

## Introduction

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# Introduction

## **Anselm Kamperman Sanders**

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This volume comprises contributions presented at or inspired by the first leg of the XIV EIPIN Congress, which was held at Maastricht University on 31 January and 1 February 2013, hosted by the IPKM in Maastricht for the very first time.

The topic covered at this conference was ‘The National Treatment Principle in an EU and International Context’, which enabled the participants to discuss one of the most fundamental non-discrimination principles in international economic and intellectual property law in an interdisciplinary setting. Speakers were invited from the worlds of international trade, international investment and intellectual property law to shed light on the communalities and differences in the application of the principle of national treatment.

It has to be understood from the outset that the principle of national treatment that is enshrined in a number of international treaties is a very generous principle in that foreign nationals, goods, services or investments are not treated on a reciprocal basis, which would invariably result in a fragmented landscape for cross-border trade, but rather equal to (or no less favourable than) domestic nationals, goods, services or investments. In awarding national treatment, governments agreed to reduce the tailor-made reciprocal advantages that they could offer to one trading partner over another, but also not to favour one’s own industry over foreign interests (IP, goods, services, investment). In the process greater certainty in trade was established, irrespective of the nationality of a right holder of industrial or intellectual property, or the provenance of goods, services or investments. The principle of national treatment has therefore been expressed in different guises in order to be applicable in relation to the subject matter covered.

The first expression of the principle of national treatment in the context of international economic law can be found in the sphere of the protection of industrial property. The Paris Convention for the protection of industrial property of 1883 is perhaps the most concise and elegant expression of non-discrimination in intellectual property law. Subsequent

expressions can be found in the Berne Convention (1886), the General Agreement on Tariffs and Trade (1947) (GATT) and the World Trade Organization's (WTO's) Uruguay Round Agreements (1994); the General Agreement on Trade in Services (GATS); the Agreement on Technical Barriers to Trade (TBT); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

***Paris Convention for the Protection of Industrial Property (1883)***

*[National treatment for nationals of countries of the Union]*

Article 2

- (1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoyed in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.
- (2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.
- (3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, which may be required by the laws on industrial property are expressly reserved.

Article 2(1) of the Paris Convention clearly guarantees 'nationals' of any country of the Paris Union the enjoyment of 'advantages' and of the 'same protection' in relation to the protection of industrial property granted by Members to its own nationals. The national treatment extends to nationals of countries that are not party to the Paris Convention, if they are domiciled in a Member country or if they have a real and effective industrial or commercial establishment in the country where protection is claimed. In doing so it almost anticipates the inception of the Most-Favoured Nation Treatment Principle. Nationals of Member countries may, however, not face conditions as to establishment in the country where protection of an industrial property right is claimed. An exception to the national treatment principle pertains to certain requirements of a mere procedural nature relating to judicial and administrative procedures, to jurisdiction and to requirements of representation. Examples involve the deposit of security or bail for the costs of litigation, the designation of an address for service, or the requirement to appoint an agent in the country where protection is sought.

***Berne Convention for the Protection of Literary and Artistic Works (1886)***  
*[National Treatment; Formalities forbidden] (Paris Text 1971)*

Article 5

- (1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.
- (2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.
- (3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.
- (4) The country of origin shall be considered to be
  - (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
  - (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
  - (c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:
    - (i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and
    - (ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

The Berne Convention for the Protection of Literary and Artistic Works of 1886 relies on three basic principles: 1) national treatment, 2) no formalities and 3) independence of protection. The principle of national treatment ensures that works originating in one of the Member states receive the same protection in each of the Member states as offered to works of their own nationals. The Berne Convention also ensures the protection of literary and artistic works without any need of the formality

of registration, deposit or the like. The combination of these two principles leads to an extremely generous application of the principle of national treatment. The combination with the third principle, that of independence of protection, means that the enjoyment of exercise on the rights granted is independent of the existence of protection in the country of origin of the work.

***The General Agreement on Tariffs and Trade (GATT 1947)***  
*[National Treatment on Internal Taxation and Regulation]*

Article III

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.
5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the

- subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.
6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947 or March 24, 1948, at the option of that contracting party; Provided that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.
  7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.
  8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.  
(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.
  9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.
  10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

***General Agreement on Trade in Services (GATS) Uruguay Round Agreement 1994***

***[National Treatment]***

**Article XVII:**

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

The national treatment obligation under GATT and GATS law primarily concerns the question whether a country favours itself over other countries, amounting to discrimination against foreign products, services or service suppliers, compared with 'like' domestic products, services or service suppliers.

***Agreement on Technical Barriers to Trade (TBT) Uruguay Round Agreement 1994***

*[Preparation, Adoption and Application of Technical Regulations by Central Government Bodies]*

Article 2

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

The national treatment obligation under TBT is similar to that under GATT and GATS, but concerns the use of technical regulations, standards and conformity assessment procedures for products, or related processes and production methods. Included are the terminology, symbols, packaging, marking or labelling requirements associated with such products, processes or production methods.

***Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Uruguay Round Agreement 1994***

*[National Treatment]*

Article 3

- (1) Each member shall accord to the nationals of other Members treatment no less favourable than that it accords its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers,

producers of phonograms and broadcasting organisations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in article 6 of the Berne Convention (1971) or paragraph 1(b) of article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

- (2) Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and whereas such practices are not applied in a manner which would constitute a disguised restriction on trade.

As is to be expected, the TRIPS Agreement does not apply to goods, but to persons who are nationals of the Members to the WTO, as was the norm under the existing intellectual property agreements mentioned in the provision. The most interesting distinction from the pre-existing intellectual property law framework is that TRIPS follows the trade-based form of national treatment allowing *more* favourable treatment of foreigners than nationals, whereas *inter alia* the Paris and Berne Conventions refer to the *same* treatment.