

# Intellectual Property, Trade and Development

*Strategies to Optimize Economic  
Development in a TRIPS-Plus Era*

Second Edition

Edited by

DANIEL J GERVAIS

*Professor of Law and Director of the Intellectual Property  
Program at Vanderbilt University Law School*

**OXFORD**  
UNIVERSITY PRESS

# Contents—Summary

<i>Table of Cases</i>	xii
<i>Table of Legislation</i>	xvi
<i>List of Abbreviations</i>	xxv
<i>List of Contributors</i>	xxvii

Introduction	xxxix
--------------	-------

*Professor Daniel J Gervais*

## I. INTELLECTUAL PROPERTY AND DEVELOPMENT: THE GLOBAL LINKAGES

1. Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional Wisdom	3
<i>Professor Robert L Ostergard, Jr</i>	
2. Intellectual Property Treaties and Development	41
<i>Professor Anselm Kamperman Sanders and Dr Dalindyabo Shabalala</i>	
3. The Dynamics of International IP Policymaking	73
<i>Professor Susan K Sell</i>	
4. IP Calibration	86
<i>Professor Daniel J Gervais</i>	
5. Knowledge Management and Access to Essential Technologies	115
<i>Dr Abbe EL Brown</i>	

## II. INTELLECTUAL PROPERTY AND DEVELOPMENT: THE REGIONAL LINKAGES

6. TRIPS and TRIPS-Plus Protection and Impacts in Latin America	141
<i>Professor Carlos M Correa</i>	
7. A False Dawn? TRIPS and TRIPS-Plus Impacts in Africa	180
<i>Professor Ikechi Mgbeoji</i>	

8. TRIPS and TRIPS-Plus Development in India <i>Prashant Reddy T</i>	214
III. OPTIMIZING DEVELOPMENT WITHIN AND OUTSIDE INTELLECTUAL PROPERTY NORMS	
9. TRIPS and Its Methods: The Resilience of Developing Country Implementation of Intellectual Property Norms <i>Professor Ruth L Okediji</i>	241
10. Intellectual Property and Theories of Developmental Justice <i>Professor Margaret Chon</i>	256
11. A Model for Access to Educational Resources and Innovation in the Developing World <i>Dr Susan Isiko Štrba</i>	287
12. Traditional Knowledge as a Source for Innovation <i>Viviana Muñoz Téllez and Daphne Zografos Johnsson</i>	314
13. Global Ethical Boundaries of Intellectual Property and Development: The Case of Genome Sequencing <i>Dr Noam Shomron and Dr Amir H Khoury</i>	328
<i>Index</i>	351

# Contents

<i>Table of Cases</i>	xii
<i>Table of Legislation</i>	xvi
<i>List of Abbreviations</i>	xxv
<i>List of Contributors</i>	xxvii

Introduction	xxxi
--------------	------

## I. INTELLECTUAL PROPERTY AND DEVELOPMENT: THE GLOBAL LINKAGES

<b>1. Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional Wisdom</b>	<b>3</b>
Introduction	3
I. The Measurement of IPR Protection	4
A. Empirical research	5
B. Research assessment	8
II. The Concept of IPR Protection	11
A. Law measurement	11
B. Enforcement measurement	12
III. The Debate: IPR and Economic Growth	14
IV. The Economic Model	17
A. The partial adjustment model	17
B. Base model results	18
C. Developed and developing countries	21
D. Discussion	26
V. The Determinants of IPR Protection	27
A. Empirical research	29
B. The pressure for IPR	30
C. The empirical model	30
D. Data and measurement	32
E. Model results	36
Conclusion	39
<b>2. Intellectual Property Treaties and Development</b>	<b>41</b>
Introduction	41
I. Investment and Intellectual Property	43
A. Intellectual property and national innovation	43
B. Intellectual property, FDI and cross-border licensing	52

II. Multilateralism, Bilateralism, and Economic Development	59
A. The unfinished business of the TRIPS Agreement: IP in bilateral and regional FTAs	65
B. The limits of bilateralism and the rise of plurilateralism?	69
Conclusion: New Venues, Old Venues—Multilateralism and a Return to WIPO?	71
<b>3. The Dynamics of International IP Policymaking</b>	<b>73</b>
Introduction	73
I. Forum Proliferation and Forum Shifting	74
II. A Recursive Dynamic	77
III. The Problem of Enforcement	80
IV. The Democratic Deficit	81
V. Leaks and Legitimacy	82
VI. Leaving Out the Main Targets	84
<b>4. IP Calibration</b>	<b>86</b>
Introduction	86
I. TRIPS: Beyond Reductionist Narratives	90
A. The four TRIPS narratives	90
B. The displacement of innovation	92
C. Calibration in international negotiations	94
II. The Parameters of Calibration	96
A. Defining the objective	96
B. TRIPS and traditional innovation	99
C. Distinctions among developing countries	100
D. Distinctions among industries	103
III. Calibrating Towards Innovation	105
A. R&D spillovers	106
B. Clusters and growth poles	109
Conclusion	113
<b>5. Knowledge Management and Access to Essential Technologies</b>	<b>115</b>
Introduction	115
I. Why ‘Knowledge Management’?	116
A. Knowledge, its management, and law	116
B. Traditional knowledge and genetic resources	116
C. Information and law	118
D. Summary	119
II. What Are Essential Technologies?	119
A. Practical problem, legal solutions?	119
B. Human rights and identifying essential technologies	120
C. Competition and identifying essential technologies	127
D. What does this achieve?	133

III. Access and its Delivery	133
A. What is access?	133
B. Access and human rights	133
C. Access and biodiversity	135
D. Access and competition	135
Conclusion	137
II. INTELLECTUAL PROPERTY AND DEVELOPMENT: THE REGIONAL LINKAGES	
<b>6. TRIPS and TRIPS-Plus Protection and Impacts in Latin America</b>	<b>141</b>
Introduction	141
I. Assessing the Impact of IPRs	143
II. Changes in Intellectual Property Legislation	145
A. Patent law	145
B. Copyright and neighbouring rights	161
C. Trademarks	164
D. Geographical indications	165
E. Industrial designs and utility models	167
F. Integrated circuits	167
G. Undisclosed information	168
H. Breeders' rights	171
III. Protection of Traditional Knowledge	171
Conclusion	177
<b>7. A False Dawn? TRIPS and TRIPS-Plus Impacts in Africa</b>	<b>180</b>
Introduction	180
I. The Colonial Origins and Historical Development of IPRs in Africa	183
II. The Significance and Normative Impact of TRIPS in Africa	189
III. TRIPS in Africa—An Overview	191
A. TRIPS in Northern Africa	193
B. TRIPS in Western Africa	196
C. TRIPS and post-TRIPS in Eastern Africa	199
D. TRIPS in Central Africa	202
E. TRIPS in Southern Africa	204
IV. TRIPS in Africa: The Paths Not Taken	206
Conclusion	212
<b>8. TRIPS and TRIPS-Plus Development in India</b>	<b>214</b>
Introduction	214
I. TRIPS and the Indian Pharmaceutical Industry	216
II. India's Copyright Policy	229
Conclusions—Did India Benefit Through Signing of TRIPS?	237

<b>III. OPTIMIZING DEVELOPMENT WITHIN AND OUTSIDE INTELLECTUAL PROPERTY NORMS</b>	
<b>9. TRIPS and Its Methods: The Resilience of Developing Country Implementation of Intellectual Property Norms</b>	<b>241</b>
Introduction	241
I. The Promise of TRIPS: Bargaining to the Baseline	243
A. Non-discrimination	243
B. Scope of protection	245
C. Sanctions and enforcement	246
II. The Resilience of the Development Impulse	248
A. The triumph of legislation in developing countries	248
B. Legal innovation in the developing countries	249
C. Legal innovation or resilience in the developed countries?	254
Conclusion	255
<b>10. Intellectual Property and Theories of Developmental Justice</b>	<b>256</b>
Introduction	256
I. The Impact of IP on Developmental Justice	260
A. The promise of development	260
B. The promise of trade	270
II. A Proposed Substantive Equality Principle in Global IP	277
A. Defining substantive equality	277
B. Discerning substantive equality in multilateral initiatives	279
Conclusion: Matching Development Reality to Rhetoric	285
<b>11. A Model for Access to Educational Resources and Innovation in the Developing World</b>	<b>287</b>
Introduction	287
I. Access Policy	289
II. Educational Policy—Regional Initiatives	291
III. Copyright Policy	292
IV. State of Limitations and Exceptions	293
A. Limitations and exceptions in national legislation	294
B. Enforcement	302
V. Beyond Limitations and Exceptions	305
A. Open Educational Resources (OER)	305
B. Framing education as a human right	308
C. Framing education as development issue	310
D. Trading blocs, access and innovation	311
Conclusion	312

<b>12. Traditional Knowledge as a Source for Innovation</b>	<b>314</b>
Introduction: Innovation for Development	314
I. TK Innovation Within TK Systems	316
II. TK Innovation Beyond the Local Context	319
A. Access and benefit-sharing legislation	319
III. Intellectual Property Rights and TK-Based Innovation	323
A. Use of IPRs for innovations within TK systems	325
Conclusion	327
<b>13. Global Ethical Boundaries of Intellectual Property and Development: The Case of Genome Sequencing</b>	<b>328</b>
Introduction	328
I. Sequencing the Human Genome as a Global Development Project	330
II. The Challenges Pertaining to the Genomic Project in View of Ethical, Legal, and Social Issues	334
A. Populous genomics	334
B. Tailored unilateral life and health insurance	335
C. Cloning and 'superficial resurrections'	336
D. Harvesting body parts	336
E. Prejudging people based on personal embedded genetic characteristics	337
III. The Global Legal Structure of the Regulation of Genomic Information	338
A. Genomic data: as a public good	341
B. Transparency	344
C. Inclusion of genomic sequencing in an international regulative framework	345
D. The International Court of Genomics	347
Conclusion	349
<i>Index</i>	351