

AIPLA

American Intellectual Property Law Association

October 26, 2017

Christophe Bernasconi
Secretary General
Permanent Bureau
Hague Conference on Private International Law
Churchilplein 6b
2517 JW THE HAGUE
The Netherlands

Via Email
secretariat@hcch.net

RE: AIPLA Comments on the Draft Convention on the Recognition and Enforcement of Foreign Judgments Relating to Civil or Commercial Matters, Currently Being Negotiated at The Hague Conference on Private International Law

Dear Mr. Secretary General;

The American Intellectual Property Law Association (AIPLA) respectfully submits our comments on the Draft Convention on the Recognition and Enforcement of Foreign Judgments Relating to Civil or Commercial Matters Currently Being Negotiated at The Hague Conference on Private International Law, which we previously shared with the United States Government earlier this year. AIPLA respectfully requests the distribution of the attached comments to the participants of the Special Commission on the Judgments Project (November 13-17, 2017).

Thank you in advance for your kind attention to this matter.

Very truly yours,



Lisa K. Jorgenson
Executive Director

Attachments: AIPLA and PhRMA Comments on Draft Convention on the Recognition and Enforcement of Foreign Judgments Relating to Civil or Commercial Matters Currently Being Negotiated at The Hague Conference on Private International Law, July 19, 2017

AIPLA Comments on a Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments Currently Being Negotiated at The Hague Conference on Private International Law, January 18, 2017

AIPLA

American Intellectual Property Law Association

January 18, 2017

The Honorable Michelle K. Lee
Under Secretary of Commerce for Intellectual Property and
Director of U.S. Patent and Trademark Office
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451
Via email: judgmentsproject@uspto.gov

Attention: Office of Policy and International Affairs

Dear Under Secretary Lee:

The American Intellectual Property Law Association (AIPLA) is pleased to present its view in response to the Request for Comments and Notice of Public Meeting on a Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments Currently Being Negotiated at The Hague Conference on Private International Law. 81 Fed. Reg. 81741 (November 18, 2016).

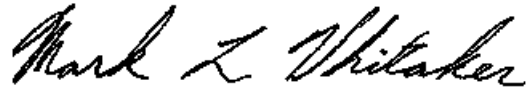
AIPLA is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

On December 8, 2000, AIPLA submitted comments to the earlier Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, as requested by the USPTO in 65 Fed. Reg. 61306 (October 17, 2000) ("AIPLA 2000 Letter"). Although the current Request for Comments concerns a new draft convention, the view that AIPLA presented in 2000 is relevant and reflects our views with respect to the June 2016 Preliminary Draft Convention that is the subject of the current Request. Accordingly, AIPLA respectfully re-submits the comments that we submitted in 2000, included herein as Attachment 1. We call your attention to our "General Comments" section as well as our responses to Questions 1, 3, 5 and 9 in the AIPLA 2000 Letter, which we believe are particularly relevant in view of the questions included in the current Request for Comments.

We note that the current Request includes questions on trade secret protection. Since trade secrets are a form of intellectual property and therefore should be considered in the same light as other forms of intellectual property, the comments in the AIPLA 2000 Letter apply also to trade secrets.

We thank you for allowing AIPLA the opportunity to provide comments on the June 2016 Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments.

Sincerely,

A handwritten signature in black ink that reads "Mark L. Whitaker". The signature is written in a cursive style with a large, stylized initial 'M'.

Mark L. Whitaker
President
American Intellectual Property Law Association

Attachment: AIPLA 2000 Letter

AIPLA

AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

2001 JEFFERSON DAVIS HIGHWAY ■ SUITE 203 ■ ARLINGTON, Virginia 22202

December 8, 2000

The Honorable Q. Todd Dickinson
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
United States Department of Commerce
Box 4
Washington, D.C. 20231

Attn: Elizabeth Shaw

Re: AIPLA Comments on Preliminary Draft Convention on
Jurisdiction and Foreign Judgments in Civil and Commercial Matters
65 Fed. Reg. 61306 (October 17, 2000)

Dear Under Secretary Dickinson:

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to present its views on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters as requested in the *Federal Register* on October 17, 2000.

The AIPLA is a national bar association of more than 10,000 members engaged in private and corporate practice, in government service, and in the academic community. The AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property.

General Comments

While the AIPLA appreciates the effort by the U.S. State Department to create and establish a set of harmonized rules of jurisdiction in civil cases to facilitate the enforcement of judgments internationally, we oppose the United States becoming party to the draft Hague Convention. Not only has no need for including intellectual property rights in such an exercise been demonstrated, but several articles currently in the draft Convention contain provisions which would adversely impact IP litigation in the United States.

Many U.S. corporations with a multinational presence as well as other U.S. domestic IP rights holders do not rely upon the enforcement of judgments outside of the United States and therefore have not had a need to seek enforcement of overseas judgments. Many of their competitors are also multinational or at least have a business presence and business interests and assets in the U.S. that provide an adequate basis for jurisdiction and the enforcement of any judgment. Moreover, the advantage of broad discovery in the United States and the uniformity in the interpretation and application of the U.S. patent laws by the Court of Appeals for the Federal Circuit (CAFC) provides a significant incentive to litigate in U.S. courts. In addition, where appropriate, U.S. firms and individuals who create any of the several intellectual property rights that may be available under law will acquire corresponding rights in other countries and enforce such rights in the courts and under the laws of those countries.

There is yet another consideration that deals with the underlying law that establishes enforceable intellectual property rights. Notwithstanding a significant international effort to harmonize industrial property laws, the effort today is far from complete. Until substantial harmonization is achieved, so that the same basic principles are applied by the courts of our major trading partners, the interpretation by a court in one country of the laws of other countries is inherently likely to be flawed. Intellectual property laws create property rights that are complex and cannot be treated as involving generic tort or contract issues, but demand a more tailored set of rules.

Finally, while the draft Convention does address issues of jurisdiction and enforcement of judgments, it fails to address two issues that are frequent barriers to effective adjudication of legal rights (without limitation to intellectual property): (a) the effective initiation of litigation against foreign parties, and (b) obtaining evidence in foreign countries. Furthermore, while an injunction against IP rights infringement may be obtained in several countries, it is rare that substantial damages are collected for an infringement, thereby diminishing the value of an enforcement effort in other countries.

For all of the foregoing reasons, the AIPLA urges the U. S. Delegation to the draft Hague Convention negotiations to advocate that intellectual property rights be excluded from the Convention.

Responses to Questions

In view of our overall negative assessment of the draft Convention, we have only provided answers to selected questions. The answers underlie our concerns with the provisions of the draft Convention.

1. What are your experiences in having judgments involving intellectual property from one jurisdiction recognized in a foreign court?

There are a number of reasons why it is rarely necessary to seek recognition of U.S. judgments involving IP rights in foreign courts. The attractiveness of the U.S. market means that foreign defendants usually have a significant U.S. presence, business interests and assets that permit enforcement in the United States. Once a determination of infringement is made, the possibility of exclusion from the U.S. market creates significant pressure for resolution by agreement. To the extent that the litigation extends beyond the borders of the U.S., direct and parallel enforcement of corresponding rights in other countries often is undertaken.

One difficulty which has been encountered in a few cases involving attempts to enforce U.S. patent judgments in foreign countries has been the refusal of courts to recognize large damage awards, because a number of countries do not recognize the principle of punitive damages in private litigation on public policy grounds. The Hague proposal does not appear to change that situation.

However, the need to enforce a U.S. court's patent judgment in a foreign country could increase if U.S. courts render judgments affecting foreign patent rights. (See *Mars, Inc. v. Nippon Conlux KK*, 58 F.3d 616, 619, 35 USPQ2d 1311, 1314 (Fed. Cir. 1995))

3. Are uniform rules for international enforcement of judgments desirable?

As noted above, the occasion to seek international enforcement of judgments in IP cases has been so rare that the absence of uniform rules has not been a significant hindrance.

4. Do you support or oppose the United States becoming party to a jurisdiction/enforcement of judgments convention?

As indicated in our general comments, the AIPLA opposes the United States becoming party to the draft Hague Convention as long as it continues to contain provisions which adversely impact IP litigation in the United States. In the absence of more uniform national IP laws throughout the world and a uniform judicial interpretation of those laws, the treaty would undermine the underlying scheme of the U.S. Court of Appeals for the Federal Circuit to achieve uniformity in the interpretation and application of the U.S. patent laws.

5. What would be the benefits or drawbacks of the United States becoming a party to the proposed Hague Convention?

As noted above, the draft Convention fails to address the two principal difficulties under existing Hague Conventions which are encountered by U.S. plaintiffs in IP litigation with foreign defendants resident in countries which hinder the initiation of U.S. litigation against foreign defendants and hinder the taking of evidence in foreign countries. This is caused by the necessity to serve process through government channels, which delays institution of proceedings and prompt resolution, and by the restrictions on taking depositions in those countries.

In addition, Article 2(1)(a) unnecessarily limits agreements between parties relating to jurisdiction of current and future disputes, and Articles 4(3) and 12(4) might bar parties habitually resident in one country from agreeing on a single foreign jurisdiction for adjudicating related disputes over IP rights registered in several foreign countries. (See also Art. 12(5)-(6)). Finally, we note that there are no supplemental jurisdiction provisions that would permit courts to take jurisdiction of substantial and related matters when jurisdiction is established under an IP right. (See 35 U.S.C. §§ 1338(b) and 1367)

6. Would the elimination of tag or general “doing business” jurisdiction have any impact on intellectual property owners’ ability to protect their rights either domestically or internationally?

U.S. rights holders may not find the elimination of tag or “doing business” jurisdiction to be a problem to the extent they are willing and able to enforce their intellectual property rights in other countries; however, the elimination of “doing business” jurisdiction could at least complicate U.S. IP litigation. The existence of “doing business” jurisdiction minimizes jurisdictional disputes at the outset of IP litigation and its elimination would needlessly complicate domestic litigation.

7. What other changes to U.S. law would be needed to implement the proposed convention? Please identify any drawbacks and/or advantages to such changes.

As earlier noted, the goal of U.S. IP law and its court system, particularly with regard to patent law, is to achieve uniformity and predictability so that companies and other IP rights holders may make sound business decisions without the uncertainty of liability based on unforeseen or unpredictable assertions of rights. The U.S. Court of Appeals for the Federal Circuit (CAFC) was established for that purpose in 1982 and, through its decisions and its “de novo” review of claim interpretation issues, has sought to achieve some measure of predictability. The draft Convention, which would seemingly allow foreign courts to interpret U.S. patent law, would undermine this purpose of the CAFC. Moreover, it would not be unreasonable to expect that certain foreign courts, which traditionally evidenced a narrow view of the scope of intellectual property protection, would become favored jurisdictions for the interpretation of U.S. patents and the evaluation of their scope and validity.

Further, with regard to the standard for jurisdiction under Article 10, there is a substantial question of whether the “forseeability” that an “act or omission would result in an injury of the same nature in that State” would satisfy the “minimum contacts” which the U.S. Supreme Court has required for jurisdiction over a person. (See Art. 10(1)(b), 10(3) and (4)).

8. What effect, if any, could this Convention have on other international intellectual property obligations, including, but not limited to, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Paris Convention, and the Berne Convention?

In the current political environment, it is extremely unlikely that the interpretation of either the Paris or Berne Conventions would be the subject of an internationally sanctioned judicial review, so it is difficult to foresee any impact of the draft Hague Convention on these two Conventions. As regards TRIPS, there have been relatively few disputes that have been considered by the World Trade Organization and to make any comment on the impact which the Hague Convention might have in this regard would be mere conjecture at this time.

9. What effect, if any, could this Convention have on the enforcement of intellectual property with respect to the Internet?

The effect on jurisdictional issues could be significant since the proposed standards for jurisdiction, such as the location of an act or omission that “caused injury” or in which the injury arose, under Article 10, may be broadly interpreted in an electronic environment to provide jurisdiction over a person having minimal active, or even passive (e.g., through a website) contact with the claimed place of injury. Although the damages may be limited under Article 10(4) to the injury that occurred in that jurisdiction, even a default judgment would have significant impact elsewhere in the world, thus requiring a party to incur the cost to appear and defend. While in a given case this could be viewed positively or negatively depending on one’s perspective as a potential plaintiff or a potential defendant, such uncertainty is unacceptable in the context of the Internet.

10. Would application of Article 10 change existing jurisdictional principles as applied to intellectual property infringement actions? If yes, please describe any changes in detail and provide any relevant legal authority.

Article 10 appears to change existing jurisdictional principles regarding IP infringement, but the meaning and scope of the Article are ambiguous. In this latter regard, there is a question of interpretation concerning the language of section (a) with reference to “in which...that caused the injury” and the language in section (b) “in which the injury arose”. Subsection (b) also uses the phrase “result in an injury ... in that State,” which suggests that it is referring to the place of economic loss as a result of the injury. That interpretation would distinguish the “in which the injury arose” language of (b) from the “act or omission that caused the injury occurred” in subsection (a).

Article 10(3) provides for exclusive jurisdiction in proceedings involving validity or nullity of entries in public registers. Because IP rights--addressed in Article 10(4)--often are subject to registration, they should be clearly excluded from this section. Similarly, if IP rights are excluded from the Convention, as we would urge, they also should be expressly excluded from this section.

Article 10(4) would limit jurisdiction that is based only on the place where the injury arose or occurred to “the injury that occurred or may occur in that State unless the injured person has his or her habitual residence in that State.” This provision is ambiguous because it would appear to exclude jurisdiction where only the “injury arose.”

15. What changes, if any, should be made to the proposed Convention? Please describe any changes in detail and provide any relevant legal authorities that support such suggestions.

As previously noted, the institution of proceedings and the taking of discovery are not addressed in the draft Convention. The procedures of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents to initiate litigation against a defendant in another country, and those of the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, are cumbersome and cause significant delays. There should be a means to initiate litigation without going through diplomatic channels and to take evidence, including discovery, at locations other than embassies and consulates.

The draft Convention also fails to address choice of law issues. This could be a major problem, as some traditional choice of law rules permit the court to assume that the foreign law is the same as that of its jurisdiction.

At this time, that would not be acceptable in IP litigation. Further, there is an issue of the choice of law standard to be applied. In the United States, there are three prevailing standards: (1) the place where the right to be asserted vested, i.e., the last act to complete the tort, (2) the place having the most significant relationship, or (3) the place having the greatest policy interest. See June 29, 2000 statement of U.S. Deputy Associate Attorney General D. Jean Veta at nn. 28-30. (<http://www.house.gov/judiciary/veta0629.htm>)

We appreciate the opportunity to provide our comments on the draft Convention and look forward to continuing to work with you as this effort proceeds.

Sincerely,

A handwritten signature in black ink that reads "Michael K. Kirk". The signature is written in a cursive, flowing style.

Michael K. Kirk
Executive Director

July 19, 2017

John J. KIM,
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RE: Draft Convention on the Recognition and Enforcement of Foreign Judgments
Relating to Civil or Commercial Matters

Dear Mr. Kim, Mr. Matal and Ms. Pagan:

Further to your Request for Comments and Notice of Public Meeting on a Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments Currently Being Negotiated at The Hague Conference on Private International Law (81 Fed. Reg. 81741, November 18, 2016), the American Intellectual Property Law Association (AIPLA)¹ and the Pharmaceutical Research and Manufacturers of America (PhRMA) are providing the following views on whether patents should be included within the scope of the Draft Convention on the Recognition and Enforcement of Foreign Judgments Relating to Civil or Commercial matters

¹This letter adds to comments AIPLA submitted in response to the Federal Register notice on January 17, 2017. While those comments referred to all forms of intellectual property, including patent, trademarks, copyright and trade secret, this letter focuses on the Draft Convention as it relates to patents only.

(Draft Convention). Having further considered the February 2017 version of the Draft Convention, we believe patents should be excluded from the scope of the convention.

AIPLA is a national bar association of approximately 13,500 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

PhRMA represents leading biopharmaceutical innovators in the United States. PhRMA member companies and the more than 850,000 women and men they employ across the country are devoted to inventing, manufacturing and distributing valuable medicines that enable people to live longer, healthier and more productive lives. The U.S. biopharmaceutical industry is the world leader in medical research – producing more than half the world's new molecules in the last decade. In 2015 alone, the industry supported 4.5 million American jobs, produced over \$1 trillion in economic output for the United States and invested almost \$60 billion in research and development for new medicines. Innovators in this critical sector depend on strong intellectual property protection and enforcement at home and abroad.

We question whether the Draft Convention adequately takes into account the particular territorial nature of patent rights and whether it sufficiently respects the established international framework within which patent law functions. Among the specific concerns that AIPLA and PhRMA have about including patents within the scope of the Draft Convention are the following:

- 1) Whether the Draft Convention takes into consideration that the scope of patentable subject matter differs from State to State, and whether a requested State would be required to enforce a judgment of infringement with respect to an invention that is unpatentable in that State. The issues that this lack of clarity raises are considerable. For example, it leaves open the possibility that a State would be required to enforce a judgment even if that State had previously rejected a patent application or invalidated a previously granted patent for the same invention. Similarly, it raises the possibility that the Draft Convention would require a court to enforce a judgment for infringement when the acts that gave rise to the judgment were not infringing acts in the requested State. The failure of the Draft Convention to address those and similar issues is compounded by the language of the Draft Convention itself. Draft Article 4(2) provides that “there shall be no review of the merits of the judgment given by the court of origin.” It is not inconceivable, therefore, that the Draft Convention would require U.S. courts to enforce judgments that are contrary to U.S. law.

- 2) The Draft Convention provides in Article 26(1) that its provisions should be interpreted “so far as possible to be compatible with other treaties....” Insofar as the Draft Convention does not require full compliance with the network of treaties (TRIPS, NAFTA, Paris, PCT, PLT, bilateral agreements) that set procedural and substantive standards of protection for patents, the convention raises the specter that a requested State may be required to enforce a judgment that contravenes treaty law. The Draft Convention also leaves unanswered the question whether the courts of a requested State would have jurisdiction to review the conformity of a judgment with the terms of a treaty. If the Draft Convention were interpreted to limit that jurisdiction, a court of a requested State might be forced to choose between violating the terms of the Draft Convention or violating the terms of an IP treaty.
- 3) The question of jurisdiction raises other issues, in particular with respect to U.S. law. In the absence of implementing legislation, it is unclear whether federal or state courts would have jurisdiction to enforce judgments under the Draft Convention. The convention also ignores the issue of geographic jurisdiction. As a matter of constitutional law, the need to determine what minimum contacts, if any, would be required to bring an enforcement action before a particular court is crucial. It would also appear that forum shopping could become an issue unless clear guidelines were in place.
- 4) The Draft Convention provides that a foreign judgment is enforceable only if it was issued by a court. However, in some countries (Germany, for example), infringement actions are bifurcated and the question of infringement is determined by a court, but the question of validity is determined by an administrative body. Such systems are not addressed in the Draft Convention. As a result, it is unclear whether the Draft Convention would prevent a judgment of infringement from being enforced before an administrative body has ruled on validity or whether the convention grants the court of a requested State the power to refuse to enforce a judgment because an administrative body in the State of origin has determined the patent to be invalid or has not yet issued its determination.
- 5) The U.S. is one of the few jurisdictions that provides jury trials in patent infringement cases; in the vast majority of States, judges rule on patent matters. The Draft Convention does not distinguish between the two types of trials, but as jury trials occasionally come under criticism by countries that do not provide for them, it is potentially troublesome that the Draft Convention fails to expressly provide for equal treatment of judgments rendered by juries and judges, respectively.
- 6) Draft Article 12 would provide that non-monetary remedies are not enforceable under the Draft Convention. There is broad disparity in the amount of monetary damages that States award. Monetary damages tend to be minimal in many States compared to the size of damages in countries like the U.S., and monetary damages in the U.S. tend to be greater than in any other State.

The Draft Convention is silent with respect to the size and scope of damage awards, but geographical differences may pose serious challenges to the operation of the convention. For example, a court in a State that tends to grant large awards may consider it contrary to public policy to enforce a monetary judgment that it considers grossly insufficient, just as a court in a State that tends to grant small awards may consider it contrary to public policy to enforce a monetary judgment that it considers excessive.

- 7) Article 5(1)(k) provides that a judgment on the infringement of “a patent... or similar right...” falls within the scope of eligibility of the Draft Convention. Some States provide for the grant of utility models or design patents (which could be considered a “similar right”), while many others do not. The broad language of Article 5(1)(k) thus raises the issue of whether the Draft Convention would require a State to enforce a foreign judgment for infringement of a utility model or a design patent when the requested State does not provide for those types of rights. Would, for example a judgment for infringement of a U.S. design patent be enforced in an EU country, which grants registered design rights but not design patents? Similarly, would a U.S. court be required to enforce a Chinese judgment for utility model infringement although the U.S. does not grant utility model protection? Unfortunately, the Draft Convention does not provide clear responses to these important questions.
- 8) The Draft Convention is particularly troublesome because extraterritorial enforcement of patent rights has not traditionally played a role in the international patent system. While a considerable number of treaties broadly define those inventions eligible for patents, patent enforcement is considered a matter of national law. The principle of independence of patents is enshrined in the Paris Convention, infringement litigation takes place on a State-by-State basis, the Patent Cooperation Treaty expressly provides that substantive conditions of patent law are to be determined by each State, and States do not give full faith and credit to the patent determinations of other States. It is therefore worrisome that, without due deliberation and consideration for the particular patent issues at stake, the Draft Convention may significantly impact long-standing patent law principles.
- 9) AIPLA and PhRMA believe that many of the foregoing concerns would be expressed by other organizations and entities in the United States and abroad that have an expertise in and thus, an interest in the proper protection and enforcement of patent rights, should they be consulted on this matter. We feel that the considerations of these complex issues would benefit from more time and additional outreach to informed and invested patent system stakeholders, both in the United States and other industrial countries with mature patent systems. Our current sense is that this exercise would conclude that patent judgments should be expressly excluded from the scope of applicability of the Draft Convention.

In sum, AIPLA and PhRMA are concerned that the risks and unintended consequences of granting recognition of foreign judgments in patent infringement matters will outweigh any potential benefit. AIPLA and PhRMA therefore believe that patents should be excluded from the

scope of applicability of the Draft Convention, and asks the U.S. to advocate for the adoption of draft Article 2(1)(1), which is currently in square brackets in the text of February 17, 2017.

We thank you for allowing AIPLA and PhRMA the opportunity to provide these comments.

Sincerely,



Mark L. Whitaker
President
American Intellectual Property Law
Association

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