic of copyright. Above all, the growing gap between the North and the South is widening. While the South believes that the initial intellectual property values should be protected, used and counterbalanced by fundamental principles, the North seeks profit through essential or unnecessary benefits.

The recent example of Nike against the Kuma Indians of Panama<sup>30</sup> shows that from now on, the North thinks to be able to adapt and to exceed the rights of the underprivileged populations or to impose its own standards in the south thanks to a bilateral logic. As Pr. J. GINSBURG wrote: “More generally, the move towards bilateralism must have implication for the multilateral system as the bilateral agreements come to contain stipulations that reflect the domestic standards of the hyperpower”<sup>31</sup>. Should we redefine intellectual property at the international level to renew the global multilateralism in order to strengthen it? In any case, this is one of the main ambitions<sup>32</sup> of the WIPO<sup>33</sup>, which works slowly but surely to protect intellectual property and its evolutions at a multilateral level. Of course, an international consensus will be difficult to obtain immediately, but despite the length of debates, meetings don’t get bogged down. On the contrary, they are moving towards a total multilateral approach; whose commitment to respect representativeness of all interests as well as the integration of all countries, even the smallest one, are to be welcomed.

This evolution of intellectual property law facing new issues of a digitized society doesn’t question previous multilateral treaties. The conclusion of the Berne Convention, considered as the bedrock of copyright, transcends the historically contingent and is projected beyond the nineteenth century, influencing the field of intellectual property to the present day. And today, the EU seems to have understood the need to adapt at all levels, to reach a better copyright/author’s right protection, by adopting a profitable strategy in many ways.

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<sup>30</sup> Nike used a Kuma traditional print on its new limited-edition shoes, without any consent when their design was protected under traditional knowledges.

<sup>31</sup> S. RICKETSON, J. GINSBURG, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford, Oxford University Press, (2006), at 4.55.

<sup>32</sup> Indeed, the WIPO promotes informal negotiations, as well as the use of soft law as a solution in international intellectual property law. Above all, it must bear in mind that bilateral negotiations combine domestic standards of the hyperpower, the same standards that are found in multilateral treaties and conventions.

<sup>33</sup> F. GURRY, welcome address during the *International Conference on Intellectual Property and Development – How to benefit from the IP system*, [2019], WIPO, Geneva.

B. Current trends: the increase of bilateralism facing a powerful copyright/author's rights regionalism

**1. EU's main strategies: Free Trade Agreements on a bilateral level, ...**

The European copyright protection does not require any legal action, the acquisition by the owner of the right is somehow “innate”, resulting from an original creation<sup>34</sup>. Therefore, States need to be able to protect their creators effectively. With intellectual property evolutions, the twenty-first century confirms the regressive position to a bilateral logic, with a primary objective of increasing the level of protection and to overcome blockages of multilateralism, and its stalemate during negotiations. Under the impulse of the American model that uses many bilateral agreements<sup>35</sup>, to establish its power and reach skyrocketing levels of protections with other countries, the EU also became a real active<sup>36</sup> player when it comes to intellectual property bilateralism.

Therefore, according to the saying “Serious discussions are held by two”<sup>37</sup>, the EU opted for Free-Trade Agreements (FTA) as they contain very detailed provisions. According to the Council on Foreign Relations, “free trade agreements, many of which are bilateral, are arrangements in which countries give each other preferential treatment in trade, [perhaps by] eliminating tariffs and other barriers on goods”<sup>38</sup>. However, despite obvious advantages of bilateral agreements granting greater protection to the powerful EU position in the reach for a higher level of protection according to their needs, and a possibility of adaptation for the contracting countries according to their capacities; there are also disadvantages when using bilateralism. The main one lies in the multiplication of rules and standards and as a consequence, a risk of hindering international trade in the long run. In this lasagna becoming a “spaghetti bowl”<sup>39</sup> between multilateral and bilateral agreements, the North has an opportunity to impose its obligations to the South as a consequence of bilateralism.

This is why, in its recent negotiations and bilateral agreements, the EU seems to have found an ingenious way to preserve bilateral advantage while protecting the multilateral ideology.

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<sup>34</sup> See, ECJ, Case C-170/12, Peter Pinckney v KDG Mediatech AG, EU: C: 2013: 635.

<sup>35</sup> e.g. P. ARHEL Pierre, *Propriété intellectuelle – Approche ADPIC-Plus : l'exemple de l'Accord de libre-échange entre les États-Unis et le Maroc*, Revue Propriété industrielle No 1, étude 2, LexisNexis (January 2008), p.1 : « L'accord de libre-échange conclu entre les États-Unis et le Maroc en 2004 constitue une excellente illustration de cette tendance, comme en témoignent ses dispositions relatives au droit d'auteur et aux droits connexes, aux marques, aux brevets, à la protection des données résultant d'essais et aux moyens de lutter contre la contrefaçon et le piratage ».

<sup>36</sup> EUROPEAN COMMISSION, *The EU's bilateral trade and investment agreements – were are we?*, [August 2013], MEMO/13/1080.

<sup>37</sup> trans. : « Les entretiens sérieux ne se font qu'à deux ».

<sup>38</sup> J. GINSBURG, E. TREPPOZ Édouard, *International Copyright Law: U.S and E.U Perspectives: Text and Cases*, Cheltenham UK/Northampton USA, Edward Elgar Publishing, (2015), p.49, citing Robert McMahon, *The Rise in Bilateral Free Trade Agreements*, Council on Foreign Relations (June 13, 2006).

<sup>39</sup> P. GARCIA-DURAN, *The Bilateralism/Multilateralism Debate and EU Trade Policy*, Colección Monografías, CIDOB, (2016).

In the particular field of intellectual property, let's take the recent example of the EU/Singapore Free Trade Agreement<sup>40</sup>. Using the TRIPS most-favored-nation clause<sup>41</sup> principle in its provisions, the FTA requires respect for pre-existing multilateral conventions including the TRIPS<sup>42</sup> agreement, and thus the respect of fundamental principles of the WTO: the equal treatment between member countries of the organization and a non-discrimination between commercial partners. Thus, in granting and submitting to a special favor, this free trade agreement has the practical effect that Singapore will be required to extend to other States – it will negotiate with in a bilateral way –, the TRIPS-Plus type of benefits it has granted the EU concerning the reduction and/or elimination of Custom Duties on Imports<sup>43</sup>, giving them the same obligations. This most-favored-nation approach allows the EU to harmonize new levels of protection on the international scene. Indeed, the new disguised bilateral approach of the EU concerning intellectual property seems to be turning into a form of multilateralism<sup>44</sup>.

In the end, while these bilateral agreements go beyond the level of protection of multilateral treaties<sup>45</sup>, they still rely on those same old multilateral agreements. Therefore, once again, multilateralism, even if it is not trending in international policies nowadays, remains and turns out to be a fundamental element of effective negotiations<sup>46</sup>.

## 2. EU's main strategies: ... a powerful position to preserve multilateralism, ...

With the Berne Convention being ratified by each member state of the EU, the Union did not have competence on the international stage. However, with the WTO's inclusion of

<sup>40</sup> Free Trade Agreement between the European Union and the Republic of Singapore, October 19, 2018.

<sup>41</sup> Art 4, TRIPS Agreement – Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, [1994]: “With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members”. This bilateral provision has some effects of multilateralism to the benefit of powerful negotiations.

<sup>42</sup> *Ibid.* Art. 10.4 – Protections granted: “The Parties shall comply with the rights and obligations set out in the Berne Convention for the Protection of Literary and Artistic Works (of September 9, 1886, as last revised at Paris on July 24, 1971), the WIPO Copyright Treaty (adopted in Geneva on December 20, 1996), the WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996), and the TRIPS Agreement.2 The Parties may provide for protection of performers, producers of phonograms and broadcasting organizations in accordance with the relevant provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (done at Rome on October 26, 1961)”.

<sup>43</sup> Art 2.6 – Reduction and/or elimination of Custom Duties on Imports, Free Trade Agreement between the European Union and the Republic of Singapore, October 19, 2018, Chapter 10: [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151761.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151761.pdf): “If at any moment, a Party reduces its applied most favored nation (hereinafter referred to as “MFN”) customs duty rates on imports after the date of entry into force of this Agreement, that duty rate shall apply if and for as long as it is lower than the customs duty rate on imports calculated in accordance with its Schedule in Annex 2-A’

<sup>44</sup> Other States and organizations use this mechanism in intellectual property and other fields.

<sup>45</sup> J. GINSBURG, *International Copyright: From “Bundle” of National Copyright Laws to a Supranational Code?*, Journal of the Copyright Society of the USA 47, (2000).

<sup>46</sup> M. MARESCHEAU, *Bilateral agreements concluded by the European Community (Volume 309)*, in Collected Courses of the Hague Academy of International Law, The Hague, The Hague Academy of International Law, (2004), p.142: “There may be evident relationships and interconnections between bilateral and multilateral frameworks; moreover in some cases, the existence or non-existence of a bilateral instrument can only be properly explained by referring to a particular multilateral context. In certain instances, in order to clarify some specific situations at the bilateral level, it might be useful and even necessary to take into consideration the multilateral background of certain instruments. It must also be said that while for decades the popularity of bilateral agreements suffered from increasing multilateralism, there now seems to be a growing discovery (or rediscovery) of the charm of bilateral agreements.”

the convention into the TRIPS agreement<sup>47</sup>, the EU regained its legitimate position internationally and from a multilateral standpoint<sup>48</sup>. Indeed, Article 207 TFEU<sup>49</sup> requires that “the common commercial policy is conducted within the framework of the principles and objectives of the Union’s external action”, including commercial aspects of intellectual property. “These new competencies enable the European Union to significantly increase its sphere of political influence in the global governance of intellectual property. This assertion is reflected in particular by an irrefutable ability of the Union to export European protection standards, in support of effective multilateral action, combined with a conquering bilateral strategy”<sup>50</sup>. Thanks to this ideal position, the EU has now a chance to harmonize interpretations for its 28 member States. For instance, in a case “Daiichi Sanko v. Demo”<sup>51</sup>, the Court of Justice of the European Union, stated that since the entry into force of the Lisbon Treaty, the common commercial policy also covers commercial aspects of intellectual property, defining this concept in support of the Berne Convention as a tool to justify its answer.

More generally, the EU can harmonize intellectual property rights with an autonomous interpretation, with its case-law<sup>52</sup>, but above all with its almost exhaustive competence in negotiating and concluding multilateral agreements within the WTO. That’s not all; in the WIPO, the EU also has a say during the negotiations, since its member States aspire to unified agreements, and speak with one voice. With its economic power, the EU must continue to defend the maintenance of multilateralism to counter a sometimes-abusive bilateralism, which attempts to allow author’s rights to dominate copyrights – and its economic and profit logic. In the end, despite some institutional constraints<sup>53</sup> that prevent the EU from carrying out a full external intellectual property rights policy, it still seems to support multilateral strategies of international organizations.

Through harmonization between its member States, the European Union protects and adapts copyrights and author’s rights to the global digital era, insuring its power at the international level.

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<sup>47</sup> Art 2.2 – Intellectual Property Conventions, TRIPS Agreement, - Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, [1994]: “Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits”.

<sup>48</sup> *supra*. C. KADDOUS, *Politique Commerciale Commune*.

<sup>49</sup> Art 207 TFEU or Art 133TCE: “1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action”.

<sup>50</sup> *supra*, V. RUZEK, *Propriété intellectuelle – Communautarisation et mondialisation du droit de la propriété intellectuelle*, para.9.

<sup>51</sup> ECJ, Case C-414/11, Daiichi Sankyo CO. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonymos Viomichaniki kai Emporiki Etaira Farmakon, EU:C:2013:520.

<sup>52</sup> For instance, the notion of parody exception in copyright, interpreted by the ECJ in ECJ, Case C-201/13, Johan Deckmyn & Vrijheidsfonds v. Helena Vandersteen EU: C: 2014: 458, allowing all member States to construe this notion in a harmonize way.

<sup>53</sup> *supra*, V. RUZEK, *Propriété intellectuelle – Communautarisation et mondialisation du droit de la propriété intellectuelle*.

### 3. EU's main strategies: ... and a steel determination for harmonization through regionalism.

Today, facing the ubiquity of intellectual property, there is a real need for a harmonized response, ideally at the international stage. The EU remains concerned at a regional level<sup>54</sup>. Its regionalism option is the most logical approach for the European Union since it allows the unification of intellectual property rights at the European level. In European law, the regional approach of intellectual property is developed through many specific Directives and Regulations, as well as effective case-laws.

With new challenges of the digital world, in order to offer better protection adapted to the evolutions, the EU showed a strong reaction by implementing multiples directives and regulations, (e.g. the EU Regulation No 2015/2120 on the Open Internet<sup>55</sup>). The recent and highly controversial Directive 2019/790 on the Digital Single Market (DSM)<sup>56</sup>, illustrates how the EU attempts to introduce new solutions and better protections to creators. Indeed, the Internet has challenged the conception of copyright through a “free of charge” philosophy, which younger generations have adopted eagerly and seems to have a hard time giving up. In the context of implementing a digital single market strategy, the regulatory framework had to be adopted. The objectives of the DSM Directive are simple: to adapt copyright protection to the digital and cross-border environment, while seeking a just balance between the power of online content providers, creators, and Internet users alike<sup>57</sup>.

Could the United Kingdom “Brexit” disrupt the balance of regional agreements? Not entirely. On the one hand, the United Kingdom was a precursor<sup>58</sup> in addressing digital challenges within the Union and a key actor in the development of new legislation in this field. At this level, the referendary decision to leave the European Union may destroy the UK's potential influence in the construction of this new regulatory framework (think of the UK's involvement in harmonizing questions such as the author's moral right<sup>59</sup>). On its impact on regionalism, the Brexit will not change anything: directives set goals that will need to be

<sup>54</sup> We must bear in mind that while this study focuses on the European Union role in these negotiations, other non-state actors are negotiating and concluding treaties.

<sup>55</sup> Regulation of the Parliament and of the Council of 25 November 2015, laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, [2015] OJ L 310/1

<sup>56</sup> Directive 2019/790 of the European Parliament and of the Council, of 17 April 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L130/92

<sup>57</sup> A. ANSIP, in EUROPEAN COMMISSION, *Press release “Digital Single Market: EU negotiators reach a breakthrough to modernize copyright rules”* [February 2019], IP/19/528: “Users will benefit from the new licensing rules which will allow them to upload copyright protected content on platforms like YouTube or Instagram legally. They will also benefit from safeguards linked to the freedom of expression when they upload videos that contain rightsholders' content, i.e. in memes or parodies. The interests of the users are preserved through effective mechanisms to swiftly contest any unjustified removal of their content by the platforms.”

<sup>58</sup> P. SIRINELLI, *Dossier premières vues sur la directive droit d'auteur dans le marché unique numérique*, *Revue IP/IT*, Dalloz, (May 2019), p.278.

<sup>59</sup> É. TREPPOZ, *Chroniques droit européen de la propriété intellectuelle – Le Brexit et la propriété intellectuelle*, *Revue trimestrielle de droit européen*, Dalloz, (December 2017), p.855.

achieved by its member States, adapting their laws to achieve results. Now decided to remain outside of the EU, the Brexit will not, however, impact the EU's regionalism. On the other hand, it remains to be seen whether the UK will opt for a multilateral approach to protect its nationals' copyrights, for a bilateral approach with some or all of the member States, or for regionalism by concluding agreements directly with the EU: a "deal or no deal" situation. This last option does not seem to satisfy the current English government<sup>60</sup>. "As a result, Brexit raises many questions in the audiovisual sector, which will not be dealt within the free trade agreement since the audiovisual sector is not a commodity like the others but will have to be the subject to commitments to prevent the European audiovisual regulation penalizing European actors"<sup>61</sup>.

The EU, facing internal breakdowns and international challenges, adopts a multifaceted strategy: maintaining multilateralism and regionalism for its member States' sake, it competes with some powerful States bilateralism and the trend toward bilateral agreements. Is this a judicious approach of copyright retrieved in respect of industrial property? The next chapter will analyze patent law, this territorial right facing innovations cross-border, and the European approach when it comes to the protection of industrial property rights.

### III. Industrial Property rights: The antagonism between territoriality and internationalism in patent protection

"There is no global intellectual property law that would define singular perennial legal methods and solutions *ubi et orbi*. There are multiple manifestations of the globalization of this law that must be understood in necessarily different ways depending on the legal context in which they are approached."<sup>62</sup> J.-S. BERGÉ, S. TOUZÉ

While the long-established multilateral territorialist approach at first seemed to be able to adequately respond to future developments of innovation (A), the technological paradigm shift and challenges of the digital globalization are defying and diverting multilateralism while introducing a sometimes, over-powerful bilateralism (B).

<sup>60</sup> *Ibid.*

<sup>61</sup> É. SCARAMOZZINO, *Brexit : conséquence sur la régulation audiovisuelle et le financement des films*, Juris Art etc. No 42, Dalloz, (January 2017), p.24, trans. : « Il en résulte que le Brexit soulève de nombreuses questions dans le secteur audiovisuel, qui ne seront pas traitées dans l'accord de libre-échange puisque l'audiovisuel n'est pas une marchandise comme les autres, mais devront faire l'objet d'engagements pour éviter que la réglementation européenne audiovisuelle pénalise les acteurs européens ».

<sup>62</sup> J.-S. BERGÉ, S. TOUZÉ, *CEDH – Variations autour du for de nécessité et de la propriété intellectuelle globalisée*, Journal du droit international (Clunet) No 3, Chronique 7, LexisNexis (juillet 2017), p.9.

A. Earlier methods: multilateral agreements facing multiple national and territorial patent systems

### 1. The beginnings of a territorially oriented multilateralism: the Paris Convention

Historically, patent law can be traced back to ancient times, in the heart of a Greek colony in Italy, the Sybaris, who gave their cooks a year of exclusivity on their culinary creations. Over time, the protection of innovation in the industrial sector continued to evolve, and in certain regions (such as Venice) documents were delivered to protect inventions. The ambition to obtain a privilege thanks to innovation occupied all minds<sup>63</sup> throughout centuries, and despite the ubiquity of these immaterial creations, transcending borders, a territorialist approach continued to prevail in the field of patent law.

By drafting the Paris Convention for the Protection of Industrial Property<sup>64</sup>, the pier of international conventions in industrial property, a multilateral approach to the harmonization of protection standards emerged, with an aim to achieve standardization at the international level of the single market<sup>65</sup>. Nevertheless, it remained faithful to territorialism, illustrated by the principle of national treatment<sup>66</sup>, and by the principle of independence<sup>67</sup> being a logical consequence of the principle of territoriality. The universalist ideology according to which a title of origin would be created for the use in several countries was erased for a more favorable territorialism and a protection State by State. This territoriality is even used by the EU, which still relies on this multilateral agreement to settle its cases<sup>68</sup>.

Despite a global consensus around the scope and philosophy of the Paris Convention, some inconsistencies remain part of the Convention. For instance, the right of priority<sup>69</sup>. While fictitiously displacing the filing date, the possibility is offered to right holders to take into consideration that the application was made on the day of the first application in the country of origin. It will therefore not only be necessary to take into account a legal fact that

<sup>63</sup> See: Thomas JEFFERSON, letter to Isaac McPHERSON, Monticello, August 13<sup>th</sup>, 1813: “Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody”.

<sup>64</sup> Paris Convention for the Protection of Industrial Property of March 20, 1883.

<sup>65</sup> S. ZHANG, *De l'OMPI au GATT-La protection internationale des DPI*, Paris, Litec, (1994), p.131.

<sup>66</sup> *supra*. Art 2 – National Treatment for Nationals of Countries of the Union, Paris Convention [1883]: “(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with”.

<sup>67</sup> *supra*. Art 4bis – Patents: Independence of Patents Obtained for the Same Invention in Different Countries, Paris Convention [1883]: “(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not”.

<sup>68</sup> i.e., EUIPO, Case T-61/16, *The Coca-Cola Company v EUIPO*, EU: T: 2017: 877: the EUIPO takes up the same writing by citing the Convention in support of its conclusions on the principle of territoriality.

<sup>69</sup> *supra*. Art 4 – Right of Priority, Paris Convention [1883]: “A. (1) Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed”.

took place in another country but also a legal right since it will be necessary to assess the regularity of the first deposit. Yet, this provision makes sense since it is part of an international framework, to allow harmonization of deposits and a better organization for protection at the global level.

Thus, the multilateral logic has continued to grow through the 19<sup>th</sup> and 20<sup>th</sup> centuries, with major international organizations providing an effective framework for patent law and guarantees for innovations.

## 2. The reception of global issues by international institutions: WIPO, WTO and WHO

As intellectual property is a priority in countries' industrial policies, it must be organized and especially eased. The multilateral logic of industrial property harmonization has resulted in an international cooperation arrangement at the application stage, within the WIPO, through the Patent Cooperation Treaty (PCT)<sup>70</sup>. It allows applicants to obtain patent protection more easily by filing only a single international application and subsequently obtaining the protection of their invention simultaneously in several States among the 152 parties to the PCT. The right of priority<sup>71</sup> is also part of the PCT, in a more powerful and modern way, since it becomes a claim based on a previously completed international application. Furthermore, the efforts made by the WIPO to deal with issues of industrial property are obvious and very welcome, although the WTO has, once again incorporated industrial property under its egis.

To the extent that the TRIPS Agreement also covers patent law<sup>72</sup>, the multilateral approach could have enabled the WTO to become a main protagonist in safeguarding industrial property rights. Yet today, the failure of multilateral negotiations and the return to bilateralism have reduced the WTO to the role of a secondary actor. And even if it recognizes the importance of current issues, and especially the challenges faced by the pharmaceutical industry in the context of the TRIPS Agreement, it is committed to solving the problem<sup>73</sup>, without really giving impulses or any recommendations. In order to recover its position as

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<sup>70</sup> Patent Cooperation Treaty, Washington June 19, 1970.

<sup>71</sup> Ibid. art 8 – Claiming Priority: '(1) The international application may contain a declaration, as prescribed in the Regulations, claiming the priority of one or more earlier applications filed in or for any country party to the Paris Convention for the Protection of Industrial Property. ... (b) The international application for which the priority of one or more earlier applications filed in or for a Contracting State is claimed may contain the designation of that State. Where, in the international application, the priority of one or more national applications filed in or for a designated State is claimed, or where the priority of an international application having designated only one State is claimed, the conditions for, and the effect of, the priority claim in that State shall be governed by the national law of that State'.

<sup>72</sup> Art 27 – Patentable Subject Matter, TRIPS Agreement – Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, [1994].

<sup>73</sup> DOHA WTO MINISTERIAL 2001: TRIPS, *Declaration on the TRIPS Agreement and public health*, WT/MIN(01)/DEC/2. "6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002".

a protective institutional organization, the doctrine<sup>74</sup> recommend that the WTO changes its strategies. Should it review its priorities, change its approach to global issues of intellectual property, or review its institutional model?

Multilateral institutions will have to adapt to new challenges in order to survive the rise of bilateralism, highly criticized<sup>75</sup> by non-governmental organizations. We must not forget the profound imbalance between the powers of the North and the vulnerability of the South, leading to “a large segment of the world’s population [that] cannot however, afford to pay the medicines bill. Throughout the developing world, people live without adequate access to medicines, and their governments have very limited capacity to reallocate resources to help them”<sup>76</sup>.

As industrial property has an important influence on health issues, the WTO finds some mechanisms to regulate the pharmaceutical patent market, such as the Doha compulsory licenses. Mostly, a new actor has made its appearance on the international scene: the World Health Organization, which has been endowed with the duty to regulate the pharmaceutical industry internationally. Promoting the system of parallel imports<sup>77</sup>, or the one of compulsory licenses<sup>78</sup>, which are authorizations given by a local authority for the use and exploitation of a product without the consent of the right holder, it provides flexibility and acts on exceptional circumstances related to the public interest. Today, more than ever, despite the weaknesses of developing countries facing pharmaceutical lobbies of the great powers of the North, there is an awareness and a desire to change the field of public health.

Whether by a logic of developing countries fundamental rights’ respect for some<sup>79</sup>, or a hope to replace pharmaceutical patents by innovation prizes<sup>80</sup> for others, we must keep our feet on the ground and avoid naivety. The pharmaceutical industry market remains an overly important foundation of the economic growth of the world powers.

<sup>74</sup> F. MORIN, *Le bilatéralisme américain : la nouvelle frontière du droit des brevets*, Bruxelles, Larcier, (2007).

<sup>75</sup> *supra*. P. ARHEL Pierre, *Propriété intellectuelle – Approche ADPIC-Plus : l'exemple de l'Accord de libre-échange entre les États-Unis et le Maroc* ;

<sup>76</sup> F. M. ABBOTT, *Toward a New Era of Objective assessment in the field of TRIPs and variable geometry for the preservation of Multilateralism*, Journal of Economic Law No 8.1, (March 2005), p.93

<sup>77</sup> C. CORREA, *Integrating Public Health Concerns into Patent Legislation in Developing Countries*, Geneva, WTO, (2000), Chapter VII.3 Parallel Imports: “Parallel imports involve the import and resale in a country, without the consent of the patent holder, of a patented product which was put on the market of the exporting country by the title holder or in another legitimate manner. For example, a company may buy a patented machine sold in Germany and then resell it in Canada – where the same patent is in force – without the patent holder’s permission”.

<sup>78</sup> *Ibid.*, Chapter X.1 Grounds for Granting Compulsory Licenses: “The provision of compulsory licenses is a crucial element in a health-sensitive patent law. Such licenses may constitute an important tool to promote competition and increase the affordability of drugs, while ensuring that the patent owner obtains compensation for the use of the invention. The use of such licenses, however, has been generally opposed by the research-based pharmaceutical industry, on the grounds that they discourage investment”.

<sup>79</sup> C. LE GAL, *Droit à la santé et droits de propriété intellectuelle : l'accès aux médicaments dans les pays en développement*, Revue de Droit Sanitaire et Social, Dalloz, (mai 2005), p.456.

<sup>80</sup> *supra*. F. MORIN, *Le bilatéralisme américain : la nouvelle frontière du droit des brevets*, Bruxelles, Larcier, (2007) p.491.

There are still many global economic, political and social issues to be resolved, yet “while negotiations are proceeding slowly, with difficulty at the multilateral level, bilateral and regional agreements are multiplying”<sup>81</sup>.

## B. Current trends: finding solutions to overcome the abuse of bilateralism for the benefit of the world powers

“Bilateralism is like cooking an elephant and rabbit stew: however you mix the ingredients, it ends up tasting like elephants.”<sup>82</sup> P. DRAHOS

### 1. The superpowered American bilateralism: a globalized innovations’ protection through the logic of economic profit

Very early on, the United States of America opted for a bilateral strategy concerning industrial property. Indeed, reluctant to adopt multilateralism or its major international conventions, the US would join only after long negotiations in their favor. Conversely, they understood quickly that benefits of bilateralism were numerous: less media attention, fewer militant campaigns, negotiations in their own interest, while they would be controversial at the multilateral level, and the possibility to promote the US economic power at the global level. In this “race for bilateralism”<sup>83</sup>, the US occupies the first place by imposing a blatant asymmetry<sup>84</sup>.

Through a coercive strategy geared to their economic interests, they are negotiating with developed, vulnerable and developing countries in the global economy<sup>85</sup>. At least, the regretted multilateral negotiations made it possible to find a consensus among all States and avoid the hegemony of a few of them.

Yet, by pursuing bilateral negotiations with developed and developing countries, the US strategy is becoming a powerful weapon in a globalized economy. Its objectives are clear and determined: to dominate the field of innovation through the protection of patents, either for instance by limiting the options of compulsory licenses or requiring patent term extension under certain conditions<sup>86</sup>. In going beyond the multilateral framework, the American government can export their own protection standards and therefore maximize their profits by imposing their protection system. Therefore and more generally, as a result

<sup>81</sup> B. REMICHE, H. RUIZ-FABRI (supv.), *Le commerce international entre bi- et multilatéralisme*, Bruxelles, Larcier, (2010), p.5.

<sup>82</sup> P. DRAHOS, J. BRITHWAITE, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, (2003), p.194.

<sup>83</sup> B. RICHEZ-BAUM, *La nouvelle politique commerciale de l’Union Européenne : véritable choix ou simple conformisme ?*, Revue du Marché Commun et de l’Union Européenne, Dalloz, (December 2006), p.644.

<sup>84</sup> *supra*. F. MORIN, *Le bilatéralisme américain : la nouvelle frontière du droit des brevets*.

<sup>85</sup> Initially, when promoting multilateralism with the Anti-Counterfeiting Trade Agreement (ACTA), May 1, 2011, the USA received a backlash revealing a will of the European Parliament to be opposed to the American legal hegemony.

<sup>86</sup> *supra*. F. M. ABBOTT, *Toward a New Era of Objective assessment in the field of TRIPs and variable geometry for the preservation of Multilateralism*.

of bilateralism, the marginalization of developing countries is increasing, since these negotiations focus on competitiveness.

And with the “GAFA”<sup>87</sup> now attacking the health field to solve inefficiencies in the health system, it is imperative that the EU become a real counterweight to the American hegemony by looking for a world standardization to endorse a coherent and flexible international position concerning innovation.

## 2. The enlightened European bilateralism: harmony at the regional level for competitiveness at the global level

At the European level, territoriality and national fragmentation of member States’ patent laws had to be overcome by certain mechanisms. On the one hand, the EU had implemented a conciliation tool promoting freedom of movement, the exhaustion of rights<sup>88</sup> and therefore a single market, suitable to a better harmonization. On the other hand, Europe has opted for a system of standardization at the European level thanks to the Munich Convention<sup>89</sup> and the institution of the European Patent Organization to outstrip the obstacle of territoriality. From now on, the patent application can be centralized according to standardized provisions in order to obtain national patents. This logic of conciliation remains to be completed, as the European judicial logic of its Unified Patent Jurisdiction, currently takes a territorialist approach in case of litigation, reasoning title by title, country by country. What about the future of this regionalism with Brexit? Some will say that Brexit will be fatal to this European construction<sup>90</sup>. However, the United Kingdom again, should not disrupt the EU’s role in industrial property, as the regional approach emanates more from Europe than the UE regionalism.

Should we think that the EU, whose role is subsidiary at the regional level in terms of patent protection, will retrieve its influence back by a return to bilateralism, driven by the US?<sup>91</sup> Not really. In order to have a good degree of competitiveness, it succeeds to negotiate bilateral agreements in a faster way than multilateral negotiations, without forgetting international considerations. It differs from the US approach as it is not a State entity, but the result of harmonized intellectual property rights on a regional level. Having already had the experience of negotiations between powerful countries and some less developed ones within its Union, the EU knows the issues, and therefore tries not to pressure fragile coun-

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<sup>87</sup> Google, Amazon, Facebook, Apple.

<sup>88</sup> Art. 36 TFEU: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

<sup>89</sup> European Patent Convention (EPC), Munich, October 5, 1973.

<sup>90</sup> *supra*. É. TREPPOZ, *Chroniques droit européen de la propriété intellectuelle – Le Brexit et la propriété intellectuelle*.

<sup>91</sup> *supra*. B. RICHEZ-BAUM, *La nouvelle politique commerciale de l’Union Européenne : véritable choix ou simple conformisme ?*

tries to obtain higher standards than those already established in previous multilateral conventions. The EU is thus avoiding the criticism often aimed at the US of making its economic interests prevail over those of the weakest partners.

Today, the debate is changing profoundly, because the search for higher standards is no longer driven by a logic of economic profit but is caused by rapid and new technological advances created by our global digital society. Thus, the industrial property bilateralism of recent years must offer new answers to avoid paralyzing innovation. And then, it could “serve as a gateway to multilateralism. It [could] help to create alliances that enhance the power of coercion of their members at the multilateral level. It [could] also serve as an institutional laboratory for the formulation and promulgation of new rules”<sup>92</sup>. Should the EU have to choose between multilateralism and bilateralism, it should preserve previous multilateral conventions and use harmonized bilateral agreements to help the multilateral approach to rise from ashes.

#### IV. Conclusions

“Uniformity is a kind of perfection that sometimes catch great minds and infallibly strikes the little ones.”<sup>93</sup> MONTESQUIEU

Despite the “Belle Époque” of conventions harmonizing legislation, great international creations are ancient, and can no longer respond effectively to the issues at stake with the contemporary evolution of global society. Today, it is no longer possible to rely only on a multilateral approach. States must use a significant bilateralism, – yet in accordance with previous agreements as the center of gravity<sup>94</sup> of the intellectual property rights protection –, which is concerning because at least, when in a multilateral strategy, a consensus was needed. From now on, the hyperpower<sup>95</sup> of the North will be able to impose its own standards to the developing countries.

Today, the European Union, in order to strengthen its competitiveness<sup>96</sup>, must adapt its strategies to new challenges of intellectual property and boost its growth while respecting its partners’ boundaries. Whether at the multilateral or bilateral level, its objectives of pro-

<sup>92</sup> *supra*. F. MORIN, *Le bilatéralisme américain : la nouvelle frontière du droit des brevets*, p.70, trans. « servir de voie d’entrée au multilatéralisme. Il [pourra] contribuer à créer des alliances accentuant la puissance de coercition de leurs membres au niveau multilatéral. Il [pourra] en outre servir de laboratoire institutionnel pour la formulation et la promulgation de nouvelles règles ».

<sup>93</sup> PORTALIS, quoting MONTESQUIEU, *Esprit des lois* (Chapitre XXIX, Livre XVII), trans. : « L’uniformité est un genre de perfection qui saisit quelquefois les grands esprits et frappe infailliblement les petits ».

<sup>94</sup> *supra*, V. RUZEK, *Propriété intellectuelle – Communautarisation et mondialisation du droit de la propriété intellectuelle*, para. 3.

<sup>95</sup> *supra* RICKETSON, J. GINSBURG, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*: “More generally, the move towards bilateralism must have implication for the multilateral system as the bilateral agreements come to contain stipulations that reflect the domestic standards of the hyperpower”.

<sup>96</sup> *supra*. B. RICHEL-BAUM, *La nouvelle politique commerciale de l’Union Européenne : véritable choix ou simple conformisme ?*

tecting innovation and the growth of creation must be achieved. In this direction, the European Commission proposes some paths for the future<sup>97</sup>. Needless to remind that whether in a now uncommon multilateral approach or a very used bilateral one, the EU – and States in general – must be careful not to exceed the abilities’ contractor to conclude agreements, while meeting the initial needs of protection. Nevertheless, it must be borne in mind that it will only be through a full international and global cooperation, therefore multilateral negotiations, that innovation and creation will be stimulated and fully protected. Even if the trend, today, is the one of bilateralism, we must remain hopeful as for the establishment of a new multilateralism in a connected and globalized economy.

If in the Game of Thrones, John Snow had chosen a bilateral approach to fight the White Walkers with Daenerys Targaryen, the Night King would be ruling over in a unilateral way. Instead, we now have a living King chosen by the Seven Kingdoms in a multilateral way. Should we hope for the same “happy ending” in intellectual property, with multilateralism finally finding its way back thanks to international organizations works? Despite the speed of technological changes towards the slowness of international negotiations, explaining why bilateralism is nowadays the most used way to reach a better intellectual property protection, there is still hope for multilateralism. Indeed, “It is easier to make rules and get agreement among a smaller number of states than it is to do so with the whole world. This shift in the international landscapes is a major challenge for multilateralism”<sup>98</sup>. Don’t forget that French saying: in the end, “l’Union fait la force”<sup>99</sup>.

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<sup>97</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN AND SOCIAL COMMITTEE *Trade, growth and intellectual property – Strategy for the protection and enforcement of intellectual property rights in third countries* /COM/2014/0389.

<sup>98</sup> WIPO, Francis GURRY *on the challenges for multilateralism in the field of IP*, WIPO Magazine No 5, October 2016, p.4.

<sup>99</sup> S. A. STROWEL, “Intellectual property rights at the bilateral and multilateral levels: How to reach consistency?”, *IPdigIT*, 2016: “Why then not make these agreements work together to achieve these common goals? Some will say l’union fait la force, to which other will respond: easier said than done”.

**List of abbreviations**

EU European Union

US/USA United States / United States of America

TRIPS Trade-Related Aspects of Intellectual Property Rights Agreement

WIPO World Intellectual Property Organization

WHO World Health Organization

WTO World Trade Organization

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