TRANSCENDING TERRITORIALITY:  
INTERNATIONAL COOPERATION AND HARMONIZATION  
IN INTELLECTUAL PROPERTY ENFORCEMENT AND  
DISPUTE RESOLUTION

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Abstract

Intellectual property owners often face difficulties when trying to enforce their rights in cross-border and multi-jurisdictional disputes. Enforcement processes usually need to be litigated jurisdiction-by-jurisdiction, which can be prohibitively complicated and expensive. Chinese investors can find themselves facing unpredictable outcomes if they try to enforce their intellectual property rights abroad, and outcomes may vary dramatically although similar facts are presented in each dispute in different jurisdictions. Similarly, foreign intellectual property holders may face quite diverse litigation environments and outcomes if they wish to enforce their rights in different jurisdictions, e.g. in the European Union (EU), the United States of America (US) and the People’s Republic of China (China). This article examines international steps being taken towards addressing these issues, and it discusses ongoing concerns. Categorizing developments as "cooperative" or "harmonizing", the article first examines cross-border cooperation in intellectual property enforcement and dispute resolution that is found in international treaties. Some agreements are specific to intellectual property law, while others have broader applicability but nonetheless affect the adjudication of intellectual property disputes by domestic courts. Initiatives with respect to the intersection of public international law and intellectual property may resolve many cross-border enforcement difficulties, and the article also considers the use of arbitration to side-step existing problems. The second half of the article examines harmonization. Horizontal and vertical harmonization are being used to streamline laws and administrative processes concerning the acquisition of intellectual property worldwide. This lays foundations from which harmonized enforcement mechanisms may evolve. The article concludes that, in due course, it would not be surprising to see groups of nations develop unitary patents, trademarks and/or designs, and international intellectual property courts through which to enforce them. It would also be unsurprising if – as its own intellectual property system matures,¹ and it becomes increasingly dominant in world trade – China were gradually to take a more leading role in shaping the future of cross-border cooperation and harmonization in intellectual property enforcement and dispute resolution.

I. INTRODUCTION

Delineated by territorial boundaries and sourced from the national laws of sovereign states, intellectual property laws have traditionally been constrained by geography. Interconnectedness in cyberspace presents challenges to intellectual property’s territorial underpinnings, as does interconnectedness in international commerce. This article examines problems faced by Chinese and foreign intellectual property

holders alike when trying to enforce their rights across jurisdictional borders. It examines existing measures that smooth cross-border acquisition and enforcement in a world in which technology and globalization are challenging the geographical boundaries that lie at the heart of intellectual property laws, and it suggests areas in which existing legal structures could be extended to simplify cross-border enforcement.

Under the principle of territoriality, national intellectual property laws give rise to intellectual property rights that are enforceable within a nation’s territorial boundaries. This creates a situation in which registered rights, such as patents, designs and trademarks, need to be formally recorded in each jurisdiction in which they are to be protected. Even when intellectual property rights come about automatically and without formal registration requirements, they must be dealt with and protected separately in each jurisdiction.

It can be complicated, expensive and inefficient to register (or otherwise acquire) the same intellectual property interests in multiple jurisdictions, and to litigate the same dispute in each jurisdiction. The costs and complexity of battling multifaceted intellectual property disputes through the courts of each jurisdiction in which rights are being enforced can be prohibitive. The Apple v. Samsung disputes provide a good illustration. In 2012, the giant technology companies Apple and Samsung were fighting over fifty patents and/or design cases on similar issues in ten separate countries (Australia, Britain, France, Germany, Italy, Japan, the Netherlands, South Korea, Spain, and the US), at enormous expense.

Issues of access to justice are raised when only the wealthiest businesses are likely to be able to afford such litigation. It is also questionable whether territorially-based intellectual property laws work effectively in an increasingly globalized and interconnected world in which the law’s jurisdictional boundaries can seem mismatched with the way in which communication and commerce are evolving. With the arrival of the Fourth Industrial Revolution’s "internet of things" and creativity by Artificial Intelligence (AI) – both of which can transcend nationality and territorial limits – demand for easier, more efficient trans-jurisdictional protection of intellectual property interests is only likely to increase.

Developments in cross-border intellectual property protection and enforcement suggest practical solutions are gradually being found to

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2 Such as copyright and passing off, and designs in some jurisdictions.
circumvent the limitations imposed on rights-holders by geographically-based intellectual property jurisdiction. Some of these trends are extensions and developments of existing laws; other measures seem almost designed to thwart gaps in legal protection. While not supplanting traditional enforcement mechanisms, these trends are extending and enhancing protection for intellectual property owners who seek to defend their rights in the context of cross-border communications and trade.

This article outlines difficulties involved in applying traditional international enforcement options in the contemporary environment, and it considers trends in trans-border intellectual property enforcement. Part II outlines the basic jurisdiction-by-jurisdiction approach to trans-border acquisition of intellectual property and the gaps it leaves for those trying to enforce their rights across national boundaries. It summarizes the many practical challenges that can stand in the way of enforcement in cross-border or multi-jurisdictional disputes. Where relevant, this article takes particular note of China’s approach to resolving structural problems around cross-border intellectual property enforcement and dispute resolution.

The article then identifies two general trends in the ways in which the international intellectual property community is responding to these difficulties, first, through cooperation and, second, through harmonization of intellectual property laws and administrative practices. Part III discusses how international treaties have modified the basic approach, engendering cooperation between nations with respect to the acquisition of intellectual property. While these agreements have greatly increased the ease by which intellectual property can be obtained in another jurisdiction, they do relatively little to assist intellectual property owners who seek to enforce their rights across borders. Part IV analyses efforts to smooth intellectual property acquisition and/or enforcement through harmonization of national laws and administrative practices. Identifying two main patterns of harmonization – which may be characterized as "horizontal" and "vertical" – the article examines the ways in which the trend towards increasing harmonization of intellectual property laws and practices can assist those who seek to enforce their rights in trans-border disputes.

The article concludes that – particularly through collaborative mechanisms for obtaining intellectual property outside a person’s home jurisdiction – foundations have been laid upon which more widespread, comprehensive and streamlined arrangements could be put in place to enable easier cross-jurisdictional enforcement of the rights that attach to that property. There is already a diverse range of precedents for this. It suggests that, while public international law provisions continue to construct the legal conditions in which cross-
border intellectual property rights can be obtained, the future of international intellectual property enforcement increasingly also invokes administrative measures and aspects of private international intellectual property law. It also suggests that China is likely to play an increasingly prominent role in this future.

II. JURISDICTION-BY-JURISDICTION ACQUISITION & ENFORCEMENT

Given the territorial nature of intellectual property laws, the surest way for a creator to obtain intellectual property protection beyond its home jurisdiction has traditionally been to systematically seek registration or recognition of rights in each overseas jurisdiction in which it might intend to assert ownership over the material. For example, if a Chinese investor wishes to protect its investment through patent law in the US, the EU and Australia, it would need to seek registration under the domestic laws of each of these jurisdictions. The property and rights obtained in each jurisdiction are independent of those in each other jurisdiction, and each must be enforced separately. Thus, if a Chinese patent holding company discovered its registered rights were being infringed by a competitor in the US, the EU and Australia, it would expect to have to litigate separately in each of those jurisdictions in order to enforce its rights. The territoriality principle has traditionally been taken to mean that each country has jurisdiction with respect to adjudicating intellectual property disputes, and no state should interfere in the legal affairs of other sovereign states.\(^5\)

With respect to registered intellectual property interests – patents for inventions, trademarks for brands, and/or designs for the appearance of objects – the most straightforward way in which a person or business could traditionally gain international protection was to register in each jurisdiction in which protection was desired. However, this jurisdiction-by-jurisdiction approach is a time-consuming and expensive strategy that typically involves the retaining of local patent and/or trademark attorneys and/or lawyers to prosecute applications through local registries. But for benefits provided by grace periods in some countries, and recognition of foreign priority dates under treaty provisions, the registration of an equivalent patent or design in a second country would also face existential difficulties in jurisdictions that apply international novelty standards that take into account prior art anywhere in the world.

In times past, registration was also a method of obtaining copyright protection in some jurisdictions.\(^6\) In jurisdictions not requiring


\(^6\) For a discussion of copyright registration requirements in the US prior to 1989, see Rita Marie Cain, Timing Is Everything: Copyright Registration and Preregistration, 88 J. PAT. & TRADEMARK OFF. SOC’Y
registration, an author would usually demonstrate a "connecting factor" (usually citizenship or residency) to the jurisdiction in question in order to obtain copyright. Another way of obtaining the requisite connection has been to publish the work in the jurisdiction in which protection is sought, and "first publication" of a work in a foreign jurisdiction has traditionally been a common method of obtaining copyright abroad. While with less administratively burdensome than seeking registered rights abroad, the downside of copyright subsistence arising automatically if certain pre-conditions are met is that it leaves putative rights-holders unsure of the existence and scope of their property until they seek to enforce their interests through the courts, and outcomes may vary case-by-case.

Once intellectual property has been obtained in the foreign jurisdiction, legally it can also be enforced there. However, various limitations and complications can make this problematic in practice. In a case involving allegations of trans-border infringements, which court has jurisdiction? Which jurisdiction’s law applies? Then there are pragmatic considerations: not all jurisdictions have predictable, well-functioning, uncrupt legal systems in which litigants can be confident of receiving a fair trial. Concerns about receiving a fair trial may sometimes be compounded when the plaintiff is a foreigner.

China’s conflict of laws system has been described as “partially modernized”. The Law of the Application of Law for Foreign-related Civil Relations of the People’s Republic of China 2010 entered into force in 2011, introducing general rules and several provisions relating specifically to intellectual property law. The ownership and content of intellectual property are governed by the law in force in the jurisdiction where protection is sought. However, this law has been

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7 This article does not consider normative arguments for or against particular intellectual property or its rights. Instead, discussion is confined to the enforcement of rights that have already been provided for in national legislation.


described as “far from comprehensive”, and leaving need for a “more detailed judicial interpretation… to facilitate the smooth implementation” of the law in practice. Meanwhile, Chinese intellectual property holders may face a variety of different conflict of laws principles when seeking to enforce their rights in different countries abroad.

Even if a fair trial can be expected in a jurisdiction, the rights might not give rise to remedies in the jurisdiction that terminate and/or compensate for infringement that has occurred. Even if a court orders remedies that would, in theory, produce the desired results, it might be difficult or impossible to enforce orders for damages and/or other remedies. For example, on-the-ground enforcement of a judgment might be difficult in a jurisdiction beset with venality, or when assets are hidden and/or beyond reach. If there are no assets in that jurisdiction, would it be possible to have a foreign judgment enforced abroad? Whether or not a foreign judgment will be recognized and enforced by a Chinese court first depends upon whether China has concluded or acceded to an agreement with the foreign court’s government. If not, the decision is left to the Chinese People’s Court.

Even if the legal system of one jurisdiction functions well and produces effective and worthwhile remedies for the plaintiff, parallel actions may need to be taken in other jurisdictions to seek remedies to the infringing conduct. In such circumstances, there is no guarantee that the courts of different jurisdictions will reach the same findings of fact or law if equivalent litigation needs to be conducted to protect one’s intellectual property in multiple jurisdictions. Despite identical or similar facts, the findings of courts in different jurisdictions may be quite diverse. Difficulties with respect to predictability, coherence and diverging outcomes can inhibit cross-border enforcement of intellectual property rights, and these factors are often claimed to act as a disincentive to engage in trade with nations in which strong,

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11 Id. at 323.
12 Id.
13 Fan, supra note 9.
14 Id.
consistent intellectual protection may not be available. Various approaches have been taken to address this problem.

III. COOPERATION THROUGH INTERNATIONAL TREATIES & AGREEMENTS

In response to the sorts of concerns outlined in Part II, international intellectual property treaties and practices have been developed over several hundred years to give overseas recognition to nationally-based

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intellectual property and to make it possible for nationals of one jurisdiction to acquire intellectual property and enforce their rights in another jurisdiction. These treaties formalize cooperation between the legal systems of various jurisdictions, making it easier to obtain intellectual property interests abroad. They also address issues such as cooperation between national border authorities, which assists with enforcement of intellectual property rights in cases involving copyright piracy and/or counterfeiting of trademarked goods. However, these arrangements tend to make little practical difference to the enforcement difficulties outlined in Part II.

Numerous treaties address issues of intellectual property recognition by non-nationals, whether through formal registration of property interests, or by automatic copyright subsistence or recognition of unregistered trademarks. These agreements range from bilateral trade or investment treaties that include intellectual property clauses, to comprehensive multilateral treaties covering multiple areas of intellectual property law. Whatever their nature, such agreements typically adopt "national treatment" principles that entitle persons from one jurisdiction to obtain intellectual property rights in other jurisdictions. It is also common for the treaties to incorporate the principle of "priority rights", which enable patents, designs and trademarks registered in one jurisdiction to be recognized and used as the basis for applications in other jurisdictions within a specified period. Flowing from these methods of obtaining intellectual property in foreign jurisdictions, the holder of such rights also obtains the legal ability to enforce them within those jurisdictions. As such, the legal ability to enforce one’s rights is a simple corollary to intellectual property ownership. Enforcement through national courts in cross-jurisdictional cases also tends to be regarded as a concern of private international intellectual property law or "conflict of laws", a notionally domestic issue.17 Perhaps these reasons help to explain why little additional attention is paid to enforcement issues in the treaties.


This part of the article outlines key intellectual property treaties, all of which China is a signatory to, and it points to gaps that those treaties leave for those seeking international enforcement of intellectual property rights. It concludes that existing intellectual property treaties tend to be inadequate to meet the contemporary needs of creators and businesses wishing to enforce their intellectual property interests across international boundaries.

A. Intellectual Property Treaties

Since the late 19th Century, international treaties have created frameworks by which countries agree to measures that effectively transcend geographical limitations of intellectual property laws.

Articles 2 and 3 of the Paris Convention 1883 provide for its 177 Member States (including China) to treat the nationals of other members as they treat their own with respect to patent, design, and trademark law. Article 4 requires a right of priority. Together, these provisions result in nationals of one contracting state being able to register and enforce intellectual property interests in other contracting states. In addition to the Paris Convention, the World Intellectual Property Organization (WIPO) administers inter alia the Madrid system (trademarks), the Hague system (designs), and the

21 Article 4(1) states: “Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.” Paris Convention, supra note 18.
23 There are currently 67 contracting parties to the HAGUE AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF INDUSTRIAL DESIGNS (1925), http://www.wipo.int/wipolex/en/details.jsp?id=12526. The Hague Agreement creates the Hague International Design System, which enables an applicant to register multiple designs in multiple
Patent Cooperation Treaty 1970, each of which provides unified procedures for seeking simultaneous registration of intellectual property rights in multiple signatory jurisdictions. Of these, China is a party to the Madrid System and the Patent Cooperation Treaty.

These treaties standardize aspects of the laws of various nations and make it easier to obtain intellectual property abroad, but they do little to overcome the problems with cross-border enforcement outlined in Part II above. For example, if a Chinese company that registered its patent in Australia, Germany, India and the United States wanted to enforce those patents against a multi-national entity that it alleged was infringing in all those jurisdictions, the rights-holding company would have to pursue litigation through the courts of Australia, Germany, India and the United States separately. In each case, it would need to litigate under the domestic patent laws of the jurisdiction in question, and there would be no guarantee of uniform outcomes. While enforcement of foreign judgments is a possibility, it will be seen later in this article that this process is also unpredictable and fraught with difficulties. Even if enforcement of a foreign judgment could be achieved – thus avoiding the need for a full trial in the jurisdiction that enforces the foreign judgment – it would nonetheless have been necessary to litigate in multiple jurisdictions to achieve this outcome.

WIPO’s Berne Convention 1886 covers copyright and related rights, and its Article 5(1) provides that nationals of any of its 175 Member States (including China) can use the laws of other Member States to protect their copyright. Rather than using a registration approach, the Berne Convention requires that copyright automatically contracting parties with a single application: http://www.wipo.int/ha.../ For references to associated legal texts. See also http://www.wipo.int/ha.../  


27 See Part III.C below.


30 Article 5(1) states: “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.” Berne Convention, supra note 28.
subsist in Member States once certain prerequisites have been met. With respect to cross-border interests in copyright, the Berne Convention requires a state to afford the nationals of treaty-partners the same advantages and protection under the law that it provides to its own nationals. This means that nationals of one Berne Convention Member State receive the same copyright protection in each other Berne Convention Member State as locals receive. For example, Australia and China are both Berne Convention members. Therefore, the works of an Australian author would receive the same copyright protection in China as would the works of a Chinese author, and the Australian author could litigate in the Chinese courts to enforce Chinese copyright law against Chinese nationals or others within China. A Chinese author would likewise enjoy reciprocal privileges in Australia. However, in a world in which an estimated 3.6 billion people are connected to the internet, over which digitized versions of copyright-protected text, music, movies, software, and so on, can be transferred nearly instantaneously, to seemingly infinite recipients globally, and at a negligible cost, an author wanting to enforce its copyright might face the prospect of separate legal actions in multiple countries. In a vast majority of situations, cost and practical considerations would make this unrealistic.

Observance of the Paris and Berne Conventions was greatly expanded in the mid-1990s with the institution of the World Trade Organization (WTO). The WTO requires all Member States (including China) to comply with its Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement). The TRIPS Agreement sets out minimum standards of intellectual property protection that all Member States are required to implement in their domestic laws. Under Article 9(1) of the TRIPS Agreement, all members must comply with Articles 1 through 21 of the Berne Convention (1971 text) and, under Article 2, all members must comply with Articles 1-12 and 19 of the Paris Convention. The principle of national treatment is also found in Article 3 of the TRIPS Agreement. The cumulative effect has been to entrench minimum standards of

34 Article 2(1) states: “In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).” Id.
35 Article 3 states: “Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property…” Id.
legally mandated intellectual property protection throughout much of the world.

At the time of writing, 164 nations are members of the WTO. While the number of sovereign states on earth is contested, the United Nations recognizes 193 Member States. On this figure, around 85% of sovereign states are now members of the TRIPS Agreement. In practice, this means that over 90% of nations are required to offer copyright protection in their territories to authors and copyright owners based in other Berne Convention/WTO Member States. Nationals of over 91% of states can apply to have their patents, trademarks and designs recognized in other nations. In these ways, it has never been easier for creators and businesses to obtain intellectual property beyond their home jurisdiction.

Equivalent ease in enforcing intellectual property rights has not followed. The TRIPS Agreement does contain enforcement provisions, some of which seem directly intended to overcome difficulties outlined above. For example, Article 41 states: “Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” However, this is vague, and assessments concerning what are "fair", "equitable" and "unnecessarily complicated or costly" are very subjective.

The TRIPS Agreement also contains a provision addressing international cooperation. However, this deals with the prevention of trade in infringing goods across jurisdictional boundaries, rather
than making it easier to enforce intellectual property rights abroad or in several jurisdictions simultaneously through a unified process. The TRIPS Agreement therefore did relatively little to combat the sorts of difficulties outlined in Part II that intellectual property owners can encounter when seeking to enforce their rights trans-jurisdictionally.\textsuperscript{42}

Other multilateral treaties have been concluded. However, these tend to address specific issues, creating additional areas of intellectual property, such as the 2012 Beijing Treaty on Audiovisual Performances\textsuperscript{43} (which is not yet in force), or carving out exceptions for use of existing property, such as the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.\textsuperscript{44} They do not address the enforcement difficulties outlined in Part II above. The Director General of WIPO, Francis Gurry, has predicted that further large multi-issue intellectual property treaties are likely to be difficult to achieve,\textsuperscript{45} and this forecast seems to be supported by the recent history of the Anti-Counterfeiting Trade Agreement (ACTA)\textsuperscript{46} and the Trans Pacific Partnership Agreement (TPP),\textsuperscript{47} both of which reached advanced stages of negotiation and were signed by many parties, or even ratified,\textsuperscript{48} but failed to enter into force.\textsuperscript{49} Gurry suggests that

\textsuperscript{42} Yu, supra note 40.
\textsuperscript{49} Note that an alternative to the TPP, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, alternatively TPP11 or TPP2.0), was signed on 8 March 2018 by Australia, Brunei,
success in concluding recent intellectual property treaties has been more likely to occur if they “dealt with specific and technical problems that were negotiated on their own merits and without making connections to interests in the wider IP or multilateral agenda”.

Perhaps there is scope for a narrower treaty dealing specifically with private international law aspects of intellectual property to be concluded in the future.

B. Trade, Investment & Arbitration Agreements

In addition to worldwide multilateral treaties such as the Paris Convention, Berne Convention and TRIPS Agreement, many trade and/or investment agreements include intellectual property chapters that require parties to implement agreed minimum standards of protection.

These agreements may be multilateral, such as the trilateral North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico, which entered into force in 1994. Chapter 17 of NAFTA concerns intellectual property issues, including clauses relating to national treatment and enforcement. While NAFTA attempts to address some of the aforementioned difficulties that cross-border enforcement can invoke, some of its requirements are

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51 For proposals with respect to such a treaty, see discussion in Part III.C.2 below.


53 Article 1703(1) states: “Each Party shall accord to nationals of another Party treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights…” Id.

54 Article 1714. Id.

55 For example, Article 1714 states: “1. Each Party shall ensure that enforcement procedures, as specified in this Article and Articles 1715 through 1718, are available under its domestic law so as to permit effective action to be taken against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies to deter further infringements. Such enforcement procedures shall be applied so as to avoid the creation of barriers to legitimate trade and to provide for safeguards against abuse of the procedures. 2. Each Party shall ensure that its procedures for the enforcement of intellectual property rights are fair and equitable, are not unnecessarily complicated or costly, and do not entail unreasonable time limits or unwarranted delays. 3.
vague, and the problem remains that a plaintiff may have to file multiple cases in multiple jurisdictions to address infringement of rights in a single invention or brand. As noted above, this can be prohibitively complicated and costly, and it remains an effective barrier to cross-border enforcement of intellectual property rights.

Other trade/investment treaties are bilateral, such as the "ChAFTA" free trade agreement between China and Australia that entered into force in December 2015. ChAFTA includes the principle of national treatment, as well as provisions relating to enforcement and border measures. While Article 11.21 provides that “[e]ach Party commits to implementing effective intellectual property enforcement systems with a view to eliminating trade in goods and services infringing intellectual property rights”, and Article 11.22 provides for cooperative border measures to combat trade in pirated copyright goods or counterfeit trademarked goods, ChAFTA does little to address the other sorts of impediments to cross-border enforcement that were outlined in Part II above. In this regard, it is quite typical of the intellectual property clauses found in trade and investment treaties.

China has concluded bilateral investment treaties with over 100 countries and 14 Free Trade Agreements, and more are envisaged as its Belt and Road Initiative (BRI) progresses. The BRI creates five

Each Party shall provide that decisions on the merits of a case in judicial and administrative enforcement proceedings shall: (a) preferably be in writing and preferably state the reasons on which the decisions are based; (b) be made available at least to the parties in a proceeding without undue delay; and (c) be based only on evidence in respect of which such parties were offered the opportunity to be heard.” Id.

Some of NAFTA’s provisions are reminiscent of the TRIPS Agreement, and similar criticisms can be made of its vague enforcement terminology. In the TRIPS Agreement context, see Yu, supra note 40, at 84.


Article 11.5 states: “In respect of intellectual property rights covered in this Chapter, each Party shall accord to nationals of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection of such intellectual property rights, subject to the exceptions provided under the TRIPS Agreement and those multilateral agreements concluded under the auspices of WIPO to which the Parties are party.” Id.

Id.


Id.

For a summary of China’s strategy around the conclusion of such agreements, see John Whalley et al, China’s Regional and Bilateral Trade Agreements (Nat’l Bureau of Econ. Research, Working Paper No.
maritime and land routes to link Asia, Europe and Africa, opening economic corridors between China and its trading partners. An analysis of the intellectual property clauses in the free trade agreements concluded by China identifies a process moving “from simplicity to complexity and from being contained in some clauses to [occupying a] special chapter [that] reflects the increasing attention paid by China to the international protection of intellectual property rights.”

Compared with trade and investment agreements concluded by other nations, China’s free trade agreements are unexceptional in their focus on issues other than private international intellectual property issues to date.

Treaties and trade/investment agreements might not provide immediate or direct relief to intellectual property holders who wish to enforce their rights abroad. However, at a macro level, many do provide mechanisms by which a nation’s allegedly inadequate laws or inadequate enforcement of laws can be challenged in an international forum. The WTO has a dispute resolution mechanism for determining outcomes when allegations are made of violations of trade rules. Meanwhile, a common provision within trade and investment agreements allows for "investor-state dispute settlement" (ISDS) through arbitration. Both mechanisms provide dispute resolution options for an intellectual property holder or state that is disappointed with the operation of a particular jurisdiction’s legal system with respect to the enforcement of intellectual property rights within its territory. The WTO Dispute Settlement Body (DSB) establishes panels to consider cases and make findings, and the DSB chooses whether to accept panels’ findings and appeal decisions. A nation that is found to have violated trade rules must promptly rectify the situation by following the DSB’s recommendations or face WTO-sanctioned trade retaliation. In ISDS, a neutral third-party arbitration panel examines the evidence and makes a legally binding and enforceable decision. In effect, these are mechanisms by which an intellectual

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property holder can try to bring pressure to bear upon a jurisdiction that it believes is hostile or indifferent to its rights.

The Australian "tobacco plain packaging" experience provides an interesting illustration of how these different forums can be used. In 2011, the Australian government passed legislation requiring plain and unappealing packaging of tobacco products, as a health initiative to reduce smoking rates. After lobbying and a media campaign failed to achieve changes to the law, tobacco companies challenged it in the courts. The companies claimed plain packaging would unconstitutionally expropriate intellectual property in their trademarks. The High Court of Australia rejected the constitutional challenge and upheld the law, with French CJ concluding:

"While the imposition of those controls may be said to constitute a taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition. That conclusion is fatal to [the tobacco companies'] case...."

Meanwhile, the governments of five tobacco producing countries requested the WTO DSB establish dispute settlement panels on the grounds that the tobacco plain packaging measures "appear to be inconsistent with a number of Australia's obligations under the TRIPS Agreement..." The tobacco industry could not itself bring an action

68 Id. The case was decided 5:1 in favor of Australia.
69 Id. Para. 44.
as there is no direct access to the DSB by non-state actors. Instead, the requests were brought by Ukraine (which later discontinued its complaint), Honduras, Dominican Republic, Indonesia and Cuba, and the tobacco industry reportedly provided legal support. At the time of writing, no official decision has been published. However, media outlets reported in May 2017 that the DSB had made a draft finding that Australia had not violated WTO rules.

Meanwhile, in June 2011, tobacco company Philip Morris Asia took action against Australia in the Permanent Court of Arbitration (PCA) under a bilateral investment treaty between Hong Kong and Australia. Alleging unfair or inequitable treatment of an investor by the Australian government, Philip Morris announced that it was seeking suspension of the plain packaging laws and compensation for loss of its trademarks. Ultimately Australia was successful on a

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jurisdictional point, on grounds that the tobacco company’s litigation constituted an abuse of rights. Given its conclusion that it had no jurisdiction to hear the case, the PCA did not consider Philip Morris’ substantive claims. The plaintiff did not win the case, but it nonetheless demonstrated how an intellectual property owner could use ISDS to exert pressure on a domestic jurisdiction whose laws it considered were failing to protect its interests.

Although these sorts of actions might be of some benefit to a plaintiff with deep pockets in a jurisdiction that willfully fails to enforce its intellectual property laws, it is significantly less useful to a small or medium sized business or an individual that confronts the sorts of enforcement difficulties outlined in Part II above. Furthermore, concerns about corporate interference with national sovereignty – especially in the context of a measure intended to improve public health – have given rise to a popular backlash against ISDS. Criticisms are also found in the academic literature.

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77 Philip Morris Asia Ltd. (H.K.) v Commonwealth (2015) PCA Case No. 2012-12. The Tribunal held: “the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.” Id.


China has only shown interest in ISDS relatively recently, many of its bilateral investment treaties do contain ISDS clauses.

In light of concerns about ISDS in the EU, the European Commission has proposed an alternative system in the form of a standing multilateral investment court with independent specialist judges. Emerging out of trade treaty negotiations between the EU and Canada, and colloquially dubbed the "World Investment Court" project, it has grown into a proposal to establish a multilateral court that would replace the ISDS mechanism in all ongoing and future EU investment negotiations. While the proposal is viewed as a method of moving past objections to ISDS that are creating stumbling blocks to the conclusion of trade negotiations with some states, its

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Id. Trakman, supra note 81.


EU Trade Commissionerer Malmström & Canadian Minister of International Trade Freeland, The case for creating a multilateral investment dispute settlement mechanism 4 (2017), http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf (“the backlash in certain parts of the world following a number of high profile ISDS cases has prompted discussions on the adequateness of this particular system of dispute settlement. The discussions have focussed on the fact that these cases have involved challenges to public policy in sensitive areas such as health, safety or the environment and therefore are different from traditional commercial arbitration. For some economies, ISDS has become one of the main stumbling blocks for the successful conclusion and implementation of new trade and investment agreements and has contributed to growing scepticism regarding the benefits of such agreements more generally.”). Id. at 1.
proponents argue it also creates consistency and predictability in the enforcement of investment rules:

Creating a genuine multilateral investment dispute settlement mechanism would also be the only way to ensure more consistency and predictability in the interpretation of identical or similar investment rules across different investment agreements. The more agreements would be subject to the jurisdiction of the new mechanism, the more coherence could be built up in the interpretation of their respective provisions, thus improving the legal certainty and predictability of the international investment regime across different regions of the world.\(^\text{87}\)

The EU has suggested the Court would have clear rules and a defined appeal process. It has received some opposition,\(^\text{88}\) including from the Deutsche Richterbund (DRB)/German Judicial Association.\(^\text{89}\) It has received cautious support from some other nations and commentators.\(^\text{90}\) China would appear to be waiting for more details before voicing an opinion,\(^\text{91}\) particularly against the backdrop of its ongoing negotiations with the EU towards an investment agreement.\(^\text{92}\)

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\(^{88}\) See generally discussion in Laird, supra note 85.


If it proceeds, the Court could arguably go further than engendering cooperation amongst nations with respect to enforcement of intellectual property laws abroad. It could, instead, generate a type of *de facto* harmonization of enforcement procedures 93 that could potentially assist intellectual property holders to enforce their rights more easily.

### C. Private International Law and Intellectual Property: Jurisdiction, Applicable Law, and Recognition and Enforcement of Foreign Judgments

General "conflict of laws" rules apply when a dispute involves more than one jurisdiction. These rules involve considerations as to which court has jurisdiction to hear the matter, what body of law will apply in the case, and issues concerning the recognition and enforcement of a foreign judgment in other jurisdictions implicated by the case. These questions can be difficult to address in matters involving the movement of persons and/or tangible things. Complexity can be intensified in intellectual property matters that involve geographically bounded rights to intangible objects that are unconfined by national borders. One issue that can complicate decisions about jurisdiction, applicable law, and recognition and enforcement of foreign judgments is the statutory basis for grants of industrial property (patents, designs, and trademarks), which has traditionally left common law courts reluctant to investigate validity in another state. Another issue arises from the general nature of intellectual property rights, which can be asserted against parties to contracts and licenses (who may have entered into a choice of law agreement), and also against the jurisdictionally-confined "world at large" (where issues such as jurisdiction and applicable law generally need to be determined on a case-by-case basis). 94

Various international agreements can be invoked in such cases, though not all of the agreements are binding. The domestic laws of various nations can also come into play, but approaches vary from place to place, 95 and/or time to time. For example, in Britain and some

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93 These sorts of procedures are discussed further in Part IV(A) below.
94 For a detailed analysis of intellectual property and private international law, see JAMES J. FAWCETT & PAUL TORREMAN, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW (2nd ed. 2011).
95 For comparison of civil and common law jurisdictions, see MASATO DOGAUCHI, PRIVATE INTERNATIONAL LAW ON INTELLECTUAL PROPERTY: A CIVIL LAW OVERVIEW (2001). GRAEME AUSTIN,
common law countries, the "Mozambique Rule" has long meant that a domestic court does not have subject matter jurisdiction over disputes in a foreign land. This has traditionally been extended to copyright infringement in many jurisdictions, following recognition of an analogy between foreign land and foreign intellectual property assets. However, the UK Supreme Court judgment in LucasFilm v Ainsworth (2011) held that the "Mozambique Rule" applies to considerations of validity of rights, not infringement. Therefore, a domestic court can exercise jurisdiction over whether foreign intellectual property rights are valid. The effect is that foreign litigants could now bring claims before English courts for infringement of their rights under non-UK copyright law. This could be very useful for a Chinese intellectual property holder wanting to enforce a judgment from one court beyond that jurisdiction's territorial boundaries. For example, it might be used if the applicant and defendant, or the defendant’s assets, are in another jurisdiction.

1. Existing Agreements

Several international instruments codify general principles with respect to the determination of jurisdiction and applicable law, and the recognition and enforcement of foreign judgments. However, the efficacy of each is hampered by the limited number of jurisdictions in which it applies. The nature of intellectual property means their substantive rules may also be problematic when used in intellectual property disputes.

The inter-governmental Hague Conference on Private International Law (HCCH) has produced several relevant instruments. While not specific to intellectual property law, these agreements could be of some assistance in intellectual property disputes involving cross-border enforcement. However, each has limited geographical reach.

The Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention) entered into force on 1 October 2015. The Choice of Court Convention is intended to provide "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters" by providing for courts

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96 British South Africa Co v Companhia de Moçambique [1893] AC 602 (Eng.).
98 Potter v Broken Hill Pty Co Ltd [1906] 3 CLR 479 (Austl).
99 LucasFilm v Ainsworth [2011] UKSC 39 (Eng.).
101 Id. Preamble.
to give effect to parties’ "choice of court" in private commercial agreements, and to recognize and enforce judgments by the court chosen by the parties. It is binding in all ratifying states, however there have only been seven signatories to the Choice of Court Convention (albeit including the large jurisdictions of the EU, the US and China), and it has come into force only in the EU, Mexico and Singapore. With sparse coverage, the Choice of Court Convention is of limited assistance to intellectual property holders involved in cross-border disputes.

The Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 102 (Recognition and Enforcement Convention) establishes common rules on mutual recognition and enforcement of judgments in member nations. However, this Convention has only five contracting parties thus far (Albania, Cyprus, Kuwait, the Netherlands, and Portugal), giving it limited utility in cross-border intellectual property disputes.103

In addition, the HCCH has published the Principles on Choice of Law in International Commercial Contracts (Hague Principles). 104 These are non-binding guidelines to assist in the interpretation of private international law by courts and arbitral tribunals, which may also be used as a model for legal instruments promulgated by states or groups of states. The introduction to the Hague Principles states they “may be considered to be an international code of current best practice in relation to party autonomy in international commercial contracts”.105

Instruments covering similar considerations have been promulgated within the EU. The Rome I Regulation106 (for contractual matters) and Rome II Regulation 107 (for non-contractual disputes) determine the applicable law. This will usually “be the law of the

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country for which protection is claimed”, though exceptions may apply. The EU’s Brussels I Regulation determines how decisions will be made about jurisdiction, and the recognition and enforcement of judgments. It provides that defendants should normally be sued in the courts of their domicile or the place of performance of the contract. However, exceptions may arise in intellectual property cases, and pan-European relief can be difficult to achieve.

2. Proposals for an International Intellectual Property-Specific Agreement

Difficulties using general private international law principles with respect to intellectual property cases arise from the territorial basis of intellectual property laws and the intangible nature of the intellectual property to which rights attach. As some of these problems are specific to intellectual property, the last decade has brought a raft of treaty proposals concerning the private international law of intellectual property.

Several proposals by academics recommend a treaty on jurisdiction, choice of law, and enforcement of foreign intellectual property judgments, with agreed principles to apply in all signatory states. The proposals thus far emanate from the US, the EU, and Japan/Korea.

The 2008 ALI Principles from the American Law Institute contain comprehensive rules with respect to jurisdiction, applicable law, and the recognition of foreign judgments. They address many of the problems outlined in Part II above and were generally well

108 Id. Article 8(1).
111 Id. Article 4.
112 Id. Article 7(1)(a).
received, particularly in the US. However, they attracted some criticism in Europe. In assessing the likelihood of the ALI Principles being adopted as, for example, the basis of an HCCH convention on aspects of private intellectual property law, Fawcett and Torremans conclude:

if there were to be such a convention it is by no means clear that the ALI Principles would be the starting point, given that there are the alternative CLIP Principles. The excessive complexity of the ALI Principles on coordination of actions and the excessive reliance in the coordination Principles on US concepts and on the doctrine of forum non conveniens is likely to make this cornerstone of the ALI Principles unacceptable to European lawyers, who are likely to prefer the CLIP Principles which closely resemble the Brussels I Regulation.

The 2009 Transparency Principles were produced to improve Japanese law. Meanwhile, a separate Japanese–Korean proposal, known as the Waseda Principles, was produced in 2010. The KOPILA Principles were being prepared by the Korean Private

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Id.

Fawcett & Torremans, supra note 94 at 219.


International Law Association (KOPILA) at the same time, and were reportedly intended to be incorporated into the Waseda Principles.

In 2011, the Max Planck Institute in Germany released the final text of the CLIP Principles. Like the ALI Principles, the CLIP Principles were intended to assist interpretation and/or supplement local laws, to instruct parties to draft contracts and resolve disputes, and as a possible model for law-makers in national, regional and international fora.

Detailed comparative analysis of the various proposals points to many similarities, but also diverges on some important issues – such as the determination of applicable law to initial ownership of intellectual property – and significant differences in the details.

The concerns addressed in the various academic proposals have also been picked up by both the Committee on Intellectual Property and Private International Law of the International Law Association (ILA Committee) and WIPO. WIPO hosted a Forum on Private

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122 Kono & Jurčys, supra note 115, at 12.
126 Matuionyte, supra note 125 at 294, paragraph 170.
International Law and Intellectual Property in 2001, and the ILA and WIPO hosted a joint seminar on public international law and intellectual property in 2016. The ILA Committee is working to prepare a set of guidelines on which national, regional or international law-making organizations could model instruments with respect to intellectual property and private international law, and has published a set of draft guidelines. If such guidelines were to form the basis of an international agreement promulgated, for example, by the HCCH or WIPO, the foundations would be in place for ratification by nations. If large numbers of nations were to ratify the treaty – which, as noted above, they have with many other intellectual property treaties – this would go a long way to address the enforcement problems faced by intellectual property holders in cross-border disputes.

D. Commercial Arbitration: the New York Convention & UNCITRAL Model Law

If a foreign judgment may not be able to be enforced locally and/or competing parties have to litigate the same case repeatedly to achieve legally binding resolutions in multiple jurisdictions, commercial arbitration can offer an attractive alternative. It is increasingly being used as a dispute resolution option in intellectual property cases because it allows for "party autonomy" as parties choose their own decision-makers in the form of the arbitrator or arbitral panel, and also choose the applicable law, and the place and language of proceedings. Arbitration can be faster than litigating: it can be more flexible, and it allows for confidential hearings and confidentiality attached to the award (equivalent to a court’s judgment), and awards are usually final and not subject to appeal. Although arbitration of intellectual property

130 Paulius Jurčys, Rita Matuionyte & Benedetta Ubertazzi, Intellectual Property and Private International Law Part II: Committees, 79 INT’L L. ASS’N REP. CONF. 791 (2012). “The Committee aims to examine the current state of the legal framework concerning the protection of IP rights in the international sphere. In addition, the Committee also aspires to discuss some of the issues that have emerged after the adoption of legislative proposals. At the outset the members of the Committee agreed to keep the options regarding the possible outcomes of the Committee open (i.e. depending on the progress of the discussions, the Committee may adopt a resolution, recommendation, principles, model law or perhaps a draft text for an international treaty).” Id. at 792.
disputes is not permitted under the laws of all countries, its benefits make commercial arbitration a popular alternative to litigation in many intellectual property disputes. Therefore, while not specific to intellectual property law, several international agreements and organizations concerning commercial arbitration are of particular relevance to discussions about cross-border enforcement of intellectual property rights.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) gives effect to private agreements to arbitrate by providing for the enforcement of arbitral awards in multiple jurisdictions. The 157 contracting states agree to recognize and enforce arbitration awards made in other contracting states, and the grounds on which a national court might refuse to recognize and enforce an arbitral award are more limited than the grounds on which it might refuse to recognize and enforce a judgment of a foreign court. China acceded to the New York Convention on 22 January 1987, with the reservation that:

“1. The People's Republic of China will apply the Convention, only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State;
2. The People's Republic of China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the People's Republic of China.”

Arbitration also has obvious advantages over the more limited geographic jurisdiction of individual nations as it allows multiple issues covering multiple jurisdictions to be determined in one legally binding arbitral decision that is enforceable by the domestic courts of multiple nations. While arbitration is an option only for willing parties who have agreed to this form of dispute resolution either before

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problems arose (e.g. in a commercial contract) or afterwards, it can offer an attractive alternative to complex cross-border litigation. Prepared by the UN’s Commission on International Trade Law, the UNCITRAL Model Law on International Commercial Arbitration (Model Law)\textsuperscript{136} provides a template for legislation that nations can voluntary incorporate into their domestic laws. UNCITRAL reports that legislation based on its Model Law “has been adopted in 78 States in a total of 109 jurisdictions”.\textsuperscript{137} While it has not directly adopted the Model Law, China’s arbitration law’s provisions have been influenced by it.\textsuperscript{138}

In addition, the UNICRAL Arbitration Rules\textsuperscript{139} can be adopted by parties to commercial agreements. The rules contain a model arbitration clause that can be inserted into a contract, as well as setting out procedures for the conduct of an arbitration in the event of a dispute. This includes information about the form an award must take, and its interpretation.

The WIPO Arbitration and Mediation Center\textsuperscript{140} acts as a neutral provider of services for the resolution of international intellectual property disputes. It is a non-profit organization that provides parties with model clauses and agreements through which they can submit disputes to the WIPO Center for resolution through mediation, arbitration, expedited arbitration, med-arb (which may, for example, arise from use of the WIPO model clause that provides for “mediation, followed in the absence of a settlement by (expedited) arbitration.”),\textsuperscript{141} or expert determination. The WIPO Center also maintains a list of "neutrals" (mediators and arbitrators) who can be employed to resolve disputes. In addition, the WIPO Center is one of several dispute resolution organizations responsible for the arbitration of disputes under the Uniform Domain Name Dispute Resolution Policy\textsuperscript{142} of the Internet Corporation for Assigned Names and Numbers (ICANN).

\textsuperscript{139} United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules.
In addition to those offered by the UNCITAL and the WIPO Center, various rules and model clauses, and commercial arbitration facilities and services, are provided by other generalist dispute resolution organizations. These include the American Arbitration Association’s International Centre for Dispute Resolution (ICDR), the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce’s (ICC) International Court of Arbitration, JAMS, the London Court of International Arbitration, Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC).

Each of these examples offers a route by which parties can use arbitration as an alternative to litigation. In the context of trans-border disputes, commercial arbitration provides a means by which parties can circumvent some of the problems outlined in Part II (eg. corruption and other problems with judicial systems; inadequate remedies; the need to litigate in multiple jurisdictions with respect to a single example of infringing activity). While it cannot be guaranteed that arbitral awards will be enforced internationally – for example, a national court in a New York Convention country might nonetheless refuse to enforce an arbitral award on jurisdictional or public policy grounds – commercial arbitration does offer an alternative to multi-jurisdictional litigation that will often overcome problems outlined in Part II above.

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147 JAMS, JAMS, https://www.jamsadr.com/. This organization was formerly known as Judicial Arbitration and Mediation Services, Inc.


149 HKIAC, Hong Kong International Arbitration Centre, http://www.hkiac.org/.


E. Conclusion: Cooperation through Treaties and Agreements

Part III of this article has indicated many ways in which nations cooperate through international treaties and agreements to standardize the way in which intellectual property can be acquired outside a person’s home nation, and in which cross-border disputes can be addressed. While the focus of treaties to date has mainly been on smoothing the path to cross-border acquisition of intellectual property, ongoing initiatives to establish a convention addressing issues such as jurisdiction, choice of courts, and recognition and enforcement of foreign judgments would overcome many of the problems described above in Part II. In the meantime, China’s conclusion of numerous bilateral trade and investment agreements goes some way to improving predictability for intellectual property holders, both in China, and in its partner nations.

Another way in which impediments to trans-border enforcement in cross- and/or multi-jurisdiction intellectual property disputes can be diminished is through harmonization of intellectual property laws, judicial bodies, and administrative procedures. Harmonization initiatives are discussed in Part IV of this article.

IV. Consistency through Harmonization

Harmonization occurs when nations establish uniform minimum standards of protection and/or enforcement through the adoption of equivalent laws (this type of harmonization may be dubbed "standardization", as it creates equivalent but not identical laws and legal conditions). It also occurs when nations adopt shared rules and institutions to align their domestic intellectual property laws, courts and/or administrative procedures with those of other participating nations. Both methods engender consistency in the laws of various nations, and this can help to overcome some of the barriers to enforcement described in Part II above.

Harmonization tends to occur in either a horizontal or vertical arrangement, each of which has the capacity to create uniform legal conditions throughout multiple jurisdictions. Each model can apply comprehensively, or to only some areas of intellectual property law, or to only the acquisition of rights, or enforcement of those rights. There is, therefore, scope for great variation even when nations are said to have harmonized their intellectual property laws. The following sections explore how horizontal and/or vertical harmonization can assist parties to disputes with intellectual property enforcement. They also note where the harmonization of measures with respect to acquisition of intellectual property has put in place foundations on which further measures may be built to smooth cross-border enforcement of intellectual property rights.
A. Horizontal Harmonization

The first type of harmonization could be described as "horizontal". This is an intentional, formal arrangement, which involves independent nations agreeing to implement laws that will be applied uniformly across their jurisdictions and/or to share registry offices. In this model, nations continue to participate in the law-making decisions that determine what will be protected as intellectual property within their jurisdiction, and how that intellectual property will be protected. This section examines several instances of horizontal harmonization. Of these, administrative harmonization is of most relevance to China thus far.

1. Regional Harmonization

One type of horizontal harmonization is characterized by its regional nature. It effectively groups nations together to expand the geographical reach of their collective intellectual property laws. For outsiders – such as Chinese businesses that hold intellectual property assets in the relevant regions – such arrangements can ease the acquisition and/or enforcement of their intellectual property interests abroad.

Europe provides the most comprehensive example to date of horizontal harmonization of intellectual property laws. In the European Union (EU), the European Commission (EC) makes laws with respect to intellectual property. Harmonization occurs when Member States align domestic statutes with the EC’s laws, either through the adoption of EC Regulations, which are legally enforceable in all Member States upon their commencement, or through the adoption of binding EC Directives, which Member States are required to give effect to in their national laws. Having created EU-wide standardization of laws (via Regulations) and/or legal principles (via Directives), enforcement is left at first instance to the domestic courts in which an alleged infringement occurs. The European Court of Justice (CJEU) is the final court of appeal, and national courts are required to follow precedents it sets. While this leaves scope for variations in the way in which laws are enforced within different Member States, and therefore scope for forum shopping in multi-jurisdictional disputes, the overall effect is to create a general uniformity in the application of intellectual property law throughout the EU.

For the most part, the EU’s intellectual property laws are harmonized only with respect to acquisition and the nature of rights. Enforcement remains the responsibility of national courts. Each EU Member State may administer inter alia national copyright, patent, trademark and design laws, which must comply with the EU laws with respect to copyright,\(^{153}\) patent, trademarks,\(^{154}\) and designs.\(^{155}\) In addition, the EU Intellectual Property Office (EUIPO) registers unitary trademarks (EUTMs) and designs (RCDs) with effect throughout the European Union. While this creates consistency in the creation of the intellectual property, and rights are harmonized through EU laws, infringements must be litigated in the domestic courts of EU Member States. The CJEU is the final appellate court for EUTM and RCD cases, and also for national trademarks and designs. This creates a degree of harmonization in the way in which the courts of Member States enforce trademark and design laws through the EU. However, if an EUTM or RCD is infringed in multiple EU jurisdictions through a single action, the proprietor is faced with having to enforce it separately through the courts of the various nations in which it has allegedly been infringed.

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While not formally an EU institution, the European Patent Office (EPO) administers a single-grant procedure to issue patents that apply in 38 EU and non-EU countries. EPO grants create national patents, which are enforced by national courts. Therefore, a case involving cross-border infringement may need to be litigated in multiple jurisdictions. The EU has provisions for recognition and enforcement of judgments, but this remains complicated. Thus, European intellectual property harmonization has, to date, tended to focus on processes for obtaining intellectual property, and uniformity with respect to the rights that attach to that property. Enforcement has generally remained a matter for each jurisdiction.

The proposed Unitary Patent and Unified Patent Court (UPC) – together known as the Unitary Patent System – could mark the beginning of patent harmonization within Europe that extends from grant to enforcement of rights. The EPO will issue the Unitary Patent, which is a “European patent with unitary effect (also referred to as a EPUE).” It will have effect throughout the territory of all the jurisdictions that have signed the UPC Agreement. This covers most EU Member States (with the exception of Croatia, Poland and Spain), thereby replicating – albeit on a smaller scale – the harmonization of intellectual property acquisition that already exists with EPO-issued patents. The UPC will extend harmonization into the sphere of enforcement, with Unitary Patents being able to be litigated in a single court rather than needing to be enforced individually in national jurisdictions. This could help to overcome many of the sorts of problems outlined in Part II above.

The UPC will be watched closely, and it remains to be seen whether other nations will follow its lead. Will the UPC herald a trend towards the creation of other regional or international intellectual property courts?

In time, it is also possible that the Unitary Patent could evolve into a global patent, and the UPC could evolve into a global patent court. Britain’s scheduled departure from the EU in 2019 would, unless arrangements are made to alter existing rules, leave Britain outside the EU’s intellectual property aquis. The Unitary Patent and UPC have also been created as institutions available only to EU members so,

156 The jurisdiction of the EPO flows from the Convention on the Grant of European Patents, (1973).
157 See supra Part III.C.2.
under existing rules, they would also be expected to cease to apply in Britain after "Brexit." However, the Unitary Patent and UPC are not technically EU institutions,\(^{161}\) so it is possible their constitution could be amended to allow the continued participation of Britain beyond 2019. Indeed, this would seem to be envisaged by a somewhat ambiguous but optimistic statement on the UPC’s website about the effect of Brexit on Britain’s ongoing participation.\(^{162}\) And if the Unitary Patent System were to be opened to one non-EU nation, why not more? The continued participation of Britain post-Brexit might create a precedent for the participation of non-EU nations in the Unitary Patent and UPC, and could even open the door to participation by nations such as Australia, China and the US. Over time, this could even transform the Unitary Patent System into a Global Patent System.\(^{163}\) At least with respect to patents, this would go a long way toward overcoming some of the enforcement problems outlined in Part II above. It could also provide a precedent that could be followed in the context of design, trademark, and perhaps even copyright law.

The EU is not the only grouping of nations to have harmonized intellectual property laws. Other examples of horizontal harmonization occur when a group of nations forms a regional organization for the governance of intellectual property. The joint intellectual property arrangements administered by the Benelux Office for Intellectual Property (BOIP),\(^ {164}\) and the intellectual property arrangements put in place by the Cooperation Council for the Arab States of the Gulf (GCC) are two instances that will be discussed in this article. Other regional groupings that are not specifically addressed in this article but that provide examples of varying degrees of harmonization are: the African Regional Intellectual Property Organization (ARIPO),\(^ {165}\) Organisation Africaine de la Propriété

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\(^{162}\) The FAQ page states: “The long-term participation of the UK in the Unitary Patent system is legally possible. However, this is a political decision to be taken by the EU, its remaining Member States and the UK. Should the UK’s withdrawal from the EU become legally effective, EU Regulations No 1257/2012 and 1260/2012 creating the Unitary Patent system will cease to apply there. This will not, however, lead to a loss of patent protection in the UK for Unitary Patent proprietors. Appropriate solutions are likely to be put in place to avoid this happening. The protection of acquired rights and the preservation of legal certainty are general principles of law respected throughout Europe.” European Patent Office, FAQ - UNITARY PATENT, https://www.epo.org/service-support/faq/procedure-law/faq.html (last visited Apr. 27, 2018).


Intellectuelle (OAPI), and arrangements in the Latin American MERCOSUR and PROSUR groupings.

Under the provisions of the Benelux Convention on Intellectual Property (the Benelux Convention), BOIP registers trademarks and designs that cover Belgium, the Netherlands and Luxembourg. As well as harmonizing registration requirements, the Benelux Convention contains provisions to promote uniform enforcement across national boundaries in the Benelux region. For example, it provides for mutual recognition of judgments in the courts of all three Benelux states. Further, to prevent a case being litigated simultaneously in the different jurisdictions, the Benelux Convention also provides for the referral of a dispute from the court of one Benelux country to that of another where an associated dispute has already commenced. With respect to trademarks and designs, these measures arguably overcome many of the enforcement difficulties described in Part II above.

Originally established in 1981, the GCC is an intergovernmental union comprising the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom of Saudi Arabia, and the States of United Arab Emirates. Heads of State of the GCC Members form the Supreme Council, which passes unanimous enactments that are implemented by the Ministerial Council. The Economic Agreement Between the GCC States contains a provision agreeing to cooperate and develop laws ensuring protection of

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169 Art. 1.14 states: “The authority of court decisions handed down in one of the three States pursuant to this convention shall be recognized in the other two States and court ordered cancellation shall be carried out by the Office at the request of the most diligent party, if: a. in accordance with the legislation of the country in which the decision was handed down, the extract of the order resulting from it meets the conditions regarding its authenticity; b. the decision is no longer open to opposition or appeal or to reversal by a court of cassation.” Id.
170 Art. 4.6(5) states: “The courts of one of the three countries shall, if one of the parties so requests, refer disputes brought before them to the courts of one of the other two countries where these disputes are already pending there or when they are associated with other disputes placed before these courts. Referral may only be requested when the actions are pending at first instance. This shall apply to the benefit of the first court in which an action is initially brought, unless another court has given a decision in the matter other than just an internal provision, in which case referral shall be to the other court.” Id.
intellectual property, and the GCC has passed laws harmonizing aspects of patent and trademark law.

Based in Riyadh, Saudi Arabia, within the Secretariat-General of the GCC, the Patent Office of the Cooperation Council for the Arab States of the Gulf grants a pan-GCC patent that automatically extends throughout the six Gulf Cooperation states. The Office applies the Unified Patent Law that was issued by the Supreme Council of the Gulf Cooperation Council in 1992 and implemented by patent regulations in 2006. As the GCC does not provide a unified court to hear patent-related disputes, infringement actions are heard in the courts of the Member State in which the alleged violation occurred. Therefore, harmonization is only partial and does not address all of the enforcement concerns raised earlier.

The GCC has also issued a uniform trademark law. However, the GCC has not established a central trademark registry, so each Member State must apply the uniform law when assessing applications for national trademark registrations. As Member States issue only domestic trademarks, separate registration is needed in each Member State to achieve trademark protection throughout the entire GCC region. Part 5 of the law deals with enforcement of rights, including provisions allowing customs to seize infringing goods at the border, but it does not address cross-border enforcement issues.

The patent and trademark arrangements put in place by the GCC arguably lay the foundations that would be needed for centralized enforcement of patent and trademark rights in the region. If groups of

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172 Economic Agreement Between the GCC States (Jan. 1, 2003), http://www.wipo.int/edocs/lexdocs/treaties/en/gcc2/trt gcc2.pdf. Art. 20 states: “Member States shall develop programs encouraging talented individuals and supporting innovation and invention; cooperate in the field of intellectual property and develop regulations and procedures ensuring protection of intellectual property rights; and coordinate their relevant policies towards other countries, regional blocs and international and regional organizations.” Id.


178 The GCC Trademarks Law, supra note 177, art. 38.
countries – such as the GCC – were to unite to adopt BOIP-like provisions concerning recognition of judgments in intellectual property cases, as well as rules concerning the consolidation of related intellectual property cases brought in any court within their jurisdictions, it would go a long way towards overcoming cross-border enforcement problems.

While such arrangements have thus far tended to be regional and concluded between nations with shared legal traditions, it is not inconceivable that they could provide a precedent or model for more ambitious harmonization schemes involving other countries. For example, when negotiating trade or investment treaties, nations could agree to degrees of intellectual property harmonization (as distinguished from the more diverse standardization created by existing treaties such as TRIPS and the Paris and Berne Conventions). This might involve nations agreeing to use a uniform model law and/or joint registry for the creation of trademark, design and/or patents. It could even extend to the formation of uniform or joint courts. While the extension of "regional harmonization" beyond regions seems rather far-fetched at present, it remains possible that a leading trading jurisdiction – such as the EU, China or the US – could in time precipitate such harmonization by negotiating such provisions in bilateral or multilateral agreements with its trading and/or investment partners.

2. Administrative Harmonisation

The trend towards sharing and streamlining the administrative burden of the patent examination process represents a different type of horizontal harmonization. In this model, nations retain decision-making authority but can adopt patent search and examination work done by other states’ registry offices. If different nations share workload, it seems almost inevitable that a degree of harmonization will follow. While this impacts mainly on the acquisition of intellectual property, it nonetheless helps to harmonize national legal systems’ performances with respect to intellectual property. This could in turn assist intellectual property owners wishing to enforce their rights in cross-jurisdictional disputes in those nations.

Several examples already exist of this type of administrative harmonization of intellectual property registration practices. The aforementioned PCT provides a unified procedure by which inventors can lodge a centralized "international application" that

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179 While groupings of nations engaging in administrative harmonization may also be regional in nature, their key harmonizing feature in the current discussion is their focus is on sharing of administrative workload.  
180 PCT, supra note 24.
simultaneously requests patents in multiple nations. One of the PCT’s International Search Authorities then conducts searches of the prior art and issues an opinion on the patentability of the invention, and an international preliminary examination may be done at the applicant’s request. After an initial period, the application is sent to the national patent offices nominated by the applicant, which conduct an examination for registrability in that jurisdiction. As the national examiner can rely on the PCT searches and any preliminary examination, standards are likely to become somewhat harmonized between the PCT’s 152 parties.

In addition to the PCT, China is involved in another example of administrative harmonization known as Patent Prosecution Highways. These are arrangements in which nations agree to expedite domestic patent applications that have already been examined by other participant states. By relying on search and examination work already carried out by other registry offices – even if full examinations are then conducted locally – participants not only reduce the administrative burden, but also increase the cross-jurisdictional uniformity of patent examination practices. This goes some way towards harmonizing patent arrangements within the participant jurisdictions. Several overlapping highways have been established or are being piloted. Examples include:

- the Patent Prosecution Highway, with 46 members, including China;
- the Global Patent Prosecution Highway pilot (GPPH), which has 24 participants;
- the IP5 Highway, which involves the EPO, the JPO, the Korean Intellectual Property Office (KIPO), the State Intellectual Property Office of the People's Republic of China (SIPO), and USPTO and

bilateral highways.

181 WIPO, supra note 26.
The use of such Highways within a group of trading nations – such as those involved in China’s Belt and Road Initiative – could increase connectivity and, in time, lead to further administrative harmonization of patent practices. However, it is worth noting empirical research that suggests that USPTO patent examiners rely mainly on prior art they have found themselves, even to the exclusion of prior art identified by patent examiners assessing counterpart applications in other nations.\footnote{Christopher A. Cotropia, Mark A. Lemley & Bhaven N. Sampat, Do Applicant Patent Citations Matter? Implications for the Presumption of Validity, 42 RESEARCH POLICY 844–54 (2013). See also Mark A. Lemley, Can the Patent Office Be Fixed?, 15 MARQ. INT’L PROP. L. REV. 295–308 (2011).} Such practices could undermine the harmonizing effect of administrative work-sharing by patent registries.

Another example of administrative harmonization is found in the "Trilateral Co-operation" involving the EPO, Japan Patent Office (JPO), and the United States Patent and Trademark Office (USPTO), work towards harmonization of the administration of industrial property, and the interoperability of their office systems.\footnote{The Trilateral Co-operation, https://www.trilateral.net/index.html (last visited Apr. 27, 2018).}

Meanwhile the Vancouver Group involves collaborative agreements between the national registries of Australia, Canada and Britain to simplify the patent examination process and remove duplication of work through the adoption of "mutual exploitation principles."\footnote{Intellectual Property Offices of Australia, Canada and the United Kingdom, Vancouver Group - Mutual Exploration Principles, https://www.ipaustralia.gov.au/sites/g/files/net856/f/vg_mutual_exploitation_principles.pdf (last visited Apr. 27, 2018).} In essence, it gives rise to a default position of reliance on patents granted by other members of the Group, or searches and examinations performed by other members of the Group, though further examination may still be undertaken locally if thought necessary. This sort of reliance on other nations’ patent examinations and/or grants arguably goes a significant way towards harmonizing patent practices between the participant nations.

The ten members of the Association of Southeast Asian Nations (ASEAN)\footnote{The ASEAN Member States are: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam: Association of SouthEast Asian Nations, ASEAN MEMBER STATES, http://asean.org/asean/asean-member-states/. The organization was established in 1967: “To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations.” ASEAN, The Asean Declaration (1967), at para. 2(1), http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/ (last visited Apr. 27, 2018).} operate a similar system known as the ASEAN Patent Examination Co-operation (ASPEC). ASPEC provides for the patent registry offices of members\footnote{Of the ASEAN nations, all but Myanmar participate in ASPEC: ASPEC, ASEAN Patent Examination Co-operation (ASPEC) Programme Procedures (2017) at para.1.2.,} to consider the search and examination
results of corresponding applications by registry offices from other members when conducting examinations under their own laws. When an applicant requests an ASPEC examination, it does not require the receiving office to rely on the results from other members. However, doing so may reduce workload, speed up examination timeframes, lead to cost savings, and increase consistency of outcomes between the different nations’ patent offices. In addition to ASPEC, ASEAN also provides various common facilities to its members. These include a trademark desk manual for examiners,\textsuperscript{191} trademark,\textsuperscript{192} design,\textsuperscript{193} patent,\textsuperscript{194} and geographical indications databases, and an enforcement action plan.\textsuperscript{196} Notably, the enforcement action plan is rather general in nature and, while it addresses piracy and counterfeiting, it does little to address the sorts of problems of cross-jurisdictional enforcement outlined in Part II of this article.

A conclusion can be drawn from this brief survey of examples of regional and administrative harmonization that horizontal harmonization has the potential to underpin enforcement rules that would address many of the practical difficulties faced by intellectual property owners who wish to enforce their rights. Weinian Hu has argued that substantive administrative harmonization – aka "work sharing" – will gradually harmonize the patent management systems of participating nations with respect to rule making, decision making, and enforcement. He says:

\begin{quote}
Once relevant rules are harmonised among the group of offices, such rules may be effectively exported to third countries by means of, for example, capacity building. By doing so, substantive administrative harmonisation will be achieved at working level among a broader range of countries. Therefore, perhaps as a compromise to substantive legal harmonisation,
\end{quote}

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work sharing, or substantive administrative harmonisation, could be a direction for furthering international patent rights harmonisation for the time being.\(^{197}\)

While the focus of the examples thus far has been primarily on registration, and on aspects of enforcement such as standardization of rights and border cooperation measures by customs authorities, the Unitary Patent, the UPC, and BOIP’s trademark and design arrangements each demonstrate how existing infrastructure can provide the foundations for harmonization that would assist in cross-border enforcement of intellectual property rights. To date, harmonization has usually been unifying with respect to the grant of property. However, if unitary patents, trademarks and designs could be enforced through a single court, this would provide a level of harmonization that would overcome many of the enforcement problems discussed in Part II above. This is an area in which it is conceivable that China might, in due course, start to play a leading role amongst its trading and investment partners.

**B. Vertical Harmonization**

A second type of harmonization might be described as "vertical". This *de facto* form of harmonization occurs when a nation adopts the intellectual property laws and/or outsources functions to the registration bodies of another country. In this model, nations relinquish their administrative functions\(^{198}\) and/or law-making power with respect to some or all recognition of intellectual property. However, they tend to retain legal power over the determination of disputes involving intellectual property within their jurisdiction.

An example of vertical harmonization can be found in the Kingdom of the Netherlands. As well as administering intellectual property arrangements for its members within the EU, BOIP’s Department of the Caribbean Netherlands (Rijksdienst Caribisch Nederland) also implements the BES Trademarks Act\(^{199}\) for the Caribbean Netherlands. This applies in the three Dutch municipalities of Bonaire, Sint Eustatius, and Saba, which lie in the Caribbean Sea.

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Although separated by the Atlantic Sea from Europe, the BES Islands are "special municipalities" within the Netherlands (itself a country within the Kingdom of the Netherlands). Thus, the Dutch government makes the laws that apply in the BES Islands, and parties can bring intellectual property matters before the courts of either the Netherlands or one of the BES Islands. Vertical harmonization is perhaps a natural extension of this governance arrangement.

Another example of vertical harmonization is found in systems whereby a nation re-registers or recognizes (through direct application) foreign intellectual property rather than administering its own comprehensive trademark, patent and/or design registration office. It could be argued that this already occurs with respect to copyright as a result of national treatment provisions giving rise to reciprocity of recognition of foreign copyright under the Berne Convention and some other copyright agreements.

With respect to industrial property, this type of vertical harmonization is common in the South Pacific, where island nations have relatively small populations and limited resources. For example, French trademarks apply directly in the South Pacific islands of French Polynesia, New Caledonia, and the Wallis & Futuna Islands, and French patents apply in automatically in New Caledonia, and upon request in French Polynesia. American Samoa, Guam, and the Northern Mariana Islands are covered by US trademark registrations, Kiribati, the Solomon Islands, and Tuvalu re-register British trademark and patent registrations. Similarly, British patents can be re-registered in Fiji (which also operates a national patent registration system), Kiribati, the Solomon Islands, Tuvalu, and Vanuatu. A Nauruan patent application can be based on a pending

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201 With grateful thanks to Elina Blaauboer, lawyer at VanEps Kunneman VanDoorne, for providing information about the application of laws in the BES Islands.
207 Berger, supra note 203.
or granted Australian, British, or US patent, and New Zealand patents automatically apply in the Cook Islands, Niue and Tokelau.

Vertical patent harmonization may also occur when a nation opts to outsource patent search and/or examination functions to an established patent registry in another nation. For example, Papua New Guinea operates a national intellectual property bureaucracy, but substantive examinations are conducted on its behalf by IP Australia. Georgia outsources patent searches and examinations to the Intellectual Property Office of Singapore (IPOS), and the Intellectual Property Office of Brunei Darussalam outsources substantive patent examinations to the patent registries of Austria, Denmark and Hungary.

In these instances of vertical harmonization, the conduct of patent examination functions by established overseas registry offices has the potential to increase consistency of examination practices within the participating states.

It is also interesting to ponder how the practice of large established patent registries outsourcing their search and examination work to other patent registries with specific areas of expertise, or to private organizations in lower-cost economies, may also have a vertically harmonizing effect. For example, the UK Intellectual Property Office outsources international patent examinations to India, and the USPTO outsources international patent examinations. IPOS’ historical partnership with patent offices in Austria, Denmark, and Hungary.

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208 Id.
209 Lewis, supra note 204.
214 Hu, supra note 197 at 76.
and examinations according to Singaporean standards has been said to:

raise the overall quality of patents granted in Singapore, align Singaporean practices with that of other established regimes (eg. the European Patent Office, the patent offices of the US, UK and Japan), and strengthen business and investor confidence in Singapore’s IP regime.216

In an increasingly globalized world, it seems natural that patent registries would collaborate in the interests of efficiency.217

It remains to be seen whether this type of harmonization will take a step further as AI-driven search and examination software is developed. If one or more established intellectual property registries were to commission an AI-driven search and/or examination system, which was then sold to patent offices around the world, it might further entrench vertical harmonization of these procedures.218 The effect could be even more pervasive if a private organization were to develop a patent search system that was sold to patent attorneys and lawyers, as well as to governmental patent registries.219

The reasons for adopting vertical harmonization might lie in colonial or post-colonial relationships and/or reflect the practicality that it is more efficient and cheaper than employing specialist examiners and operating a comprehensive patent and trademark registry.220 To the extent they relinquish law-making and administrative responsibility for intellectual property in a vertical harmonization structure, these nations become interdependent. To the extent that these systems are harmonized, it can assist people who

217 Jeremy Phillips has observed: “we live in a new era now and we must be prepared to evaluate every suggestion on its merits, however formerly unthinkable it might have been.” Jeremy Phillips, Outsourcing of IP office functions: no longer a joke, 5 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 389 (2010).
218 For a discussion of patent office automation, see Andrew Chin, Search for Tomorrow: Some Side Effects of Patent Office Automation Frontiers in Empirical Patent Law Scholarship, 87 N.C. L. REV. 1617 (2008). Little has thus far been written in the academic literature on the use of AI in patent searching. However, for a discussion of new questions raised by the use of AI with respect to patenting, see Ben Hattenbach & Joshua Glucoft, Patents in An Era of Infinite Monkeys and Artificial Intelligence, 19 STAN. TECH. L. REV. 32 (2015).
220 For a discussion of the factors South Pacific island nations weigh prior to establishing national intellectual property bureaucracies, see Miranda Forsyth, Intellectual property laws in the South Pacific: friend or foe?, 7(1) Journal of South Pacific Law,1 (2003).
intend to acquire intellectual property in foreign or multiple jurisdictions.

However, the examples of vertical harmonization examined above tend to concern only the acquisition of intellectual property. Nations remain largely independent with respect to enforcement of intellectual property rights within their territories. It would only be if enforcement functions were also outsourced to other countries – somewhat akin to the aforementioned situation in the BIS Islands, where parties can litigate locally or in the Netherlands’ courts – that vertical harmonization is likely to combat the barriers to cross-border enforcement discussed earlier in this article.

C. Conclusion: Consistency through Harmonization

Either the horizontal or vertical model of harmonization can create a quite comprehensive framework of intellectual property institutions in which recognition and/or enforcement of intellectual property is likely to be quite uniform across the participating jurisdictions. Harmonization has thus far been limited, and has had a commensurately muted impact worldwide. However, the various examples of *de jure* and *de facto* harmonization given in Part IV of this article suggest that nations are gradually but increasingly working together in ways that standardize procedures for the acquisition of intellectual property across national borders. As China’s intellectual property system develops, and as China’s economic influence over its trading and investment partners grows, so too does the ability of China to influence intellectual property harmonization processes of the future.

V. The Future of International Cooperation & Harmonization in Intellectual Property Enforcement & Dispute Resolution

Treaty making has been a major contributor to the globalization of intellectual property laws and enforcement of intellectual property rights. While it remains central to the protection of intellectual property interests internationally, this approach has distinct limitations with respect to enforcement. Perhaps it is because the right to enforce one’s intellectual property interests arises as a spontaneous accompaniment to ownership that the enforcement problems discussed in Part II tend not to have attracted prominence in existing intellectual property treaties. Whatever the reasons, it is abundantly evident that intellectual property interests can remain prohibitively difficult, cumbersome, and expensive to enforce cross-territorially. For Chinese businesses holding intellectual property interests abroad,
and foreign intellectual property holders in China, problems can arise when it comes to enforcing rights in cross-jurisdictional contexts.

A practical reality is that international treaties have assisted greatly in enabling cross-jurisdictional recognition and acquisition of intellectual property, but have provided limited assistance when it comes to enforcement of rights attaching to that property. Not all nations are members of the relevant treaties, and – despite standard minimum requirements – not all treaty members offer the same protections as one another. This means the practical effects of intellectual property rights will vary among jurisdictions. Even when nations have instituted comparable standards of protection, intellectual property owners usually need to take separate enforcement measures in each jurisdiction in which their rights have been compromised. Again, this can be complicated and unaffordable, and it offers an unviable solution for most individuals and businesses.

Beyond the "no trespassing" effect of informing the public that that one has legally-enforceable intellectual property rights, intellectual property is of relatively limited use if its associated rights cannot be enforced for practical reasons such as cost. In a world that is ever more globalized through international networks of commerce and communications, this creates uncertainty and practical impediments that are unacceptable to businesses competing on an international stage. In such a globalized world, it is impractical – and often commercially unacceptable – to have to go to separately to the courts of each foreign jurisdiction in which an intellectual property owner seeks to enforce its rights.

In such an environment, businesses operating beyond national boundaries are likely to welcome the cooperation and harmonization efforts described in this article with respect to intellectual property laws and administrative procedures. The international framework seems to have been designed with more emphasis upon with cross-border acquisition of rights than enforcement of those rights. However, years of evolution and globalization of the intellectual property system have put in place foundations on which enforcement institutions could be built. The extension of EPO patents to Unitary Patents and the Unified Patent Court offers an example of how this could occur. BOIP’s trademark and design arrangements offer another. It will not be surprising if, in due course, other regional and multilateral organizations develop unitary patents, trademarks and/or designs, and international courts through which to enforce them. Nor will it be surprising if China comes to play an ever-greater role in determining this future of international cooperation and harmonization.