

Human Rights and IP Law at the Bilateral and Plurilateral Level

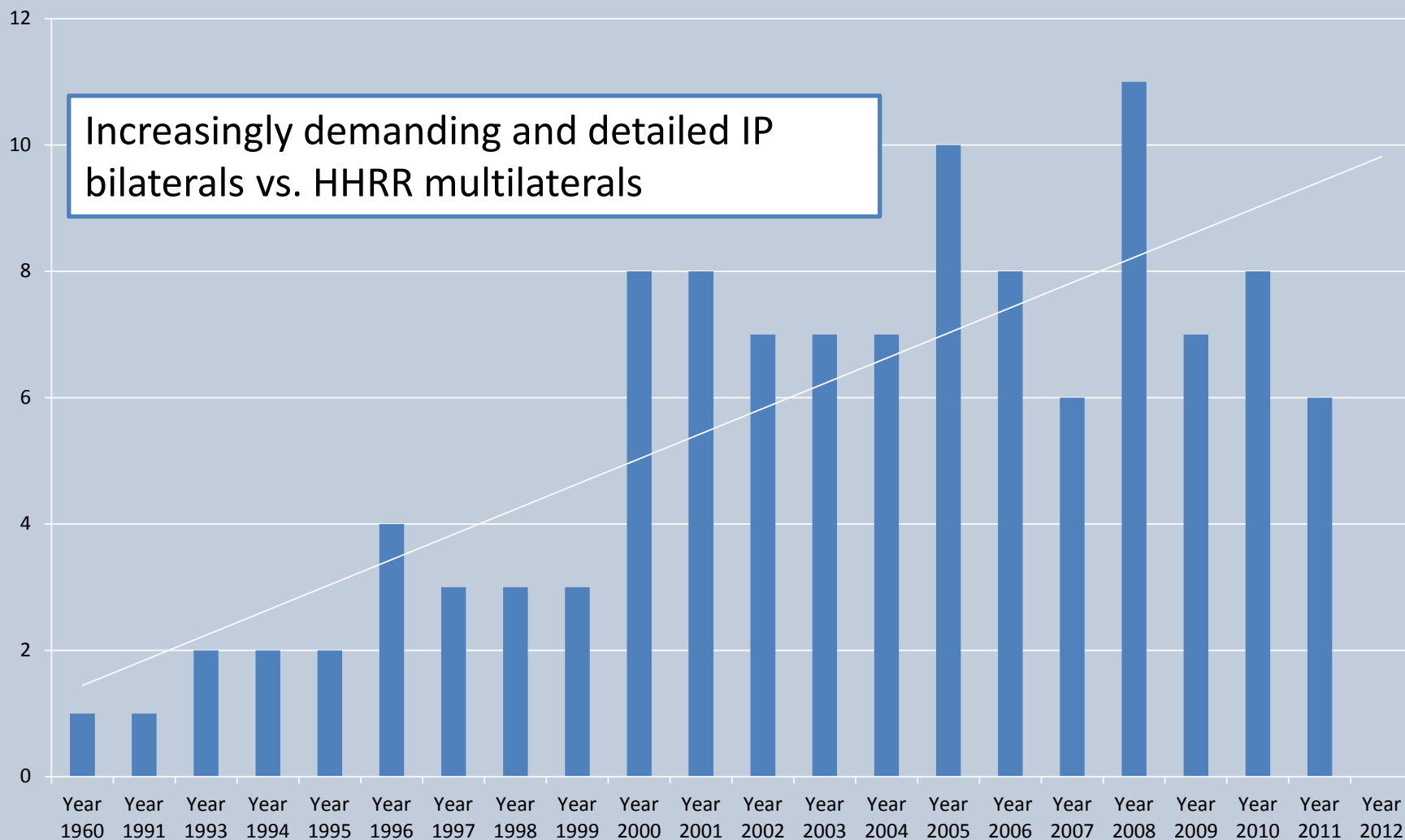
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114 Regional or Free Trade Agreements with IP arts



Data generated in the context of the research project *IP enforcement and the public interest*, X. Seuba

Delimitation

- Context:
 - Several international regimes implied
 - Public International Law
- Addressing the relations between “HRR and IP Law at Bilateral and Plurilateral Level” involves two sets of different but related issues
 - Relations between primary norms: Substantive issues, fundamentally to identify positive and conflictive relations.
 - Implementation of secondary norms: management of the primary norms and its relations

... further delimitation

- Addressing the interactions HHRR and IP at bilateral and plurilateral level in its entirety would imply analyzing IIOO, courts and norms.
 - Our analysis is focused on norms, which to some extent imply IIOO and courts as well.
 - Increasingly complex relations between regimes
 - regimes that make up organizations, courts and treaties contain mechanisms on who is to rule and under what norms
- Relations between IP norms and HHRR
 - Can be positive, ambiguous or conflictive
 - Examples provided in the area of IP enforcement
- Human rights are rights of persons
 - but not legal persons



Conflict

Interpretation

Presumption
against conflict

- Conflict clauses
- *Lex posterior / lex specialis*
- Are they of any use with regards to human rights treaties?

A single operation of treaty interpretation (textual, teleological and contextual) that must take into account the entire international legal order:

Art. 31.3.c): systemic integration

Overarching principle: International obligations implemented in good faith

GENERAL PUBLIC INTERNATIONAL LAW TOOLBOX

Supportive relations

HRRR multilateral - IP enforcement in bilateral

- Right to a remedy & right to a fair trial, two faces of the same coin: access to justice + characteristics of the process and forum
 - IP enforcement norms fulfil both functions
- Right to a remedy and IP enforcement in bilaterals
 - Right to a remedy in the most important HRRR covenants
 - 14.1 ICCPR and 6.1 ECHR: civil and criminal proceedings
 - Obligation to set up appropriate judicial and administrative mechanisms to have the rights determined by a competent authority
 - Implementing this right, IP bilateral treaties order that “measures, procedures and remedies” must be available so as “to permit effective action against any act of infringement of intellectual property rights”
 - Criminal proceedings do not fall within this scope: obligation reserved for the most serious HRRR violations

Ambiguous relations

HHRR multilateral - IP enforcement in bilateral

- Frequently the relations won't be clear-cut: there is need for interpretation
- In the area of IP enforcement, bilaterals enact ambiguous provisions and unbalanced regimes
- Ambiguous provisions:

Systemic interpretation

HHRR

Right to a fair trial

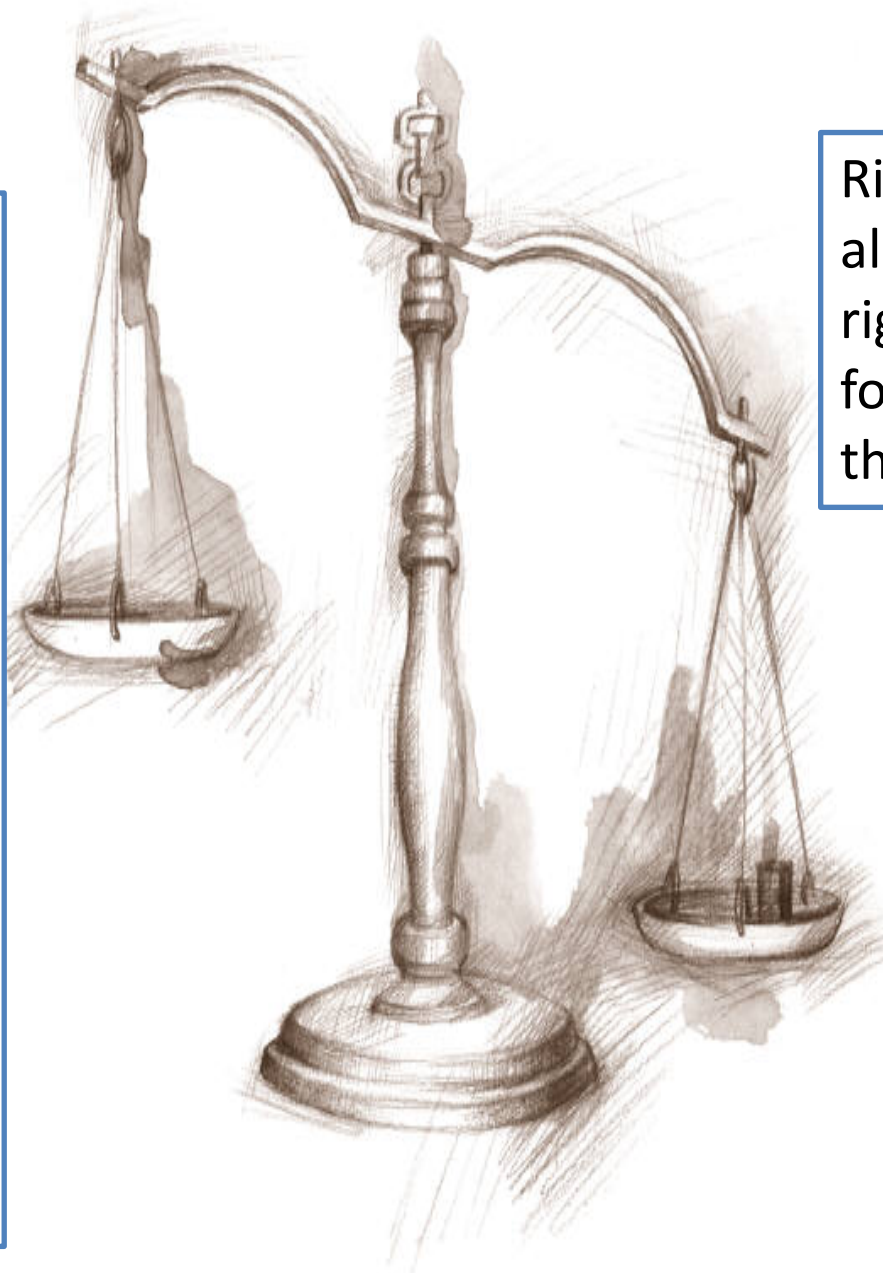
- Unbalanced regimes
 - the general content of the article creates an unbalanced situation which, in itself, is incompatible with human rights prescriptions

Measures for the preservation of evidence

Defendant

No reference to:

- obligation to give notice immediately after the execution of the measure
- right (to be heard and) to ask for a review of the measure
- revocation of the measures if proceedings are not established in a reasonable period
- provide security or equivalent assurance
- awarded compensation in case measures are revoked or lapse



Rightholder:
all the
rights
foreseen in
the EU

What to do with ambiguous & unbalanced provisions?

- Re-drafted internationally or/and improved through national implementation.
 - HHRR standards are decisive in shaping IP (enforcement) legislation
- Measures for the preservation of evidence, right to a fair trial - privacy : *Chappel v. United Kingdom (Anton Piller)*
 - “this measure should be accompanied by adequate and effective safeguards against arbitrary interference and abuse” (Court)
 - “The phrase ‘in accordance with the law’ (...) relates to the quality of the law, requiring it to be compatible with the rule of law” (Commission)
- Equality of arms: “same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant” HHRR Committee

Conflict

- If norms cannot be reconciled, norms on treaty conflict will come into play
- Principle of legality, article 7 ECHR: clarity, non-ambiguity
 - However, some criminal measures in FTAs contain ambiguous wording, for instance, the obligation to enact criminal measures in response to piracy and counterfeiting conducted “on a significant scale” or “more than *de minimis* financial harm”
- Conflict clauses: subordination or priority
 - ACTA: “Nothing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement”
- VCLT: *lex posterior*
 - Most of the occasions, FTAs
 - Regarding the others, relation of international responsibility
- Will national courts accept this outcome? Are these rules applicable to conflicts with human rights norms?

Conclusions

- The coexistence of multilateral HHRR treaties and bilateral treaties laying down new IP obligations is frequently tense
- Well-known and acknowledged conflicts in the areas of food, health and culture are also recurrent in the area of IP enforcement
- From the point of view of general public international law, the preferred option is to reconcile through interpretation the conflicting provisions
- However, if a conflict is confirmed, public international law doesn't offer very conclusive solutions
- It is very plausible to expect (more) national courts addressing these issues

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