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COMPETITIVENESS AND INTELLECTUAL PROPERTY, MEGA TRENDS IN THE INDUSTRY THAT PRESENTS FOR THE FUTURE

COMPETITIVIDADE E PROPRIEDADE INTELECTUAL, MEGA TENDÊNCIAS DA INDÚSTRIA QUE SE APRESENTA PARA O FUTURO

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Abstract

This article studies intellectual property and its effects on the competitiveness of national states. Nowadays, there is an almost ideological dispute between the agreements of the world trade organization and other organizations such as the World Intellectual Property Organization. The first views intellectual property as a commodity and the second as a good with uses according to the wishes of its creator. Intellectual property, more than any other good or service, brings important effectors in labor productivity and the production of wealth, hence the relevance of this study. The case of Brazil is very important, since this country has the greatest biodiversity on the planet and its industry must be guided by this characteristic. This is another point that expands the relevance of this study, to guide new discussions about a new industry in Brazil.

Keywords: WTO and WIPO; Economic development Intellectual property; Competitiveness.

Resumo

Este artigo estuda a propriedade intelectual e seus efeitos na competitividade dos estados nacionais. Há nos dias atuais uma disputa quase que ideológica entre os acordos da organização mundial do comércio e outras organizações como a World Intellectual Property Organization. A primeira exerga a propriedade intelectual como uma mercadoria e a segunda como um bem com usos segundo q vontade do seu criador. A propriedade intelectual, mais do que qualquer outro bem ou serviço traz efeituadores importantes na produtividade do trabalho e a produção de riquezas, daí a relevância deste estudo. O caso do Brasil é muito importante, visto que este país possui a maior biodiversidade do planeta e sua indústria deve-se pautar nesta característica. Este é outro ponto que amplia a relevância deste estudo, para orientar as novas discussões sobre uma nova indústria no Brasil.

Palavras-chave: OMC e OMPI; Desenvolvimento Econômico; Propriedade Intelectual; Competitividade.

EMERGENCE AND NATURE

After World War II the intellectual property rights have undergone major transformations. Before that, international system of protection of those rights arose from the Unions of Paris (1883) and Berne (1886) stood almost unchanged for longer than fifty years. The structures and features originated from the Unions were archaic and didn't cover the real needs of intellectual property rights protection but left a legacy for International Law. With the evolution and the emergence of international organization became necessary a new discussion on international community about this protection. The Stockholm Convention in 1967, established the World Intellectual Property Organization, based on Genève and, due to the relevance of the new organization, the appeal for the universal coverage of intellectual property rights and the trans-nationality of its relations, was considered in 1974, as an UN special agency (DOMINGUES, 2005).

WIPO came as a response to international community that needed to organize itself according to new needs and changes occurred on the post-war. Basso (2000, p. 146) asserts that, until the establishment of World Trade Organization – WTO, "WIPO was considered the main international center of promotion of intellectual property rights".On international relations context, as observed by Polido (2011), the World Intellectual Property Organization, has dominated until TRIPS Agreement creation, and the consequent creation of Council for TRIPS on World Trade Organization's institutional framework.

However the role played by WIPO on assuring the respect of authors and inventors rights, this international organization had a restriction of imposing sanctions. So, Del'Omo explains (2015, p.261) that the "industrialized countries felt the need of reviewing the treaties in order to set dispute settlement mechanisms". Under the sponsorship of the United States, around 1947, the United Nation Economic and Social Council held a Conference on Trade and Employment, where the General Agreement on Tariffs and Trade – GATT, written, basically, by England and United States (REGO, 2001). With the goal of avoiding recurrence of trade war in 1930, GATT proposed multilateral rules for international trade.

A concern has started on protecting the intellectual property rights and the multilateral trade regime, but in a very low way, only mentioned by some articles. This treaty did not have specific norms on intellectual property rights protection, provided only hypotheses by which determined goods protected by intellectual property rights would not compose barriers to legitimate trade (POLIDO, 2011). The importance of making the relationships among trade and intellectual property more precise was noticed, through a more effective system of protection more that bought a broader technologic development and more direct investments for trade, fact that did not happen before the insertion of TRIPS on GATT.

> *The deepening of intellectual property protection on international order stands on the new substantial harmonization established on many levels – multilateral and regional – with the adoption of protection expansionist standards and consequential limitations on users of technology goods and information rights (POLIDO, 2011, p. 83).*

The Uruguay subject of intellectual property rights protection to discussion, characterized by the divergences among the developed and on development countries (DOMINGUES, 2005). Round negotiations, the broadest and most complex of all GATT's rounds. The interest on complete the deficiencies of the intellectual property protection system of WIPO and the need to link the subject to trade (BASSO, 2000) were, among others, the main reasons of TRIPS' inclusion on GATT.

Developed countries, especially the Unites States, tried to take intellectual property to GATT's scope, "on the sense of seeking a larger protection to intellectual property rights" (BASSO, 2003, p. 18), but the developing countries did not accept, because they knew they would be the most harmed. As it can be observed, the insertion of intellectual property rights on the scope of multilateral trade was one of the greatest results of Uruguay's round, with the creation of the World Trade Organization – WTO and the adoption of TRIPS Agreement. Furthermore, "when placing the intellectual property on WTO, it became the object of mandatory dispute settlement mechanisms" (ALBUQUERQUE, 2004, p. 39).

As analyzed, the enforcement on January 1st 1995 of the international treaty of the TRIPS Agreement, that was closed in the Uruguay Round and established WTO, determined the permanent binding of WTO's Member-States and caused the progressive observance of the intellectual property protection norms. Therefore, the endorsement of TRIPS Agreement became a compulsory requirement for instance to affiliate on the World Trade Organization. Based on this analysis, Almeida e Knewitz (2013) emphasize that the country that wished to compose the international market should join the standards set by TRIPS. The enlightening teachings of Basso (2000, p.159) highlight that there are two reasons that determined the inclusion of TRIPS on GATT, specifically: "the interest on supplementing the deficiencies on WIPO's intellectual property protection system, and the second, the need to definitely link the subject on international trade". WTO's constitutive scenario, as points out Maristela Basso can be stressed on the following terms:

> *The annexes 1, 2 and 3 of WTO's Agreement incorporate the group named "Multilateral Trade Agreements" and are mandatory to Member-States. The annex 4 is composed by "Pluri-lateral Trade Agreements", which are optional, binds only the countries that accepted it (BASSO, 2000, p. 173).*

TRIPS compose the Annex 1-C of the General Agreement that establishes WTO, integrating a complex of Multilateral Trade Agreements and, it should be pointed out that the WTO is an independent economic-commercial international organization and not an

UN's special agency. TRIPS' nature is a contract-treaty, different from law-treaties, once the member-States do not need to play the role of legislator.

> *The 'contract-treaties' creates international conduct duties on international order and not on internal order of Member-States, that only can be required by other or others treaty's member-States. The ones who are not member are unable to demand its fulfillment, as happens with contracts, on the Civil Law of Obligations (BASSO, 2000, p. 174).*

According to Barbosa (1998, p.87), "the recipients of TRIPS' norms are the WTO's member-States. None subjective right results for private parts, on the validity and application of TRIPS". The member States of the TRIPS Agreement committed to implement, on their National Law systems, the minimum protection standards set in common (BASSO, 2000). Therefore, they appointed the most appropriated way of fulfilling the rules set on the agreement.

In spite of the internal procedures to be adopted by WTO's member states Baptista (1996, p.17) explains on a didactical way that the member-States should "create a legislation that observes a ground" and put an internal norm of juridical operation in place. Thus, the countries are free to adapt the Agreement norms to the current rules on their law systems. Article 1 of the TRIPS Agreement reports the nature and coverage of the duties obligation brought specifically on their contractual essence:

> *1.1 The members shall take effect the disposed on this Agreement. The Members might, but won't be enforced to provide in its legislation, protection broader than that required by this agreement, provided that such protection does not contravene the provisions on this Agreement. The Members will determinate freely the appropriate form to deploy the provisions on this Agreement on the scope of their corresponding law system and legal practice (INPI, 1994).*

Under this context, a violation of TRIPS Agreement will remain typified when the member-States don't fulfill the minimum standards established on the Agreement.The fundamental basis of TRIPS Agreement is the "cooperation among the States-parties and, if necessary, the multilateral trade agreement can go through the jurisdiction of WTO's Dispute Settlement Mechanism" (POLIDO, 2013, p.110), when there is not a common understanding among constituent parts of the Agreement or if there is a violation of minimum standards stablished on the agreement. The Dispute Settlement Mechanism analyzes the consultations and discussions that relate the principles or operation of any agreement granted on World Trade Organization. As taught by Caparroz (2016, p.136),

> *The Dispute Settlement Mechanism emerged as an answer to the need to grant legal security and effectiveness for the provisions on the multilateral agreements, so that the countries that felt harmed by commercial practice of other WTO member could settle the dispute, through an adequate agreement or, ultimately, by applying appropriate sanctions.*

As Barbosa teaches (2003, p.55), the TRIPS Agreement has the following structure: a) General Provisions and Basic Principles; b) Standards Concerning the Availability, Scope and Use of Intellectual Property Rights; c) Enforcement of Intellectual Property Rights; d) Acquisitions and Maintenance of Intellectual Property Rights and Related *Inter-Parties* Procedures; e) Dispute Prevention and Settlement; f) Transitional Agreements; g) Institutional Arrangements; Final Provisions. The intellectual property rights contents that composes the minimum standards of protection are on Section II of the Agreement: Copyright and Related Rights; Trademarks; Geographical Indications; Industrial Designs; Patents; Layout Designs (Topographies) of Integrated Circuits; Protection of Undisclosed Information; Control of Anti-Competitive Practices in Contractual Licenses. This time, TRIPS represents a key milestone on strengthening the intellectual property rights on contemporary international society and the binding of those rights to international trade.

OBJECTIVES AND SCOPE

Before the TRIPS Agreement came into force on the international level, the intellectual property norms were connected to internal law. There were two main concerns that the TRIPS agreement: one was the need to supplement the deficiencies of the protection system brought by WIPO; the other one, was to bind, definitively, the intellectual property rights protection to international trade.

Pursuing the reduction of "the distortions and obstacles to international trade", as well as, "the need to promote an effective and suitable protection of intellectual property rights" (INPI, 1994), are the TRIPS agreement main goals, widely discussed on the Uruguay Round, that are expressively provided on its preamble. The TRIPS Agreement preamble orientates that the Member-States must make sure that "measures and procedures to intellectual property rights observance cannot serve as barrier to legitimate trade". It is recognized that, through this overview, that the intellectual property rights protection would become an obstacle to legitimate trade, in case of not being inserted in a system of general standards.

In this scenario, TRIPS arises as a multilateral organization of understanding and dispute settlement, responsible for five main points reinforced by Caparroz (2016, p.145), specifically:

> *To enforce basic principles of trade and of the other intellectual property agreements; provide adequate protection for intellectual property rights; the countries must ensure those rights on their territory; settle disputes on intellectual property among WTO members; the use of transition special agreements during the new system introduction phase.*

Article 7 of the TRIPS Agreement reasserts the social purpose that the rules of protection of intellectual property rights must mainly have the observance of public objects of social and economic welfare:

> *The protection and application of norms of intellectual property rights protection must contribute to technologic innovation promotion, and for technology transfer and diffusion, on mutual benefit of users and producers of technologic knowledge in a way that leads to social and economic welfare and a balance among rights and duties (INPI, 1994).*

TRIPS establishes that the Members must endow and vest in local authorities – legal and administrative – specific powers and capacities to adopt measures of intellectual property rights protection (POLIDO, 2013). The Agreement has the goal to reduce tensions among states that compose it through the commitment to settle disputes regarding intellectual property, using multilateral procedures brought by article 64 and on annex 2 of the General Agreement. Fair balance of rights and duties must exist among manufacturer and technology users, seeking the economic and social welfare, key features from TRIPS' norms (BARBOSA, 2003). The Agreement's creation had as one of its main goals to reduce the trade barriers among its States Parties, though the adoption of cooperation policies, as article 67 sorts:

> In order to facilitate the Agreement's application, developed countries Members shall, upon request and on mutually agreed terms and conditions, provide technical and financial cooperation to developing country Members and least developed Members. Such cooperation shall include assistance in the development of laws and regulations on the protection and enforcement of intellectual property rights and on the prevention of their abuse and shall include support for the establishment and strengthening of national offices and agencies competent in such matters, including In staff training (INPI, 1994).

Under the lessons of Basso (2000), the TRIPS Agreement is based on norms of mutual cooperation, consensus, loyalty and prudence, under the scope of conducting a joint enterprise, in order to promote a shared interest. Therefore, it is asserted that TRIPS was arranged with the goal of "reducing the differences on how the rights related to Intellectual Property are protected all over the world, and to bring them under international common rules" (ALMEIDA; KNEWITZ, 2013, p. 196). In this way, it seeks to balance long term benefits and short-term costs to international society.

The TRIPS' norms recipients are WTO's Member-States and no subjective right result for the private part of the validity and application of the Agreement, as disposed on article 1.1, already transcribed on this chapter. It demonstrates, based on this mechanism, two immediate consequences from the agreement: the first one brings the idea that those norms are a minimum ground of rights ensured to the assignee; and the second, is about the agreement's applicability time, which should not be immediate, but be implemented according to constitutional systems of Member-States. On this activity, Maristela Basso consigned that many countries, especially the developed ones, "have ratified TRIPS, and because of its non-executory or no *self-executing* nature, have adopted laws to incorporate the Agreement's dispositions on their legislation" (BASSO, 2000, p.177).

It is emphasized, that for Member-States it is optional to dispose on their internal laws' protection broader than what is predicted on the treaty. The provisions contained on TRIPS are not independent and can't be directly applied, because they dictate the minimum criteria of protection, and not the exact content of those rights (BASSO, 2000).

The diverse principles and interests

In order to understand the guiding principles of TRIPS Agreement, it must be stressed that it is based on the incorporated principles on the Paris Union Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works[1]. The principles are sources of law that must also be applied on international treaties, including the TRIPS Agreement. It is important to underline that the TRIPS Agreement principles must be in accordance to the World Trade Organization's Constitutive Agreement and are compulsory to signatory countries.

Under the clarifying point of view of Roberto Caparroz, both fundamental principles of GATT succeed, "which sustains all negotiations base under the scope of the World Trade Organization: the National Treatment (article III) and the Most Favored Nation Clause (article IV)" (CAPARROZ, 2016, p.147). The TRIPS Agreement integrates norms from Paris and Berne Conventions, enhancing the traditional systems on intellectual property rights protection under the regulatory framework of international trade.Nonetheless, the international treaties involving important rules regarding the conflicts of laws in space don't regulate the matter in a comprehensive manner, suggesting, in this way, that other elements fill their gaps. Thereby, the need to rely on the common principles of the TRIPS Agreement and of World Trade Organization to solve the deficits of those agreements is realized.

The single undertaking principle

The single undertaking principle is specifically provided on lines 2 and 3 of article 2nd from Uruguay Round Final Act and determines that TRIPS is an inseparable part of World Trade Organization. It is a fundamental principle to understand the approach of WTO's system. According to this principle, TRIPS makes no provision for reservations.

Basso (2000, p.179) clarifies that "it is not possible to join only part of the Agreements, under penalty of breaking its structural balance and logic, with the exception made for the 'Pluri-lateral Trade Agreements', from Annex 4". The unity of the system runs from this principle, which is why TRIPS must be considered within the World Trade Organization structure.

The National Treatment Principle

[1] The Paris Union Convention (Industrial Property) was signed in 1883 and the Berne Convention (Literary and Artistic Works) was formed in 1886. Both major conventions established the international system of intellectual property rights protection.

Acknowledged as guiding of all WTO's establishing agreements, this principle integrated the structural layout of GATT in 1947 on articles I and III. The National Treatment principle is a contumacious rule on international treaties of intellectual property that forces the member-States to concede no less favorable treatment than the one provided for their own nationals in relation to protecting the rights due to intellectual creation. As well pointed out by Almeida (2013, p.192), "the imported products must receive the same tax treatment as their national equivalent, in order to oppose protective or discriminatory measures". Foreign countries, as disposed on article 3 of TRIPS' agreement, must comply with the rules imposed to nationals, on the following terms:

> *Each Member shall grant nationals from other Members no less favorable treatment than the conferred to their own nationals related to intellectual property right protection, except for those already foreseen cases, respectively, on the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and on the Treaty of Intellectual Property in Respect of Integrated Circuits. Regarding performing artists, phonogram producers and broadcasting organizations, this duty applies only to rights provided on this Agreement. Every Member that makes use of the possibilities provided on article 6 of the Berne Convention and at paragraph 1(b) from article 16 of Rome Convention will notify, according to those dispositions, to TRIPS Council.*

Polido (2013, p.55) makes important comments regarding national treatment:

> *On the edge, the national treatment principle contributed as a paradigm not only for progressive development of the International Law of Intellectual Property, but also to protect the intellectual property owners' interests, that could indistinctively claim on the protection of inventive and creative activity at all frameworks of TRIPS' Members under the same standards granted to nationals on developing countries.*

According to this principle, the unequal treatment among national and imported products is forbidden, when the goal is to discriminate the imported product impaired the competition with the national product (BRASIL, n.d), given that both can exercise the right. The National Treatment not only imposes to internal legislations in order to avoid discriminations against property rights against foreigners. Furthermore, the non-discrimination principle established by the Paris and Berne Conventions, later invigorated by the TRIPS Agreement, "based on the premise that national law are the ones that grant protection to intellectual property rights" (LUCHESI, 2007, p.374).

It is also important to stress that, as article 5 of the TRIPS Agreement determinates, the duties of this principle don't apply to procedures provided on multilateral agreements closed under the auspices of WIPO related to obtaining and maintaining the intellectual property rights (BASSO, 2000).It can be deduced from the quoted article that TRIPS recognizes, in case of disagreement, the supremacy of rights

and duties established under the scope of the World Intellectual Property Organization (CAPARROZ, 2016).

Most Favored Nation Principle

The article 4 of TRIPS Agreement focuses on one of the WTO's most important principle and establishes that regarding intellectual property protection, every benefit, favoring, privilege or immunity that a Member grants to nationals of every other country will be awarded immediate and unconditionally to nationals of all other Members (INPI, 1994). On the clarifying point of view of Almeida (2013), this principle disposes that any commercial concession made in benefit of a Member State must be extended, also, to all signing countries. It is considered one of the pillars of World Trade Organization and is a part of the history of GATT/1947. The exceptions to this principle are listed on the final part of the 4th article, on the following terms:

> *(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members. (INPI, 1994).*

The equality protection must exist among all Members of TRIPS' Agreement, no Member State must receive preference, regardless economic power and development level. Therefore, if any kind of advantage occurs to any of the States that are members of the Agreement, it has to be conceived to others, respecting the appropriate exceptions.

Principle of exhaustion of rights

According to the principle of exhaustion of rights, or international exhaustion, the intellectual property rights on specific products are exhausted when the owner, or a third party with his consent, insert it on a given local Market, whether commercializing or selling it. Under the lessons of Polido (2013), without the application of the exhaustion of rights, it would be possible to perpetuate the control on the sale or distribution of protected intangible goods, therefore, the act of the first sale or commercialization is fundamental to establish the end of the control the product owner exercises.

It should be noted that this exhaustion can be national, when the exhaustion of the owner's rights happens on the internal Market of a country; and international, which repercussions are larger when the product is commercialized in any place of the world,

once the sale and importations of these products are open on the importing Estate which the trademark has been registered to. There still is the supranational exhaustion that takes place on the European Common Market (BASSO, 2000). On this matter, Barbosa (2003, p.59) explains the principle of exhaustion of rights, namely:

> It is the doctrine under which once the owner had earned the exclusivity economic benefit (set in trade), through, for example the sale of a patented product, the patent owner's rights cease. Remain only, the reproduction exclusivity.

The 6th article of TRIPS Agreement provides that for the purpose of solving disputes on the scope of this Agreement, and without harming what is disposed on articles 3 and 4, nothing on this agreement will be used to deal with the matter of intellectual property rights exhaustion (INPI, 1994). This principle sets, under the interpretation of Basso (2000, p.182) the "possibility to legally import a product protected by intellectual property rights, since it is introduced, on the Market of any other country, by its owner, with his consent". In Brazil, the national exhaustion is regulated on article 43, IV and the international Exhaustion, on article 188, II, from Law 9.279, from May 14, 1996, as follows:

> Art. 43. The provisions of the previous article do not apply: (...) IV – a manufactured product according to a process patent or product that entered the local Market directly by its patent owner or with his consent; (...) Art. 188. Commits a crime against registration of an industrial design who: (...) II – imports a product incorporating industrial design registered in the country, or substantial imitation that can mislead or confuse, for the purposes set on the preceding paragraph, and which has not been placed on the foreign Market directly by the owner or with his consent.

Under the lessons of Polido (2013, p.487), "Brazil is free to apply the international exhaustion on its intellectual property local system", which includes new legislative proposals and new case law orientations. The Brazilian law provides for the patents and trademarks exhaustion, article 68 of referred law admits, on paragraph 3 and 4, the import of products manufactured according to process patent or product by third parties, provided that they have been inserted on the market directly by its owner or with their consent, and yet, that the product was not manufactured in Brazil, in other words, the owner is merely importing (BRAZIL, 1996).

The Transparency Principle

The transparency principle reflects substantially at the pressure to protect some sectors of national economy. According to Almeida and Knewitz the protection "shall be achieved by the use of differentiated tariffs, that represents a clear and unmistakable value of the protectionism degree aimed, without the use of subterfuge or non-tariff barriers" (2013, p.192-193).

It corresponds to one of the core principles of the GATT/OMC system, and remains applicable, on the whole, to trade in goods, services and technologies. That which is provided on article 63 is considered fundamental on WTO's structure and on TRIPS Agreement, once it has an important role on conduct transparency of signing parts. Under the lessons of Basso (2000) the "Council for Trade Related Aspects of Intellectual Property Rights" – TRIPS Council role is to oversee the implementation of the agreement; therefore, the publicity of the regulations is indispensable.

> *The signing parts pledge to notify the TRIPS Council of the law and regulations above referred, in order to help in its functions. The Council will try to minimize the members' onus on fulfilling this obligation and may even dismiss them, if completes with WIPO the understanding on the establishment of a common registry (BASSO, 2000, p.184).*

Thus, the main implication of this principle is the external control on the reach of those measures, adopted by the members on exercising their sovereignty, restricting the potential deviating effects regarding the multilateral trade system unity.

The International Cooperation Principle

The TRIPS Agreement provides, respectively, on articles 67 and 69 regarding technical cooperation and international cooperation among WTO's member, the precognition to eliminate from trade the goods that break intellectual property rights. Article 67 of the agreement provides that the developed countries make available to less developed countries, technical and financial assistance for effective protection to intellectual property rights:

> *In order to facilitate the application of the present Agreement, the developed countries Members, if asked, and under terms and conditions mutually agreed, will provide technical and financial cooperation to developing countries' members and less developed countries' members. This cooperation shall include assistance on law and regulations development on intellectual property rights protection as well as on the prevention of its abuse, and shall include support on the establishment and strengthening of national offices and agencies responsible for those matters, including the staff training (INPI, 1994).*

The cooperation principle appears on TRIPS preamble, and consecrates itself, definitely, on article 69 (BASSO, 2000). The original purpose of this article was to benefit cooperation among the World Trade Organization members in order to "reduce violation practices of intellectual property rights on international economic traffic" (POLIDO, 2013, p.394). Article 69 of the agreement provides the obligation of a Member to establish and inform its contact points in his respective administration to control and eliminate goods objects of piracy on trade channels.

> *The Members agree on cooperating among themselves with the goal of sweeping international trade of goods that violate intellectual property rights away. For this purpose, contact points in its respective national*

> *administration shall be established, from which will notify and will be ready to exchange information on trade of transgressor goods. Particularly, the exchange of information and cooperation among customs authorities regarding trade of goods with infringed marks and pirated goods shall be promoted (INPI, 1994).*

Included on every treaty that constitutes WTO, the international cooperation principle is one of the most important on this institutions structure, whose main purpose is to promote common interest through mutual cooperation norms.

International cooperation is the mechanism to be used in order to banish the harmful effects and the externalities of piracy and counterfeiting practices. TRIPS aimed to assure, according to Polido (2013, p.395), the creation of "contact points" on Members which would be delegated the tasks of exchanging and notifying information related to trade of counterfeit goods. In this regard, Basso (2000, p.185) classifies cooperation as internal and external. Internal cooperation is the one that occurs among WTO's Member States; external cooperation is the one that happens among TRIPS and WIPO and other international organizations relevant on intellectual property rights protection.

The Principle of Interaction between International Treaties on the Matter

The TRIPS Agreement did not arise with the pretention of substituting treaties that preceded it, actually, it represents a complementary character regarding the other documents that recognize the mission of protecting intellectual property rights.

This commitment is acknowledged on article 2 of the Agreement:

> *2.1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). 2.2. 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. (INPI,1994).*

It is important to stress that the obligations undersigned on Paris Convention prevails over TRIPS (BASSO, 2000), there is no break between the treaties, once they neither exclude each other nor dispute the preference on regulating the legal relationship, on the contrary, they add up and complete each other, always prevailing good judgment.

The systemic interaction among trade and intellectual property exceeds the substantive and procedural rules to protect the goods resulting from creative and innovative activity and gives space to international dispute settlement related to breaches of obligations of those treaties, while its norms are expressively incorporated by reference on TRIPS (POLIDO, 2013).

On this dynamic, Basso (2000, p.187) understands that:

> *Both documents represent the current protection of intellectual property rights, its relations are of interaction, not "conflict", because we are under the context of international law of cooperation not coexistence, where are common the conflicts among sources.*

The Paris Convention does not intend to regulate the international property rights, while TRIPS is orientated to this topic.

The Evolutionary Treaty Interpretation Principle

The clauses of TRIPS Agreement must be interpreted according to the evolution matter: This is the reason why one of the main characteristics of this agreement is dynamism. The minimum standards set by TRIPS must be followed by Member States, which "shall be incorporated on their local legislations, through its own mechanism, considering that this is not a self-enforcing agreement" (BASSO, 2000, p.188).

Based on economic, social and cultural reality and of its own law system, each State must observe the Agreement's basic principle, and if a multiple clause interpretation occurs, the decisions of WTO's Dispute Settlement Mechanism (DSM) shall be observed, which will serve as a standard for a common interpretation.

IMPACTS IN DEVELOPED AND DEVELOPING COUNTRIES

The entry into force of TRIPS Agreement marked an important phase on intellectual property rights protection. The negotiations occurred during the Uruguay Round among developed and developing countries and established the organization of technology transference on the international scenario. The inclusion of TRIPS on GATT stressed the importance of intellectual property rights for the multilateral trade system. On the same line, Maristela Basso states that before the inclusion,

> *the relations between intellectual property were neither precise or determined nor could the consequences to come be perceived, on international Market, of a more effective protection system, which could bring more technological development, more foreign direct investments and more trade (BASSO, 2000, p.155).*

The developed countries, led by the United States, endowed by major industries and transnational companies, sustained and defended the intellectual property protection as a tool of innovation and investments on markets (Polido, 2013), regardless the degree of economic development of each country (BASSO, 2000). On the other hand, the developing countries demonstrated the asymmetries among Northern and Southern countries, regarding the capacity of technology and investment transference. According to Basso (2000, p.165) the developing countries "had the concern of ensuring the secure access to modern technology through a larger protection of intellectual property rights", they did not know who would have this access in practice.

Some developed countries such as Japan and the European Community members emphasized the "need of promotion of intellectual property rights protection on the multilateral system" (Polido, 2013, p.43), however, eventual abuse on exercising the right of exclusivity or practices considered obstacles to legitimate trade should be avoided (BASSO, 2000). Nonetheless, the international effort for the intellectual property protection to be applied equally to member States of the agreement, the difficulties and realities each member faces is different. The developing countries usually don't have resources to invest on technology and research, while the developed countries invest vast amounts to develop new technologies (PEREIRA, 2007).

On the conflict of divergences, the interests of developed countries prevailed. Coelho points that "the industries lobby was very strong and even with heavy opposition from Brazil and India, TRIPS was approved" (ALMEIDA, 2013, p.234). Sherwood (1992, p.159), defends the protection of intellectual property rights for developing countries, after analysis in a case study done in Brazil and Mexico which provides a perspective on the economic aspects of those rights, specifically:

> *The effective protection of intellectual property will help developing countries to walk on two directions: one in the sense of participating on the emergent technology global networks; the other one in the direction of strengthening the human creativity on the country's economy scope. The intellectual property protection is available to any developing country that wants to receive its benefits.*

The large companies that create technology are located, mostly on wealthier countries, which is why the protection to intellectual property rights is primary to carry on investments in research and development of new products. However, the developing countries, for lacking state of the art companies, need to establish policies to incentive research, which don't depend as much from foreign countries and can define a stronger technologic basis (CAPARROZ, 2016).

On the subject, Gontijo (2005, p.12) reinforces this understanding about developing countries:

> *The standardization of intellectual property rights at a high level, don't bring benefits to companies of developing countries and, in contrast, stimulates the inventions on companies of developed countries, freezing and perpetuating a situation of technical distance that only tends to increase.*

TRIPS, through article 69 already referred on this chapter, seeks consensus and cooperation among the States that compose it. Both developed and developing countries won and lost something. The developed ones aimed for more protection for intellectual property rights. In return, the developing countries aimed to assure technology dissemination, pointing out the asymmetries North-South and "committed to implement effective and appropriate measures to apply norms for protection of those rights related to trade" (BASSO, 2000, p.169).

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THE INTERNALIZATION OF THE AGREEMENT ON BRAZILIAN'S LAW SYSTEM

The Brazilian Constitution assures the protection of intellectual property both in the form of copyright and in the modality of industrial property, on article 5, lines XXIX and XXVIII respectively:

> ***Art. 5th*** *Everyone is equal before the law, without any distinction, assuring to Brazilian and foreigners residing in the country the inviolability of the right to life, freedom, equality, security and property, under the following terms:*
>
> ***XXVII*** *– the authors have the exclusive right to use, publish or reproduce their Works, which may be transmitted to the heirs for the time fixed by law;*
>
> ***XXIX*** *– the law will grant to industrial inventors a temporary privilege for their use, as well as protection to industrial creations, trademark ownership, company names and other distinctive signs, in view of the social interest and technological and economic development of the country.*

By the reading of line XXIX, which determines the legal protection of industrial property rights, it is noticed that this right is limited by social and public interest. On the opinion of Araújo (2015, p.4) the "Brazilian policy of intellectual property have always been tied to international development on this matter", since Brazil signed and ratified the most important international conventions on the matter, specifically: the Paris and Berne Conventions for the protection of industrial property and literary and artistic Works, respectively; the Agreement Concerning the International Patent Classification; the Patent Cooperation Treaty; the International Union for the Protection of New Varieties of Plants; and the TRIPS Agreement (BASSO, 2003).

It is important to clarify that Brazil's participation on World Intellectual Property Organization – WIPO, as Casella elucidates (2008, p.97), it goes back a long time and "has been aligned with the action on several of multilateral organizations and the range of the so called 'United Nations' family".

As mentioned before, the TRIPS Agreement, of which Brazil is a signer, is an integral part of a larger international agreement, which is the Agreement establishing the World Trade Organization – WTO, which possesses TRIPS as one of its five Annexes. Precisely, Basso (2003, p.27) stresses in notable article, that the norms of TRIPS Agreement entails two kinds of effects: external, which "are related to obligations undertaken with WTO"; and the internal effects, regarding "the entry into force on Brazilian law and executing in Brazil".

Actually, the effects mentioned by the referred author relate to the deadline to TRIPS rules that become applicable in Brazil. In obedience to what the TRIPS Agreement provides, everything in accordance with the Brazilian system for approval of international treaties, was approved by the National Congress the Agreement Establishing WTO, through the legislative decree nº 30 of December 15, 1994, enacted by the presidential

decree nº 1355/94, which incorporated the Final Act of Uruguay Round of Multilateral Negotiations of GATT.

After publishing on the Official Journal of the Union on December 31st 1994, an internal process of reviewing and adapting the legislations on intellectual property initiated in Brazil, in order to observe the minimum standards of protection and TRIPS requirements. Despite being enacted on 1994, TRIPS became effective on January 1st, 2000, only five years later, since it had the benefit of a transition period estimated for developing Member-States, condition applied to Brazil.

> *Brazil notified WTO in 1997, clarifying that benefitted from the transition period, which was made ad cautelam, in benefit of transparency, because, in a meeting in February 22, 1997, the TRIPS Council registered that the benefit of the transition period would occur regardless of formal communication by the member States to WTO (BASSO, 2003, p.28).*

It can be said, in general lines, that the validity and enforceability of TRIPS are set based on general criteria (general transition regime) and specific (especial transition regime). The General Transition Regime, 65.1 of the TRIPS Agreement and benefits all the signatory States of the Agreement without distinction. The referred article prescribes that the enforcement of obligations provided on TRIPS won't be required before the elapsed the general deadline of a year after the Agreement Establishing WTO entering into force. The provided on article 65.2 establishes the deadline of the Special Transition Regime for developing Member-States, which can benefit of a four year additional period, exception made on articles 3, 4 and 5 of the TRIPS Agreement, therefore, the total of this special transitory period is of five years (BASSO, 2003).

One more time, is important to stress that the TRIPS Agreement don't generate obligations to legal people of private law, for having a nature of a contract-treaty, the dispositive on the Agreement directly prescribes rights to Signing-States (BARBOSA, 2003). Some laws related to industrial property protection and copyright arose after the enactment of the TRIPS Agreement. On this matter, the background of Brazilian law of intellectual property lists:

> *1. Law nº 9.279, of May 14: Regulates the Rights and Obligations Related to Industrial Property;*
>
> *2. Law nº 9.456, of April 25 1997: Discipline the Crops Protection and Give Other Arrangements;*
>
> *3. Law nº 9.610, of February 19 1998: Changes, Updates and Consolidates the Legislation on Copyright and Give Other Arrangements;*
>
> *4. Law nº 9.609, of February 19 1998: On the Intellectual Property Protection of Computer Software, its Commercialization on the Country and Give Other Arrangements.*

It is important to stress that, once the transition deadline elapsed, discrepancies between TRIPS and the national legislation will be up to the legislator to fulfill and adapt

to the Agreement's disposition, under penalty that if Brazil violates the Agreement, it will have to answer before the Dispute Settlement Mechanism of WTO (BASSO, 2003).

On the matter, Basso (2000, p.305) clarifies that "Violation of TRIPS Agreement will only be characterized if the States don't do so and, in the case of the developing Signing-States such as Brazil, if do not do so, once the transition period is over". The signing States must incorporate the Agreement's rules in their legislation, observing the transition period established for the developing and less developed countries. In general, Brazil internalized the principles and dispositions of TRIPS, the way such internalization occurred was criticized by specialists on the subject, pointing at an excessive inflexibility of the agreement's prescriptions on Brazilian law (YAMAMURA; SALLES FILHO e CARVALHO, 2008). Barbosa (2004, p.16) emphasizes as an example, the lack of use of larger deadlines to harmonize the national law granted to less developed countries. According to the author, Brazil gave in to "American's unilateral pressure, without taking advantage of fairness gains that came along with TRIPS"

FINAL CONSIDERATIONS

This article concludes that the most influential states converge on decisions that benefit their sectors. Although a lot of scientific knowledge, mainly between medicines and drugs, comes from traditional knowledge. Countries with important biodiversity are interested in protecting this heritage. There are two paths to follow: The TRIPS Agreement and the CBD. The interests of developed countries protected by TRIPS are continually being defended and imposed by the strength of the capacity of this power that is almost always unbearable. Developing countries have tried in international forums to establish alternatives that support their interests.

TRIPS is the legal basis that oversees intellectual property at the WTO. However, signatory States, especially developing countries, are obliged to follow the political rules of the Agreement that harm their interests. Developed countries are the biggest beneficiaries of the TRIPS Agreement. The Convention on Biological Diversity, ratified by Brazil on February 28, 1994, is responsible for counterbalancing the TRIPS Agreement, by sharing the results of the sustainable use of biodiversity and the traditional knowledge of local communities.

In Brazil, as in other emerging countries, the regulation of intellectual property, consolidated after a series of technological advances, influencing due to the principles established in international treaties that the country recognized. However, in relation to Brazilian biodiversity and its legal title, it can be said that there was no priority in the scope of intellectual property regulation.

The importance of the rules of procedure for these international agreements by each Member State is highlighted. As a way of regulating access to genetic resources and traditional knowledge, Law 13.123 / 2015 was issued in Brazil, regulated by Decree nº

8.772 / 2016, with the aim of facilitating the action of researchers, simplifying access to Brazil's biodiversity, aiming to guarantee the conservation of biological diversity, the traditional knowledge of communities, indigenous peoples and farmers, establishing the sharing of the results obtained with the products.

Biodiversity is one of the issues that most highlights the clash with the issue of intellectual property. The survey revealed, however, that the CBD is at a disadvantage at the international level, as it does not have clauses that establish sanctions or provide for coercion mechanisms, contrary to what TRIPS provides. At this point, the conflict between the Agreement is clear, the debate on the reform of TRIPS seeks to revise Article 27.3. (B), in order to include the patent obtained, directly or indirectly, from the biodiversity of their countries that is valued as a norm of obligation, not a negative permission.

It is recognized that this conflict is related to the regulation of access to genetic resources and traditional knowledge, and to the need to create a sui generis system appropriate to the issue of intellectual property rights, capable of offering rewards to individuals and local communities. In addition, the legal order of intellectual property would not deconstruct the emphasis on creating a protection system complementary to that provided by TRIPS. However, developed countries insist on refuting the claim by developing countries that there is incompatibility between the CBD rules and the TRIPS rules and refusing any change in the text of this Agreement.

As can be seen from everything that is available, in order to harmonize the two international agreements, it is essential that the provisions of the TRIPS Agreement be revised and amended to reconcile with the rules brought by the CBD.

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