1. The foundation of the World Intellectual Property Organization: what came before

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ORIGINS

In formal terms, WIPO was constituted by the provisions of a multilateral treaty negotiated in Stockholm in July 1967. This was signed by 51 countries from the developed and developing worlds and the former socialist bloc,¹ and came into force formally on 26 April 1970, with the required number of accessions and ratifications by countries that were members of the Paris Union (10) and of the Berne Union (7). By the end of 1970, there were 22 member states, with a somewhat larger number (31) taking advantage of a provisional or transitional membership that was available for the first five years of the Organization's existence. At the time of writing, there are 193 member states, and the Organization occupies impressive premises in Geneva, with a number of 'External Offices' around the world,² and a staff establishment of over 1,500. It has been a specialized agency of the UN since 1974 and is now a well-established and mature member of the international institutional legal order.

The creation of an international body such as WIPO was hardly a surprise and had been anticipated for some time. For more than a decade prior to 1967, there had been ongoing discussions and debates concerning the need for a new, modernized structure to take over the administration of the various 'traditional' intellectual property conventions, such as the Paris and Berne Conventions. A further issue was meeting the challenges of the new world order that was emerging with the post-World War II process of decolonization and the development of the UN system of international organizations. WIPO's immediate bureaucratic predecessors were to be found in the united international bureaux (offices) of the Unions established by the Paris and Berne Conventions, which also had responsibility for the various 'Special Unions' that had been established in association with the Paris Convention, notably those concerned with the international registration of trade marks (the Madrid Special Union), designs (the Hague Special Union) and appellations of origin (the Lisbon Special Union). From their inception, 1885 and 1888 respectively, the Paris and Berne Bureaux had been placed under the 'high authority' and supervision of the

¹ See the list of signatories in [1968] Copyright 2.

² Brazil (Rio de Janeiro), China (Beijing), Japan (Tokyo), Russia (Moscow) and Singapore. A photographic image of the present WIPO headquarters buildings in Geneva appears on the front cover of this volume.

Swiss Government.³ However, they were only dependant on that authority as regards administrative and financial matters. Each Bureau was in effect the organ of the Union to which it belonged: ‘This Bureau [Paris] is an essential organ of the Union... and it will embody the idea of the Union, and will be the living link between the Contracting States.’⁴ This statement, made in relation to the Paris Bureau, applied with equal force to the Bureau established several years later under the Berne Convention. From 1893, the Swiss Government combined the two bureaux in joint premises situated in Berne and was responsible for the appointment of their staff.⁵ Ultimately, the joint bureaux became known as the United International Bureaux for the Protection of Intellectual Property (‘Bureaux internationaux réunis pour la protection de la propriété intellectuelle’), with the acronym BIRPI derived from the French title, but it appears that this appellation only arose in the late 1950s and, up to this time, the best description of the bureaux is the ‘united international bureaux’.⁶ A model for their operation, if any were to be sought, was to be found in the international offices that had been set up under the Universal Postal Union and International Telegraph Union a little over a decade earlier.⁷ Over the next 80 or so years, the dedicated staff members of the united international bureaux, who were mostly Swiss nationals, ‘administered’ the affairs of the Unions and the subsequently adopted Special Unions under the Paris Convention in a meticulous and conscientious fashion. These tasks included: preparing for and convening revision conferences where required, in cooperation with the host government and providing the necessary secretarial support for these meetings; compiling and editing records of these conferences once completed; acting as a central repository and clearing house for national laws and regulations, court decisions and relevant statistics; providing translations of these documents where these were in different languages (primarily into French, the most commonly spoken language of the period in intergovernmental relations); and, from the outset, publishing comprehensive monthly journals of

³ The International Bureau of the Paris Convention 1883 was not formally established until 1885, while the International Bureau of the Berne Convention 1886 began operations on 1 January 1888. The Bureaux were then combined in 1893.

⁴ Statement by le chevalier de Villeneuve, Brazilian delegate, to the seventh session of the first diplomatic conference on the Paris Convention, 12 November 1880: *Actes de la Conférence internationale pour la protection de la propriété industrielle, réunie à Paris à Paris du 4 au 20 novembre 1880*, Deuxième ed, Berne, Bureau internationale de l’Union, 1902, 85; also quoted by GHC Bodenhausen, [1963] *Droit d’auteur/Copyright* 91.

⁵ *Paris Mémoire*, 136ff. A similar memoir was published by the Bureau of the Berne Union several years later on the 50th anniversary of the Berne Convention: *Berne Mémoire*, 104ff. See further the detailed memorandum on the operations and functions of the two Bureaux by Henri Morel, the first director, that is reproduced in *Actes de la Conférence diplomatique de Paris, 1896*, 205–212. (This Conference resulted in the first revision of the Berne Convention, the Additional Act of Paris 1896.)

⁶ For a history of this usage, see Justin Hughes, ‘A Short History of “Intellectual Property” in Relation to Copyright’ (2012) 33 *Cardozo Law Review* 1293, 1296–1303.

⁷ The International Telegraph Union office in 1869 and the Universal Postal Union office in 1874, both located in Berne.

record and commentary for the information of member countries,⁸ to say nothing of several elegantly written celebratory ‘memoirs’ of the first 50 years of the Paris and Berne Conventions.⁹ Registration services were also provided, as required for the Madrid and Hague Special Unions. Successive directors, and their deputies, were Swiss lawyers and scholars of some note, who brought a real intellectual rigour into their work and, from the 1920s, engaged in contacts with other international bodies that were emerging under the auspices of the League of Nations in related areas, such as private international law and economic regulation.¹⁰

DEVELOPMENTS AFTER WORLD WAR II

After 1945, however, the united international bureaux (not yet called ‘BIRPI’) appeared something of an anachronism in the new environment of intergovernmental organizations (IGOs) which was emerging with the establishment of the UN system, with its specialized agencies and other associated bodies. The separate international legal personality of these new institutions was now firmly recognized, together with their funding and staffing arrangements. While the functions of the Paris and Berne Bureaux were set out in their respective conventions, there was no other governing structure provided for the member states of the Unions. The day-to-day supervision and financing of the bureaux fell to the Swiss Government, while the organization of any diplomatic conference to revise the convention texts rested ultimately with the government of the state that had offered to host the conference, albeit with the expert assistance of the united international bureaux. Moreover, the sole permanent representative of the Unions in the interval between diplomatic conferences for revision was the Director of each International Bureau, who, from the start, was the same person.

⁸ *La Propriété industrielle* and *Le Droit d’auteur*, beginning in January 1885 and January 1888 respectively. Published for many years in French only, both publications were published in English as from the early 1960s: see *Industrial Property* (1960 to 1994) and *Copyright* (1965 to 1994). They were succeeded from 1995 to mid-1998 by a combined monthly publication.

⁹ See n 5 above.

¹⁰ Thus, Professor Ernest Röthlisberger attended meetings of the Economic Committee of the League of Nations in the mid-1920s that was considering economic regulation and consumer protection issues. This Committee was the source of proposals for a provision of the Paris Convention dealing with unfair competition that was adopted at the Hague Revision Conference in 1925 (as art 10*bis* of the Hague Act). In the 1930s, Director Fritz Ostertag attended meetings of the Paris-based Institute for Intellectual Co-operation and the Rome Institute for the Unification of Private International Law to discuss copyright agreements with South American states, as well as the development of draft treaties on neighbouring rights, although it appears that this was largely in a private capacity: Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (OUP 2015) para 13.40 and Sam Ricketson, ‘Rights on the Border: The Berne Convention and Neighbouring Rights’ in R Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) (pp 341–374).

For the most part, these arrangements had worked well enough. In the case of the Berne Convention, for example, productive revisions had been effected at Paris (1896), Berlin (1908), Rome (1928) and Brussels (1948). The history of the Paris Convention had been less successful in this regard, although not for want of trying, with revisions in Brussels (1900), Washington (1911), The Hague (1925) and London (1934); on the other hand, if revisions of the Convention itself had been slow and piecemeal, other important agreements had come in the wake of these conferences, notably the Madrid Registration Treaty (1891) and the Hague Agreement on Designs (1925). On two occasions, the united international bureaux themselves had been instrumental in organizing useful conferences to deal with the effects of wartime conditions on intellectual property rights: Berne (1920)¹¹ and Neuchâtel (1947).¹² Nonetheless, there were continuing concerns about the financing of the bureaux's operations, as the annual subscriptions of Paris and Berne Union members were fixed in their respective conventions and could only be changed at a revision conference: this meant that the Swiss Government had frequently been called upon to subsidize the bureaux's activities where there was a shortfall in receipt of subscriptions. Furthermore, by 1945 the quiet and scholarly surroundings of the united international bureaux, with their excellent library but somewhat antiquated headquarters in Berne,¹³ seemed out of touch with the changing times. While novel at the time of their creation, as a body '[i]t no longer surprises by its existence but rather because it appears, however active it may be, as an institution of the past'.¹⁴

Furthermore, as Professor GHC (Georg) Bodenhausen, the newly appointed Director of BIRPI (as it was now known), noted in early 1963: 'The general trend of the evolution of law towards the notion of international public service gradually affected the pre-eminence of the International Bureaux as organs of the Unions and increased the role of the Member States.'¹⁵ An early reflection of this trend was to be found in a resolution adopted by the 1948 Brussels Conference for the revision of the Berne Convention, which created a committee designed 'to assist the Bureau in its task' and 'to assure more satisfactory working of the Union'.¹⁶ The committee, known as the 'Permanent Committee', thereafter assumed functions of wide practical

¹¹ For an account of this conference, convened by the Swiss Government but on the initiative, it appears, of the bureaux, see *Paris Mémoire*, 106–107.

¹² *Actes 1947*.

¹³ Initially, a two-room apartment at Amtshausgasse 1 and then at Hirschengraben 8 (1885–1892), before moving into a ten-room apartment at Kanonengasse 14, Berne (1892–1904), and finally into a four storey building at Helvetienstrasse 7 from 1904 to 1960.

¹⁴ Professor Robert Plaisant, quoted by Jacques Secretan, 'Structural Evolution of the International Unions for the Protection of Intellectual Property' [1962] *Industrial Property* 170, 171. Centenary volumes celebrating the first 50 years of the Paris and Berne offices respectively were published by the office in 1933 and 1936: see *Paris Mémoire* and *Berne Mémoire*.

¹⁵ Georg HC Bodenhausen, 'The Evolution of the United International Bureaux' [1963] *Industrial Property* 85, 85.

¹⁶ *ibid*.

scope and heralded a gradual shift of control over the Berne Union to its member states.¹⁷

A strong advocate of this approach was Bodenhausen's predecessor, Jacques Secretan. Unlike earlier directors, several of whom had spent almost their entire professional careers as officials of the united international bureaux,¹⁸ Secretan had no particular background in intellectual property law. On the other hand, he was an international lawyer with a wide and worldly background (including a youthful stint doing ethnological and oceanic studies in the South Pacific) and extensive experience with other international organizations, notably the International Labour Office, as well as time spent in practice and in academic institutions.¹⁹ So far as BIRPI was concerned – he appears to have been the first to refer to the united bureaux by this abbreviation²⁰ – Secretan was a highly proactive figure, who sought out links with related international bodies, and sought to involve BIRPI more closely with the emerging UN system. As early as 1956, in a speech to the XXVII AIPPI Congress, he had drawn attention to the need for the united international bureaux to be recognized as being the international organization competent to represent intellectual property in international relations. He specifically advocated for the united international bureaux to become part of the family of the UN organizations. To that end, from the start of his tenure in 1953, he had negotiated working agreements with UNESCO, ICITO and the Council of Europe, and other such agreements were under consideration with the FAO and WHO.²¹ Furthermore, as a result of his persistence, in 1961 BIRPI's competence came to be recognized by a Resolution of the UN General Assembly which called for a report to be drawn up in respect of the role of patents in the transfer of technology to under-developed countries, 'utilising the existing machinery of the International Union for the Protection of Industrial Property'.²² So began a collaboration with the UN which accepted BIRPI as the competent intergovernmental body

¹⁷ See Bodenhausen, 'Evolution of the United International Bureaux' (n 15) 85.

¹⁸ For example, Röthlisberger (1922–1926) and Mentha (1938–1953). The Directors in chronological order were: Henri Morel (1893–1912, Swiss judge and politician); Roberte Comtesse (1912–1921, Swiss lawyer, official and federal counsellor, president of the Swiss Confederation); Ernst Röthlisberger (1922–1926, Swiss linguist and employee of the Berne bureau from its foundation in 1888); Fritz Ostertag (1926–1938, Swiss lawyer and judge); Benigne Mentha (1938–1953, Swiss jurist and translator, lifetime employee of the united offices); Jacques Secretan (1953–1963, Swiss lawyer and official); and Georg Bodenhausen (1963–1973, Dutch lawyer and academic). For details on the lives and careers of the various directors, see WIPO, *The Berne Convention for the Protection of Literary and Artistic Works 1886–1986* (WIPO International Bureau for Intellectual Property 1986) 56–59 (written by Arpad Bogsch, the first Director General of WIPO) ('*Berne Centenary volume*').

¹⁹ See Secretan's obituary in [1964] *Industrial Property* 182.

²⁰ This change of nomenclature appears to have become established by 1959: see Hughes (n 6) above.

²¹ Jacques Secretan, Opening Speech, XXV11 Congress of AIPPI (Washington), 28 May–2 June 1956 [1956] *La Propriété industrielle* 148, 149.

²² *The Role of Patents in the Transfer of Technology to Under-Developed Countries*, GA Res 1713 (XVI), UN Doc A/RES/1713 (XVI) (adopted 19 December 1961).

for intellectual property and culminated in WIPO being recognized as a specialized agency of the UN in 1974.²³

Well before this, however, Secretan had begun to promote the discussion of new structures for the administration of the Unions and Special Unions. Writing in 1956, he said:

Three years of experience in the present Union [of Paris] and 30 years of experience in other associations of States have led me to the following conclusions: (a) Intellectual rights – whether in the field of patents and trademarks or in the field of copyright – must enjoy international protection just as much as any other rights mentioned in the Universal Declaration of Human Rights. For this effect, they must benefit from the support of their own and general intergovernmental organization ... (b) Such organization must be given its own jurisdiction – that is, intellectual rights – and organs that can represent it, and can represent the said rights, efficiently in international relations, (c) Finally, the said organization should be part of the great family of the United Nations.²⁴

Indeed, even prior to Secretan's arrival on the scene, the united international bureaux had been engaged in cooperative enterprises with other international bodies, beginning with UNESCO and the negotiation of the UCC in 1952, and discussions with the newly named International Labour Organization (ILO)²⁵ and UNESCO concerning protection for performers, sound recordings and broadcasting organizations (leading ultimately to the adoption of the Rome Convention in 1961). Subsequently, BIRPI officials were involved with the preparation and negotiation of a treaty outside the Paris Convention dealing with plant varieties (UPOV).²⁶ Indeed, responsibility for the administrative functions required under UPOV were later assigned to BIRPI by the Swiss Government as the supervising authority when the new Convention came into force, giving it responsibility for yet another 'Union'.²⁷

So far as consultation and coordination mechanisms within BIRPI itself were concerned, mention has already been made of the Permanent Committee of the Berne Union which was established by resolution of the Brussels Revision Conference in 1948. This comprised 12 member states, to be elected on a three-yearly basis, and was given the brief of assisting the Berne Bureau in its task of preparing for

²³ A Working Agreement was established in 1963 between the UN Secretariat and BIRPI: see [1964] *Industrial Property* 207. Regular reports on cooperation between the UN and BIRPI on patents were published annually thereafter in *Industrial Property*. That Working Agreement was replaced in 1970 by a new Working Agreement: see [1970] *Industrial Property* 368.

²⁴ Secretan, AIPPI Opening Speech 1956 (n 21) 149.

²⁵ Prior to World War II, this had been called the 'International Labour Office', linked to the previous League of Nations. It is worth noting here that the first draft of what was to become the Rome Convention was drafted by former Director Mentha of the united international bureaux in November 1951 and Mentha was also responsible for the drafting of the famous 'Berne Safeguard Clause' of the UCC: Obituary of Benigne Mentha, [1974] *Industrial Property* 328, 330.

²⁶ See *Actes* 1972, 20, 35, 40, 46, 104.

²⁷ Noted in [1970] *Industrial Property* 3, 8.

revision conferences.²⁸ Meeting regularly, often annually, up to 1970, it dealt with a wide range of topics relating to copyright, but lacked authority in relation to such issues as finances (the level of member country subscriptions remained a matter for revision conferences) or direct supervision of the Berne Bureau (the responsibility of the Swiss Government). Outside the Berne Union, a direct link with UNESCO, the organization responsible for the UCC, existed in the form of an intergovernmental committee, on which the Director of BIRPI was represented in an observer capacity and which met on a regular basis, often in conjunction with the Berne Permanent Committee.

There was no counterpart to the Permanent Committee in the Paris Union, but in the early 1950s the International Bureau under Director Secretan took the unprecedented step of organizing meetings of the heads of national industrial property offices of the restricted Madrid Union²⁹ to begin preparations for what ultimately became the trade mark classification agreement that was adopted at the Nice Diplomatic Conference in 1957.³⁰ A significant outcome of that meeting was the constitution under the new agreement of a committee of experts nominated by member states to consider and make recommendations for changes to the classification adopted under the agreement.³¹

As for the Paris Convention itself, at the Lisbon Revision Conference in 1958, presumably on Secretan's prompting,³² a more formal attempt to provide for oversight between the meetings of successive revision conferences was provided by the constitution of a conference of representatives of all Paris Union countries. That Conference would meet every three years for the purposes of reviewing 'foreseeable expenditure' of the International Bureau for each three-year period and to 'consider questions relating to protection and development of the Union'.³³ It was further provided that the Conference 'might modify' the maximum annual amount of expenditure of the International Bureau, provided that this was done by them meeting as 'Conferences of Plenipotentiaries of all the countries of the Union, convened by the Government of the Swiss Confederation'.³⁴ Provision was also made for the convening of addi-

²⁸ A task entrusted to the Bureau under Article 24(2) of the Brussels Act of the Berne Convention.

²⁹ See further [1953] *La Propriété industrielle* 56 and 45; [1954] *La Propriété industrielle* 238 and 243; [1955] *La Propriété industrielle* 24–28; [1956] *La Propriété industrielle* 61–72. And see further *Actes 1957*. It seems, however, that the credit for organizing the first of these meetings should be given to Secretan's predecessor, Mentha, who retired only five days before the meeting was held: Obituary of Benigne Mentha, [1974] *Industrial Property* 328, 330.

³⁰ This Conference was, of course, convoked by the French Government, working in conjunction with the International Office: *Actes 1957*, 28ff (letter of invitation from the French Minister of Foreign Affairs).

³¹ Nice Agreement, art 3.

³² See the proposal of the International Office with respect to this in the programme for the Lisbon Conference: *Actes 1958*, 221ff.

³³ Lisbon Act 1958, art 14(5)(a).

³⁴ *ibid* art 14(5)(b).

tional meetings of the Conference between their triennial meetings at the initiative of either the Director of the International Bureau or the Government of the Swiss Confederation.³⁵ In the period prior to the coming into operation of the Lisbon Act, the same revision conference resolved that the proposed triennial meetings should be convened by the Swiss Government and/or the Director of the International Bureau in the terms of Article 14(5), meeting as a 'Consultative Committee composed of representatives of all the countries of the Union'.³⁶ As Bodenhausen comments, the Conference that was so constituted here had what were essentially only advisory powers,³⁷ but the questions of finances and future planning for the development of the Convention were obviously important ones that required a more workable long-term solution. The Consultative Committee had its first meeting in May 1961, constituting itself formally with the adoption of an internal regulation and the appointment of a 'Permanent Bureau' composed of 15 member states.³⁸ At the request of the Permanent Bureau, expert reports on the financial and administrative organization of the Paris and Berne Unions and BIRPI were commissioned by the Swiss Government, and it was then decided to convene a joint meeting of the Permanent Bureau of the Paris Union and the Berne Permanent Committee.³⁹

This joint meeting was then held in October 1962 and had before it the report of a Working Group appointed by the Permanent Bureau entitled 'Plan of Reorganization of BIRPI' together with draft financial and staff regulations.⁴⁰ A number of significant measures expressed in ten separate resolutions came out of this joint meeting. Of these, perhaps the most important in relation to the foundation of WIPO was resolution 9, which recommended that the supervisory functions of the Swiss Government should be transferred to an Assembly of Member States of the Unions, and that the system of contributions of member states towards the expenses of BIRPI should be modernized by an administrative convention designed to accomplish these objectives by revising some of the administrative clauses of the existing Conventions and Arrangements.⁴¹ So far as the future was concerned, the Committees expressed the

³⁵ *ibid* art 14(5)(c).

³⁶ Resolution II of the Lisbon Revision Conference: *Actes 1958*, 1014.

³⁷ Georg HC Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as revised at Stockholm in 1967* (BIRPI 1969) 169.

³⁸ 15–20 May 1961: [1961] *La Propriété industrielle* 169–172. The Permanent Bureau was appointed under Article 6 of the Regulation: [1961] *La Propriété industrielle* 171. This 1961 meeting had been preceded by a meeting of heads of industrial property offices in July 1960: [1960] *La Propriété industrielle* 210.

³⁹ Meeting of the Permanent Bureau of the Consultative Committee of the Paris Union for the Protection of Industrial Property, 29–30 March 1962: [1962] *Industrial Property* 112. It was the first time since their creation that these two consultative bodies were called together. The same joint meeting advised the Swiss Government to appoint Bodenhausen Director of BIRPI with effect from 1 January 1963, as well as Dr Arpad Bogsch of the USA as a Deputy Director with special responsibility for the Paris Convention with effect from 19 July that year.

⁴⁰ 15–19 October 1962: [1962] *La Propriété industrielle* 234–237.

⁴¹ See Bodenhausen, 'Evolution of the United International Bureaux' (n 15) 93. See also the Text adopted by the joint meeting of the Permanent Bureau of the Consultative Committee

view that BIRPI should undertake new activities, including cooperation with the UN and technical assistance to industrially less-developed countries.⁴²

Of more immediate impact, however, was the decision to constitute an Inter-union Coordination Committee of the Paris and Berne Unions, with the particular role of advising the Swiss Government as Supervisory Authority ‘on the administrative and financial problems of BIRPI including the matters referred to in the recommended new financial and staff regulations’.⁴³ A further recommendation was for the appointment of a small Working Party to prepare proposals for structural change, which would then be considered by a committee of governmental experts meeting prior to submission to a Diplomatic Conference, which would draw up ‘an administrative convention designed to accomplish the objectives referred to ... and, for that purpose, to revise some of the administrative clauses of the existing Conventions and Arrangements’.⁴⁴ The Working Party met in May 1964,⁴⁵ setting in train the preparation of the administrative convention which resulted in the final proposals to the administrative and financial provisions of the Paris, Berne and other conventions administered by BIRPI.⁴⁶

of the Paris Union and the Permanent Committee of the Berne Convention on 19 October 1962: [1962] *Industrial Property* 236, 237 (resolution 9).

⁴² Resolution 6 of the joint meeting of the Permanent Bureau of the Consultative Committee of the Paris Union and the Permanent Committee of the Berne Union: [1962] *Industrial Property* 236.

⁴³ *ibid* (resolution 5).

⁴⁴ *ibid* 237 (recommendations 9.2 and 9.4).

⁴⁵ 20–26 May 1964: [1964] *Industrial Property* 139.

⁴⁶ These were contained in docs S/3-S/9 in the programme for the Stockholm Revision Conference in 1967 and are discussed further below: *Records 1967*, 187, 191–192. Fuller details on the history of these preparations are at 423–425. At the Conference itself, these proposals, and the parallel ones affecting the other Unions, were discussed in Main Committee IV (Chairman: F Savignon of France; *rapporteur*: V de Sanctis of Italy). For further background reading on the administrative changes made at the Stockholm Revision Conference, see: G Beguin, ‘Organization des Bureaux internationaux réunis pour la protection de la propriété industrielle, littéraire et Artistique’ [1962] *Le Droit d’auteur* 9; Jacques Secrétan, ‘Évolution structurelle des Unions internationales pour la protection de la propriété intellectuelle’ [1962] *Le Droit d’auteur* 131; [1962] *Industrial Property* 170; Leon Malapate and Jean Vilbois, ‘Réforme de la structure administrative des Unions de Berne et de Paris et des Bureaux réunis’ (1965) 46 *Revue Internationale du Droit d’Auteur* 5; Georg HC Bodenhausen, ‘Evolution of the United International Bureaux’ (n 15); Albrecht Krieger, ‘New International Organization for Intellectual Property? Efforts to Modify the Structure of the Paris and Berne Unions’ [1966] *Industrial Property* 37; MG Luzzati, ‘Réforme des clauses administratives des unions et l’institution de l’organisation mondiale de la propriété intellectuelle’ (1967) 101 *Annales de la Propriété Industrielle, Artistique et Littéraire* 344; Henri Desbois, ‘L’organisation mondiale de la propriété intellectuelle’ (1967–1968) 54–55 *Revue Internationale du Droit d’Auteur* 573; Claude Joubert, ‘Les clauses administratives et les clauses finales’ (1967–1968) 54–55 *Revue Internationale du Droit d’Auteur* 427; Guillaume Finniss, ‘An Important Period’ [1963] *Industrial Property* 4 (an interesting personal reflection on the role of Secretan in the changes to BIRPI in the period of Secretan’s directorship from 1952 to 1962). See

More significant, and accompanied by some controversy, was the further proposal for the constitution of the ‘International Intellectual Property Organization’ as a separate international organization under its own treaty, which would now be responsible for the administrative functions of both the Paris and Berne Unions and the other industrial property Unions.⁴⁷ This proposal, as seen above, emanated from Secretan, and his role in effecting changes in the organization of BIRPI and bringing its operations into line with those of other comparable international institutions was obviously critical. Like many innovators, he did not live to see the foundation of WIPO (his term of office expired at the end of 1962 and he died in July 1964), but the physical and staff settings for the proposed Organization had been set by the early 1960s with the move to a new building in Geneva and the appointment, for the first time, of a non-Swiss successor, Georg Bodenhausen from the Netherlands, and a highly capable younger deputy, Arpad Bogsch from the USA (formerly of Hungary) in 1963. By this stage, BIRPI was already operating in the same way as other intergovernmental organizations, but without the appropriate powers and capacities of such bodies. Thus:

- Any legal capacity that BIRPI possessed arose under Swiss law, rather than any public international law instrument. While the ‘unions’ established under the Paris Convention, Berne Convention and associated agreements enjoyed a loose but undefined legal capacity, this fell short of what might be required for the purposes of renting property and running a physical office.
- Employment conditions of staff, including pensions, were regulated under Swiss law, rather than the ‘common system’ applying to employees of the UN and its specialized agencies.
- Officers of BIRPI, unlike UN officials, lacked diplomatic immunity in any missions undertaken on behalf of the offices.
- Member countries of the various Unions had no direct control over the operations of BIRPI, although paying the annual contributions required under the relevant conventions: ultimate supervisory responsibility rested with the Swiss Government, including the appointment of staff. While it does not seem that the Swiss Government ever carried out its role in this regard otherwise than in a hands-off and benevolent fashion, particularly in relation to financial matters, it was not until 1963 that non-Swiss citizens (Bodenhausen and Bogsch) were appointed to the director and deputy director positions of BIRPI (after consultation with Union members).
- The limited staff of BIRPI were coping with a significant professional and administrative burden, extending far beyond their ‘official’ duties in providing secretarial services to the various Unions and Special Unions (although the scope and volume of these commitments alone was increasing rapidly, in any

also Joseph Eked-Samnik, *L’Organisation mondiale de la propriété intellectuelle (OMPI)* (Etablissements Emile Bruylant 1975).

⁴⁷ *Records 1967*, 489 (Doc S10).

event).⁴⁸ These additional involvements included observer roles in other international organizations with an interest in intellectual property as well as important non-governmental international organizations (what we might call ‘stakeholder’ groups, such as AIPPI and the International Chamber of Commerce), but also significant involvements with projects being carried out by the Council of Europe in relation to patents and broadcasts.⁴⁹

JANUARY 1963 – BIRPI AT A CROSSROADS

January 1963 – the time at which the handover of the Directorship of BIRPI from Secretan to Bodenhausen occurred – was a pivotal moment. While Secretan was clearly a transformative figure in the development of the organization, the path leading to the establishment of WIPO would now be overseen by a new leadership team drawn from outside the organization and, indeed, from outside Switzerland. Two important articles published around this time by Secretan⁵⁰ and Bodenhausen,⁵¹ the former writing in 1962 just before his retirement as Director and the latter early in 1963 shortly after he took over, provide useful perspectives on the legal and political situation at the time.

Secretan’s Vision on Leaving Office

Secretan, ever the internationalist, gives a broad outline of the structural evolution of BIRPI and the Unions during his tenure starting in 1952, a period he describes as one of basic transformation. From a political viewpoint, the move of BIRPI to Geneva, the headquarters of the UN in Europe, from Berne in 1960 was a first and symbolic step in this transformation.⁵² However, the organizational structure of BIRPI

⁴⁸ Bodenhausen, writing in 1963, provides an exhaustive list of the meetings of the Berne Permanent Committee, other committees of experts and ad hoc bodies that BIRPI had to organize and service between 1958 and 1963: Bodenhausen, ‘Evolution of the United International Bureaux’ (n 15) 89.

⁴⁹ *ibid.*

⁵⁰ Secretan, ‘Structural Evolution of the International Unions’ (n 14) 172, 173. His first anxiety ‘on taking over the Directorship of BIRPI in 1952, was to adapt BIRPI step by step, to the necessities and requirements of the modern world. At that time ... the legal structure of BIRPI was nearly as decrepit and dusty as was its premises’. See Finniss (n 46) 4. In the same article, Finniss referred also to Professor Secretan’s ‘high intelligence, his vast experience in the international field, his well-known courtesy and the great professional conscientiousness with which he has exercised his duties’: at 4.

⁵¹ Bodenhausen, ‘Evolution of the United International Bureaux’ (n 15) 86.

⁵² See Roland Walther, ‘The International Union for the Protection of Industrial Property in 1962’ [1963] *Industrial Property* 12. Walther records the gratitude of the Union to Secretan *inter alia* with regard to the transfer of the headquarters from Berne to Geneva which involved the building, on his initiative and under his directives, of a magnificent office worthy of the important international union.

remained typical of international unions of states whose management was entrusted to one state member before World War I. Meanwhile, the world had changed and BIRPI required structural reform to enable it to take its place as an autonomous intergovernmental organization (IGO). Secretan refers here to the establishment of the UN and its specialized agencies after World War II as providing the necessary models for modern IGOs to follow. He also refers to the crisis which the united international bureaux had faced in 1948 when the United Nations Economic and Social Council (ECOSOC) had adopted a Resolution⁵³ recommending that, in order to avoid ‘possible duplication or dispersion of effort between [the specialized agencies of the UN] and other existing intergovernmental organizations ... the possible termination, absorption or integration of any of these organizations (including BIRPI) into the UN or the specialized agencies’ should be considered. BIRPI survived, Secretan tells us, because the specialized agency which was to absorb it – the International Trade Organization – was never finally established. This enabled BIRPI to continue to play an active role in the defence of intellectual property in its relations with UNESCO and the ILO in connection with the establishment of the UCC (for which UNESCO was to provide the secretariat), as well as in connection with the negotiation and establishment of the Rome Convention for the Intergovernmental Committee of which UNESCO, the ILO and BIRPI provided the joint secretariat.⁵⁴

Secretan also drew attention to the appearance of new technologies to which intellectual property rights needed to adapt, but which required more resources to deal with than were available to BIRPI, which lacked competent organs with sufficient powers and finances to examine and suggest solutions to such problems. He expressed concern that BIRPI’s competence in the intellectual property field might be taken over by other institutions to the detriment of the principles enshrined in the Paris and Berne Conventions, not to mention the possibility of new conventions for the protection of intellectual property rights being initiated in the framework of ‘other international organizations representing other fields of activities and protecting different interests from those traditionally connected with such property’.⁵⁵ One senses here the apprehensions of an experienced international civil servant scenting future ‘turf’ wars.

Pointing to the possibility of BIRPI becoming a specialized agency of the UN, Secretan drew attention to the role of ECOSOC, the coordinating body of the UN for international relations.⁵⁶ ECOSOC was the *de facto* gatekeeper for new specialized agencies, meaning that it was essential for BIRPI to be recognized as the principal intergovernmental agency for intellectual property and to avoid new conventions in the field being initiated within the framework of other international organizations.

⁵³ ESC Res 171 (VII), UN Doc E/818 (29 August 1948).

⁵⁴ Secretan, ‘Structural Evolution of the International Unions’ (n 14) 171.

⁵⁵ *ibid* 172. Secretan had discussed these problems in an earlier publication: see Jaques Secretan, ‘Vers l’organisation internationale de la propriété industrielle’ in Marcel Plaisant, *Études sur la propriété industrielle, littéraire, artistique* (Sirey 1960) 173–176.

⁵⁶ *ibid* 172.

The objective of protecting intellectual property had been formally recognized by the Universal Declaration of Human Rights (1948), thereby making the UN and ECOSOC competent to oversee the matter. At the time Secretan was writing, BIRPI already had Agreements with UNESCO, the UN International Trade Organization (ICITO), the WHO, as well as with the Council of Europe, the OAS, the International Patent Institute and the recently established Olive Oil Council. Secretan proposed that those agreements be complemented by an agreement with ECOSOC, so that BIRPI could become a specialized agency and part of the family of the UN. However, such an agreement could only be concluded by an 'agency' set up by intergovernmental agreement and BIRPI did not meet this criterion. He therefore proposed the adoption of an intergovernmental agreement changing the structure of the Unions, making each of them an agency, that is, a generally recognized juridical and international body, possessing organs fully representative of the states and a secretariat. In 1958, proposals to this effect had been made by Secretan himself to the Diplomatic Conference held at Lisbon for the revision of the Paris Convention.⁵⁷ However, the states were unwilling to follow his advice at the time.⁵⁸

Nevertheless, the movement towards reform had continued after 1958 in the context of both the Paris and Berne Conventions, and Secretan foresaw that the planned Diplomatic Conference for the Revision of the Berne Convention to be held in Stockholm in 1967 would be the opportunity for a meeting of both Unions to examine structural reform. He suggested that 'If the unity of the protection of intellectual property is to be maintained, it is necessary to maintain a single International Bureau and to add a single Assembly of representatives of all the Unions to which the Director General of the International Bureau would be responsible'.⁵⁹ Such a reform would require also the revision of all the administrative and final provisions of all the Unions administered by BIRPI.⁶⁰ Secretan concluded by expressing his firm conviction that it was 'urgent to strengthen the intellectual property unions on the international level and to create the International Organization of Intellectual Property and to seek recognition of its competence by the Economic and Social Committee of the United Nations'.⁶¹

Secretan's experience and vision as Director of BIRPI was undoubtedly the inspiration and impetus not only for the establishment of the intergovernmental agency that became WIPO, but also for its eventual acceptance as the specialized UN agency responsible for intellectual property. His successors built on the foundations laid by him.⁶²

⁵⁷ *Actes 1958*, 222.

⁵⁸ Secretan (n 14) 174: 'Unfortunately, ... the States were unwilling at Lisbon to go as far as the Director of the United International Bureaux had advised.'

⁵⁹ *ibid* 178.

⁶⁰ It should be noted that each Union had a slightly different structure, with different organs, which required harmonization in any new IGO embracing them.

⁶¹ Secretan (n 14) 179.

⁶² In his obituary of Secretan, Charles-Louis Magnin, who was a Deputy Director of BIRPI under Secretan and Bodenhausen, said: 'He knew that this was a long-term project and that it would be left to others to bring it to a successful conclusion; but it was he who had sown the

Bodenhausen's Perspective on Assuming Office

While Secretan was not to live to see the realization of his vision for the future of BIRPI, Bodenhausen, the first non-Swiss Director of BIRPI, now faced the challenge of bringing it about. In an article published in *Industrial Property* in early 1963,⁶³ he described the measures which he foresaw as required to further the plans put forward by his predecessor. Thus, the Unions still lacked a complete international organization, meaning that they were unfinished structures,⁶⁴ and 'it is this structure which has now to be finished off'.⁶⁵ The immediate impetus for action came from a statement by a joint session of the Paris Consultative Committee and the Berne Permanent Committee in October 1962: 'The Permanent Bureau and the Permanent Committee are of the opinion that the supervisory functions of the Swiss Government should be transferred to the Assembly of the Member States of the Unions, and that the system of contributions of Member States towards the expenses of BIRPI should be modernised'.⁶⁶ Meanwhile, the Swedish Government had agreed to host a Diplomatic Conference to be held at the same time as the revision Conference of the Berne Convention to draw up an administrative convention designed to accomplish these objectives and, for that purpose, to revise some of the administrative and final clauses of the existing Conventions and Arrangements. Work on the Diplomatic Conference was to begin immediately and to include relations with the UN among the questions to be examined. This task was to be entrusted to the Inter-union Coordination Committee, set up in October 1963. This Committee was to advise the Swiss Government and make recommendations for reform.

Bodenhausen pointed also to the need for a new organization with more resources, both human and financial, than were available to BIRPI. Discussing the manifold duties of the International Bureaux at the time, he emphasized that, in addition to the preparation and drawing up of draft instruments (there had been five Conferences of revision of existing instruments or for the adoption of new Conventions, with all the preparations these entailed, in the years 1957 to 1961 alone), the need for collaboration with the specialized agencies of the UN, such as UNESCO, the ILO and the

good seed': [1964] *Industrial Property* 182, 183. Arpad Bogsch provides the following and rather fuller appreciation of Secretan, which suggests a figure of some charm and ebullience, perhaps a contrast to his successor, Bodenhausen: 'Secretan was a man of great culture and a man of the world. He liked flamboyance and knew that a great enterprise – in which he was engaged – needed public attention, and that public attention had to be created and cultivated. He travelled much and in style, and was a generous host. The bronze bust of Secretan, placed in the lobby of the BIRPI Building on March 20, 1983, the date of the centenary of the Paris Convention, bears the following inscription: "Jacques Secretan, 1897–1964, Directeur des BIRPI de 1953 à 1963, Bâtisseur du siège des BIRPI à Genève"': Bogsch, *Berne Centenary volume* (n 18), 59.

⁶³ See Bodenhausen, 'Evolution of the United International Bureaux' (n 15).

⁶⁴ See Paul Roubier, *Le droit de la propriété industrielle*, vol 1 (Rec Sirey 1952) 231.

⁶⁵ Bodenhausen, 'Evolution of the United International Bureaux' (n 15) 87.

⁶⁶ [1962] *Industrial Property* 236.

WHO, 'imposes upon us obligations of contact and study which we cannot neglect'.⁶⁷ BIRPI was closely involved also with the work of the Council of Europe on various aspects of intellectual property, as well as that of the Secretariat of the UN on the effects of patents on the economy of developing countries.

With plans for the Diplomatic Conference at Stockholm in 1967 already advanced at the time he took office, Bodenhausen put the establishment of the new International Organization for Intellectual Property high on his agenda.

PREPARING FOR THE STOCKHOLM REVISION CONFERENCE

Preparatory work for this began in earnest in 1964. The BIRPI Working Party, which met in May of that year,⁶⁸ drew up a draft instrument entitled 'Draft Convention of the World Intellectual Property Organization' based on the structural model of a specialized agency of the UN with a secretariat which would take over the functions of BIRPI. The deliberations of the Working Group in formulating this draft were far from straightforward. As noted by one of the key participants, Albrecht Krieger of the Federal Republic of Germany, the differences of opinion that emerged were:

... sometimes violent and on several occasions brought the meeting to the verge of breakdown although a compromise solution was found ... The adoption of the compromise should not conceal the fact that there is no certainty of a unanimous attitude on the part of Member States to the various questions dealt with.⁶⁹

The major concern of a minority, led by France and Italy, was that admitting so-called 'third states', that is, states which were not party to any of the existing intellectual property Unions, to the proposed World Organization, would be damaging to the Unions and the protection of intellectual property, even if such states were members of the UN or one of its specialized agencies. For the most part, these 'third states' were newly independent states in Africa and Asia, although there was also a significant group from Latin America that had long been independent. Relevantly, however, most of these third states were developing rather than developed countries, although

⁶⁷ Bodenhausen, 'Evolution of the United International Bureaux' (n 15) 90–99. In the early 1960s, formal recognition by the UN of BIRPI's competence for intellectual property became increasingly urgent in the light of the competing interests of new UN agencies such as UNCTAD and UNIDO which were interested in the transfer of technology to developing countries. Even UNESCO was a potential danger to BIRPI's primacy, given its responsibility for copyright as Secretariat of the UCC and of which the USA was a member. Note also that the USA did not accede to the Berne Convention until 1989.

⁶⁸ [1964] Industrial Property 139. It is worth noting that the number of states represented was small and came mainly from industrialized countries, with the exception of two from the then Socialist bloc. The states represented were Czechoslovakia, France, the Federal Republic of Germany, Hungary, Italy, Japan, Sweden, Switzerland, the UK and the USA.

⁶⁹ Krieger (n 46) 37.

an important outlier until 1965 was the former Soviet Union, which acceded to the Paris Union only in that year. The minority did not accept that this was the only way to demonstrate and safeguard the world-wide character of the new organization and its claim to be the only IGO for the protection of intellectual property and for preventing the potential foundation of a competitive organization under the auspices of the UN. Noteworthy here is the fact that there was no developing country representative on the Working Group, although by 1964 a number of such countries were already members of the Berne and/or Paris Unions.⁷⁰

A second contentious issue was how best to preserve the integrity and independence of the individual Unions in relation to the new organization. In one sense, this concern was somewhat theoretical as the legal character of the individual Unions was far from clear – while they possessed ‘organs’ in the form of their offices and funding through member contributions, they hardly possessed the kind of international legal personality now recognized in the case of the various UN specialized agencies that had emerged post-World War II.⁷¹ Nonetheless, there was clearly a symbolic significance attached to the historic unions established under the Berne and Paris Conventions that the Working Party minority sought to maintain against possible usurpation by the new organization. Notwithstanding these concerns, the minority consented to cooperate in drafting the new Convention, while continuing to emphasize its point of view.

The Working Party draft was subsequently considered and amended by two meetings of a Committee of Experts representing member states of the Paris and Berne Unions which met in March 1965 and May 1966. The reports of these meetings published in *Industrial Property* record only the bare facts of the meetings and details of the discussions were not published.⁷² However, Krieger’s commentary on the 1965 Committee meeting makes clear that the differences in approach of the various parties ‘were at times so marked that the very possibility of continuing the meeting sometimes hung in the balance’,⁷³ including strong disagreement over whether the Working Group draft could even serve as a basis for the Committee of Experts.

⁷⁰ For example, India (Berne), Pakistan (Berne), Brazil (Berne and Paris), Mexico (Paris), Egypt (Paris), Lebanon (Paris and Berne), Tunisia (Berne and Paris) and Philippines (Berne).

⁷¹ See further Chapters 2 and 16 by Alison Duxbury and Ian Heath respectively in this volume, and see also Ricketson, *Paris Convention Commentary* (n 10) 167ff.

⁷² [1965] *Industrial Property* 98; [1966] *Industrial Property* 159. Thirty-seven states were represented at the first of these meetings: Australia, Austria, Belgium, Brazil, Canada, Congo (Leopoldville), Czechoslovak Socialist Republic, Denmark, Finland, France, Federal Republic of Germany, Greece, People’s Republic of Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Ivory Coast, Japan, Lebanon, Luxembourg, Monaco, Morocco, Netherlands, New Zealand, Norway, Pakistan, Polish People’s Republic, Rumanian People’s Republic, Spain, Sweden, Switzerland, UK, USA, Socialist Federal People’s Republic of Yugoslavia. This number increased to 39 at the second meeting, with the addition of two new members: the Soviet Union and Uganda (both of which had joined the Paris Union in the meantime). A limited number of IGOs and non-intergovernmental organizations were also present.

⁷³ See Krieger (n 46) 44, fn 55.

The majority, including the representatives of the USA, the UK, Israel, Sweden and Germany, called for the modernization of the organizational forms of the existing Unions and the creation of a new international organization as an essential step to ensure the participation of the developing countries. The minority, led by France and Italy, believed that no more than an internal reorganization of BIRPI was needed and took a strong stand against the establishment of any new international organization. In its view, the developing countries should simply be offered a forum for the provision of technical and legal assistance in the field of intellectual property protection, without any further commitment. It was made clear that the minority was prepared to risk a failure of the Stockholm Revision Conference if the draft Convention was not acceptable to it.

Nevertheless, a compromise ultimately emerged, which, in Krieger's view, represented progress. This provided for the establishment of a new 'International' rather than 'World' Intellectual Property Organization, with headquarters in Geneva. Its organs would be the General Assembly of the member states of the various Unions, a Coordination Committee, the Conference and the Secretariat (absorbing BIRPI). A vital element on reaching compromise was that all essential functions and most powers of decision were to be assigned not to the Conference embracing all member states but to the General Assembly to which only the member states of the individual Unions were to belong, to the exclusion of the so-called third states.⁷⁴ Another key aspect of the compromise was that the status and role of the individual Unions and Special Unions was to be untouched by the new organization and, indeed, enhanced, leading to a potential weakness in the overall proposed structure to be created (and one that continues to resonate even today, as discussed in the chapter on governance and finance by Ian Heath in Chapter 16 of this volume).

The compromise draft texts were subsequently revised by a second meeting of the Committee of Experts in May 1966, following which BIRPI was asked to prepare the official proposals and commentary for the Stockholm Revision Conference based on the deliberations of the Committees of Experts.⁷⁵ Soon after, in August 1966, BIRPI published a synopsis of the resulting proposals for the administrative and structural reform of BIRPI to the Stockholm Revision Conference.⁷⁶

Synopsis

The main administrative changes proposed would:

- *Create a separate assembly for each Union, consisting of all its member States;*
- *Transfer the supervision of the International Bureau from the Government of one country (Switzerland) to the Assemblies of the Unions;*
- *Do the same with respect to the approval of the program and budget, the control of the accounts, and the appointment of the head of the International Bureau;*

⁷⁴ *ibid* 45.

⁷⁵ [1966] *Industrial Property* 159.

⁷⁶ [1966] *Industrial Property* 183.

- *Provide for a system in which financial contributions would be voted once every three years rather than written into the treaties and modifiable only by unanimous consent. The main structural change would be the establishment of a new Organization which would:*

- *Be a framework for administrative coordination among the various Unions since they are served by the same International Bureau;*
- *Be a world-wide forum for propagating the principles of intellectual property mainly for the benefit of developing countries.*

The new Organization would have full members (States Members of any of the Unions) and associate members (States not members of any Union).

BIRPI would continue as the International Bureau of the Unions and would also be the executive organ of the new Organization.

The new Organization would not interfere with the independence and sovereignty of the Unions.

As regards BIRPI's ambition to become a specialized agency of the UN, the synopsis added the following final paragraph:

While UNESCO's role in the administration of the Universal Copyright Convention would be left untouched, the new Organization was expected to be the centre of all new world-wide efforts for maintaining, improving, and adapting, the rules of international protection in the field of industrial property and copyright. This was regarded as essential if it was wished to entrust the safeguarding of such protection to a specialized organization which can devote all its attention to it.⁷⁷

THE STOCKHOLM REVISION CONFERENCE, JUNE–JULY 1967

The Stockholm Revision Conference opened on 11 June 1967 and concluded its work on 14 July that year. It met in the magnificent surroundings of the Swedish Riksdag (Parliament) building in the centre of Stockholm, with an ambitious agenda that covered substantive copyright and patent matters as well as the administrative and structural reorganization of BIRPI and its Unions. The principal structural change was the establishment of the new proposed 'International Intellectual Property Organization' (IPO). This was the task of Main Committee V, chaired by the Head of the US delegation, Eugene M Braderman, with Bogsch as secretary and Joseph Voyame, deputy head of the Swiss delegation, as the Rapporteur.

The reservations of the minority delegations expressed during the preparatory committees in 1965 and 1966 had not been completely overcome at the start of the Committee's work. These were focused on three matters, stated at the first meeting by France: first, to maintain the system of protection of intellectual property which the Paris and Berne Unions had progressively established; second, to ensure that the independence and special role of each Union and hence the equality of the Unions

⁷⁷ *ibid* 183.

should be fully respected; and third, that a clear distinction should be made between the two tasks incumbent on the new organization: administrative coordination among the Unions, and promoting the protection of intellectual property throughout the world. Any confusion between the two tasks might well endanger the fundamental objective, which was, and should remain, the protection of intellectual property.⁷⁸ Others, however, took the view that enabling countries which were not members of the Unions to participate in discussions would be useful in promoting the protection of intellectual property. It was time to adapt the Conventions to new requirements of international law and to adapt the Unions to provide better coordination between them and to broaden their international representation. Thus, the principal objective of the new organization should be to further the efficient protection of intellectual property and the rights of authors throughout the world, to harmonize national laws, and to give legal-technical assistance in the sphere of intellectual property to those countries requesting it.⁷⁹

Nevertheless, these differences were to a substantial degree overcome at Stockholm, as is apparent from the Rapporteur's Report on the work of the Committee.⁸⁰ At the start, the Committee settled on the name 'World' Intellectual Property Organization rather than 'International' to reflect that the new Organization had a universal calling and that its Unions already comprised the majority of the countries in the world and extended over five continents.⁸¹ Debates of special interest focused on the definition of the legal-technical assistance to be provided by WIPO to developing countries; such assistance could consist, for example, in the organization of seminars and training courses, the supply of experts, the drafting of model laws for developing countries, and so on. The criteria for membership of the Organization also gave rise to much discussion. The final decision was to admit any state member of a Union as well as any other state invited by the General Assembly of WIPO to become a party, or if it were a member of any of the international organizations indicated in the WIPO Convention. The need for the establishment of the Conference of all WIPO member states was disputed, but this was finally agreed, with the limited roles of providing

⁷⁸ *Records 1967*, para 4088.3 (Main Committee V). It may be of interest that when Gillian Davies was engaged in research while on the staff of BIRPI in the summer of 1965, the legal departments of several specialized agencies located in Geneva expressed reservations against turning BIRPI into an organization modelled on the specialized agencies of the UN. They saw a real danger in that admitting developing countries which were not members of any Unions would threaten the protection of intellectual property because of the emphasis that would follow from pressure to concentrate on the transfer of technology to developing countries (the aim expressly set out in BIRPI's 1963 agreement with the UN).

⁷⁹ *ibid* paras 4091, 4092.1 and 4094.1.

⁸⁰ *ibid* vol II, 1221.

⁸¹ The delegations of Brazil, Italy, the UK and the USA pointed out that the initials 'WIPO' might sound rather odd in English and would benefit from being rearranged (the matter was referred to the drafting Committee without result): *ibid* vol II, para 4621 (Summary Minutes (Main Committee V)). In the first years of WIPO, the Secretariat's publications said the abbreviation should be pronounced 'double you eye pea oh'.

a forum for exchange of views in the field of intellectual property between all states members of the Organization, ‘whether or not members of any Union’ and acting as ‘supreme organ for all matters concerning legal-technical assistance’.⁸²

Four years of arduous discussion thus resulted in a compromise agreement which all member states of the Unions could support, while opening up the possibility that the new organization could become the UN specialized agency for intellectual property.

THE ADOPTION OF THE WIPO CONVENTION

Against the background of the controversies and strong feelings among the BIRPI member states outlined above, the achievements of the Stockholm Revision Conference are highly impressive. Leaving aside substantive changes to the texts of the different conventions (notably the Berne Convention) and the overall restructuring of the administrative and final clauses of the Berne and Paris Conventions, and the two Madrid, Hague and Lisbon Agreements, the highpoint was clearly the adoption of the WIPO Convention itself. The provisions of this agreement are worth noting briefly, as they will provide a continuing reference point in the more detailed chapters which follow. Thus, the preamble declares that:

The Contracting Parties,
Desiring to contribute to better understanding and cooperation among States for their mutual benefit on the basis of respect for their sovereignty and equality,
Desiring, in order to encourage creative activity, to promote the protection of intellectual property throughout the world,
Desiring to modernize and render more efficient the administration of the Unions established in the fields of the protection of industrial property and the protection of literary and artistic works, while fully respecting the independence of each of the Unions,
Agree as follows:

The World Intellectual Property Organization was then established under Article 1, with the following objectives stated in Article 3:

- i to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,
- ii to ensure administrative cooperation among the Unions.

⁸² *ibid* vol II 1231, para 49 (Report of Main Committee V). The representative of the UN, during the General Discussion, said there was great scope for cooperation between the UN and WIPO, especially in providing assistance to developing countries, and hoped that the fruitful cooperation which existed between the UN and BIRPI would continue to operate within the new Organization: at 43.1–43.7 (Summary Minutes (Plenaries)).

And, in order to attain these objectives, it was provided in Article 4 that the Organization, ‘through its “appropriate organs”, and subject to the competence of each of the Unions’:

- i shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field;
- ii shall perform the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the Berne Union;
- iii may agree to assume, or participate in, the administration of any other international agreement designed to promote the protection of intellectual property;
- iv shall encourage the conclusion of international agreements designed to promote the protection of intellectual property;
- v shall offer its cooperation to States requesting legal–technical assistance in the field of intellectual property;
- vi shall assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies;
- vii shall maintain services facilitating the international protection of intellectual property and, where appropriate, provide for registration in this field and the publication of the data concerning the registrations;
- viii shall take all other appropriate action.

Membership was essentially unrestricted, being open to states that were already members of the Paris and Berne Unions, the Special Unions or other associated agreements for which WIPO was now responsible, and, more broadly, any member state of the UN or its specialized agencies or state that was a party to the Statute of the International Court of Justice or invited by the General Assembly to become a party to the Convention.⁸³

The Organization was given governing organs, beginning with a General Assembly of States party to the Convention that were members of one of the Unions, a parallel Conference of States party to the Convention whether or not members of a Union, a Coordination Committee, an International Bureau and a chief executive officer in the form of a Director General with provision for deputies (Articles 6 to 9). The respective role and functions of these bodies and officials were spelled out in some detail, but the key features were:

- Overall supervisory responsibility for the new Organization now lay with the member states, acting through the General Assembly and Conference, rather than one state, such as Switzerland.
- The Assembly and Conference, with their overlapping supervisory and financial responsibilities crafted so as to take account of the possibility that some states might join the Organization without being members of one of the Unions,⁸⁴ would

⁸³ WIPO Convention, art 5(1), (2).

⁸⁴ This has only been the case with a handful of countries, chiefly LDCs.

meet biennially and in parallel sessions (in practice, this appears to have been annually).

- The Coordination Committee, drawn from the Executive Committees of both the Paris and Berne Unions, would meet more regularly (at least annually), with a general advisory and preparatory role with respect to Assembly meetings, but with a crucial function in relation to the nomination of the Director General for appointment by the General Assembly.
- The International Bureau was to be the secretariat of the new Organization, and henceforth, under the direction of the Director-General, would perform the administrative tasks of the Unions and Special Unions and any other international agreement designed to promote the protection of intellectual property. Likewise, under the Director-General it would carry out the Organization's more general obligations of promoting the development of measures to protect intellectual property throughout the world as well as encouraging the conclusion of international agreements designed to promote this, and the taking of 'all other appropriate action'. Furthermore, it would have the responsibility of managing the budgets of the Unions and Conference, to be financed, among other things, by contributions from member states and charges for services performed by the Bureau (Article 11) – to become, in time, a rich source of funding from fees received in relation to registration processes performed in relation to the PCT adopted in 1970 (although this development could hardly have been envisaged in 1967).
- In formal terms, WIPO, or rather its Director General, became the official repository for all official documents relating to the various agreements it would now administer, that is, the receipt of ratifications, accessions, declarations and the like from intending and present member states, with the responsibility of communicating these matters to other member states. Previously, this function had been performed by the Swiss Government, although BIRPI provided an unofficial record of all these matters in its monthly publications.
- Responsibility for staffing arrangements was conferred on the Director General, subject to regulations to be fixed by the Coordination Committee (on the recommendation of the Director General) and with regard to the need to secure the 'highest standards of efficiency, competency and integrity', with due regard being paid to 'the importance of recruiting the staff on as wide a geographical basis as possible'.⁸⁵ A further provision emphasized the 'international' character of the Organization's staff:

The nature of the responsibilities of the Director General and of the staff shall be exclusively international. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each Member State undertakes to respect the exclusively international char-

⁸⁵ WIPO Convention, art 9(7).

acter of the responsibilities of the Director General and the staff, and not to seek to influence them in the discharge of their duties.⁸⁶

This was an important provision in so far as it underscored the transformation of the status of BIRPI employees from appointees of the supervising government (Switzerland) to that of international civil servants not beholden to any national government, but only to the member states collectively. Notwithstanding this, the headquarters of the Organization was to continue to be in Switzerland, in accordance with an agreement to be negotiated with the Swiss Government (Article 10), and the Organization, on the territory of each member state, was to have ‘such legal capacity as may be necessary for the fulfilment of the Organization’s objectives and for the exercise of its functions’.⁸⁷ To this end, the Organization was to conclude bilateral or multilateral agreements with member states with a view to the enjoyment by the Organization, its officials and representatives of all member states of ‘such privileges and immunities’ as might be necessary for the fulfilment of these objectives and the exercise of its functions.⁸⁸ The Organization was therefore assuming the same legal personality as possessed by other comparable international organizations in the post-War environment. In this regard, its integration into the broader UN system was foreshadowed in a further provision authorizing the Organization, where appropriate, to establish working relations and cooperation with other IGOs and to enter general agreements to such effect with any such organizations.⁸⁹ This was to occur within four years of the WIPO Convention entering into force, and this development is described briefly in the next section.

- Accompanying the adoption of the new WIPO Convention were parallel structural changes that were made to the administrative and financial provisions of the Berne and Paris Conventions, the Madrid Agreement and the Hague Agreement. These established governing bodies (an assembly and executive committee) for each union and revised their contributions and budgetary arrangements and were to provide the template for similar governing structures in other treaties to be administered by WIPO in the future. In form, these changes satisfied the concerns of those states that wished to preserve the status of the traditional unions, giving rise to a kind of federal structure in which the individual unions and their governing bodies now sat below, or perhaps more correctly, alongside the new umbrella organization provided by WIPO. For various reasons, as highlighted in Ian Heath’s chapter below, this has not generally been a problem in practice as WIPO has *de facto* become the moving authority overall. However, an incipient tension remains here between the notionally independent unions and the larger

⁸⁶ *ibid* art 9(8).

⁸⁷ *ibid* art 12(1).

⁸⁸ *ibid* art 12(3).

⁸⁹ *ibid* art 13(1).

umbrella organization, and has, on occasion, given rise to some significant conflicts (matters explored in more detail by Heath in Chapter 16 of this volume).

WIPO BECOMES A UN SPECIALIZED AGENCY

In the period between the adoption of the WIPO Convention and its entry into force in 1970, WIPO continued its cooperation with the UN by virtue of the Working Agreement established in 1964 between the UN Secretariat and BIRPI.⁹⁰ In 1965, as in later years, BIRPI was represented at meetings of a number of UN bodies, including the Trade and Development Board and its main Committees, ECOSOC, the Advisory Committee on the Application of Science and Technology to Development, the General Assembly, and the Asian Conference on Industrialisation. All these meetings were concerned with the industrialization of developing countries and the need to promote the effective transfer of technology, both patented and unpatented, as well as know-how, from private and public industrial enterprises in the developed countries to industrial enterprises in the developing countries. BIRPI was asked to give special attention to requests from developing countries for technical assistance in the field of industrial property legislation and administration.

In consequence, in this period BIRPI's focus was on patents, as evidenced in a 1966 report that concluded that the course of events

encourages the view that a patent system, under a proper control and an appropriate legislation, is now generally accepted to be an encouragement to the industrialization of developing countries. The tendency now seems to be to concentrate on the best means of getting the technical knowledge, which is a prerequisite to industrialization, into the hands of the developing countries at a price they can afford to pay.⁹¹

In the ensuing years, BIRPI, and from 1970 onwards, WIPO, continued and extended their cooperation on industrial property matters with the UN and its subsidiary bodies. The emphasis throughout this period was on the transfer of technology to developing countries. Copyright was not under consideration in this context and there is no mention in the reports of the need for developing countries to develop their own national legislation on intellectual property so as to promote their own national industries and creators.⁹²

Following the entry into force of the WIPO Convention in April 1970, a new Working Agreement in the form of an exchange of letters between the Secretary General of the UN and the Director General of WIPO was adopted in September that

⁹⁰ [1964] Industrial Property 207.

⁹¹ [1966] Industrial Property 69.

⁹² [1968] Industrial Property 53, 163; [1968] Industrial Property 67; [1970] Industrial Property 66.

year.⁹³ WIPO continued to have similar relations with the UN thereafter and finally entered into a formal agreement in 1974, under which WIPO was recognized as a ‘specialized agency’:

... and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organization, as well as of the United Nations Educational, Scientific and Cultural Organization and of other agencies within the United Nations system.⁹⁴

Concomitant obligations were undertaken by WIPO and the UN to cooperate and liaise in relation to such matters as exchange of information and statistics, mutual representation at meetings of the others, staffing and budgetary matters, and compliance with general UN policies and resolutions. Most importantly, for present purposes, the recognition of the role of WIPO by the UN in the provision quoted above goes wider than the stated objectives and functions in the WIPO Convention: the latter focus on the international protection of intellectual property and the promotion of cooperation in this area, while the UN statement refers explicitly to facilitation of the transfer of technology and the promotion of economic, social and cultural development in developing countries, matters which are only implicit, at best, in the WIPO Convention.⁹⁵ As a result, in the ensuing years, the representation of developing countries expanded rapidly in WIPO forums, as did membership of the Conventions administered by WIPO, as all member states of the UN are entitled, though not obliged, to become members of its specialized agencies. The implications of this, so far as WIPO’s day-to-day operations were concerned, were rapidly to come to the fore, breaking out spectacularly in the last decade of the twentieth century and the first decade of the next. This is a story for later chapters in this volume, as is the relationship between WIPO and the older Unions and Special Unions and the unexpected ‘rivers of gold’ from its registration activities that have made WIPO an almost completely self-financing international organization, with all the issues for accountability and governance that flow from this. These developments are noted further in Chapter 3, and are dealt with in more detail in Chapters 10 and 16.

⁹³ ‘Working Agreement between WIPO and the United Nations’ [1970] *Industrial Property* 368.

⁹⁴ UN-WIPO Agreement, art 1.

⁹⁵ For a stringent critique of the way in which WIPO has carried out its mission and interpreted its role, see James Boyle, ‘A Manifesto on WIPO and the Future of Intellectual Property’ (2004) 3 *Duke Law and Technology Review* 1.