From the Paris Convention (1883) to the TRIPS Agreement (1994): The History of the International Patent Agreements as a History of Propertisation?

Margrit Seckelmann

RESÜMEE

Anhand des Patentschutzes zeigt der Aufsatz, dass die *global governance* dieser Rechte seit der Einführung eines internationalen Patentschutzes 1883 von einer kritischen Diskussion begleitet wurde über die handelshemmende und die handelsfördernde Wirkung von Patenten sowie über den Verlust staatlicher Entscheidungshoheit. Dabei stellt die Autorin drei Entwicklungslinien heraus, die die Vertiefung des internationalen Patentschutzes im 20. Jahrhundert prägten: Ein zyklisches Aufflammen dieser Diskussion, sobald die Rechte der Patentinhaber substantiell gestärkt wurden; die Verschiebung der Konfliktlinie von einer europäischen Auseinandersetzung zu einem Streit zwischen Industrie- und Entwicklungsländern im Gefolge der stärkeren Regulierung der Weltwirtschaft nach dem Zweiten Weltkrieg; und schließlich die Neuausrichtung des Patentschutzes im Rahmen der WTO, die sich die im geistigen Eigentum angelegte Tendenz zur Ausdehnung der Schutzgegenstände in Zeit und Raum für die Integration neuer Gegenstandsbereiche und für die Formulierung strikter Teilnahmebedingungen an internationalen Handelsnetzwerken zunutze macht.

I. Introduction

The mutual acknowledgement of intellectual property agreed upon by various states between 1880 and 1890 inspired the imaginations of contemporaries. In 1889, the Swiss Law Professor Friedrich Meili characterised his fellow humans as "mobile global citizens", who could choose their state in accordance with their needs – thanks to the existence of international administrative unions.[1] In his time, these unions included the Interna-

1 F. Meili, Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums.

tional Telegraph Union of 1865/1868, the Universal Postal Union of 1874, the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886.[2] All of them formed nuclei of an international economic system, today mostly incorporated in the legal framework of the World Trade Organisation (WTO).[3]

This paper examines the process leading to the Paris Convention for the Protection of Industrial Property of 1883,[4] and the accompanying formation of the governance structure of the international patent regime and its development from 1883 to 1994.

The 110 years between the Paris Convention of 1883 and the TRIPS Agreement of 1994 can be seen as a time when the industrial society of the late 19th century was developing its rules applicable to technical knowledge and transforming them to meet the requirements of today's transnational 'information society'.[5] This process does not only apply to national but also to international rules concerning the usage of technical information. The focus of the latter issue implies a mutual acknowledgement of national patents by transnational rules monitored by international organisations (as long as no 'world patent' can be applied).

In this sense, one could argue, the history of the formation of the international governance system protecting intellectual property rights can be seen as a history of propertisation. As *Hannes Siegrist* pointed out in 2006, "interdisciplinary property research poses the question of what the optimum mixture of institutions could be for a transition from an industrial society to a knowledge and information society, and from a nation state order to a European and global order. In order to answer this question, it must extend property analysis to include an analysis of the governance of modern societies, international systems and transnational networks".[6]

Today, the World Trade Organisation is the heart of a multinational trade system that strongly regulates the trade laws of 140 states. Intellectual and industrial property rights form a part of the WTO's legal framework. This is evidenced by the fact that the *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeiting Goods* (TRIPS Agreement) of 1994[7] constitutes Annex 1 C of the legal framework

Ein Vortrag, gehalten in der Juristischen Gesellschaft zu Berlin am 05. Januar 1889, Leipzig 1889, p. 5; biographical information about Meili can be found in the post-mortem written by E. Huber, Friedrich Meili †, Deutsche Juristen-Zeitung 19 (1914), pp. 212-213.

2 M. Vec, Recht und Normierung in der Industriellen Revolution, Frankfurt am Main 2006.

3 A. Krueger, The WTO as an International Organisation, Chicago 1998.

4 The Berne Convention for the Protection of Literary and Artistic Works of 1886, for further details see E. Roethlisberger, Die Berner Uebereinkunft zum Schutze der Werke der Literatur und Kunst und die Zusatzabkommen. Geschichtlich und rechtlich beleuchtet und kommentiert, Bern 1906; P. Wauwermans, La convention de Berne (revisée à Paris) pour la protection des œuvres littéraires et artistiques, Bruxelles 1910; I. Löhr, Geistiges Eigentum in Kriegszeiten. Der Schutz von Urheberrechten und die Berner Übereinkunft im Ersten und Zweiten Weltkrieg, in: Comparativ 16 (2006), no. 5/6, p. 236 and Löhr's contribution to this volume.

5 H. Spinner, Die Architektur der Informationsgesellschaft, Hamburg 1998.

6 H. Siegrist, Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne, in: Comparativ 16 (2006), no. 5/6, p. 52.

7 Agreement on Trade-Related Aspects of Intellectual Property Rights as of April 15th, 1994.

of the WTO.[8] The *General Agreement on Tariffs and Trade* (GATT) also underwent significant change as a result of this agreement. This was due to the fact that, during the Punta del Este Conference in September 1986, the GATT contracting parties had agreed on adding trade related aspects of the protection of intellectual property to the subjects for negotiations within the GATT:[9] Reasons for the inclusions were a halt in negotiations over a revision of the Paris Convention, and the perceived need to end the 'balkanisation' of international trade regulations by harmonising existing treaties and making them more effective by means of a further linkage.[10] The negotiations of this so-called "Uruguay Round" gained momentum when the Iron Curtain fell in 1989 and Eastern European countries were considering joining the GATT.

As in 1889, the ratification of the TRIPS Agreement and the revision of the GATT in 1994 gave rise to visions of a peaceful new world (trade) order. Having experienced the recent fall of the Berlin wall, many contemporaries hoped for a peaceful self-regulation of autonomous subjects on an international level.[11]

The development of the international regulation concerning the mutual acknowledgement of patent protection can be seen as a process in which today's property structure, that underlies international trade law and international organisations, has been formed. This structure has been discussed a great deal – due mostly to the fact that it displays a specific concept of ownership of technical information, formed along the lines of the model of private property. Therefore, the TRIPS Agreement, the WTO and the GATT are all still issues of a lively discussion.[12]

The granting of patent rights[13] can be understood as a definition of property rights with regard to new technical knowledge for a limited time span.[14] During the life of the patent, the owner of the patent has the right to exclusively exploit the protected specific

8 Ch. Herrmann / W. Weiß / Ch. Ohler, Welthandelsrecht, Munich 2007, p. 45 and 51.

9 H.-D. Assmann / P. Buck, Trade Related Aspects of Intellectual Property Rights: Limitation of the Mandate or Point of Reference for the Further Development of the GATT?; in: Th. Oppermann / J. Molsberger (eds.), The New GATT for the Nineties and Europe '92, Baden-Baden 1991, p. 261.

10 For further details see e. g. H.-D. Assmann / P. Buck, Trade Related Aspects (annotation 9), p. 261; R. Dhanjee / L. Boissonde de Chazournes, Trade-Related Aspects of International Property Rights (TRIPS): Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions, in: Journal of World Trade 24 (1990), pp. 5-18; U. Joos / R. Moufang, Neue Tendenzen im internationalen Schutz des geistigen Eigentums, in: GUR Int. (1988), p. 902; R. Faupel, GATT und Geistiges Eigentum, in: GRUR Int. (1990), p. 256.

11 See for instance the foreword by Th. Oppermann and J. Molsberger, in: Th. Oppermann / J. Molsberger (eds.), The New GATT (annotation 9), p. 5; for a later assessment of the peace-keeping role of the WTO see the contributions in G. P. Sampson (ed.), The Role of the World Trade Organization in Global Governance, Tokyo 2001.

12 See for instance C. M. Correa, Intellectual Property Rights, the WTO and Developing Countries. The TRIPS Agreement and Policy Options, London / New York 2000, p. 149. As for the Declaration of Doha and its consequence, see part II of this paper and F.M. Abbott, The Doha Declaration on the TRIPS Agreement and Public Health: Lightning a Dark Corner at the WTO, in: Journal of International Economic Law (2002), pp. 469-505; ibid., WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights, in: E.-U. Petersmann (ed.), International Trade Law and the GATT / WTO Dispute Settlement System, Den Haag 1997, pp. 413-437. H. P. Hestermeyer, Flexible Entscheidungsfindung in der WTO. Die Rechtsnatur der neuen WTO Beschlüsse über TRIPS und Zugang zu Medikamenten, in: GRUR Int. (2004), pp. 194-200.

13 In the course of this paper, only patents shall be analysed. As for the international treaties regarding the copyright, see the contribution of I. Löhr.

14 According to the TRIPS Agreement, this span is 20 years.

knowledge economically. Other market participants can only gain access to the protected 'informational good'[15] (i.e. the technical knowledge) on the condition of approval by the owner. The latter is usually linked to licences which are granted in exchange for money or another type of compensation (e.g. access to other technical knowledge). This makes new technical knowledge tradable. With regard to the theory of propertisation, this process can be interpreted as a process of commodification of knowledge.

Patents will not protect mere discoveries but are limited in their scope to technical inventions with proven applicability to either products or processes (details may, however, differ significantly from country to country[16]). Unlike the author's right regarding literature, paintings and films,[17] patent rights require a governmental registration or approval procedure (again, details vary from country to country).

In most Western countries, legislation does not limit the granting of patents to new products or processes but also makes patents available for new technical applications of existing sets of knowledge. Over the last 100 years,[18] this possibility has been applied to new biochemical and medical applications of existing natural substances (namely after the Budapest Treaty of 1977[19]). Some critics view this extension of property rights as a means of securing the predominance of the Western property model in the world economy.

To give an example, the American law professor *Marci A. Hamilton* accused the TRIPS Agreement of securing a "Western, Protestant-based capitalist copyright".[20] She argues that the agreement rests on a bundle of axioms about the rights to information organised in a property-like manner which can be characterised according to the following criteria: 1. the individuality of the owner (the Western concepts disagree on the question of whether it has to be a natural person[21]), 2. the limitation of time, 3. the possibility of a technical application (instead of knowledge "as such") and 4. the exploitability of the invention instead of the sustainability of knowledge.

As a system can be as controversial as that, it is worth digging further into its construction and its history (II.). After this, the question will be posed of whether and to what extent the history of international patent protection between 1883 and 1994 can be viewed

15 K. Goldhammer, Wissensgesellschaft und Informationsgüter aus ökonomischer Sicht, in: J. Hofmann (ed.), Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter, Bonn 2006, pp. 81-106.

16 For historical examples see M. Seckelmann, Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich, 1871–1914, Frankfurt am Main 2006.

17 For further details see Isabella Löhr's contribution to this volume.

18 The German Patent Law of 1877 for instance did not initially allow the patenting of medical products: M. Seckelmann, Sittenwidrig oder nicht? Die Beurteilung der Patentfähigkeit von Verhütungsmitteln in der Praxis des Kaiserlichen Patentamts, in: C. Kleinschmidt (ed.), Kuriosa der Wirtschafts-, Unternehmens- und Technikgeschichte, Essen 2008, p. 33.

19 Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure of April 28, 1977.

20 M. A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, in: Vanderbilt Journal of International Law 29 (1996), pp. 613-634; see also S. Oddi, TRIPS – Natural Rights and a "Polite Form of Economic Imperialism", in: Vanderbilt Journal of Transnational Law 29 (1996), pp. 415-470.

21 For further details, Seckelmann (annotation 16), pp. 57-85.

as a history of propertisation, and what conclusions can be drawn from the answer to this question (III.). However, before exploring the historical dimensions of the international patent system we will briefly analyse the paradoxes underlying the problematic relationship between propertisation and international patent protection.

Propertisation and internationalisation of patent rights

The term 'propertisation' can be interpreted in a twofold way: as a process of ongoing commodification, a narrative of industrial society and – moreover – of the 'information society', where technical information becomes tradable, subjected to property rights and traded by licences.[22] However, 'propertisation' can also be seen as a heuristic category with which to analyse the governance structure regarding rights to information in a society. Is it organised in a more 'liberally exclusive' or 'liberally inclusive'[23] way: does it – for instance – allow the state to interfere with compulsory licences for the benefit of the community? The specific answer to this question invites conclusions about a society – as the social responsibility clause concerning the property right in Art. 14 of the German constitution can be seen as a constitutional indicator for the German state as being a social market economy.

The internationalisation of patent protection, therefore, reveals a serious problem, because it prevents states from setting up rules concerning technical information completely autonomously. As will be discussed at the end of this paper, this can be a serious problem for less developed countries[24] when it comes to the patent protection of medication. The most prominent example of this is the protection of patent rights of AIDS medicine in these countries, imposed by mutual acknowledgements ruled by the WTO and the TRIPS Agreement. Although the Declaration of Doha in 2001[25] made some gains for the less developed countries, concerning for instance the possibility of granting compulsory licences, the ambiguous nature of these agreements has been revealed: After the fall of the 'Iron Curtain' and the end of competition between different economic systems, it is unlikely that states will be able to develop from an "imitation industry" to an "innovation" industry[26] without being a member of the WTO. On the other hand, such agreements limit their sovereignty in specific regards that can be crucial to their social health care. The Paris Convention had its roots in the heterogeneous structure of the patent protection of more developed states versus less developed ones which wanted to take

22 W. W. Fisher III, Geistiges Eigentum – ein ausufernder Rechtsbereich. Die Geschichte des Ideenschutzes in den Vereinigten Staaten, in; H. Siegrist/ D. Sugarman (eds.), Eigentum im internationalen Vergleich (18.-20. Jahrhundert), Göttingen 1999, p. 286.

23 H. Siegrist, Die Propertisierung (annotation 6); H. Siegrist/ D. Sugarman, Geschichte als historisch-vergleichende Eigentumswisenschaft. Rechts-, kultur- und gesellschaftsgeschichtliche Perspektiven, in: H. Siegrist/ D. Sugarman, Eigentum (annotation 22), pp. 9-30.

24 In the course of this paper "less developed countries" include developing countries, lesser and least developed countries, if not specifically mentioned otherwise.

25 As for that subject, see chapter II of this paper.

26 M. Seckelmann, Industrialisierung (annotation 16), p. 8 and p. 91.

part in the developing of international commerce in the course of the industrial revolution. While in 1883 these countries were Germany, Austria and Switzerland, the TRIPS Agreement affects African and Asian states that want to be part of the world economy. The difference is that in 1883, the less developed countries had more opportunities with which to influence the regulations (although the example of the German Empire, which did not join the Paris Convention until 1903, already demonstrates the problems involved with harmonising patent systems in the late 19th and early 20th centuries[27]).
Seen from a propertisation perspective, the interrelationship of patent rights to free trade is a theoretical problem. When propertisation is seen as a heuristic category with which to analyse the underlying property structure of a community or state, the existence of patents is completely connected to a state that can grant a patent (or to the international treaties integrating these national patent systems). Therefore, visions of a globalised community are often combined with a critical view of patent protection.[28] Patent rights are first of all *national* rights. As patent protection ends on the respective border line, on the other hand, export and import are hindered. This can be explained by the free-rider model of institutional economics. Inventions resemble public goods as they are hard to protect and will not diminish when they are used.[29] What will decrease, however, is their commercial exploitability. Thus, inventors in further developed states will not export their goods to less developed states until they are able to guarantee them their inventions will be protected against imitation.[30] This fact can be termed the *paradox of patent protection*: Patents can function as a non-tariff impediment to commerce on the one hand, because they can be used against the import of goods violating the patent right of the owner. On the other hand, the non-existence of patent rights or a similar protection of foreign inventions will also act as a non-tariff impediment to commerce, because no one will export highly advanced technology or for instance medicine into that country. This is the very dilemma which developing states are confronted with nowadays. The historical answers to this paradox shall consequently be further analysed.

II. The development of an international patent regime

The harmonisation of patent protection was a highly controversial topic that was completely connected to the formation of the industrial society, displayed at global exhibitions.[31] Since the Great Exhibition of 1851 promised to unify the industrial products of all civilised peoples on earth in a comparative display, visitors were meant to gain a

27 For more information refer to M. Seckelmann, Industrialisierung (annotation 16).
28 See for instance L. Lessig, Free Culture. The Nature and Future of Creativity, New York 2004, p. 19.
29 M. Olson, The Logic of Collective Action. Public Goods and the Theory of Groups, Cambridge 1965; D. C. North, Structure and Change in Economic History, New York 1981.
30 As for historical examples see B. Dölemeyer, Einführungsprivilegien und Einführungspatente. Mittel des Technologietransfers, in: ius commune 12 (1984), p. 207.
31 M. Seckelmann, "The Indebtedness to the Inventive Genius". Global Expositions and the Development of an International Patent Protection, in: V. Barth (ed.), Identity and Universality. A Commemoration of 150 Years of

glimpse of a "new world"[32] of progress, peace and harmony. However, the promised land which the admirers of the exhibitions seemed to enter did not retain its innocence for a long time. The "fetish commodity" (as the philosopher Walter Benjamin put it)[33] did not only demand adoration, it also produced manifest greed. The promised "peaceful competition of nations"[34] exposed a certain nationalistic subtext.[35]

The newly invented substances of the dyestuff industry, for instance, amazed visitors to the Global Exposition of Paris in 1867. They admired the "mighty, metallic glimmering block of the 'Violet de Paris' and, beside it, the new intermediate products of the dyestuff industry, the methylated and ethylated anilines".[36] The new inventions nonetheless proved to be extremely vulnerable. This was as a result of the simplicity of imitation of knowledge[37] and the difficulties involved in finding out about such a deed. Furthermore, the vulnerability of intellectual property rights was accompanied by a still insufficient and heterogeneous form of protection of literary and industrial authorship by the countries displaying their products. The possibilities of protection proved to be even weaker with regard to inventions by citizens from foreign countries. In the age of mercantilism, many countries granted patents to the first importer of foreign inventions. These so-called "import patents" could subsequently even prevent the first inventor from selling his goods in the related country.[38]

Patent rights are granted by the country. The country allows a patentee to exploit his invention for a limited time and prevents anybody on his territory from using the same invention for commercial purposes or from importing goods that are produced violating these rights. Therefore, patents function as non-tariff impediments to imports of certain goods, as has previously been outlined.

Consequently, and due to the fact that patents were derived from monopolies, both possibilities have been discussed: both the internationalisation of patents and their abolition in general. A debate on the economic benefits and justifiability of intellectual property

Universal Exhibitions, Paris 2002, pp. 131-144; G. Wegner, Die Welt – an einem Ort erfahrbar. Weltausstellungen als Weltereignisse, in: T. Werron / R. Unkelbach / S. Nacke (eds.), Weltereignisse, Wiesbaden 2008, p. 77.

32 H. Caro, Ueber die Entwickelung der Theerfarben-Industrie, Berlin 1893, p. 80.

33 W. Benjamin, Paris, Hauptstadt des XIX. Jahrhunderts, in: W. Benjamin, Illuminationen, Frankfurt am Main 1977, p. 176.

34 C. Pieper (ed.), Der Erfinderschutz und die Reform der Patentgesetze. Amtlicher Bericht über den Internationalen Patent-Congress zur Erörterung der Frage des Patentschutzes, Dresden 1873, p. 2.

35 J. A. Auerbach, The Great Exhibition of 1851: A Nation on Display, New Haven/ London 1999. See also P. Greenhalgh, Ephemeral Vistas. The Expositions Universelles, Great Exhibitions and World's Fairs, 1851–1939, Manchester 1988; U. Haltern, Die „Welt als Schaustellung". Zur Funktion und Bedeutung der internationalen Industrieausstellung im 19. und 20. Jahrhundert, in: Vierteljahresschrift für Sozial- und Wirtschaftsgeschichte 60 (1973), p. 140; A. Andersen, Chemie als Zukunftstechnologie. Teerfarbeninsutrie vor dem Zweiten Weltkrieg, in: P. Hernter/ D. Schott (eds.), Zukunftstechnologien der letzten Jahrhundertwende: Intentionen – Visionen – Wirklichkeiten, Berlin 1999, pp. 85-101; J. P. Murmann, Knowledge and Competitive Advantage. The Coevolution of Firms, Technology and National Institutions, Cambridge 2003; A. Engel, Farben der Globalisierung. Die Entstehung moderner Märkte für Farbstoffe 1500–1900, Frankfurt am Main / New York 2009.

36 H. Caro, Ueber (annotation 32), p. 45.

37 For this topic refer to D. C. North, Structure (annotation 29); M. Seckelmann, Industrialisierung (annotation 16), p. 35.

38 B. Dölemeyer, Einführungsprivilegien (annotation 30), p. 207; A. Heggen, Erfindungsschutz und Industrialisierung in Preußen, 1793–1877, Göttingen 1975.

rights took place in Great Britain, France, the Netherlands, Germany and Switzerland during the time of the Industrial Revolution. In the "liberal era" of the 19th century, monopolies were worked against in all of these countries. While in Great Britain the *Statute of Monopolies* of 1624[39] was initially adapted by *jurisdiction* to the needs of industrialisation, the French and American model opted for a foundation of the inventor's right in their *constitutions* and their *patent legislation*. All three models, however, went back to the philosophy of *John Locke,* who declared everything one could form with one's hands or mind to be the property of the one who formed it.[40] *Immanuel Kant* and *Johann Gottlieb Fichte* construed an individual right to one's ideas and inventions not unlike this justification.[41]

In Germany, nonetheless, the "crisis of patent protection" went deeper.[42] This applied even more to Switzerland and the Netherlands, where patent legislation was altogether abandoned for a certain period. Other models of constructing rights to new technical information (which patents are) can be conceived: unhindered access, collective ownership of knowledge, sustainability instead of exploitability, unlimited access to knowledge instead of ownership for a limited time.[43] Nonetheless, simplifications and mystifications have to be avoided. The limited time span of patents in the Western model is, for instance, already a compromise between societal and individual interests. Technical knowledge is held in common after the protected time span, not lost.

The anti-patent tendency was motivated by the idea of infinite scientific progress. According to the view of leading free-trade economists, technological progress was self-inductive, and the role of inventors and engineers consisted merely in picking the fruits of new techniques as soon as they were ripe.[44] Patents, by contrast, appeared to be the rotten fruits which only reduced the yield of a wholesome harvest. Thus a member of the German free-trade movement predicted in 1863: "Patents are ripe to fall and be recognised more and more as a foul fruit hanging from the tree of human culture."[45] To their opponents, therefore, patents, which excluded others from the commercial utilisation of an idea, merely appeared to be a reminder of the old-fashioned viewpoint that the government should direct the economy.

Following a lengthy discussion on the pros and cons of patent rights, which developed in the middle of the 19th century, it was finally concluded that the advantages (in most

39 The common reference to the year 1623 for the enactment of this statute is due to the fact that, until the enthronement of George III, statutes were dated from the first day of the parliamentary session onwards. See F. Damme / R. Lutter, Das Deutsche Patentrecht. Ein Handbuch für Praxis und Studium, Berlin 1925, p. 3.

40 J. Locke, The Second Treatise of Government. An Essay concerning the True Original, Extent, and End of Civil Government, in: ibid., Two Treatises of Government, Cambridge [1689] 1988.

41 For further References see C. P. Rigamonti, Geistiges Eigentum als Begriff und Theorie des Urheberrechts, Baden-Baden 2001, p. 22; M. Seckelmann, Indusrialisierung (annotation 16), p. 129.

42 M. Seckelmann, Industrialisierung (annotation 16), p. 127.

43 Many of these criteria applied to knowledge can be found with indigenous people. Regarding this issue see the contribution of S. Francis.

44 K.-H. Manegold, Der Wiener Patentschutzkongreß von 1873. Seine Stellung und Bedeutung in der Geschichte des deutschen Patentwesens im 19. Jahrhundert, in: Technikgeschichte 38 (1971), p. 162.

45 V. Boehmert, Die Erfindungspatente, Berlin 1869, p. 80.

countries: temporary and conditional) of bestowing industrial property rights outweighed their drawbacks.[46]

1. The Paris Convention of 1883

The urge to reach an international agreement on the treatment of exhibits was primarily felt when American firms threatened to boycott the Global Exposition of Vienna, which was to be held in 1873. In September 1871, the programme of the planned Global Exposition had been published, translated into all languages and distributed to all the nations existing in 1871.[47] However, the American inventors and enterprises only wanted to display their inventions in a country where the exhibits were protected in accordance with American standards.[48]

Thus, the Austrian government enacted a regulation that allowed the displayed inventions to be protected for the whole of 1873, when the exposition was to be held. In addition, an international patent congress was held with the aim of setting up an international and general code for the protection of exhibits during global expositions. It took place in Vienna between 4 and 8 August 1873, in the conference programme of the exhibition.[49] 158 participants attended the conference.[50]

The congress agreed on setting minimum requirements for 'reasonable' patent law, which all 'civilised nations' had to enact. Secondly, they agreed to advise all these nations to form an international union which would guarantee any citizen of its member states equal treatment to the inhabitants of any other member state.

To enforce its resolutions, the congress installed an executive committee. It consisted of the Vienna conference's preparatory committee and several international experts. It was instructed to hold a new congress on the matter whenever it seemed to be favourable. Moreover, the participants were invited to form national sections.

In the course of the preparations for the 1878 Global Exposition in Paris, a conference on the protection of the exhibits became part of the conference programme again. The second *International Congress on the Protection of Industrial Property* convened in Paris from 5 to 17 September, 1878. It unified 500 participants from countries, professional associations, chambers of commerce and other organisations coming from even more countries than those that had attended the Vienna conference.[51] The conference

46 F. Machlup / E. Penrose, The Patent Controversy in the 19th Century, in: The Journal of Economic History 10 (1950), p. 5; M. Seckelmann, Industrialisierung (annotation 16).

47 C. Pieper, Der Erfinderschutz (annotation 34), pp. 2-3.

48 Ibid.

49 Invited were "delegates of governments, members of exhibition committees, delegates of trade or technical associations or of chambers of commerce from all nations, industrialists, traders, technicians, economists and everybody who feels, either as an inventor or exhibitor, a vocation to give substantial support to the interest of the envisaged issue", in: C. Pieper, Der Erfinderschutz (annotation 34), p. 11.

50 Coming e.g. from Denmark, France, the German Empire, Great Britain, Greece, Italy, the Netherlands, Romania, Russia, Sweden, Switzerland and the United States, or they even reported to Japan.

51 Comité Central des Congrès et Conferences / Ch. Thirion (eds.), Congrès International de la Propriété Industrielle, tenu à Paris du 5 au 17 Septembre 1878, comptes redus stenographiques, Paris 1879, p. 12.

members agreed on an envisaged protection of three sections of industrial property (for the protection of designs and models and the section for trademarks and commercial names). It was modelled on the Universal Postal Union (*Union postale universelle*, UPU) which had first been founded under the name General Postal Union in Berne in 1874 by 22 signatory states.[52]

The congress installed a permanent commission which was vested with full power to induce negotiations with the national governments and to hold new conferences. As soon as the managing French section had drafted a proposal for an international section, it was discussed within the national sections. After the alterations had been worked on by the French section, the modified draft was submitted to all interested foreign governments in 1880 and the French government invited the interested foreign governments to a diplomatic conference. At this conference, which convened in Paris in March 1883, the modified draft was discussed. It again underwent several alterations. Most importantly, a common patent law for all countries finally proved to be impossible. However, a union was created which had to guarantee any citizen of its member states equal treatment to the inhabitants of any other member state. It appeared problematic that at least two countries which were willing to join the union did not have their own patent law: the Netherlands and Switzerland. The convention only stated a merely "moral" obligation[53] to enact a patent law. Although this obligation was later combined with considerable economic pressure from the other member states, it took Switzerland several years before it finally enacted a patent law in 1888 and the Netherlands even longer, until 1910. On March 20 1883, Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Serbia and the Swiss Federation finally signed a treaty which came into force after the ratification documents had been exchanged on July 7 1884.

The most important article of the convention dealt with mutual acknowledgement of industrial property rights (Article 2 of the convention).[54] Another important point concerned the priority right. In order to facilitate the application procedure, the inventor had to be granted a certain period during which he could decide whether he wished to apply for a patent for the same invention in any of the other member states. During this period, a valid patent could not be awarded to any other applicant (Article 4 section 1 of the convention). Since the prime motivation for harmonizing patent legislation was

52 Austria, Belgium, Denmark, Egypt, France, Germany, Greece, Great Britain, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Rumania, Russia, Sweden, Switzerland, Serbia, Spain, Turkey and the United States, see H. Bühler, Der Weltpostverein. Eine völkerrechtliche und wirtschaftspolitische Untersuchung, Berlin 1930, p. 22; K.-H. Schramm, Der Weltpostverein, Berlin 1983, p. 20; also M. Vec, Recht und Normierung in der Industriellen Revolution (annotation 2).

53 B. Dölemeyer, Die internationale Rechtsvereinheitlichung auf dem Gebiet des Gewerblichen Rechtsschutzes, in: H. Coing, Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, vol. 3, Munich 1986, p. 4210.

54 Convention pour la Protection de la Propriété Industrielle. Signée a Paris le 20 mars 1883, in: Recueil général de la législation et des traités concernant la propriété industrielle, tome VI, Berne 1901, pp. 586-602.

related to the treatment of exhibits at global exhibitions, this issue was settled in Article 11 of the convention.[55]

2. Further development up to the Second World War

The union additionally installed its own law enforcement agency. An *International Bureau for the Protection of Industrial Property* was founded, according to Section 13 Subsection 1 of the Paris Convention. This bureau was set up in Berne, financed by the member states of the union and managed by the Swiss Department for Commerce and Agriculture. The bureau collected data from the member states. In its periodical *La Propriété Industrielle* it informed readers about the latest developments concerning the protection of industrial property (e.g. new national patent regulations) from 1885 onwards. After the *Agreement concerning the International Registration of Marks* was signed in Madrid in 1891,[56] the bureau was also mandated to register trademarks on an international basis. In 1892, it began to publish the newly registered trademarks in its journal *Les Marques Internationales*. In 1893, the bureau merged with the agency of another convention. The *Berne Convention for the Protection of Intellectual Property Rights* of 1886[57] ensured literary authorship would be respected. As the Berne Convention had also set up an International Bureau in Berne to carry out administrative tasks, these bureaus were united in 1893 under the title of *United International Bureaux for the Protection of Intellectual Property* (BIRPI).

The Paris Convention provided an option for other countries to join (article 16). Up until the First World War, this invitation was accepted by many of them. The British government, which had to struggle with some opposition to the ratification act, declared it would join the union in 1884, as did Ecuador and Tunisia. Although Ecuador and Salvador then left the union in 1886, and Guatemala likewise in 1894, the convention was soon ratified by Norway and Sweden (1885), the United States of America (1887), the Dutch part of India (1888), Surinam and Curaçao (1890), New Zealand and Queensland (1891), Denmark (1894) and Japan (1899). The Dominican Republic, however, joined the union in 1884, left it in 1889 and re-joined in 1890. However, the German and Austro-Hungarian Empires did not initially join the union. Although this was seemingly contradictory, considering that German engineers had been among the strongest promoters of an international agreement around 1873, the German trade associations were ambiguous with regard to joining the union. This was due to the fact that the inner structure of the union was modelled along the lines of the French patent system. Throughout the Paris conference, the German and Austrian sections of the asso-

55 A. Osterrieth / A. Axster, Die internationale Uebereinkunft zum Schutze des gewerblichen Eigentums vom 20. März 1883 (Pariser Konvention) nebst den uebrigen Vertraegen des Deutschen Reichs über den gewerblichen Rechtsschutz, Berlin 1903, p. 226.

56 Arrangement concernant l'Enregistèrement International des Marques de Fabrique ou de Commerce. Conclu a Madrid le 14 avril 1891, in: Recueil général (annotation 54), pp. 606-610.

57 Regarding this issue see the contribution of I. Löhr in this volume.

ciation for harmonizing intellectual property legislation which had initiated the Vienna conference on patent protection could be seen to have lost their influence. Therefore, the German Federal Government opted – following the advice of leading industrialists – for the 'classical' style of having mutual trade agreements with specific countries. Soon, however, the policy of bilateral agreements proved to be inadequate. Serious differences between German and Swiss dyestuff producers, which mostly ended up in court, caused the representatives of the modern German industries, namely the chemical industry, to change their view. After the United States had joined the International Union in 1887, the statutes of the latter were discussed once more. They were then changed, in two distinctive aspects, in favour of the German patent system. Germany finally joined the union in 1903, and Austria and Hungary in 1909.

Since the Paris Convention only provided for mutual recognition of national patents but no common patent of its own, several initiatives were carried out for further harmonisation of patent legislation ("*loi uniforme*"). This vision of a universal 'global patent'[58] or 'global trademark' came to a preliminary end during the First World War. Nonetheless, attempts were resumed after the war. The Paris Convention was formally reinstalled in accordance with Article 286 of the Versailles Treaty.[59]

During the interwar years, the international patent system was further developed. The convention of The Hague in 1925, for instance, was concerned with harmonising the time span of patent protection (15 years). Transnational debates affected the *'droit moral'* of employed inventors.[60]

3. Setting up the GATT and the negotiations of the TRIPS Agreement in 1994

The Second World War introduced new actors onto the stage of international patent harmonisation. New regimes concerned with international trade policy were installed, initially competing with the WIPO until the latter system was integrated into the former. Starting with the Atlantic Charta of 1941, international relations, following an US-American initiative, underwent formalisation and institutionalisation. This applied to the establishment of the United Nations in 1945 and the World Bank in 1944 and, finally, the ratification of the GATT Agreement in 1947.[61] Another US project was the

58 A. Jost, Eine Anregung zur Internationalisierung des Patenwesens, Antwerpen 1910.

59 A. Osterrieth, Gewerblicher Rechtsschutz und Urheberrecht im Friedensvertrag von Versailles, Berlin 1920; as for this topic also refer to F. Mächtel, Das Patentrecht im Krieg, Tübingen 2009.

60 Regarding the 'droit moral', refer to K. Gispen, New Profession, Old Order, Engineers and German Society, 1816–1914, Cambridge 1989; ibid., Poems in Steel, National Socialism and the Politics for Inventing from Weimar to Bonn, New York / Oxford 2002; ibid., Die Patentgesetzgebung in der Zeit des Nationalsozialismus und in den Anfangsjahren der Bundesrepublik Deutschland, in: R. Boch (ed.), Patentschutz und Innovation in Geschichte und Gegenwart, Frankfurt am Main 1999, pp. 85-99; A. K. Schmidt, Erfinderprinzip und Erfinderpersönlichkeitsrecht im deutschen Patentrecht von 1877 bis 1936, Tübingen 2009; M. Seckelmann, Der „Dienst am schöpferischen Ingenium der Nation" – Die Entwicklung des Patentrechts im Nationalsozialismus, in: J. Bähr / R. Banken (eds.), Wirtschaftssteuerung durch Recht im Nationalsozialismus, Frankfurt am Main 2006, pp. 237- 279; M. Seckelmann, Industrialisierung (annotation 16), p. 325.

61 Ch. Herrmann / W. Weiß / Ch. Ohler, Welthandelsrecht (annotation 8), p. 51.

establishment of an *International Trade Union* (ITU), but this project was abandoned in 1950. The *General Agreement on Tariffs and Trade* (GATT) that had been drafted as a preliminary settlement in order to prepare the International Trade Union was then taking the part of a quasi-constitution of the international trade policy. With the foundation of the World Trade Organization, the international trade policy was finally given a formal constitution in 1995. The Treaty of 1994 that enacted that settlement contained some new agreements as appendices. One of them was the *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeiting Goods* (the aforementioned TRIPS Agreement) of 1994.

In 1994, the WIPO entered into an agreement with the *World Trade Organization* (WTO) which was derived from the international organisation formed by the *Agreement on General Tariffs and Trades* (GATT). The reasons for this development have already been touched on at the outset of this article: During the Conference in Punta del Este, the leaders of the member states of the WTO were looking for ways in which to make the WTO more effective. One of the possible measures was by integrating regulations concerning intellectual property rights into the WTO framework which had been left out previously. The reasons for the integration of the Paris Convention have been mentioned above: The establishment of the WTO resulted from a movement of bundling the different pluri- and multilateral trade agreements under one umbrella organization: the WTO. This situation caused problems due to the fact that most trade conflicts are affected by questions of (technical) information in one way or another in an 'information society'. Nonetheless, it has to be stated that the Uruguay round left the initial mandate given to it at the conference in Punta del Este: Initially, this was only seeking to combat imitations of products, but the members of the Uruguay round extended their negotiations to setting up rules for trade related aspects of intellectual property rights.[62] This procedure evokes memories of the setting up procedure of the Paris Convention at the international patent congresses of Vienna (1873) and Paris (1878).

According to the WTO Agreement (Section II Subsection I), this organisation will now supply the organisational framework for the trade relationships of its member states. Furthermore, the organisation, with its seat in Geneva, has the competence to administer related trade agreements (Section III Subsection 1 of the WTO Agreement) and provide a panel for negotiations (Section III Subsections 2 and 3) and a Trade Policy Review Mechanism (Section III Subsection 4). The broad competences of the WTO lead to a linkage of the different subsections of the WTO and their organs.[63]

The so-called TRIPS Agreement (*Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeiting Goods*) in 1994 enhanced the obligations concerning the patent protection of its member states. In Article 2.1, the TRIPS Agree-

62 R. Senti, WTO. System und Funktionsweise der Welthandelsordnung, Zürich 2000, p. 655.

63 S. Mauderer, Der Wandel von GATT zur WTO und die Auswirkungen auf die Europäische Gemeinschaft unter besonderer Berücksichtigung der unmittelbaren Anwendbarkeit des primären WTO-Rechts, Osnabrück 2001, p. 23; W. Meng, WTO-Recht als Steuerungsmechanismus der Neuen Welthandelsordnung, in: M. Klein et al. (eds.), Die Neue Welthandelsordnung der WTO, Amsterdam 1998, p. 20.

ment of April 15 1994, which came into force on January 1 1995,[64] obliged its member states to comply with the most important articles (Art. 1-12 and 19) of the Paris Convention. Furthermore, it stated stronger minimum requirements for patent protection systems (duration of 20 years counted from the filing date (Art. 33 TRIPS Agreement)). The TRIPS Agreement forms annex 1 C of the legal framework of the World Trade Organisation.[65] It requires its member states to keep minimum standards regarding patent protection, including protection of pharmaceutical products.[66] The last requirement is related to the fear of industrialised nations regarding re-imports of medical products from less developed countries that could (ordered via internet etc.) easily find their way back into the industrialised nations when imported by less developed countries without taking their patent protection into consideration. As outlined previously, the TRIPS Agreement thus concerned a point that is crucial to any state and even more so to African countries, whose populations are strongly affected by the AIDS disease: the national health system.[67] Respecting the requirements of the TRIPS agreement, which those states need to catch up with the international trade networks, necessary for export and import, imposes restrictions on those countries in solving one of their most crucial domestic problems, namely by making cheap imports of medicine available – while at the same time endangering a sustainable import (and as a result of the strong reciprocity principle:[68] export) policy. Here, the disadvantages of joining international treaties expose a loss of sovereignty, which can – as demonstrated by this extreme example – not only strongly impact the trade policy but by means of reflection also other policies in the signatory states.

In order to at least deal with some of the relevant problems, the *Declaration of Doha* of 2001[69] was negotiated. In this Declaration, the member states of the WTO declared their concern regarding the implications of patent protection on the prices of medicine. Furthermore, they agreed on some official interpretations of the TRIPS concerning the right of the member states to grant compulsory licences. States can grant such licences to enterprises under certain circumstances when the patent owner does not voluntarily give a licence. These licences have to be financially compensated by the recipient, whereas the fee is fixed by the state. The problem in African countries, however, consists in the fact that sometimes no possible recipient enterprise is available due to the state of the

64 The TRIPS Agreement obliged industrialised countries to fulfil its requirements by 1996, developing and transitional countries by 2000 and the least developed countries by 2006.

65 Ch. Herrmann / W. Weiß / Ch. Ohler (annotation 8), p. 45 and p. 51.

66 Regarding the protection of pharmaceutical products, see the contribution of S. Francis to this volume.

67 Ch. Herrmann, TRIPS, Patentschutz für Medikamente und staatliche Gesundheitspolitik: Hinreichende Flexibilität?, in: Europäische Zeitschrift für Wirtschaftsrecht (2002), p. 37-43; P. Rott, TRIPS-Abkommen, Menschenrechte, Sozialpolitik und Entwicklungsländer, in: GRUR Int. (2003), pp. 103-118; F.M. Abbott, Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, in: Vanderbilt Journal of Transnational Law 22 (1989), pp. 689-745.

68 On this issue, see the next paragraph.

69 Regarding the Declaration of Doha, see the quotations in annotation 12 and S. Mildner, Welthandel und Entwicklungsländer. Chancen der Doha-Runde für die Dritte Welt?, in: Internationale Politik (2002), pp. 29-36.

industry – and then the import question is raised again. In this case, the Declaration of Doha provides a panel in which the related problems between the states affected can be discussed: the "TRIPS Council".

Although the Declaration of Doha cleared some points and provided a new conflict regulation, many points were still unsettled: The TRIPS Agreement opted not for a uniform patent law but for a guarantee of minimum requirements (Art. 1.1 TRIPS). However, those requirements were construed according to the needs of the industrialised countries. By extending the TRIPS negotiations from an anti-piracy policy to a more integrative settlement, the Western standards were taken as a measure for "minimum requirements".[70] Art. 4(b) of the TRIPS Agreement distributed the advantages of the agreement in favour of the industrialised countries. The overall principles of the TRIPS agreement, the "most-favoured nation treatment" "inhabitant-similar"[71] patent protection, could be limited when it came to intellectual property rights safeguarded by the Rome Convention. The result was that not all member states' citizens but only those of member states guaranteeing a similar patent protection could profit from a specific intellectual property protection in another member state (exemption from the "most-favoured nation treatment" of Art. 4).[72]

This regulation is perhaps the crucial point that distinguishes the TRIPS Agreement from the Paris Convention: The Paris Convention set out a mere moral obligation to set up a patent legislation in accordance with its principles (and even set up its international bureau in Switzerland that did not have a patent legislation at that time). The TRIPS Agreement departed from this principle and set out a basic reciprocity. This principle derives from the revised Berne Convention[73] but is, when it comes to patent conventions, a fallback to the period of mercantilism.

III. A History of propertisation?

The international system regarding trade-related intellectual property rights developed between 1883 and 1994. The first step in this development was an acknowledgement of the economic benefits (not necessity) of patent protection after the discussion during the liberal era regarding other possibilities such as an unimpeded common use of new technical knowledge. The German "patent controversy" between patent supporters from

70 H. Ullrich, Technologieschutz nach TRIPS: Prinzipien und Probleme, in: GRUR Int. (1995), p. 630.

71 Ch. Herrmann / W. Weiß / Ch. Ohler, (annotation 8), p. 433.

72 Art. 4 states: "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. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: […] 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." As to Art. 4 of the TRIPS Agreement see B. Lorenzen, Designschutz im europäischen und internationalen Recht. Zur Anwendung und Auslegung internationalen und europäischen Designschutzrechts, Münster 2002, pp. 30-31.

73 R. Senti, WTO (annotation 52), p. 656.

the new profession of engineers and Prussian economists, who mostly favoured other forms of distributing technical knowledge, can illustrate this debate.[74] The next step was the option of mutual acknowledgement of patent protection between states, not only by mutual trade negotiations or treaties but also by an international convention, the Paris Convention. This decision helped the international trade system to develop and helped economic growth during industrialisation[75] by safeguarding certain prerequisites for import and export and thus for industrial research. This development can be seen as a process of propertisation.

However, did this development necessarily lead to an individual, time-limited property right or – in *Hamilton's* words – a "Western, Protestant-based capitalist copyright"?[76] Yes and no. On the one hand, as demonstrated above, the TRIPS Agreement declared many elements of the patent law of an industrialised society to be "minimum requirements", which poses enormous problems for less developed countries. The central problem is how to safeguard these requirements with a strong reciprocity principle. In this regard, Hamilton is certainly right. On the other hand, certain doubts arise regarding the aspect of Protestantism. Rather than Protestantism, the governance set regarding technical information is based on the individual rights of the Enlightenment and the French Revolution, which declared the ideas of the author and inventor to be his "property". This concept goes back to the philosophy of *John Locke* who declared everything one could form with one's hands or mind to be the property of the one who formed it.[77] The discussion during the Enlightenment, namely by *Immanuel Kant* and *Johann Gottlieb Fichte*, stressed the individual right as being the foundation of the right to one's ideas and inventions. Thus, the foundation of the Western model of intellectual property law is influenced not so much by Protestantism as by the Enlightenment which in certain regards opposed the traditional property structure of the Catholic Church. According to *Max Horkheimer* and *Theodor Adorno*, the Enlightenment had a dialectic structure.[78] While it enabled the individual against despotism on the one hand, it established a property structure which *Crawford B. Macpherson,* in his famous critique of *John Locke,* called "possessive individualism".[79] Thus the new, Enlightenment-based property structure – including intellectual property rights – is inclusive and exclusive at the same time. Inclusive, when it involves the rights of the citizen (and one could go further into the question of which citizens are meant, male, female etc.) and exclusive, when it involves property and possession. After all, the system is not specifically Protestant but "individual", or perhaps, along the lines of *Macpherson,* "possessively individual".

When regarded as based on a *human right*, as the Enlightenment argued, an intellectual property right tends to be universal and expanding. When it comes to this, the aspect

74 F. Machlup / E. Penrose, The Patent Controversy (annotation 46).
75 D. C. North, Structure (annotation 29).
76 M. A. Hamilton, The TRIPS-Agreement (annotation 20).
77 J. Locke, The Second Treatise (annotation 40).
78 M. Horkheimer/ Th. W. Adorno, Dialektik der Aufklärung, Frankfurt am Main 1971, p. 42.
79 C. B. Macpherson, Die politische Theorie des Besitzindividualismus: Von Hobbes bis Locke, Frankfurt am Main 1989.

of *space* is related to that of *time*. Intellectual property rights in an internationally interlinked economy have an inherent tendency to be expanding. And this expansion is twofold. On the one hand, it wishes to acquire more and more topics under its command. On the other hand, it wishes to leap over the limits of states and territories. With regard to the first point, more and more material is assumed under its regime. As can be seen, patent protection – although widely discussed – increasingly tends to dominate "white landmarks" that nobody previously considered to be "white", for instance the genetic information of creatures, the knowledge of healing processes or the source code of a computer program.

This tendency is the subject of fierce debate. However, in our opinion a distinction has to be made again between two points. With the German law professor *Thomas Dreier*, a first group of cases, which are made the object of intellectual property rights, has to be identified: namely, those arising when new technologies allow new possibilities of imitation and new possibilities of protection are called for by at least some of the providers of information that have invested their time or money in the development.[80] And here, it can be seen that new information and new possibilities pose the question of their property structure – however this will be solved for the specific case.

Another case has to be distinguished from this one, concerning knowledge or material that has previously existed but not been regarded as a possible object of intellectual property rights until a certain point of technology or foreign intervention occurred. Examples of this are the methods of healing that are conserved by indigenous people and also, even though the methods of deciphering are new, the genetic information of plants used during this healing process.[81] In this case, the question of ascribing common knowledge to a specific person, even when he or she develops a new technical or medical application for it, is a different one and should be treated with the utmost sensitivity.

The Declaration of Doha was not far-reaching enough because it did not chance a strict reciprocity principle. However, from a propertisation perspective it can provide hints as to what a prospective international governance structure regarding intellectual property rights could look like. When it comes to rights to technical information, the governance structure does not necessarily have to be either "common" or "individual". Both governance structures mark two poles of a continuum in which different variants can be imagined. The granting of compulsory licences, for instance, opens up a possibility of designing a more 'liberally inclusive'[82] governance structure of property rights, which is in some respects analogous to the social responsibility clause concerning the property right in Art. 14 of the German constitution.

80 Th. Dreier, Verdichtungen und unscharfe Ränder – Propertisierungstendenzen im nationalen und internationalen Recht des geistigen Eigentums, in: Comparativ 16 (2006), no. 5/6, p. 187.

81 As to this issue refer to the contribution of S. Francis in this volume. See also A. v. Hahn, Traditionelles Wissen indigener und lokaler Gemeinschaften zwischen geistigen Eigentumsrechten und der public domain, Berlin 2004.

82 H. Siegrist, Die Propertisierung (annotation 6).

And now, the propertisation perspective shall give way to more than an analysis of the existing structure of the international property rights system. If understood not only as a heuristic category but also as a political programme,[83] it demands the formulation of a separate vision for the future of international patent protection.

Thus, taking all precautions into consideration, a separate vision for this future shall be formulated: The idea of a social responsibility of intellectual property rights can be, in our opinion, also be applied to international trade relations. Nowadays (even given the background of the historical development) there is hardly any alternative for lesser and the least developed countries to try to take part in the international trade system. On the other hand, ways have to be sought (and the Declaration of Doha was too inadequate) in order to enable the developing and lesser and least developed countries to take an active part in the international system. Measures have to be conceived that either affect the patent system, for instance more freedom for specific national solutions in countries that are specifically suffering from AIDS and/or other measures to help those countries to become partners in international trade relations, e.g. more favourable import regulations concerning their (e.g. textile) products, maybe additionally financial aids in order to help enterprises from those countries to develop (maybe by meso-credits analogous to micro-credits). Then, there will be a chance that Meili's visionary words of "global citizens" in the sense of enabled "citoyens" can at least begin to come true.

83 Ibid.