

FOREWORD

"PUBLIC-PRIVATE INITIATIVES AFTER TRIPS: DESIGNING A GLOBAL AGENDA "

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This symposium—or rather, this collection of Conference papers, for that is what the symposium actually is—had its origins in January, 1996, when Duan Ruichun, then effectively the head of intellectual property enforcement for the People's Republic of China,¹ accompanied by one of his principal American professional contacts, Stephen C. Curley, Esq.,² came to the Duke campus with an intriguing proposal. Would Duke's Schools be interested in joining with Messrs. Duan and Curley in a venture calculated to improve intellectual property stability in the emerging economies of the world and, in turn, to encourage increased foreign direct investment in those same economies? In fact, a venture of that sort was entirely consistent with the Schools' respective professional missions. Accordingly, the parties entered into a joint agreement to establish a Center at Duke that would pursue the agenda outlined in their initial conversations.³ This agreement soon led in turn to an undertaking unprecedented in the singular nature of its ambition: namely, to establish an international forum through which public officials with responsibility for intellectual property transactions in evolving economies could meet privately (essentially in the role of economic actors) with representatives of transnational enterprises, in order to negotiate transaction-specific agreements arrived at against the background of the larger and more comprehensive GATT-TRIPS accords. As the work of the

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1. Professor Duan was Director-General of the Office of Intellectual Property Rights of the Executive Conference of State Council of the People's Republic of China.

2. Mr. Curley is a founding partner in the international law firm of Haythe & Curley, with offices in New York City and Beijing. He was joined in the initial visit to Duke by his colleague Jun Wei, a citizen of the People's Republic of China, who had earned a law degree in the United States and now practiced as a partner with Haythe & Curley.

3. I was appointed Executive Director of the Center for Global Information Studies at the Duke Law School, which assumed primary responsibility for the undertaking. Raymond H. Goodmon III later joined as Co-Director of the Center.

forum was envisioned, the parties would “bargain around” the TRIPS Agreement in an effort to arrive at mutually satisfactory immediate solutions to issues involving the recognition or enforcement of intellectual property interests that TRIPS itself would not necessarily address in adequate measure in the near term. To be sure, TRIPS would remain very much in the picture; neither side would waive rights or obligations guaranteed by the TRIPS Agreement. What each side would gain, instead, was a mutually agreeable plan for early cooperation without waiting for TRIPS and its more cumbersome and uncertain mechanisms to determine the outcome.

With the leadership of China’s Duan, and an additional early commitment to participate by key intellectual property officials from the Socialist Republic of Vietnam, the effort was underway by late 1996. Initial funding came from the Duke Law School, as well as from a reassuring cross-section of transnational enterprises of exactly the sort whose support would be vital if the undertaking were to succeed. Among early supporters were The Coca-Cola Company; E.I. duPont de Nemours & Co.; Lucent Technologies, Inc.; Merck & Co., Inc.; Pfizer, Inc.; Ventana Communications Group (The Thomson Corporation); and Price Waterhouse. The participation of these and other companies insured that initial experiments in bargaining could proceed without delay.

It was clear to all concerned, of course, that the enterprise would take years—perhaps many years—before the ultimate shape of its success or failure would become clear. Meanwhile, the nature of the undertaking needed to be presented and defended publicly. Though individual negotiations would take place in private and would remain confidential, transparency was of the essence of the larger undertaking itself. In particular, the conveners of the forum would be obliged to justify its activities in terms of the TRIPS Agreement. To that end, a public international conference was planned for Brussels in the summer of 1997. The theme was reflected in the conference title: “Public-Private Initiatives After TRIPS: Designing A Global Agenda.” Among those attending were a delegation of intellectual property officials from China, the largest in number ever to attend a privately-sponsored conference outside the Mainland itself, and a smaller but no-less-distinguished delegation from Vietnam, which came to observe the initial proceedings.⁴

4. An Appendix to this Foreword acknowledges the valuable assistance of those who contributed to the planning and execution of the Brussels Conference.

The Conference proceeded on two levels simultaneously. In public sessions over three days, the Conveners of the Conference arranged for papers and discussions that would reveal the nature of their proposed undertaking, while inviting those in attendance to join in the effort. Professor Jerome Reichman of the Vanderbilt Law School presented the Keynote Address explaining the theory of public-private initiatives in a paper in which I joined as coauthor. Professor Reichman's remarks were followed by papers given by Joanna Schmidt-Szalewski, Professor of Law at the University of Lyon; by Joseph Straus, Professor of Law at the University of Ljubljana, and Head of the Industrial Property Department at the Max Planck Institute in Munich; and by Paul Edward Geller, Author and Editor of *International Copyright Law and Practice*, and Adjunct Professor at the University of Southern California Law School. Additional papers by Keith Maskus, Professor of Economics at the University of Colorado (Boulder), and by Carlos Alberto Primo Braga of The World Bank (with Carsten Fink, a consultant to the World Bank, as coauthor), offered evidence of the linkage between intellectual property stability and increased direct foreign investment. These papers are all included in this symposium, with such revisions in the meantime as the authors have thought suitable.

In addition, the delegates from the several Chinese intellectual property agencies also brought with them and delivered prepared addresses dealing with both policy and the day-to-day intricacies of their work in interpreting and enforcing China's intellectual property system. Among the delegates who spoke were Professor Duan, as well as Zheng Chengsi, Professor, Legal Research Institute, China Academy of Social Sciences; Liu Peizhi, Executive Deputy Director-General, State Trademark Bureau of State Administration of Industry and Commerce; Yin Xintian, Deputy Director, Review Department, The State Patent Bureau; Chen Zhaokuan, Deputy Director-General, Copyright Department of Copyright Bureau; Wu Shulin, Commissioner, Office of IPR Executive Conference of State Council; Li Qunying, Director, Supervision Division, General Customs Office; Cheng Yong-Shun, Justice IPR Division, Supreme People's Court, and Gao Xia-yun, Vice Director, Office of Administrative Protection for Pharmaceuticals (OAPP) State Pharmaceutical Administration of China (SPAC). Their papers, translated into English, are published here essentially as delivered at the Brussels Conference.⁵

5. Given the distinction of the delegates, these papers represent a useful record of the

Meanwhile, in private sessions also in Brussels, sponsors of the undertaking met with counterparts from among the China delegation, to search for solutions to pressing intellectual property issues that threatened to interfere with the expansion of trade and investment in the People's Republic. The parties met in the specific understanding that their exchanges would remain off-the-record, and so nothing will be added here except to say that in this fashion the first steps were taken toward the ongoing public-private initiatives the conveners envisioned. Although no great strides were taken in the three days of meetings, still, in the estimation of those who participated, the encounters were nonetheless promising by their very nature; certainly, nothing suggested that the practice of public-private initiatives in this context was foredoomed. Indeed, we make no claims here for the undertaking we have begun, except to record its beginnings in this fashion, through the publication of the written documents produced in connection with the Brussels Conference. Additional conferences are envisioned; and additional efforts to sustain the undertaking will continue—though inevitably the years ahead will also see great changes in our initial vision.⁶ The question of success or failure necessarily remains in issue, and is unlikely to be resolved in the near term.

Each reader can judge, meanwhile, whether the concept of bargaining around TRIPS through public-private initiatives seems plausible, viable or even desirable. For my own part, I remain convinced that this is an intriguing and useful approach to the task of bringing intellectual property into wider recognition and compliance around the world. It offers simplicity, flexibility, efficiency and, not least among its virtues, freedom from the more abrasive confrontations that can ensue when one state accuses another of failure to comply with international norms and expectations. It is but one approach among many, certainly, and it offers no prospect for success that is not bound up in the goodwill of the parties to the bargain; but this is,

status of intellectual property policy in the People's Republic of China as of the time they were delivered. The reader should be aware, however, that since the date of the Brussels Conference numerous changes in the structure and administration of intellectual property in the People's Republic have taken place as part of a more general restructuring and "downsizing" of the State bureaucracy. A number of the speakers whose papers appear here have since been reassigned or replaced, and their agencies have in some instances been reshaped as well.

6. At this writing, for example, the work of the International Forum for Intellectual Property Initiatives, which grew out of the initial negotiations in Brussels, is being transferred to the Global Capital Markets Center at the Law School, in explicit recognition of the close link between IP stability and foreign direct investment in the marketplaces of the world.

or so I think, enough. In the end, however, no matter how much we might like to suppose otherwise, intellectual property is far too fragile to survive except as a function of goodwill. Public-private initiatives of the sort envisioned here have much to teach us all about earning that goodwill from others.

APPENDIX

“PUBLIC-PRIVATE INITIATIVES AFTER TRIPS: DESIGNING
A GLOBAL AGENDA”

Principal Speakers, Organizers and Members of the Conference
Advisory Group:

Miles J. Alexander
Chairman
Kilpatrick Cody
Atlanta, Georgia

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Merck & Co., Inc.
Whitehouse, New Jersey

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Assistant General Counsel
IBM
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Jon Baumgarten
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Director, Legal Department
The Customs Administration
The People's Republic of China

Bradley Bodager
Duke University School of Law
Durham, North Carolina

Chen Zhaokuan
Deputy Director-General
Copyright Department of Copyright Bureau
The People's Republic of China

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The State Administration of Trademarks
The People's Republic of China

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Hanoi, Socialist Republic of Vietnam

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Copyright Law Review
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Universities of Lausanne and
Fribourg
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The Customs Administration
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Executive Deputy Director-
General
State Trademark Bureau of State
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