

Questionnaire 2

HCCH Judgments Project

Introduction

- 1) An important current project of the Hague Conference on Private International Law (**HCCH**) is the development of a convention on the recognition and enforcement of foreign judgments (**Convention**). This project is referred to as the **Judgments Project**. See [here](#).
- 2) In this questionnaire:
 - a) **judgment** refers, in accordance with art. 3(1)(b) Draft Convention, to “*any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.*”
 - b) **inter partes judgment** refers to a binding judgment between two or more parties that only binds the parties to that judgment, and does not affect rights *in rem*;
 - c) **in rem judgment** refers to a judgment which affects rights *in rem*, being rights against all, such as patent rights; and
 - d) **res judicata** includes the doctrines of claim and issue preclusion, claim and issue estoppel and any other doctrine which limits the ability of a party to bring new legal proceedings or re-litigate an issue.
- 3) The most recent text of the draft Convention (the **Draft Convention**) is the November 2017 text (the **November 2017 Draft Convention**), which can be found [here](#). Important intellectual property related issues in relation to the November 2017 Draft Convention include whether the Convention should:
 - a) apply to judgments that include only *inter partes* rulings regarding the validity or infringement of intellectual property;
 - b) apply to *in rem* judgments concerning intellectual property, e.g. an order to revoke a patent or an order to limit the claims of a patent;

- c) apply to court decisions only, or also to decisions from other bodies, e.g. an Intellectual Property Office;
 - d) apply just in relation to unregistered intellectual property rights and not registered intellectual property rights;
 - e) inasfar as a judgment rules on infringement, only apply to the extent it concerns monetary remedies (and costs);
 - f) mandate *res judicata* laws, such that issues which have already been finally determined in one court between certain parties cannot be re-litigated between the same parties in another court in the same jurisdiction or a different jurisdiction.
- 4) It is also relevant to note that the Draft Convention includes several provisions with more general relevance that are also relevant for intellectual property decisions, such as those addressing the situation in which a judgment can still be appealed (Article 4(4) of the Draft Convention) and those concerning costs (Article 16 of the Draft Convention). Also, as is clear from the above, the Draft Convention applies to merits decisions only (and not to interim measures of protection). See also Article 5(1)(f).
- 5) In October 2017, AIPPI circulated a first questionnaire (the **First Questionnaire**) based on the February 2017 text of the Draft Convention (the **February 2017 Draft Convention**), which can be found [here](#). The purpose of the First Questionnaire was to ascertain the view of AIPPI's National and Regional Groups (**Groups**) and Independent Members (**IMs**) as to the overall relevance of the Judgments Project. It also aimed to enable AIPPI to take a general position during the Third Meeting on the Special Commission on the Judgments Project, held on November 13-17, 2017, which AIPPI attended as an invited observer.
- 6) The summary report of the First Questionnaire can be found [here](#). The Groups that replied to the First Questionnaire were more or less split on the key question asked whether or not intellectual property rights should be included within the scope of the Convention at all. By reason of the short timeframe in which the First Questionnaire was conducted, some Groups and IMs were unable to respond at all, and others were only able to respond on a preliminary basis.
- 7) This questionnaire concerns the November 2017 Draft Convention (the **Second Questionnaire**). It aims to study the Draft Convention in more detail and give Groups and IMs the opportunity to reply per se and express their views in greater detail, if they so desire.
- 8) This Second Questionnaire has a special focus on the inclusion/exclusion of intellectual property within the scope of the Convention, and also addresses the issue of *res judicata* and its implications.

- 9) The HCCH will hold a further Special Committee Meeting on 24-29 May 2018, which AIPPI will also attend as an invited observer. At this meeting, the intellectual property related discussion is currently envisaged to be limited to "*decisions of competent authorities in relation to the validity of intellectual property rights*" (see Article 8(3) of the Draft Convention). A Diplomatic Conference will likely be held in 2019, during which the remaining intellectual property issues are expected to be discussed as well.
- 10) It is intended that (i) the information obtained from the Second Questionnaire will enable AIPPI to further develop a more detailed position in relation to the Judgments Project and (ii) AIPPI will be able to convey its findings at the Special Committee Meeting in May 2018 (at least in relation to the issue for discussion referred to at paragraph 9) above) and, in due course, at the Diplomatic Conference.
- 11) Further, it is intended that the Judgments Project will be the subject of a Resolution proposed for adoption at the 2018 AIPPI World Congress in Cancun (23-26 September 2018).
- 12) Articles 2(1)(m), 5(3)(a)-(c), 6(a), 7(1)(g), 8(3) and 11 of the November 2017 Draft Convention are particularly relevant to the issues in this Second Questionnaire.

Previous work of AIPPI

- 13) Jurisdiction as such is not part of the Draft Convention. The Draft Convention therefore does not lay down rules for determining which court has jurisdiction. Instead, the Draft Convention proceeds generally on the basis that the court issuing a judgment had jurisdiction to determine the issues before it. However, some Articles (e.g. 6(a)) do restrict the enforcement of judgments to those issued by certain courts only, which implicitly sets out jurisdictional rules that must be complied with for judgments to be enforceable.
- 14) In 2001, AIPPI provided input in relation to the Judgments Project, which primarily focused on jurisdiction and whether courts have jurisdiction to try the relevant issue(s). See the report of Special Committee Q153, [here](#), and the Resolution on Q153 – "Hague Conference on Private International Law" (Melbourne, 2001) (**Resolution Q153**), [here](#).
- 15) In Resolution Q153, AIPPI (i) noted that it has been unable to formulate a Resolution on exclusive jurisdiction in respect of industrial property rights required to be deposited or registered, and therefore (ii) recommended to exclude intellectual property matters from the substantive scope of the envisaged Convention and (iii) called on the Hague Conference on Private International Law to develop a specific protocol on intellectual property to be added to the envisaged Convention at a later point in time. It was envisaged that at a later time, AIPPI would formulate a position on exclusive jurisdiction in respect of industrial property rights required to be deposited or registered.

- 16) The question of exclusive jurisdiction in respect of industrial property rights required to be deposited or registered is touched on in Article 6(a) of the November 2017 Draft Convention. The questions below relating to Article 6(a) allow a further opportunity to progress the work commenced in connection with Resolution Q153.
- 17) It is not proposed at this stage to suggest the addition of a more comprehensive protocol addressing exclusive and non-exclusive jurisdiction to the Draft Convention, since AIPPI is an observer at the Hague Conference, with the primary focus of providing its views on proposals made by participating States.

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Questions

- 1) Relating to Article 2(1)(m) of the November 2017 Draft Convention:

“This Convention shall not apply to the following matters - ... [(m) intellectual property rights [and analogous matters].”

- a) Should any intellectual property rights be included in the scope of the Convention? Please explain why or why not.

Please answer Questions 1)b)-d) even if you have answered NO to Question 1)a) (you may e.g. have views on the definition anyway, for the event intellectual property rights would be included)

The current draft excludes intellectual property rights and analogous matters.

In most of the states including Turkey, industrial property rights such as patents, designs, geographical indications and trademarks are protected based on the territoriality principle. In other words, only the industrial property rights which are registered in requested state enjoy specific protection within the territory. Unregistered rights fall under the protection provided by general rules.

According to the draft, when a state of origin court renders a decision in favor of the plaintiff regardless of the registration status of the industrial property right, the plaintiff becomes entitled to enforce the decision in requested state. In this case, the decision obtained in the state of origin provides indirect protection for the rights which are unregistered in requested state. There is no

doubt that this exceeds the territoriality principle and leads to an unequal situation in states where only the registered rights can enjoy protection.

On the other hand, considering previous discussions and other international instruments such as Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the exclusive jurisdiction on validity and registrability of intellectual property rights has always been reserved. However, it should be kept in mind that validity and registrability argument is also discussed in most of the infringement cases as counter argument as well. In general, before deciding on an infringement claim, the courts consider the validity and registration status of the basis rights at first instance. Therefore, while validity and registrability fall under the scope of exclusive jurisdiction of the courts of the relevant state, all claims regarding the industrial property rights which can be protected through registration should be exclusively considered by the same courts.

According to the Turkish International Private and Civil Procedure Law; if the private law transactions and relations contain a foreign element, the judge shall apply the rules of the Turkish conflict of laws and the governing foreign law which is applicable in accordance with the rules ex officio. The judge may seek assistance of the parties for the determination of the content of the governing foreign law. In the light of the Turkish International Private and Civil Procedure Law and Background paper about the recognition and enforcement of foreign judgments, it is technically possible to apply the foreign law if the relation contains a foreign element. But, the prevailing view is that in case of an infringement of a registered trademark; the law of the country in which the trademark is registered should be applied. However, considering that the protection of industrial property rights are mostly based on the registration and territoriality principle is adopted in several countries, all industrial property rights should be excluded from the scope of the Convention.

On the other hand, since copyright is protected as long as the right ownership is proven without the need of a registration, we believe that the exception can be limited only with copyright and related rights. Nevertheless, considering that the scope of the copyright protection isn't certain and same in each country, the scope of the protection can differ from country to country. For instance a shoe design may be accepted as a work of art in one country, yet it isn't accepted as such according to some of the Turkish courts. Therefore, we have doubts even for the inclusion of the copyright and related rights.

- b) Should intellectual property rights be included in the scope of the Convention, what should be included within the concept of "intellectual property"? For example, should the concept of "intellectual property" be limited to the "traditional" intellectual property rights, e.g. patents, designs, trademarks, copyright? Alternatively, should the concept of "intellectual property" also include related rights, such as rights relating to trade secrets, rights arising from licences, unfair competition, etc.? Please explain and specify why or why not certain types of "intellectual property" should be included or excluded.

According to Turkish Intellectual Property Code; trademark, design, patent, utility model and geographical indication are within the scope of the registration and also the Intellectual Work of Art Law in Turkey determines the scope of the "intellectual property rights". For instance; the trade secrets are protected under the Turkish Commercial Law. As we mentioned above this scope can differ in each country due to the territoriality principle, it can be reduced or expanded. Consequently, we are of the opinion that all intellectual property rights except copyright and related rights should be excluded from the scope of the Convention. Also, even if the copyright and related rights are included, it would be useful to give a definition of these rights.

- c) Do you think the wording "... and analogous matters" is clear enough? Please explain why or why not.

In our opinion, this wording is unclear because of the vagueness of the word "analogous matters". For a multilateral convention between states, each word should be well defined; otherwise it will lead to conflicts between the states. Instead of the wording "analogous matters"; we should put numerous clauses well-explained and well-defined.

- d) Please provide any proposals regarding the refinement of the wording of Article 2(1)(m) of the Draft Convention.

It could be "intellectual rights except the copyright and related rights"

Also, as it is mentioned above the works that may be included under copyright protection should be defined numerous clausus.

- 2) Relating to Article 5(3)(a) of the November 2017 Draft Convention:

"Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –

(a) the judgment ruled on an infringement in the State of origin of an intellectual property right required to be granted or registered and it was given by a court in the State in which the grant or registration of the right concerned has taken place or, under the terms of an international or regional instrument, is deemed to have taken place[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State;"]

- a) Should a judgment that ruled on the infringement of an intellectual property right required to be granted or registered only be eligible for recognition and enforcement if given by a court of the contracting state in which the intellectual property right in question was granted or is registered? Please explain why or why not.

Considering that we recommend limitation of the substantial scope with copyright and related right matters, the decisions of courts of all contracting states in terms of copyrights and related rights should be eligible for recognition and enforcement to provide that the right owner can prove its rights before the court.

- b) Should there be an exclusion in the case were the defendant has not acted in that State or their activity cannot reasonably be seen as having been targeted at that State? Please explain why or why not.

Since we consider the scope of the Convention to be limited to the copyright and related rights, such rights should be protected worldwide considering the unique nature of them. There should be no need to address or target a group of people or an intention for damage in order to protect those rights, as they shall not be duplicated in any case in anywhere. Still, as we mentioned in our previous answers above, even for the copyright and related rights we have doubts due to the various possibilities of State laws on the determination of the scope of the right. Therefore, we are of the opinion that there should not be an exclusion in the case were the defendant has not acted in that State or their activity cannot reasonably be seen as having been targeted at that State

- c) Should there be an exclusion in the case of purely inter partes judgments? Please explain why or why not.

IP rights in general are rights in rem, so they are erga omnes. In case of a preliminary question, inter partes judgments may be considered as well. We consider the scope of the Convention should contain only the copyright and related rights and they are in any case to be protected worldwide, therefore should be eligible for recognition and enforcement everywhere. We do not prefer the IP rights other than the copyright and related rights to be in the scope of the Convention in the first place as explained above. Even though it is an inter partes judgment, if it affects the final judgment, it is undesirable for the IP rights other than the copyright and related rights to be in the scope or an exclusion of the Convention. As a conclusion, we do not consider that there would be any exclusion in that matter even if it is purely inter partes judgments.

- 3) Relating to Article 5(3)(b) of the November 2017 Draft Convention:

“Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –

...

- (b) *the judgment ruled on an infringement in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which*

protection was claimed [, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State;”

- a) Should a judgment that ruled on the infringement of a copyright or related rights, an unregistered trademark or unregistered industrial design, only be eligible for recognition and enforcement if given by a court in the State for which protection is claimed? Please explain why or why not.

As it is explained above, the copyright and related rights should be protected and subject to recognition and enforcement worldwide due to its nature. It is not relevant or important that the Court of which State to render the judgment, every competent Court worldwide should be able to rule on the matters of copyright and related rights. However, we are of opinion that the unregistered trademark or unregistered industrial design should not be in the scope of the Convention. However, in case of the inclusion of such unregistered rights, it would be more healthy to allow the recognition and enforcement if it is given by a court in the State for which protection is claimed since the judgement given by the court in the State for which protection is claimed will guarantee the implementation of proper law better.

- b) Should there be an exclusion in the case were the defendant has not acted in that State or their activity cannot reasonably be seen as having been targeted at that State? Please explain why or why not.

Basing on the fact that we do not support the inclusion of IP rights except the copyrights and related rights, we believe that there should not be an exclusion on that matter considering the unique nature of them as they cannot be subject of an infringement accidentally.

- c) Should there be a requirement that the infringement in question is actionable in both the State in which the judgment was issued, and in the State in which the judgment is sought to be enforced? Please explain why or why not.¹

Yes, given that the both States has the same requirements and the infringement in question is actionable in both States, it would be possible to prevent forum shopping opportunities. In case the plaintiff is not allowed to sue the defendant in the State where the judgment is sought to be enforced or the case does not meet the conditions in order to file a lawsuit in that State, but it is possible to litigate in the State where the judgment was issued and the only reason for the plaintiff to file the lawsuit in such State is evasion of

¹ There has been a ‘double actionability’ requirement in the laws of some states. If, for example, the defendant commits acts in state A which amount to a tort in state A but is sued in state B for that tort, does the tort need to be an actionable tort in both states A and B or just in state A? This is especially relevant for territorial rights such as intellectual property rights. In relation to copyright infringement, this question arose in the UK case of *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, in which the Court of Appeal held that a claim in England for infringement of a Dutch copyright was permitted, and in New Zealand in *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179.

the law, then it should be prevented. Actually, the bad faith of the defendant would not be protected that way.

- 4) Relating to Article 5(3)(c) of the November 2017 Draft Convention:

“Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –

...

(c) the judgment ruled on the validity[, subsistence or ownership] in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed.”

- a) Should a judgment that ruled on the validity, subsistence or ownership of a copyright or related right, an unregistered trademark or unregistered industrial design only be eligible for recognition and enforcement if given by a court in the State for which protection is claimed? Please explain why or why not.

We are of the opinion that the recognition and enforcement eligibility of decisions rendered for the ownership or subsistence of copyright and related rights should not be limited with the court of a contracting state which governs the concerned right as long as the scope of the copyrights is clearly stated in the convention which will be quite difficult in our opinion.

As to the other industrial property rights, we believe that even if a judgment regarding the ownership of the right has been rendered by a court of a contracting state the law of which governs the right concerned, it should not be eligible for recognition and enforcement. As we explained in our response for the question 1-a above, territoriality principle is adopted in most of the states. Furthermore, the criteria for the registrability, validity or ownership of the industrial property rights depend on the law and practice of each state. For instance, the earlier use requirement of a trademark is accepted in consideration of the use in each state. The use of a trademark within the boundaries of one state does not automatically constitute use for another state. Therefore, the decision rendered in one state for the registration, validity or ownership of an industrial property rights cannot provide same results in another state as they apply diversified rules.

- b) Should there be a requirement that the validity, subsistence or ownership referred to in Article 5(3)(c) is actionable in both the State in which the judgment was issued, and in the State in which the judgment is sought to be enforced? Please explain why or why not.

I Yes, we are of the opinion that the validity, subsistence or ownership referred to in Article 5 (3) (c) should be actionable in both the State in which the judgment was issued, and in the State in which the judgment is sought to

be enforced. Indeed, it would be possible to prevent forum shopping opportunities. In case the plaintiff is not allowed to sue the defendant in the State where the judgment is sought to be enforced or the case does not meet the conditions in order to file a lawsuit in that State, but it is possible to litigate in the State where the judgment was issued and the only reason for the plaintiff to file the lawsuit in such State is evasion of the law, then it should be prevented. Actually, the bad faith of the defendant would not be protected that way.

- 5) See Article 6(a) of the November 2017 Draft Convention; and also Article 8(3) of the November 2017 Draft Convention:
- a) Should a judgment that ruled on the validity of an intellectual property right only be eligible for recognition and enforcement if given by a court of a contracting State in which grant or registration has taken place? Please explain why or why not.

As adopted by Brussels and Lugano Conventions, the courts have exclusive competence regarding the registration or validity of an intellectual property right. The contrary may be a major interference with the authority and sovereignty of the state of registration. Furthermore, the judgments that ruled on the registration or validity of an intellectual property right have impacts on the registration authorities in the state that registered the right. Each contracting state's court considers the circumstances within its territory; and therefore recognizing and enforcing a decision rendered by another contracting state's court may create unfair positions as the circumstances within its territory will not be considered. The courts of the state which originally registered the right have more expertise and are most suitable to address the issue of registration or validity of the right. According to our opinion based on the territoriality principle this provision is not applicable. For instance, an abbreviation of a name of the product which may create lack of distinctiveness on that product in a State in their language does not mean anything in another State, so it may pass the absolute grounds of refusal in the other State unlike the first one. These kind of disputes may cause confusion.

- b) In your jurisdiction, does the word "validity" subsume "registration"? If not, are they related, and if so, how?

Validity is a term that subsume registration in our jurisdiction. Validity is an indication that the trademark can be registered. If the trademark is not valid, it cannot be registered. However, if a trademark is not registered, it does not mean that the trademark is not valid.

- c) Should there be an exception in the case of purely inter partes validity judgments? For example, if validity is subsidiary to infringement and a finding regarding validity is only effective as between the parties in the infringement

case, or if the validity judgment only acquires in rem effect once it has been fully appealed and becomes final. Please explain why or why not.

We are of the opinion that the validity judgments should be rendered by the Court of State in which the IP right is protected and according to the law under which the IP right is protected. If the purely inter partes judgment has been made in this way, then it may be possible to exclude such decisions. The inter partes judgment may be recognized with the final judgment, as long as it does not violate the authority and sovereignty of the state of protection.

- 6) Should a decision from a body other than a court, such as a branch of government or an Intellectual Property Office, in relation to an intellectual property right required to be granted or registered have the same status under Articles 5(3), 6(a) and 8(3) of the Draft Convention as decisions of a court (particularly in view of the fact that it is not just courts that can revoke intellectual property rights, but e.g. also national and regional offices)? Please explain why or why not.

A decision from a body other than a court shouldn't have the same status under Articles 5(3), 6(a) and 8(3) of the Draft Convention as decisions of a court because it will lead to disaccord between the states and it will damage the territoriality principle and the sovereignty of the states. The credibility of a decision of body other than the court will be the core of the problem. Also, recognition and enforcement is only possible for court judgements according to the Turkish International Private and Civil Procedure Law as well.

- 7) Relating to Article 8(3) of the November 2017 Draft Convention:

"However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or

(b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment."

- a) Should the wording of Article 8(3) of the Draft Convention be adjusted, particularly in view of the fact that in intellectual property matters, it is not just courts that can e.g. revoke intellectual property rights (see also above)? Please explain why or why not.

As adopted by Brussels and Lugano Conventions, the courts have exclusive competence regarding the registration or validity of an intellectual property right. The contrary may be a major interference with the authority and

sovereignty of the state of registration. Furthermore, the judgments that ruled on the registration or validity of an intellectual property right have impacts on the registration authorities in the state that registered the right. Each contracting state's court or authorised entity considers the circumstances within its territory; and therefore recognizing and enforcing a decision rendered by another contracting state's court or competent authority may create unfair positions as the circumstances within its territory will not be considered. The courts of the state which originally registered the right have more expertise and are most suitable to address the issue of registration or validity of the right.

Therefore, in case of the inclusion of IP rights to the convention, subparagraphs of the Article 8(3) should be kept as a guarantee for the internal law of the State in which grant or registration has taken place or protected.

- b) Please provide any proposals regarding the refinement of the wording of Article 8(3) of the Draft Convention.
- 8) Should the application of a law other than the internal law of the State of origin of a judgment ruled on an infringement of an intellectual property right be a ground for refusal for recognition or enforcement? Please explain why or why not.

(see Article 7(1)(g) of the November 2017 Draft Convention)

As we mentioned before, intellectual property rights are mostly based on the territoriality principle. States may have different registration systems and various regulations having effect on a particular intellectual property right. Therefore, we repeat that IP rights should not be included within this convention.

In case of the inclusion of IP rights, application of a law other than the internal law of the State of origin of a judgment ruled on an infringement of an intellectual property right should be accepted as a ground for refusal for recognition or enforcement. In our opinion, such article is an insurance for the competency.

- 9) See Article 11 of the November 2017 Draft Convention:
 - a) Should the Convention only cover judgments ruling on an infringement to the extent that they rule on a monetary remedy in relation to harm suffered in the State of origin (in addition to the enforceability of a cost award, see Article 15 of the Draft Convention)? Please explain why or why not.

Although we do not agree with the inclusion of the intellectual property rights, in terms of Article 11 we believe that cross-border enforcement of the IP related Judgements should be restricted to monetary remedy only. For instance, we already believe that validity issues and similar non-monetary remedy resulting judgements should not be included herein convention.

Also, according to Article 16, "*Convention does not prevent the recognition or enforcement of judgements under national law*". Therefore, even if the Convention does not cover Article 11, the requested State may enforce the State of Origin decision according to Article 16 if it is convenient for its internal regulation.

- b) Do you agree with the reformulation of Article 11 (previously 12)? Please explain why or why not.

Comparing to the previous Article 12, new Article 11 has a narrower scope. Due to the concerns mentioned in a) we support such restricted formulation. Indeed, every type of remedies may not be applicable in the requested state. For instance, in Turkey we do not have punitive damages.

(see also Article 12 of the February 2017 Draft Convention)

- c) If you have answered NO to Question 9)b), how could the wording of Article 11 be refined? Please explain why or why not.

- 10) Should there be a rule, such as *res judicata*, to prevent the re-litigation of issues which have already been determined by the court of a State? Please explain why or why not.

Yes. Court of States have their own jurisdiction within their territory. According to Council Regulation (EC) No 44/2001 and Brussels Convention support stated jurisdiction rule. Otherwise sovereignty of the states might be damaged. Indeed, our Private International law prevents the revision of the decision of State of Origin.

- a) If YES, should the rule only apply between the same parties, and in relation to issues that have been finally determined with no possible appeals remaining?

All appeal options in relation to the judgment should have been exhausted in the court of states. Non-finalised decisions may be accepted as prejudicial question.

- c) If YES, should *res judicata* only apply in the case of *in rem* judgments, or also in the case of *inter partes* judgments? In particular, should a prior *inter partes* determination of validity prevent the later re-litigation of validity, e.g. if new prior art is found which is said to invalidate a patent?

Res-judicata only applies to the same issue between same parties basing on the same grounds. We believe that IP rights in general are rights in *rem*, so they are *erga omnes*. Therefore, *inter partes* judgments may be the subject of a preliminary question in an e.g. infringement action, but not a decision in merit. Consequently, in case of a new lawsuit in terms of the validity of the disputed IP right, the matter in dispute (cause of the action) cannot be accepted as the same. Therefore, we are of the opinion that *res judicata* only apply in the case of *in rem* judgments.

- 11) To the extent not yet mentioned above (e.g. in your reply to question 1) above) do you have concerns in relation to *res judicata* rules possibly being applicable (e.g. through national laws) should intellectual property be included

within the scope of the Draft Convention? Please explain your concerns and potential ways to address those.

In theory, a matter that has been examined by a competent court may not be pursued by the same parties for the same reason and therefore State of Origin Court's decision should not be examined by the requested State again in principle.

Therefore, our concerns mentioned in question 1 covers and remains valid for res judicata rules as well.

- 12) Do you have any other comments (including wording suggestions) in relation to the intellectual property related aspects of the Draft Convention?

Key terms such as intellectual property, copy rights, analogues matters and any other similar key terms are quite broad and vague. Scope of these terms should be explained in more detail and numerus clausus if it is possible.

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