



INSTITUTE OF EUROPEAN STUDIES OF MACAU  
澳門歐洲研究學會  
INSTITUTO DE ESTUDOS EUROPEUS DE MACAU

**Monday**  
**28 Nov 2016**

The 16<sup>th</sup> IEEM Intellectual Property Seminar  
**IP as Property – Of Pharmaceuticals, Tobacco, Commodities and other Matters**  
**Grand Lapa Hotel, Macau 28 and 29 Nov 2016**

*Morning*

09:00 Registration

09:30 **Welcome Address**

José Luís de Sales Marques - IEEM President

Gonçalo Cabral – Legal advisor to the Secretary for Economy and Finance, Macau

09:45 **IP as Property in the Context of International Law- An Introduction to the Seminar**

Anselm Kamperman Sanders - Maastricht University, The Netherlands

*This seminar introduction will focus on the substantive and procedural issues to be discussed: How industrial property has morphed from an arbitrary policy tool in the 19th Century to a quasi-property right whose limitations are perceived as acts of expropriation and challenged in the context of multilateral and bilateral trade agreements, and before international and domestic courts, often at the expense of public interests or other equally valid private rights.*

**10:30 Q&A followed by Coffee Break**

11:00 **Dispute Resolution in International and Bilateral Agreements**

Shahla Ali – University of Hong Kong, Hong Kong

*This presentation will focus on the mechanisms provided by international and bilateral agreements in order to resolve disputes over the interpretation and compliance, who the parties can be to these disputes, how the courts or tribunals are composed of, how proceedings are structured, whether there are appeals, and what the powers of the arbitration tribunals are in terms of remedies, and how these can be enforced. The contribution takes a look at international and bilateral agreements in general and is not limited to those involving intellectual property rights.*

11:45 **The origins of Investor Dispute Tribunals**

Julien Chaisse - Chinese University of Hong Kong, Hong Kong

*Investor Dispute Tribunals are one of the most controversial parts of currently negotiated bilateral trade agreements, namely TTIP and CETA. They are suspected of intransparency, because proceedings are not public, of unequal treatment, because they give foreign investors a right of action where domestic investors would have none, and they are suspected of hollowing out the sovereignty of States by allowing acts of legislation to be challenged. Often, these tribunals can award damages. The presentation looks at the history of investor dispute tribunals, explains how widely used this form of dispute resolution is in current and currently negotiated agreements is, addresses the above-mentioned concerns and explores possible alternatives.*

**12:30 Q&A followed by Lunch**

### *Afternoon*

**14:30 Dispute Resolution under the WTO Regime**  
Wolf Meier-Ewert - IP Division at WTO, Switzerland

*The WTO Agreement for the first time in a multilateral agreement set up a comprehensive – and compulsory – dispute resolution system. This is markedly different from dispute resolution under bilateral agreements and is credited with greater transparency, a level playing field (in that plaintiffs and defendants can only be States) and a balanced enforcement mechanism. It further provides for a two-tier enforcement mechanism with the possibility of an appeal. This presentation looks at the history of this part of the WTO Agreement, its mechanism, what use has been made of this system hitherto, and whether it has provided a satisfactory answer to non-compliance.*

**15:15 IP Disputes before National Courts - Direct Application of International Law**  
t.b.a.

*The direct application of international agreements in domestic disputes before domestic courts is a scaled-down version of the direct application by investor-state tribunals. The argument plaintiffs make is usually that due to an imperfect or missing implementation of an international agreement into domestic law, there is an inconsistency that should be resolved by direct reference to the international agreement. Past cases in the field of intellectual property rights concern the Paris Convention (Art. 6bis on well-known marks) and the TRIPS Agreement (duration of patents and patentable subject matter). Direct application of an international agreement (in contrast to a convention-friendly interpretation of domestic law) touches upon the sovereignty of parliament and is refused by some courts (US, UK, Brasil), while other courts have affirmed direct application (Austria, Portugal, Germany).*

**16:00 Q&A followed by Coffee Break**

**16:30 Disputes about IP Legislation before Investor Tribunals, the WTO or national courts – where is the Future?** Peter Yu - Texas A&M University School of Law, USA

*This provocative end-of-the day presentation will analyse where disputes over intellectual property rights should best be argued, taking into account the expectations of right owners, the interests of the general public and the proper functioning of domestic law-making. Should lawmakers be held ransom by private investors? Should private right owners depend on States in order for them to comply with their obligations or initiate a dispute settlement against States that neglect their obligations? Should the general public be given transparent access to proceedings?*

**17:15 Q & A and Closure**

19:30 Dinner

**Tuesday**  
**29 Nov 2016**

*Morning*

**9:00 Intellectual Property Legislation before Investor-State Tribunals**  
 Daniel Gervais - School of Law at Vanderbilt University, USA

*To date, three high-profile cases involving industrial property rights have been litigated before investor-state tribunals based on an alleged failure to comply with the terms of bilateral investment agreements: In the first case, Philip Morris Asia v. Australia, the focus was not on the plain packaging regime for cigarettes enacted by Australia, but the question who could benefit from a bilateral agreement. Only the second dispute, Philip Morris v. Uruguay, indeed addressed questions of substance, namely the nature of trade marks as property, and the leeway of States to limit trade mark use in order to address health concerns. The third case, Eli Lilly v. Canada (still pending), challenges the limitations of patent law as stipulated in the Canadian Patent Act.*

**9:45 Intellectual Property Legislation before National Courts**  
 Robert Burrell - University of Sheffield, UK

*This presentation looks at the two challenges against the plain packaging regime of cigarettes that were litigated before domestic courts, one in Australia (2012) and one in the UK (2015). While both suits were dismissed, the decisions extensively dealt with the nature of trade mark rights and the discretion enjoyed by national legislation to limit such rights when trying to address major public concerns such as health and safety. Both courts also addressed the issue what “expropriation” could mean in the context of intellectual property rights and arrived at a rather narrow definition thereof.*

**10:30 Q&A followed by Coffee Break**

**11:00 Should the Commission re-focus its approach on IP legislation? Balance of Rights and Mandate Commission**

Lothar Ehring - European Commission, Brussels

*In Scarlet Extended, the Court of Justice of the EU assessed the legality of enforcement of copyright on the internet. In striking down an order imposing a duty to monitor internet traffic for infringing activity, the court held that one needs to balance the interests of owners of intellectual property rights in their enjoyment of property as a human right with other societal interests equally protected by the Charter of Fundamental Rights of the European Union. This presentation assesses how these other societal interests (e.g. right to free speech and information, health, privacy etc.) could and should guide the future EU IP policy, and whether there are limits to developing such a new policy by the fact that IP rights are protected as property titles.*



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**11:45 Intellectual Property and the State's Freedom to Operate**  
Anselm Kamperman Sanders - Maastricht University, The Netherlands

*At a conclusion of the seminar, we look back at the presentations and ask whether it is possible for a (domestic) legislature to know ex ante whether and to what extent is it possible to limit the existence or exercise of intellectual property rights in order to achieve societal goals. Could legislature limit the duration of future or existing copyrighted works? Can new patent exemptions be introduced? Can the scope of trade mark protection be reduced in view of their unlimited duration? Going over a number of examples, like the abolitionist movement for patents, we arrive at today's Brexit scenario, where the question has already been put forward: "Can we completely start afresh and eradicate all European law from our IP system?"*

**12:30 Q&A followed by Lunch**

*Afternoon*

**14:15 Mock Trial:** The Hole in the Wall

**17:00 Closure & drinks**