

COOPERATION AND COERCION: THE PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES

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As the developed economies become increasingly knowledge-based, intellectual property protection has become a key concern for industrial nations. Through the birth of the World Trade Organisation (WTO), the development of an agreement for standards of trade-related intellectual property rights and an increasingly coercive approach by the United States, the world is moving towards a uniform, global system of intellectual property protection. By considering the development of the TRIPS Agreement and the mechanisms by which it is enforced, this paper identifies the effects of the evolving system of protection for developing countries. The emphasis is on the practical operation of the system – particularly the role of the United States in enforcing levels of protection in line with, and in addition to, TRIPS – and the results which have so far been achieved. The implications of the emerging system and the arguments for and against comprehensive protection of intellectual property in developing countries are then considered and some recommendations offered.

Globalisation of Intellectual Property Rights

In an era of mass communication, intellectual property is arguably more global in nature than any commodity in history. At the international level, intellectual property rights (IPRs) have traditionally been governed by a series of international conventions – most notably the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886 – administered by the World Intellectual property Organisation (WIPO).

Under both the Paris and Berne Conventions, the cornerstone of protection is the principle of ‘national treatment’ which ensures that each sovereign territory confers on foreign nationals the same protection as on their own nationals. This concept rests on the simple requirement that the laws of any member state shall be ‘no less favourable’ with respect to foreigners than with respect to nationals.

In addition to national treatment, the Paris and Berne Conventions implemented a system of ‘minimum standards’. Paris, for example, created a standardised priority period for registration, by which if a patent is filed in one member country, nothing which occurs in the subsequent twelve months will affect the

right to a patent in other member countries.¹ The same applied for trademarks for a period of six months.²

These conventions, however, do not require the *harmonisation* of rights granted by different countries – minimum standards are subject to numerous exceptions and derogations. Provisions in the Paris and Berne Conventions aim to ensure similarity, rather than uniformity, of the rules laid down by member countries.

The trend towards global markets and the ever increasing strength of multinational enterprises has placed pressure on countries to free up their trading laws by treating domestic and foreign producers equally, and by providing the same levels of protection of intellectual property as their trading partners.³ Consequently, there was an increasing drive to promote greater uniformity in the content of local laws.

Van Wijk and Junne describe how, at the end of the 1980s, developed nations started to pull the debate away from WIPO, trying to integrate the issue of intellectual property rights with issues of free trade.⁴ In practical terms, this meant that negotiations about intellectual property rights were integrated into the Uruguay Round.⁵ This implied that negotiations about free trade were coupled with negotiations on IPRs, leading eventually to the so-called Agreement on Trade Related Aspects of Intellectual Property (TRIPS).

The United States, in particular, had come to put increasing emphasis on the importance of universal protection of intellectual property rights, placing the issue at the top of its trading agenda. It was at US insistence that intellectual property was placed on the free trade agenda⁶ and became a major focus in the Uruguay Round trade negotiations under the General Agreement on Tariffs and Trade (GATT).⁷

In Marrakesh on 15 April 1994, one hundred and eleven countries signed the GATT agreement, which embodies the outcome of the Uruguay Round of

1 Article 4B and 4C(1), *Paris Convention for the Protection of Industrial Property of March 20, 1883*: where a patent is obtained in a Convention country, subsequent applications in other Convention countries within twelve months by the original patent holder are deemed as having been lodged at the time of the initial application, thus taking priority over any third party application lodged in that other Convention country between the time of the original grant of patent and the subsequent foreign application.

2 Article 6.5F and 4C(1), *Paris Convention for the Protection of Industrial Property of March 20, 1883*.

3 McKeough and Stewart, *Intellectual Property in Australia* (2nd ed) Butterworths (1997) [1.36].

4 Van Wijk J and Junne G, 'Intellectual Property Protection of Advanced Technology, Changes in the Global Technology System: Implications and Options for Developing Countries' (1993), *Maastricht University of Technology Working Paper 10*, cited in Bart Verspagen (ECIS, Eindhoven University of Technology, and MERIT, Maastricht University), 'The Role of Intellectual Property Rights in Technology Transfer' (1999), *Paper for the WIPO Arab Regional Symposium on the Economic Importance of Intellectual Property Rights* (Muscat, Sultanate of Oman, February 22-24, 1999) at 19.

5 Van Wijk J and Junne G, see above n 4 at 19.

6 Hartnick AJ, 'Intellectual Property Implications of WTO and NAFTA' (18 October 1996), *New York Law Journal*, at <<http://www.ljextra.com:80/practice/intellectualproperty/ipwto.html>>.

7 United States Information Agency (an independent foreign affairs agency within the executive branch of the US government, responsible under the *International Broadcasting Act* of 1994 (USA) for all non-military US government international broadcasting), 'Intellectual Property Rights and US Policy: USIA Fact Sheet' (June 1995), at <<http://www.usia.gov/topical/global/ip/iprfac6.htm>>.

multilateral trade negotiations. Annex 1C of the GATT Agreement contains TRIPS – a separate agreement which regulates the protection of intellectual property by signatories.

The TRIPS agreement establishes substantially higher standards of protection for a full range of IPR's than agreements such as the Paris Convention and the Berne Convention. It represents a marked shift towards the establishment of uniform international levels of protection.

This is a major concern for many developing countries, whose difficulties in meeting international standards and yet furthering their own priorities in terms of economic and social progress have been the cause of great tension within the various international forums.⁸

'Uniformity' in the Global Village

Prior to the TRIPS Agreement, there was no positive obligation on countries to develop systems of intellectual property protection. The principle of national treatment under the Paris and Berne conventions simply requires a state to extend to non-nationals the same rights and obligations in respect of intellectual property which it extends to its own nationals. Whereas previously there was no effective mechanism to ensure levels of protection were met, under TRIPS states can be compelled through WTO enforcement mechanisms to adopt certain standards – standards which are often foreign to their existing legal tradition.⁹

Legal systems are the product of specific cultures with different and distinct histories and traditions. Numerous distinctions between the attitudes of Western and developing nations towards intellectual property can be drawn, for example:

- To most Westerners, copyright is a social bribe, or at least a pay-off so as to encourage individual authors to create – copying is viewed as plagiarism. In parts of the East, artists gain validity not from creating, but by mimicking previous works. Copying proves the users' comprehension of the core of the civilisation itself.¹⁰ One argument used by the South Korean delegation at the Uruguay Round was that they were not culturally disposed to certain copyright protection since copying the work of an artist was, in their culture, a form of flattery.¹¹

8 See above n 3, at [1.37].

9 Drahos P, 'Thinking Strategically about Intellectual Property Rights' (April 1997) 21 *Telecommunications Policy* 3 at 202-3. An example of such a provision is the reversal of the onus of proof in the case of process patents under Article 34 of the *TRIPS Agreement*. Further, in relation to the criteria of patentability, where the Paris Convention allowed states to determine the criteria of patentability, Article 27 of TRIPS provides that states cannot exclude micro-organisms and essentially non-biological and microbiological processes for the production of plants or animals.

10 See above n 6.

11 Drahos P, 'Global Property Rights in Information: The Story of TRIPS at the GATT' (1995) 13:1 *Prometheus* 6, at footnote 21.

- In Japan (now a First World country but retaining many ancient ways), a sword, being a product of mental work, is regarded not merely as a material object, but as imbued with the author's living spirit. This attitude may still be seen in the craftsmanship of Japanese industrial products.¹² Furthermore, objects of worship are not limited to visible and concrete things. Even a word can have a spirit.¹³ In the TRIPS Agreement, recognition of such ancient animism was never considered and might only be said to exist in concepts such as the 'moral rights' of creators – a clearly unintended consequence of the codification of Western traditions.¹⁴
- In the developed world, only the individual (or a corporate legal entity) is considered 'creator'. In many developing countries, a different tradition exists.¹⁵ To the Balinese, for example, artistic knowledge is not restricted to a special intellectual class. In fact, the Balinese have no words for art or artist. Making a beautiful offering, carving a temple gate, or playing a musical instrument, all are tasks of equal aesthetic importance produced anonymously, and done entirely in the service of society and religion with no thought of personal gain.¹⁶
- Similarly, Koreans have historically viewed scientific inventions or intellectual discoveries not as the private property of their inventors or discoverers but as 'public goods' for everyone to share freely. Cultural esteem rather than material gain was the incentive for creativity.¹⁷

The economic discourse by which the GATT operates represents liberal cultural values in favour of open markets and private property rights.¹⁸ The preamble to the TRIPS Agreement explicitly states that intellectual property rights are recognized only as private rights – community intellectual property rights are thereby excluded. As has been noted by Vandana Shiva, this excludes all kinds of knowledge, ideas and innovations produced in the intellectual commons – in villages among farmers, in forests among tribal peoples, and even in universities among intellectuals.¹⁹

12 Chartrand HH, 'Intellectual Property in the Global Village', 4.1:1 *Government Information in Canada*, at <<http://www.usask.ca:80/library/gic/v1n4/chartrand/chartrand.html>> (accessed April 1999).

13 Koisumi T, 'Traditional Japanese Religion and the Notion of Economic Man' (1977) 1 *Journal of Cultural Economics* 2, at 35-46.

14 See, for example, Section V, Article 27: 'Patentable Subject Matter', *TRIPS Agreement*.

15 See above n 13.

16 Morris D, 'Art and Religion' in 'The Human Race', *Thames Television (UK)* (1982), cited in Chartrand HH, see above n 13.

17 Mr Kyung-Won Kim, Korean Ambassador to the United States, cited in Steidlemeier P, 'The Moral Legitimacy of Intellectual Property Claims: American Business and Developing Country Perspectives' (1993) 12 *Journal of Business Ethics* 2, at <<http://trial.ovid.com/server3/ovid...otalCit=58&D=info&S=IDNJHKLIDINCK>>.

18 Sutherland J, 'TRIPS, Cultural Politics and Law Reform' (1998) 16:3 *Prometheus* 291, at 293.

19 Shiva V, 'Monocultures of the Mind: Understanding the Threats to Biological and Cultural Diversity' (21 September 1993), inaugural Hooper Lecture, University of Guelph, cited at <<http://www.usask.ca:80/library/gic/v1n4/chartrand/chartrand.html#Shiva>>.

Under TRIPS only rights that are ‘trade-related’ are recognised.²⁰ Recognition of customary intellectual property rights was not a dominant issue during the TRIPS negotiations,²¹ but developing nations often have very different cultural or philosophical views. To countries in the developing world, intellectual property is often the product of communitarian action and activity or of cultural heritage, embodying the soul and spirit of a people.²² Such notions are foreign to Western legal systems. Thus there arises a fundamental conflict between the developed and developing world, since under TRIPS developing nations are increasingly being forced to accept the intellectual property laws of the West, if not their underlying philosophy.

The TRIPS Agreement

The TRIPS Agreement forces almost all countries to strengthen their IPR laws.²³ In the codification of these international standards, TRIPS provides unprecedented protection of intellectual property rights – it is the most comprehensive multilateral agreement on intellectual property ever.²⁴

The TRIPS Agreement came into effect on 1 January 1995. While TRIPS establishes only the minimum protection that Members must give to intellectual property rights, its scope is comprehensive: the Agreement encompasses both general and specific intellectual property rights.²⁵

Countries are required to agree to the provisions of the four previous IPR agreements²⁶ and are bound to dispute resolution procedures administered by the newly established World Trade Organization.²⁷ Further provisions require nations to give foreign intellectual property the same treatment accorded their own,²⁸ prevent countries from excluding certain products from patents;²⁹ and require protection for plant varieties,³⁰ computer programs,³¹ and databases.³²

20 See above n 13.

21 See above n 19 at 295.

22 See above n 13.

23 Sumner J, ‘Impact of Rise of Global Intellectual Property Rights on Asia’ (1995) 23 *Asia Pacific Issues*, at <<http://www.usia.gov/topical/global/ip/ip8art.htm>>.

24 Broadbent CL and McMillan AM, ‘Russia and the World Trade Organization: Will TRIPS be a Stumbling Block to Accession?’ 8 *Duke Journal of Comparative & International Law* 519, at <<http://www.law.duke.edu/journals/djcil/articles/djcil8p519.htm>>.

25 Ibid.

26 Before TRIPS, international agreements on intellectual property were contained in four conventions. The Paris Convention of 1883 covers inventions, trade names, trademarks, service marks, industrial designs, indications of source, and appellations of origin. Later conventions cover in similar fashion copyright (Berne 1886), sound recordings (Rome 1961), and layout designs of integrated circuits (Washington 1989).

27 See above n 25.

28 Article 3, *TRIPS Agreement*.

29 Article 27, *TRIPS Agreement*.

30 Article 27.3(b), *TRIPS Agreement*.

31 Article 10.1, *TRIPS Agreement*.

32 Article 10.2, *TRIPS Agreement*.

Principal Features of the TRIPS Agreement: Standards, Enforcement and Dispute Settlement

Standards

In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, Part II of the Agreement sets out the minimum standards of protection to be provided by each Member.³³

Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.³⁴ The Agreement sets these standards by requiring compliance with the substantive obligations of the main conventions of the WIPO, and the Paris and Berne Conventions in their most recent versions. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations between TRIPS Member countries under the TRIPS Agreement.³⁵

Further, the TRIPS Agreement adds a substantial number of obligations on matters where the pre-existing conventions are silent or were seen as inadequate.

It is generally thought that TRIPS standards are similar to those in industrialised countries. The standard of protection required is well in excess of the actual level in any developing country, thus the obligations must primarily be met by those countries.³⁶

Enforcement

Part III of TRIPS outlines the provisions that Members must follow to enforce intellectual property rights. Members must adhere to general obligations such as ensuring effective enforcement and fair and equitable procedures.³⁷ The Agreement also outlines the civil and administrative remedies that Members must provide, including injunctions, damages, and – under certain circumstances – the removal from commerce or destruction of the infringing goods.³⁸ Part III also contains enforcement provisions regarding provisional measures, special requirements related to border measures, and criminal procedures.³⁹

33 Part II, *TRIPS Agreement*.

34 'An overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights (*TRIPS Agreement*)', *World Trade Organisation (WTO) Web Site*, at <<http://www.wto.org/wto/intellect/intell2.htm>>

35 The relevant provisions are to be found in Articles 2.1 and 9.1 of the *TRIPS Agreement*, which relate, respectively, to the Paris Convention and the Berne Convention.

36 See above n 25.

37 'An overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights', see above n 35.

38 *Ibid.*

39 *Ibid.*

Section Five of Part III requires Members to provide criminal sanctions for, at the very least, cases involving ‘wilful trademark counterfeiting or copyright piracy on a commercial scale,’⁴⁰ and also requires that remedies be sufficient to ‘provide a deterrent consistent with the level of penalties applied for crimes of a corresponding gravity.’⁴¹

What seems to be a fairly comprehensive outline of civil, administrative, and criminal remedies may be severely limited by virtue of Article 41.5.⁴² Narrowly read, the provision merely states that Members are not required to put in place a system of judicial enforcement entirely distinct from that State’s already existing court system. However, the language that emphasises a Member State’s autonomy in distributing resources between intellectual property enforcement and general law enforcement may have a significant impact in developing countries, where governments have limited resources to dedicate to enforcement of intellectual property laws.⁴³

Dispute Settlement

Part V of TRIPS provides the parameters of dispute resolution and settlement, making disputes between WTO Members in respect of the TRIPS obligations subject to the WTO’s dispute settlement procedures.⁴⁴ TRIPS requires that Members publish or otherwise make available laws, regulations, and certain other legal documents,⁴⁵ and generally disclose to requesting Members information regarding its compliance with transparency requirements.⁴⁶

Members risk the loss of certain benefits and other adverse consequences if they fail to adhere to their obligations under TRIPS.⁴⁷

Unlike the GATT system, the WTO integrates all the dispute- settlement procedures established under individual agreements (goods, services, TRIPS). Disputes involving TRIPS or other aspects of the Uruguay Round agreement will be handled by the WTO General Council, acting as the Dispute Settlement Body.

If a dispute settlement panel finds inadequate IPR protection or enforcement in a member country, the signatory bringing the complaint will have the right to retaliate in other sectors. So far there has been only one case to reach final judgment in the WTO dispute settlement panel involving a claim under TRIPS –

40 *TRIPS Agreement*, Article 61.

41 *TRIPS Agreement*, Article 61.

42 *TRIPS Agreement*, Article 41.

43 The implications of this provision are considered below under ‘Problems of Enforcement’.

44 See above n 35.

45 *TRIPS Agreement*, Article 63.1.

46 *TRIPS Agreement*, Article 63.3, 63.4.

47 See above n 25.

brought by the United States against India in 1996.⁴⁸ All other cases brought to the panel have been settled bilaterally between the parties.⁴⁹

Provisions in TRIPS for Developing Countries

The TRIPS Agreement codifies the international intellectual property standards that are prerequisites to accession to the WTO – indeed, TRIPS is a significant component of the foundation upon which the WTO is established.⁵⁰ Developing nations, in their haste to enjoy the benefits of membership of the WTO, are thus bound by an agreement the full implications of which are not largely understood. Despite the fact that most developing countries are net importers of intellectual property and can, in all probability, never hope to be a net exporter,⁵¹ senior policy workers from many such countries have expressed support for the globalisation of intellectual property.⁵²

Prior to the formation of the TRIPS Agreement, Peter Gakunu⁵³ argued that to prevent a system detrimental to the interests of developing countries, international protection of intellectual property needs to be on the basis of national treatment – ensuring non-discrimination between foreigners and nationals and between different foreign nationals – and that reciprocity is ‘an unwarranted regression from this standard’.⁵⁴

Yet a system of reciprocity is precisely what the TRIPS Agreement establishes.

Transitional Arrangements

Part VI of TRIPS explains how Members may apply certain transitional arrangements.⁵⁵ The TRIPS transitional arrangements provide a grace period and grant exceptions to the applicability of TRIPS to certain Members. For example, under certain circumstances, TRIPS allows developing country Members and Members which are transforming their economies from centrally-planned to market-oriented economies more time in which to adhere to TRIPS provisions.⁵⁶

48 See *India Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the WTO Panel, 5 September 1997, WT/DS50/AB/R.

49 Esserman SG, General Counsel Office of the United States Trade Representative, Testimony to the House International Relations Economic Policy and Trade Subcommittee (March 30, 1998), transcript provided on *USIA Website* at: <<http://www.usia.gov/topical/econ/wto/wtxt0330.htm>> (accessed September 1999).

50 See above n 25.

51 Field work carried out by Braithwaite and Drahos for the Project on Global Business Regulation, cited in Drahos P (1997), see above n 9 at 206.

52 For example, Guatemalan Economy Minister Juan Mauricio Wurmser has stated: ‘It is undeniable that development and intellectual property are linked, (IPR protection) improves the business climate, stimulates creativity and adds to social and economic development.’: quoted in Gomez B, ‘Western Hemisphere Could Aid Global IPR Standards’, *USIA Website* at <<http://www.usia.gov/topical/global/ip/ip27art.htm>>.

53 Chief, Trade Cooperation Division *African, Caribbean and Pacific Group of States (ACP Group)*, Brussels, Belgium.

54 Gakunu P, ‘Intellectual Property: Perspective of the Developing World’, 1989 *Georgia Journal of International and Comparative Law* 19 at 364.

55 The transitional periods, which depend on the level of development of the country concerned, are contained in Articles 65 and 66.

56 See above n 25.

The obligations under the Agreement apply equally to all Member countries, but developing countries have a longer period to phase them in.⁵⁷ Developed countries were given until 1996 to comply with TRIPS, developing countries until 2000, and the least developed countries until 2005. There is also a five-year moratorium (until 2000) on all countries using the WTO Agreement's dispute-resolution procedures to resolve IPR disputes.⁵⁸

For those countries on the United Nations list of least-developed countries, the transitional period is eleven years, and the Agreement provides for the possible extension of the transitional period upon duly motivated request.⁵⁹

After the transitional period expires, by refusing to implement the WTO treaty a developing country might be taken to be signalling that it no longer wished to participate in the multi-lateral trading system.⁶⁰ Trade isolationism is a dangerous path on which to set out.

Regardless, developing countries have largely been refused the opportunity to fully exercise their right to continue with low levels of protection. In practice, as is discussed below,⁶¹ the transitional period for developing countries has not enabled them to delay implementing intellectual property protection as the United States has continued to use unilateral pressure to resolve IPR disputes.⁶²

The Role of the USA in the Development of TRIPS

The United States has pursued aggressive policies because US proprietors have been losing substantial profits to foreign producers who infringed intellectual property rights.⁶³ The export of intellectual property is believed to be one of the most important economic factors in the future of the United States.⁶⁴ Through use of Special 301 and other unilateral mechanisms, marked successes have been achieved in extending protection of US intellectual property rights internationally, however, long term success required an international forum through which to establish standards of protection and the mechanism to enforce them.

In June 1988, a US trade representative stated that:

...we have made a good start at putting pirates out of business...But many countries are yet to act, and many others still need to improve

57 Article 66, *TRIPS Agreement*.

58 See above n 24.

59 See above n 35.

60 See above n 9 at 204.

61 See 'Unilateral Actions Against TRIPS-Compliant Countries' below.

62 See above n 24.

63 See above n 25.

64 Welch MJ, 'International Protection of Intellectual Property' (1992) 1 *Texas Intellectual Property Law Journal* 41, at <<http://www.utexas.edu/law/journals/tiplj/vol1iss1/welch.htm>>.

enforcement. We...believe the best way to consolidate these gains is to create binding multilateral obligations which will ensure that nations maintain adequate and effective protection. We continue to seek this goal, through the GATT, which complements our bilateral efforts and provides an excellent opportunity for us to drive pirates out of business...⁶⁵

Developed nations were concerned that WIPO was not providing a credible institutional framework for the settlement of disputes and existing conventions lacked effective settlement provisions to ensure that individual states fulfilled their international obligations. Furthermore, the minimum standards of the substantive protection often fell short of what the US argued was necessary.

There was opposition to the development of the TRIPS agreement at Marrakesh – most notably, India and Brazil formulated counter-proposals – but such opposition was criticised and rejected by a seemingly coordinated front, comprising the developed countries, business interests and US intellectual property experts.⁶⁶

Ultimately, developing nations may simply have lacked the experience to fully understand the effect of the TRIPS provisions. Many developing countries, as discussed, do not have a history or tradition recognising intellectual property rights. Coupled with this, developed nations and business interests could present an arsenal of experienced practitioners and negotiators of intellectual property issues who were almost always in a position to ‘pull rank’ in terms of technical expertise.⁶⁷ The experience of the Uruguay Round has been said to show that the ability to negotiate in one’s own interest can be seriously hampered by pressures generated by research motivated by the agendas of rival nations.⁶⁸

Additionally, many developing countries had already experienced US pressure under the 301 process and believed that once they had shown some willingness to cooperate on TRIPS, the US might show some restraint.⁶⁹ Amendments were made to Section 301 to encourage amenable negotiation in the multilateral TRIPS negotiations through a ‘credible but distant threat of possible US unilateral action’.⁷⁰ It has further been suggested that resistance to US objectives at a multilateral forum could itself trigger the 301 process.⁷¹

Whilst some benefit to developing countries from strengthened IPR’s has been argued,⁷² there can be little doubt that acceptance of TRIPS stemmed largely from a fear that without it they would be increasingly vulnerable to Section 301

65 Per Smith M, Reported in *Anti-Piracy News and Copyright Review* (Publishers Association: USA; June 1998), cited in *Blackstone’s Guide to the CDPA 1988* at 14.

66 See above n 12 at 15.

67 See above n 12 at 14-15.

68 Panagariya A (professor of Economics, University of Maryland, USA), ‘WTO Benefits: ‘Extravagant’ Predictions’ (August 25 1999), *Economic Times* (India’s most widely circulated financial and business daily; published from Delhi, Mumbai, Calcutta, Bangalore, Madras, Hyderabad and Ahmedabad), at <<http://www.economicstimes.com/250899/25opin01.htm>> (accessed September 1999).

69 See above n 12 at 14.

70 See above n 65.

71 See above n 12, at 10.

72 See ‘The Effect of IPR’s on Developing Countries’ below.

pressure.⁷³ Yet some analysts point to pre-TRIPS implementation of IPRs by developing countries as indicative of an acceptance of their inherent benefit. In a recently released study by the Australian Government Productivity Commission, it was said that:

the threat of unilateral trade retaliation by the United States and the European Union against IPR infringing countries was another factor that convinced many developing countries to accept a multilateral IPR agreement. Some developing countries started to strengthen their IPR systems well before TRIPS was introduced, which seems to suggest that they found stronger IPR protection not against their national interest.⁷⁴

Unless the 'national interest' is here characterised as the avoidance of unilateral pressure by trading partners, it seems strange that that pressure can be acknowledged in considering the development of TRIPS, and yet ignored as a factor behind the enactment of domestic IPR protection.

The reality seems to have been that after coercing sufficient numbers of countries to improve their IPR laws at the bilateral level, there was minimal scope for resistance in the multilateral negotiations. Further, the prospect of a rule-based multilateral system of dispute resolution no doubt seemed preferable to the 'tyranny of might' inherent in unilateral action.⁷⁵ One of the basic trade-offs for developing countries in the negotiation of the TRIPS Agreement was the exclusion of unilateral actions⁷⁶ (in practice, however, this has not prevented subsequent US unilateral action).⁷⁷ Consequently, by the final stages of negotiations, developing countries had ceased to resist entirely.⁷⁸

Unilateral Pressure by the United States

Since trade ignores national boundaries and the manufacturer insists on having the world as a market, the flag of his nation must follow him, and *the doors of the nations which are closed against him must be battered down*. Concessions obtained by financiers must be safeguarded by ministers of state, *even if the sovereignty of unwilling nations be outraged in the process*: Woodrow Wilson, 1907⁷⁹ (emphasis added)

73 Hoekman B and Kostecki M, *The Political Economy of the World Trading System*, Oxford University Press: Oxford (1995) at 149.

74 Revesz J, 'Trade Related Aspects of Intellectual Property Rights', *Productivity Commission Staff Paper AGPS*: Canberra (May 1999) at 7; see also at 55. (A copy of the paper can be obtained from the Productivity Commission Web Site at <<http://www.pc.gov.au>>).

75 Evans G, 'Intellectual Property Disputes and the Supercourt of the World Trade Organisation: The Case for a New Model of Dispute Resolution' (1998) 16:3 *Prometheus* 395, at 397.

76 Correa C (Negotiator in the Uruguay Round TRIPS negotiations and the Washington Treaty on integrated circuits; Dr Carlos Correa, lawyer and economist, is also Director of the Postgraduate Course on Intellectual Property at the University of Buenos Aires and was Under-Secretary of State in the government of Argentina, 1984-1989), 'Implementing TRIPS in Developing Countries' (July 1998) 189 *Third World Economics* 16, cited at <<http://www.southside.org.sg/souths/twn/title/ment-cn.htm>>.

77 See 'Unilateral Actions Against TRIPS-compliant Countries' below.

78 See above n 12 at 10.

79 Woodrow Wilson, President of the United States 1913-1921 cited in *Third World Traveller* at <<http://www.thirdworldtraveler.com>>.

It has been suggested that the driving force behind TRIPS was a basic and well established causal mechanism – coercion.⁸⁰ By forging a link between the international trade regime and the development and enforcement of intellectual property standards, the US has succeeded in unilaterally forcing countries to implement stronger protection of IPRs and has spearheaded the development of international agreements.⁸¹

The United States has been more committed to the development of uniform intellectual property rights than any other State in the past twenty years, and it is largely due to US insistence that the TRIPS agreement was developed as part of the GATT at all.⁸²

Most sovereign States – particularly developing countries – have been less willing than the United States to make protection of IPRs a priority. For countries which are net importers of intellectual property, there was little impetus to devote resources to serve the interests of IPR holders from other States, or to crack down on local imitation industries which were often an important element of their national economies.

Section 337 of the US Tariff Act of 1930 (as amended) enables the complete exclusion of imports which have been produced in such a way as to violate the intellectual property rights of American companies or individuals under domestic US law.⁸³ However, this provision is restricted to products imported into the United States.

Where a developing country is determined to have ‘weak’ intellectual property protection, any tariff concessions extended to it under the Generalised System of Preferences⁸⁴ can be withdrawn, with no requirement that injury to a particular American industry be shown, nor that the intellectual property laws of the country concerned are either discriminatory or below international standards.⁸⁵ This provides a strong mechanism for pressure, however, the GSP provisions apply only to countries within the GSP.

80 See above n 12 at 16.

81 See above n 12 at 7.

82 D’Amato A and Estelle Long D (eds), *International intellectual Property Law*, Kluwer Law International: London (1997) at 274-5.

83 Trebilcock M and Howse R, *The Regulation of International Trade* (1st ed) Routledge, London (1995) 259.

84 The GSP scheme grants duty-free treatment to more than 4,400 specified products or product categories imported to the United States from more than 140 designated developing countries and territories – the value of GSP duty-free imports in 1994 was about \$US19 billion. Modification to the list of articles eligible for duty-free treatment for each beneficiary are made by an annual review conducted by the USTR, which examines each country’s competitiveness in producing each product. The USTR also examines the extent to which a beneficiary is providing market access for US products, refraining from unreasonable export practices, granting internationally recognised workers’ rights, and providing adequate protection of intellectual property rights: United States Information Service, ‘Intellectual Property Rights and US Policy’, US Embassy in Morocco, at <<http://www.usembassy-morocco.org.ma/Themes/Economic%20Issues/iprfac9.htm>> (accessed September 1999).

85 See above n 84 at 260.

The most effective – and broadest – provision on which the US has relied, is the so-called ‘Special 301’ provision of the Omnibus Trade and Competitiveness Act.

The Special 301 Process

US Trade Law was amended by the Omnibus Trade and Competitiveness Act of 1988 to allow the US government to respond to inadequate or ineffective protection of intellectual property rights with penalties under the so called Section 301 provision of the *Trade Act* of 1974.⁸⁶ ‘Special 301’ requires the US Trade Representative (USTR) to identify countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access for US persons who rely on such protection.⁸⁷

The Special 301 provisions of the Trade Act of 1974, as amended, require the USTR to determine whether the acts, policies and practices of foreign countries deny adequate and effective protection of intellectual property rights or fair and equitable market access for US persons who rely on intellectual property protection.⁸⁸ Special 301 was amended in the Uruguay Round Agreements Act to clarify that a country can be found to deny adequate and effective intellectual property protection even if it is in compliance with its obligations under the TRIPS Agreement.⁸⁹ It was also amended to direct the USTR to take into account a country’s prior status and behaviour under Special 301.⁹⁰

If a country does not keep its pledges on IPR protection and enforcement, then it faces priority watch list grading.⁹¹ Priority foreign countries are those countries that:

- (1) have the most onerous and egregious acts, policies and practices⁹² which have the greatest adverse impact (actual or potential) on the relevant US products;⁹³ and,
- (2) are not engaged in good faith negotiations or making significant progress in negotiations to address these problems.⁹⁴

86 1988 Trade Act section 482 102 Stat 1176-79 (1988) codified as amended at 19 USC section 2420(a)(1) (1988).

87 United States Information Agency, ‘The US Special 301 Process: Facts and Figures’ (May 1998) 3:3 *Economic Perspectives: An Electronic Journal of the US Information Agency* 26 at 32.

88 1988 *Trade Act* section 482 102 Stat 1176-79 (1988) codified as amended (hereinafter *Trade Act*) at 19 USC section 2242(a)(1) (1988).

89 *Trade Act*, at 19 USC section 2242(d)(4) (1988).

90 *Trade Act*, at 19 USC section 2242(b)(4) (1988).

91 *Trade Act*, at 19 USC section 2242(a)(2), 2242(c)(1)(B) (1988).

92 *Trade Act*, at 19 USC section 2242(b)(2)(A) (1988).

93 *Trade Act*, at 19 USC section 2242(b)(2)(B) (1988).

94 *Trade Act*, at 19 USC section 2242(b)(2)(C) (1988).

The USTR undertakes a review of foreign practices each year within 30 days after the issuance of the National Trade Estimate (NTE) Report.⁹⁵ Announcement of the USTR's findings are made by April 30 of each year,⁹⁶ following a lengthy information gathering and negotiation process. The Trade Representative may consider information 'from such sources as may be available',⁹⁷ and any 'interested person' (including firms and representatives of consumer interests)⁹⁸ may provide such information⁹⁹ or file a petition requesting that action be taken.¹⁰⁰

Through its amendments to the *Trade Act*, the US can now swiftly retaliate with trade sanctions in the event that a targeted country fails to protect its intellectual property adequately.¹⁰¹

Section 301 gives the United States Trade Representative (USTR) domestic legal authority not only to impose special duties on imports, but also to: suspend trade agreement concessions;¹⁰² negotiate new bilateral agreements to settle the charges;¹⁰³ take any other 'appropriate and feasible' action to enforce US rights under trade agreements;¹⁰⁴ or respond to foreign government practices that are found to be unreasonable and that burden US commerce.¹⁰⁵

Section 301 gives the executive branch the power to pressure foreign countries into adopting intellectual property laws to protect US intellectual property abroad. Even if the product or process never makes its way into the US, the President can retaliate with restrictions or duties on other goods made in the infringing country and imported into the US.¹⁰⁶ The threat of trade restrictions or the imposition of such restrictions by the USTR also gives the US company the leverage it needs to negotiate a license for the use of its intellectual property.¹⁰⁷

Actions Taken Under Special 301

Since the amendments were made in 1988, the US has increasingly wielded the powers they afford:

95 *Trade Act*, at 19 USC section 2242(a) (1988).

96 *Trade Act*, at 19 USC section 2241(b)(1) (1988).

97 *Trade Act*, at 19 USC section 2241(b)(1) (1988).

98 *Trade Act*, at 19 USC section 2242(b)(2)(B) (1988).

99 *Trade Act*, at 19 USC section 2241(b)(1) (1988).

100 *Trade Act*, at 19 USC section 2412(a)(1) (1988).

101 Sell SK, 'Intellectual Property Protection and antitrust in the Developing World: Crisis, Coercion and Choice' (Spring 1995), 42 *International Organisation* 2, at <<http://trial.ovid.com/server3/ovid...otalCit=58&D=info&S=IDNJHKLIDINCK>>.

102 *Trade Act*, at 19 USC section 2411(c)(1)(A) (1988).

103 *Trade Act*, at 19 USC section 2411(c)(1)(D) (1988).

104 *Trade Act*, at 19 USC section 2411(a)(1) (1988).

105 *Trade Act*, at 19 USC section 2411(b)(1) (1988).

106 United States Information Agency, 'Intellectual Property Rights and US Policy: USIA Fact Sheet' (June 1995), at <<http://www.usia.gov/topical/global/ip/iprfac6.htm>>.

107 See above n 6.

- In annual and ‘out-of-cycle’ reviews in 1994, the USTR identified 37 countries that deny adequate and effective protection of intellectual property rights.¹⁰⁸ Consequences included the Section 301 investigation of China, an understanding with Brazil, and improved intellectual property legislation of a half dozen or more other countries.¹⁰⁹
- In 1995, the USTR identified the same number of countries, entered various forms of agreements on intellectual property issues with Trinidad and Tobago, Japan, and China, and encouraged or pressured about 20 other countries into improved intellectual property legislation.¹¹⁰
- In 1996, the USTR named 35 trading partners as providing inadequate intellectual property protection, subsequently accepting various forms of settlement agreements or legislative efforts made by Brazil,¹¹¹ Taiwan,¹¹² and others.
- In 1997, the Special 301 list shot up to 46 trading partners – a 25 percent increase over 1996. The entire European Union, in addition to Argentina, Ecuador, Egypt, Greece, India, Indonesia, Paraguay, Russia, and Turkey, among many others – found a place in this class. The USTR also noted ‘growing concern’ about an additional 12 countries not named on any of the three lists.¹¹³
- In 1998, there were over 50 trading partners identified – 15 on the priority watch list, 36 on the watch list plus 15 countries named as the cause of ‘growing concerns’.¹¹⁴
- In 1999, the number of trading partners identified rose further to 57, with 16 on the priority watch list.¹¹⁵ In addition, as a result of the 1999 Special

108 Curtiss C, Bullock EC and Newman TP, ‘US Government in Tough Stand to Enforce Rights: Protection Seen Both Here and Abroad’, *New York Law Journal* (11 May 1998), at <<http://www.ljextra.com:80/practice/intellectualproperty/0511tough.html>>.

109 Ibid.

110 Ibid.

111 In a statement from the USTR, it was noted that: ‘Brazil has recently taken the admirable step of enacting a modern patent law that comes into effect one year after its publication. Among other things, the new law will provide pharmaceutical patent protection and pipeline protection. As a result, the Administration is moving Brazil from the priority watch list to the watch list. Beyond the above-mentioned patent legislation, the US Administration looks to Brazil to fulfil its longstanding commitments to enact outstanding legislation on computer software and semi-conductor layout designs, and to introduce much-needed amendments to its copyright law.’: United States Trade Representative, ‘‘Special 301’ on Intellectual Property Rights: 1996 Facts Sheet’, *USTR Homepage* at <<http://www.ustr.gov/reports/special/factsheets.html>> (accessed August 1999).

112 The USTR noted that: ‘Taiwan has continued to make significant strides in improving the protection of intellectual property in Taiwan. As a result, Taiwan is being removed from the watch list.’: *ibid.*

113 See above n 109.

114 United States Information Service, ‘Special 301 on Intellectual Property Rights’ (1988), *USIS Website* (‘regularly updated source of official US Government information’) at <http://www.usis.minsk.by/html/special_301.html> (accessed August 1999).

301 review, the Trade Commissioner announced plans to initiate WTO consultations with Argentina, Canada and the European Union. This brings to 13 the number of intellectual property-related WTO complaints filed by the United States since 1996.¹¹⁶

No country is immune to action under the 301 process – Australia and the European Community, both supporters of TRIPS, are regularly on the USTR watch list and were retained on the priority watch list in 1993. In 1999, the US Trade Commissioner announced that ‘the United States is seriously concerned with the minimalist approach Australia has taken toward intellectual property protection in recent years, especially with respect to certain decisions taken over the last year that clearly erode the level of copyright protection available in Australia.’¹¹⁷

United States Success Under Section 301

Threats of sanctions under section 301 have had a remarkable level of success at forcing developing countries to provide legislative protection of intellectual property rights. It is a testament to the importance of the US as a trade partner that the mere threat of action – through designation as priority foreign countries – is usually enough to secure compliance.

In fact, to date there is only one case where the US has needed to resort to trade retaliation under the Section 301 provisions – the 1987 case against Brazil for its lack of patent protection for pharmaceutical products. After Brazil refused to alter its policy, the US placed a 100 percent retaliatory tariff on imports of pharmaceuticals, paper products and consumer electronics.¹¹⁸ The effect was to force Brazil to develop patent legislation which would protect pharmaceutical products and process patents for the first time.¹¹⁹

However, there are numerous examples of reform initiated by section 301 threats, including:

- In April 1996, Brazil enacted a new, long-awaited industrial property law, providing patent protection and greater market access for products relying on such protection. This new legislation is a result of earlier commitments made by Brazil in February 1994 to settle a section 301 investigation.¹²⁰

115 Official Press Release (April 30, 1999), *USTR Announces Results of Special 301 Annual Review* (Office of the United States Trade Representative, Executive Office of the President) at 1.

116 *Ibid* at 2.

117 *Ibid* at 3.

118 See above n 102.

119 *Ibid*.

120 United States Information Agency, ‘US ‘Special 301’ Trade Law: USIA Fact Sheet’ (April 1995) at <<http://www.usia.gov/topical/global/ip/iprfac2.htm>>.

- The Special 301 provisions have been used continuously since 1992 to obtain steady progress by authorities on Taiwan in developing a legislative framework to provide for stronger protection of intellectual property rights and the enforcement of those rights in the Taiwan judicial system. In 1994 Taiwan made significant strides in passing intellectual property rights legislation. In April 1996, Taiwan issued an 18-point action plan for enhanced protection, which covered all major remaining areas of concern.¹²¹
- Hungary, which had been placed on the Special 301 priority watch list, concluded a comprehensive bilateral agreement with the United States, agreeing to provide patent protection to products as well as industrial processes.¹²²
- In July 1995 an agreement was concluded obligating Bulgaria to join major international IPR conventions and to put in place effective procedures to protect intellectual property rights.¹²³
- In September 1994 a comprehensive agreement was concluded obligating Trinidad and Tobago to provide NAFTA-levels of IPR protection and enforcement.¹²⁴

Perhaps the most striking example of the success of US pressure is the case of Mexico.

In 1987 and again in 1989, Mexico was cited under Section 301 for its refusal to enact adequate patent protection.¹²⁵ In 1991, Mexico was dropped from the Section 301 watch list, immediately after its government announced the 'Program of Modernisation of Industry and Foreign Trade', which explicitly stated its commitment to stronger intellectual property protection.¹²⁶ Through legislation enacted since 1991, Mexico has sought to improve the status of intellectual property generally, with specific attention to patent legislation¹²⁷ (previously the area of law it had refused to expand).

Mexico is unique among developing nations in that it appears to have redefined its interests and decided that the benefits of intellectual property protection outweigh its costs. It highlights the 'carrot and stick'¹²⁸ approach of the US government – countries are encouraged to reform by trade concessions ('the

121 Ibid.

122 Ibid.

123 Ibid.

124 Ibid.

125 See above n 102.

126 See above n 121.

127 See above n 107.

128 Mesevage T, 'The Carrot and the Stick: Protecting US Intellectual Property in Developing Countries' (1991) *Rutgers Computer and Technology Law Journal* 17 at 422.

carrot'), and if they fail to respond, they face retaliatory measures ('the stick'). As a result of Mexico's reforms, not only has it avoided threats and pressure from the United States, but it has enjoyed considerable support, including its inclusion in the North American Free Trade Agreement in 1994.¹²⁹

One point should be noted: 'the carrot' offered by the United States in the form of trade concessions and most clearly manifested in the massive trade surpluses which many countries enjoy with the US, can be of considerable benefit to developing countries. It might therefore be considered fair for the US government and industry groups to expect, in return, the protection of US intellectual property interests. However, the debate has not been couched in these terms by the US. The debate over TRIPS and IPRs generally has been argued in terms of the benefit which all countries will enjoy from stronger intellectual property protection, regardless of their stage of development.¹³⁰ It is in the context of this notion of universal benefit that TRIPS was negotiated and IPRs are otherwise enforced by the US.¹³¹

Special 301 and the WTO Dispute Mechanism

The implementation in 1995 of the Marrakesh Agreement Establishing the World Trade Organization introduced greater multilateral restrictions of unilateral trade action in return for a much stronger multilateral dispute mechanism – governments have agreed to use multilateral remedies wherever these are available.¹³² Indeed, the exclusion of unilateral actions was one of the key negotiating requirements of developing countries at Marrakesh.¹³³ The WTO procedures should therefore have reduced the use of unilateral measures such as Special 301, instead bringing disputes to the multinational forum.

Yet, whilst unilateral action is only permitted under the WTO agreement, where such retaliation has been authorised by the WTO,¹³⁴ in practice the WTO dispute mechanism has not prevented, but increased, the use of Section 301. Section 301 has become a funnel for US complaints into the WTO: a section 301 case that involves a trade agreement triggers government-to-government consultations under the Marrakesh agreement, thus intellectual property issues that fuel a Special 301 claim can roll into a TRIPS-based WTO complaint.¹³⁵

129 'NAFTA: The Mexico Factor' (April 1997) *The Cargill Bulletin*, at <<http://www.cargill.com/today/bulletin/b4971c.htm>>.

130 Feichman JH, 'The TRIPS Component Of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market', in D'Amato A and Estelle Long D (eds), see above n 83 at 270.

131 See 'IPRs and Foreign Direct Investment' below for more extensive discussion of US justification for its call for stronger IPRs.

132 See above n 74 at 49.

133 See above n 77.

134 Article 23[2][a] of the 'Understanding on Rules and Procedures Governing the Settlement of Disputes', cited in Qureshi AH, *The World Trade Organisation: Implementing International Trade Norms*, Manchester University Press, UK (1996) 97.

135 *Trade and American Prosperity in 1999*, Testimony of Ambassador Charlene Barshefsky, United States Trade Representative, before the Senate Committee on Finance, Washington DC January 26 1999 at 12.

Since the implementation in 1995 of the Marrakesh Agreement, the United States has become the most aggressive user of the new WTO dispute settlement procedures. The US has filed more complaints in the WTO – 41 cases to date – than any other WTO member, prevailing on 19 of the 21 American complaints acted upon so far, either by successful settlement or panel victory.¹³⁶

The USTR announced an intention to bring WTO dispute settlement cases on TRIPS issues where applicable.¹³⁷ It has used the Special 301 announcements every year since 1996 to identify the cases that it intends to bring to the WTO, and has then brought those cases. Since the first panel proceedings were brought against India by the United States in 1996, there have been eighteen proceedings brought.¹³⁸ Of these, twelve were brought by the United States,¹³⁹ with the other six being brought by the European Union¹⁴⁰ and Canada.¹⁴¹

Significant results have been achieved in several dispute settlement cases initiated by the US Trade Representative. As the USTR General Counsel recently testified to the House of Representatives ‘the United States has reaped more benefits from WTO dispute settlement than any other country.’¹⁴²

Testimony given to the US House of Representatives by the General Counsel to the USTR gives a clear indication of the persuasive influence of US actions at the WTO:

In cases that we brought against Portugal, Turkey, Pakistan and Japan, the responding countries recognized that their laws violated the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, or ‘TRIPS Agreement’, shortly after the United States initiated formal WTO consultations. Each of these countries’ quick commitments to change their laws in the context of WTO proceedings is highly significant, and all four countries have now amended their laws to implement the promised changes.¹⁴³

Yet, the General Counsel continued, ‘the WTO dispute settlement system is *additive* – it does not detract from our existing approaches or remedies, including: bilateral, regional, and multilateral initiatives as well as proceedings

136 Ibid.

137 See above n 109.

138 Source: World Trade Organisation, ‘Overview of the State-of-Play of WTO Disputes’ (1 September 1999), *WTO Website* at <<http://www.wto.org/wto/dispute/bulletin.htm>> (accessed September 1999).

139 Disputes against: India, Portugal, Japan and Pakistan in 1996; Sweden, Ireland and Denmark in 1997; Greece and the European Community in 1998; Canada, Argentina and the European Community (as at 1 September) in 1999.

140 Disputes against: Japan in 1996; India in 1997; Canada and (twice) the United States (as at 1 September) in 1999.

141 Dispute against: the European Community in 1998.

142 See above n 50.

143 Ibid.

under US trade laws including antidumping duties, countervailing duties, and Section 301.¹⁴⁴

Many developing countries have taken significant steps towards implementation of their TRIPS obligations. For those which have not succumbed to US pressure prior to the expiry of the transitional period, it is clear that the USTR will insist on strict compliance with these deadlines.¹⁴⁵ After succeeding in its 1996 panel dispute against India, Ambassador Barshefsky emphasised the significance of the decision for all countries, including those presently exempted by transitional arrangements:

The panel decision sets an important precedent for enforcement of U.S. rights. It serves notice that all WTO members, including developing countries, must carry out their obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. The message from the panel is clear: for developing countries benefiting from the phase-in of TRIPS obligations, the phase-in period will not be a free ride.¹⁴⁶

Ambassador Barshefsky more recently highlighted the importance of the obligation on developing countries to implement TRIPS by 1 January 2000, announcing that the USTR would conduct a special out-of-cycle review to assess the progress made by developing countries toward full implementation of their TRIPS obligations in December 1999: 'The United States will announce at the conclusion of this review in early January the actions it will take to address situations where WTO Members have failed to implement their obligations on 1 January 2000, including the possible initiation of additional dispute settlement cases.'¹⁴⁷

For foreign governments, the message is clear: providing adequate and effective protection of US intellectual property rights abroad has become a top US government enforcement priority. If that protection is not forthcoming, the US will use all means available to ensure the protection of US-owned intellectual property rights, including 'forced' bilateral negotiations through the Section 301 threat, requests for WTO dispute resolution, and suspension of or other limitations on unilateral tariff preferences.¹⁴⁸

Unilateral Actions Against TRIPS-Compliant Countries

The Uruguay Round Agreements Act (URAA), signed into law by President Clinton on December 8, 1995, amends the Special 301 mechanism to clarify that

144 See above n 50.

145 *Trade and American Prosperity in 1999*, Testimony of Ambassador Charlene Barshefsky, United States Trade Representative, before the Senate Committee on Finance, Washington DC January 26, 1999 at 12.

146 United States Trade representative: Official Press Release, 'Barshefsky Announces US Victory in WTO Dispute with India (First IPR dispute to go through WTO panel process)' (September 5 1997) USIA Website, at <<http://www.usia.gov/topical/econ/wto/wtxt0908.htm>> (accessed September 1999).

147 See above n 116 at 3.

148 United States Information Agency, 'Intellectual Property Rights and US Policy: USIA Fact Sheet' (June 1995) at <<http://www.usia.gov/topical/global/ip/iprfac6.htm>>.

the OUSTR will exercise its authority to consult with and, if necessary, retaliate against, any foreign country that fails to protect intellectual property rights, *even if that country is in compliance with the TRIPS agreement*.¹⁴⁹

The TRIPS agreement is recognized as a significant advance in assuring greater protection for US intellectual property, but the tremendous existing potential for piracy around the world has seen US companies press the administration to continue using US unilateral tools aggressively.

Thus, although the provision of transitional periods was an important element to the concessions granted to developing countries during the TRIPS negotiations, many developing countries have been pressured to accelerate the pace of reforms, so as to give immediate application to the TRIPS Agreement standards.¹⁵⁰ The US administration justifies such action on the basis that it is necessary to ensure that developing countries come into full compliance with the Agreement before the end of these transition periods.¹⁵¹

It should be noted that such unilateral action may, in fact, be in violation of Article 23 of the WTO Dispute Settlement Understanding, which provides that Members 'shall have recourse to the rules and procedures of this Understanding' when seeking redress of violations of WTO Agreements; and that Members shall not 'make a determination that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded' except through recourse to the WTO dispute settlement.¹⁵²

The full implications of Article 23 for the use of Special 301 have not yet been tested (and are beyond the scope of this paper). However it is possible that its effect is to preclude unilateral action wherever the subject matter is covered by TRIPS.¹⁵³ Should the WTO dispute settlement process prove inadequate, forcing the United States to rely on Special 301-type measures to give effect to the provisions of TRIPS, the result would then be a considerable weakening of the ability of the US to externalize its strong protection of intellectual property rights.¹⁵⁴

149 *Trade Act*, at 19 USC section 2242(d)(4) (1988).

150 See above n 77.

151 See above n 116 at 3.

152 Trebilcock MJ and Howse R, *The Regulation of International Trade* (2nd ed) Routledge, London (1999) at 333.

153 *Ibid* at 333.

154 Pechman R, 'Seeking Multilateral Protection for Intellectual Property: The United States 'TRIPS' Over Special 301' (1998) 7 *Minnesota Journal of Global Trade* 179 at 202-4.

US Policies and Developing Countries

The *Trade Act* defines the negotiating objectives of the US regarding developing countries.¹⁵⁵ In an about face from the 1974 *Trade Act*,¹⁵⁶ the 1988 Act provides that the US seeks to ‘ensure that developing countries promote economic development... by providing reciprocal benefits and assuming equivalent obligations with regard to their import and export practices’.¹⁵⁷

In general, the United States finds the arguments of countries that do not provide strong intellectual property protection unpersuasive. The US argues that such protection offers benefits for both industrial and developing countries.¹⁵⁸

The strongest and most consistently put argument by developing countries is that intellectual property protection inhibits the transfer of technology to developing countries.¹⁵⁹ The United States response is that adequate protection and effective enforcement of intellectual property rights promotes the transfer of technology into a country by reducing the apprehension a rights holder has about marketing his invention abroad. This may actually allow for the technology to be made available at a lower price.¹⁶⁰

The US argues that without effective intellectual property rights protection, a country runs the risk that state-of-the-art technology will never be introduced.¹⁶¹

There is some merit to this line of argument. An effective protection system, for example, encourages inventors to disclose creations they might otherwise attempt to keep as trade secrets. Consequently, rapid accessibility to the latest developments in technology is available to scientists conducting technological research and to decision makers who are charged with establishing new industries or modernising old ones. This helps researchers build upon work already done, increasing the pace of innovation. It also increases the efficiency of research since resources are not needed to duplicate results already known.

However, developing countries are unlikely to benefit from such disclosure without the infrastructure to conduct research of their own. Thus for many such countries, where the need for technology is urgent and where the concept of property interest in an idea may be foreign, arguments that they will benefit from legislation protecting intellectual property are often unconvincing.¹⁶²

155 See above n 129 at 422.

156 Congress explicitly noted in the 1974 Act that the international trading system is inherently stacked against developing countries and that benefits need to be offered on a non-reciprocal basis.

157 *Trade Act*, section 1101(b)(4)(a).

158 United States Information Agency, ‘Protecting Intellectual Property: Developing Country Issues: USIA Fact Sheet’ (June 1995), at <<http://www.usia.gov/topical/global/ip/iprfac9.htm>>.

159 Richerand GEL, ‘GATT, Intellectual Property Rights and the Developing Countries’, *Copyright Bulletin* Vol 25 No 3, at 8.

160 See above n 144.

161 *Ibid.*

162 See ‘The Effect of IPRs on Developing Countries’ below.

The United States has applied significant pressure to developing countries to offer stronger intellectual property protection:

In a series of WTO cases and trade law actions, we have sent developing countries the message that we are serious about intellectual property rights obligations and that these obligations must be implemented.¹⁶³

Almost all nations, particularly developing countries, rely heavily on the US for trade as a means of economic growth and development.¹⁶⁴ Thus the most effective means of exerting such pressure has come through tightening the linkage between closer trade ties and stronger protection of intellectual property rights.

US Policies and MegaCorps

Drahos has argued that TRIPS emerged, not from careful economic analysis, but from the rent-seeking desires of multinationals that saw opportunities for themselves in redefining and globalising intellectual property rights.¹⁶⁵ For technology-exporting countries – the present industrial countries and increasingly the Newly Industrialised Countries (NICs) – it increases or guarantees their income.¹⁶⁶ For developing countries which are net importers of technology, it is intended to ensure that technology is paid for, by direct purchase or through foreign investment, rather than taken without permission.¹⁶⁷

Developing country governments are often faced with a variety of enormous legal problems. In light of these other problems, the enforcement of intellectual property rights often becomes a low priority particularly where such enforcement is perceived as benefiting only wealthy foreign corporations (or ‘MegaCorps’).¹⁶⁸

The USTR relies heavily on information obtained from the private sector in compiling its ‘watch lists’ under Special 301.¹⁶⁹ Each major US company with important intellectual property holdings is a member of a trade association which, in turn, is the member of a parent organisation such as the International Intellectual Property Alliance (IIPA), which represents 1500 companies with significant copyright interests.¹⁷⁰ Member companies provide the IIPA with

163 See above n 50.

164 See above n 65.

165 See above n 9 at 46.

166 Page S and Davenport M, ‘Developing Countries in the WTO’ (1995) *Overseas Development Institute* 3, at <http://www.oneworld.org/odi/odi_developing.html>.

167 Ibid.

168 Zavin J and Martin SM, ‘The Value of Intellectual Property Rights Enforcement Developing Countries’ (June 1997), *Economic Perspectives: A USIA Electronic Journal*, cited on *USIS Website* at <http://www.usis.minsk.by/html/ipr_enforcement.html>.

169 United States Information Agency, ‘The US Special 301 Process: Facts and Figures’ (May 1998), 3:3 *Economic Perspectives: An Electronic Journal of the US Information Agency* 26 at 32.

170 See above n 12 at 10.

information about IPR practices around the world.¹⁷¹ This information is then analysed and a series of recommendations is made to the USTR as to appropriate forms of action.

It is likely that industry estimates of lost revenues are heavily overestimated, given that they rely on the assumption that if proper IPR protection was afforded, consumption of the original products (though likely to be much more expensive) would be as high as that for the imitations now being purchased.¹⁷² Nonetheless, MegaCorps have successfully argued that trade coercion is the only way in which the theft of US copyright materials, technology and profit can be halted.¹⁷³ Crucial to US success over the TRIPS agreement was the work of individual lawyers and economists and a coalition of corporations¹⁷⁴ involved in developing and drafting the US position in the Uruguay Round.¹⁷⁵

As the US has lost its competitive advantage in manufacturing traditional goods, it has come to see intellectual property as a new basis for comparative advantage.¹⁷⁶ Drahos suggests that US insistence on IPRs came about as a result of a combination of fears – fears by government that the US was losing its competitiveness and superpower status, coupled with fears by US corporations about the loss of profits through piracy.¹⁷⁷ In this sense the 301 process and TRIPS are extremely significant – they evidence that Megacorps now wield much more than simply market power, capable of executing large-scale business transactions. They are also increasingly political and economic powers in their own right on the world stage, and have profoundly influenced the development of intellectual property policy.

The Current State of Protection

Intellectual property protection systems have been stepped up in developing countries since the conclusion of the TRIPS Agreement. ASEAN member countries agreed to set up regional patent and trademark offices;¹⁷⁸ Japan is increasingly playing a leading role in implementing intellectual property protection systems in developing countries within East Asia, to boost the

171 Interview with Executive Director and General Counsel of IIPA (25 October 1993, Washington DC), cited in Drahos P (1995), see above n 12 at 10.

172 See above n 84 at 251.

173 See above n 12 at 16.

174 The Intellectual Property Committee, formed to create consensus in the international business community and persuade governments to support the inclusion of intellectual property in the GATT, was comprised of corporate giants including DuPont, General Electric, General Motors, Bristol-Myers, FMC Corporation, Hewlett Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International and Warner Communications.

175 See above n 12 at 12-16.

176 Hall P, 'Intellectual Property Rights Protection and International Trade: An Economic Survey' (September 1998) 16:3 *Prometheus* 261 at 263.

177 See above n 12 at 8.

178 Hisamitsu Arai, Commissioner Japanese Patent Office, 'Towards the Era of Intellectual Creation: IPR Protection in the 21st Century' (7 May 1997), lecture at the *WIPO International Forum Commemorating the 10th Anniversary of the International Intellectual Property Training Institute*, at <<http://www.jpomiti.go.jp/siryoe/intlfrme/ipr21st2.htm>>.

development of trade and investment in the region and promote technology transfer;¹⁷⁹ and South American countries, previously recognising few intellectual property rights moved dramatically towards compliance with TRIPS.¹⁸⁰

However, the TRIPS agreement has not seen widespread *voluntary* implementation amongst developing countries.¹⁸¹ Most countries which have moved most rapidly towards compliance with TRIPS have done so in the face of action by the United States under its section 301 and other powers.

Problems of Enforcement

There is a wide range of obligations to provide for enforcement of intellectual property rights.¹⁸² Such enforcement procedures must ‘not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays’.¹⁸³ However, Article 41.5 makes clear that there is no ‘obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general’.¹⁸⁴ Thus the enactment of a legislative IPR framework in compliance with TRIPS is not an end in itself: ‘Enforcement is more difficult than it seems, and is often taken for granted by the mere existence of a law or a treaty’.¹⁸⁵

It is unclear to what extent Article 41.5 will provide developing countries with a means of avoiding enforcement once the relevant laws have been legislated as required by 1 January 2000. On its face, Article 41.5, combined with the provision of Article 1.1 that ‘Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice’ appears to offer significant scope for providing lower standards than TRIPS requires, at least in circumstances where there is a genuine lack of resources.

Such avoidance of enforcement under existing laws has been the prime basis for increased pressure applied unilaterally by the United States.¹⁸⁶ Yet the US faces considerable difficulty in attaining compliance with enforcement standards. This is clearly illustrated by the case of China – a country without WTO membership, thus unbound by TRIPS provisions – in which, despite considerable development of intellectual property legislation in the face of US pressure, only minimal levels of enforcement of those standards have been achieved.

179 Ibid.

180 See above n 102.

181 See above n 102.

182 See generally, Article 41, *TRIPS Agreement*.

183 Article 41.2, *TRIPS Agreement*.

184 Article 41.5, *TRIPS Agreement*.

185 Marino Porzio of the Chilean law firm Porzio, Ravilet & Rios, quoted in Gomez B, see above n 53.

186 See above n 25.

The Case of China

During the 1980s, China enacted intellectual property legislation and opened patent and copyright offices in Beijing, but enforcement was sporadic and somewhat selective. US authorities complained repeatedly throughout 1994 that many Chinese firms were violating US copyrights on a variety of goods, including compact discs, laser discs, and audio cassettes.¹⁸⁷

In June 1994, the US designated China a Section 301 priority country – although the US was happy with the newly enacted intellectual property laws, they were rarely enforced.¹⁸⁸ China responded by raiding firms and seizing pirated goods (including 200,000 CDs and 750,000 video and audio tapes), arresting 7,000 people, and closing fifty-six illegal factories.¹⁸⁹ The US insisted that China close down another twenty-nine factories linked to the production of over \$75 million worth of pirated CDs, cassettes, video tapes, and software.¹⁹⁰ The Chinese refused the additional demands, and the US threatened China with \$2.8 billion worth of trade sanctions.¹⁹¹

On February 4, 1995, USTR Michael Kantor announced that 100 percent duties would be imposed on \$1.8 billion worth of imports at midnight on February 26, 1995, unless an agreement was reached.¹⁹² In a letter from the Chinese Minister of Foreign Trade and Economic Cooperation on that day,¹⁹³ an agreement was reached in which China undertook to crack down on piracy and to provide US right holders with enhanced market access. As a result, the Section 301 investigation was terminated and the sanctions were not imposed.¹⁹⁴

A potential US veto on China's entrance into the WTO, coupled with its dependence on the United States as an export market, prompted China to agree in late February to strengthen its copyright laws and to close down some compact disc factories that had been violating US copyrights.¹⁹⁵ The final deal called for stricter enforcement of China's intellectual property laws, the creation of a customs border patrol, and improvements in the judicial system.¹⁹⁶

Whilst the Chinese have done enough to avoid retaliatory sanctions by the US, intellectual property violations remain commonplace. Enforcement is an expensive exercise, and the only immediate benefit is received by the intellectual property holder – a foreigner.

187 See above n 24.

188 'Bilateral Agreements On Intellectual Property (June 1995)', *USIA Fact Sheet*, at <<http://www.usia.gov/topical/global/ip/iprfac7.htm>>.

189 See above n 6.

190 Ibid.

191 Ibid.

192 See above n 24.

193 'Letter from Wu Yi, Chinese Minister of Ministry of Foreign Trade and Economic Cooperation, to US Trade Representative Michael Kantor' (26 February 1996), at <<http://www.houston.com.hk:80/hkgipd/ustr.html>>.

194 See above n 189.

195 See above n 24.

196 See above n 6.

The Effect of IPR's on Developing Countries

The problem of enforcement highlights the key failing of the US approach: whilst it may achieve results on paper, the mindset of developing countries as to the intrinsic merit of the policies remains unchanged.¹⁹⁷ Since Article 41.5 enables countries to choose what level of resources they apply to enforcement of IPRs, it is likely that only once countries believe it is in their interest to provide enforcement will genuine international protection be achieved. A truly universal system of intellectual property protection is not possible whilst countries believe it is detrimental.

Thus the question as to the prospects for benefit for developing countries which protect intellectual property rights deserves additional consideration.

Concepts of Property in Knowledge

Underlying the development of the international system of intellectual property protection is a conception of property defined in terms based on individualistic North American and European values and culture.¹⁹⁸ Such a conception judges that a system of property rights is essential to the operation and development of modern society.

Nancy Williams has observed that this is the outcome of a historical trend in the west through which there has been a conceptual narrowing of the term 'property', to generally mean *private* property, and which presupposes *control* over some entity that may be vested in individuals or in groups.¹⁹⁹ She points to the idea of a corporation as a 'legal person' and title holder as emphasising the implicit assumption that property is individually held private property.²⁰⁰ As one economist recently wrote: 'private property and private property rights, and only private property, is an indisputably valid, absolute principle of ethics and the basis for continuous 'optimal' progress...'.²⁰¹

In many developing countries, property rights have traditionally been linked to fundamental notions of social wellbeing. The fact that property is linked to liberty and self-actualisation is an argument developing countries have employed for destroying, rather than bolstering, monopoly powers in property.²⁰² Many Western intellectual property laws are seen as less concerned with authors'

197 See above n 102.

198 Gikkas NS, 'International Licensing of Intellectual Property: The Promise and the Peril' (Spring 1996), 1 *Journal of Technology Law and Policy*, at <<http://journal.law.ufl.edu/~techlaw/1/gikkas.html>>.

199 Nancy Williams, *Intellectual Property and Aboriginal Environmental Knowledge*. Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University (1998), at 16.

200 Nancy Williams, *ibid*, at 16.

201 Hoppe H, *The Economics and Ethics of Private Property*, Boston (1993) at 227.

202 See above n 18.

rights than with the entrepreneur who invests the effort and money in exploiting and publishing the work.²⁰³

The idea of knowledge and information which is not subject to notions of property rights has received recent expression by Drahos through the concept of ‘the intellectual commons’.²⁰⁴ Drahos describes the intellectual commons as an ‘independently existing resource which is open to use’.²⁰⁵

Drahos’ characterisation highlights the fundamental tension which exists when considering the importance of IPR protection – reconciling availability of information which is ‘crucial to creativity’,²⁰⁶ whilst preventing the ‘tragedy of the commons’.²⁰⁷ He argues that the intellectual commons will be larger and richer where more stringent criteria must be met in order to enjoy protection of IPR’s.²⁰⁸ Competition relies on imitative conduct – ‘competition is a process which begins when others begin to imitate someone else’s good idea’.²⁰⁹ Therefore, since the primary purpose of intellectual property rights is to prevent imitation, Drahos argues that there is no escaping the conclusion that IPR’s are anti-competitive, thereby nullifying any welfare gains which might be created through increased innovation.²¹⁰

Drahos’ argument begs the question as to whether standards of protection of IPRs should be massively reduced, if not completely eliminated. Indeed, many developing countries assert that, given the undeniable historical importance of intellectual property to development, intellectual property should be considered the ‘common heritage of mankind’, for free availability to all.²¹¹ Yet, whether there would be sufficient incentive to engage in acts of creation and innovation where there is little prospect of reward is highly disputable. A more effective (and realistic) mechanism for technology and innovation transfer in today’s world is more likely to be the coupling of flexible, uniform regulatory environment with mechanisms for foreign aid and assistance to enable developing countries to work towards those standards.

Nonetheless, the tension of the intellectual commons characterised by Drahos is evident in the debate between developed and developing countries about the appropriate levels of IPR protection at the international level. TRIPS talks neatly divided developed countries – the major net exporters of intellectual property –

203 Pendelton MD, *Intellectual Property Law in the Peoples Republic of China*, Butterworths, Singapore (1986) at 40.

204 See Drahos P, *A Philosophy of Intellectual Property*, Aldershot, Dartmouth (1996).

205 Ibid at 54.

206 Ibid at 62.

207 The ‘tragedy of the commons’ is the idea that in the absence of private property rights, the commoners have an incentive to exploit and no incentive to conserve: Drahos P, ‘Property Rights in Information: The Trade Paradigm’ (1998) 16:3 *Prometheus* 245, at 246. In the case of intellectual property rights, Drahos suggests a further dimension, that, by encouraging self interest through the granting of property rights over abstract objects, self interest parts ways with the collective interest: Drahos P (1996), see above n 205 at 120.

208 See above n 205 at 67-8.

209 Ibid at 135.

210 Ibid at 143, note 50.

211 See above n 83.

from most developing countries – all net importers of intellectual property.²¹² The debate can be roughly divided into two competing views about the effect of IPRs on net importers (primarily developing countries) of intellectual property:

- Developed countries argue that strong protection of intellectual property is essential to provide incentives for future innovations and to ensure the competitive profitability of companies that spend on research.²¹³ Strong intellectual property protection is identified with efficiency gains, more jobs and a stronger economy, whereas weaker protection has been linked to dynamic efficiency losses, lack of innovation and a loss of creativity.²¹⁴
- Governments of developing countries, on the other hand, have often argued that the benefits of creativity should be shared and technology should be transferred between countries without impediment.²¹⁵ Protection must be weighed against the economic effects of creating a monopoly on knowledge – the exclusion of competitors who may be able to adapt or imitate the invention in a socially valuable way, coupled with the resulting higher cost of products.²¹⁶

From a trade theory perspective, it is unclear whether either position tells the full story. Studies into the effects of protection have produced conflicting results. Some analysts argue that although stronger intellectual property rights may not necessarily encourage more innovation within a developing country, they will increase foreign direct investment which will transfer valuable skills to the domestic labour force.

Ultimately, the central issues underlying the debate over strengthened IPRs are economic. Two assumptions have emerged as the justification for developing countries pursuing stronger protection:

- stronger IPRs lead to an increase in technology transfer and foreign direct investment; and
- stronger IPRs lead to an increase in domestic innovation and the corresponding development of local industry and increasing of access to rich export markets.

212 See above n 74 at 152.

213 See above n 18.

214 See above n 9 at 207.

215 United States Information Agency, 'Protecting Intellectual Property: Developing Country Issues' (June 1995), *USIA Fact Sheet* at <<http://www.usia.gov/topical/global/ip/iprfac9.htm>>.

216 See above n 84 at 250.

IPRs and Foreign Direct Investment (FDI)

The central economic argument for the protection of intellectual property rights is essentially that unless innovation or creation is protected, there will be insufficient incentive to undertake it.²¹⁷ Thus uniform and strong IPRs are generally considered to stimulate technology transfer by means of FDI, joint ventures and by stimulating international trade in general.²¹⁸

The United States Information Agency²¹⁹ presents a vast number of ‘reasons’ why all countries, including less developed countries, should aggressively and effectively protect intellectual property. These include:²²⁰

- Multinational companies that need intellectual property protection for their products are reluctant to locate in countries that do not offer this type of protection. It is hard to imagine, for example, a record company locating a CD manufacturing plant in a country that does not offer adequate protection against record piracy.
- Many companies that deal in intellectual property are reluctant to distribute in countries that do not protect intellectual property. If their property cannot be protected, they will frequently refuse to license legitimate distributors and will simply ignore the market. This means that legitimate channels of distribution will not develop inside the country.
- The market of a country that does not protect intellectual property will tend to be flooded with inferior illegitimate products. If legitimate producers of intellectual property stay out of a market because their products are unprotected, the products available in the market will frequently be of inferior quality. Thus, while the availability of pirated products may seem an economic advantage in the short term, in the long term it will inevitably impede a country’s development.
- Compliance with requirements of international law for the protection of intellectual property is important not only if a country wants to be a participating member of the world community but also if the country wishes to avoid trade sanctions that can have an economic impact on trade far beyond the boundaries of intellectual property industries.
- If a country does not protect intellectual property, it is far less likely that it will develop its own intellectual property industries. The

217 Ibid at 250.

218 Bart Verspagen, see above n 4 at 20.

219 An independent foreign affairs agency within the executive branch of the US government, responsible under the *International Broadcasting Act* of 1994 (USA) for all non-military US government international broadcasting.

220 Zavin J and Martin SM, ‘The Value of Intellectual Property Rights Enforcement in Developing Countries’ (June 1997), *Economic Perspectives: A USIA Electronic Journal*, cited on *USIS Website* at <http://www.usis.minsk.by/html/ipr_enforcement.html>.

encouragement and development of local authors and inventors depends to a great extent on their ability to earn a living from their work. Without such protection, local intellectual property is less likely to be created, and the developing country may be permanently relegated to the role of net importer of intellectual property.

Empirical studies have provided some support for these assertions. A study by the World Bank's International Finance Corporation has found 'a very high correlation between the willingness of private investors to commit their funds on a long-term basis to a country, and the level of intellectual property protection'.²²¹ Well defined property rights are said to foster innovation and investment, help countries attract technology, diffuse it throughout the domestic economy and, ultimately, develop indigenous industries.²²² The higher the value of the resource, the greater attention is given to the refining of property rights.

This two way relationship between economic development and efficient property rights has been argued as the basis for a positive correlation between the level of economic development and the level of intellectual property protection.²²³ In a study of 159 countries, by a statistical process known as 'regression analysis', Rapp and Rozek found that the level of economic development correlates closely with the level of patent protection. They further found that the nations with intellectual property protection – consistent across the full spectrum of countries, not merely the most and least developed – experienced more rapid economic development.²²⁴ The authors concluded that well developed systems of intellectual property protection foster higher levels of innovation and investment in innovative activities.²²⁵

There are several related studies which also try to estimate the effects of intellectual property rights on bilateral trade flows. Maskus and Konan (1994) also use a gravity model to estimate the effect of IPRs protection on bilateral trade. They regress the index developed by Rapp and Rozek (1990) along with several other development-related variables on the residual of the gravity flow estimation.²²⁶ This approach, however, produces only valid estimates if these variables were uncorrelated with the independent variables of the gravity estimation. This is clearly not the case as both GDP and population are included in the gravity model. Hence, it is not clear to what extent Makus and Konan's finding of a positive IPRs trade link is reliable.²²⁷

221 International Finance Corporation, 'Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer' cited in Fenner L., 'Strong Intellectual Property Laws Say 'Welcome' To Investors' (28 June 1997), *USIA Website*, at <<http://www.usia.gov/topical/global/ip/ip7art.htm>>.

222 Rapp and Rozek, 'Benefits and Costs of Intellectual Property Protection in Developing Countries' (1990) 24:5 *Journal of World Trade* 76, at 81.

223 Ibid at 78.

224 See above n 223 at 79.

225 Ibid at 79-80.

226 World Bank, *Work Paper 2051* (February 1999) at 10-11.

227 Ibid.

Mansfield (1993²²⁸ and 1994²²⁹), through analysis of survey data obtained for 100 US firms in a range of industries, found that about half of the firms in the sample reported that strength or weakness of IPRs has a strong effect on whether or not direct investment will be made. The top countries that were reported as having too weak IPRs to permit investment in joint ventures with local partners, were India (44% of respondents indicate IPRs are too weak), Nigeria (33%), Brazil (32%), Thailand (31%), Indonesia and Taiwan (28%).²³⁰ The same countries were reported to have IPRs too weak to permit transfer of the newest or most effective technology to wholly owned subsidiaries, or to permit licensing of the newest or most effective technology.²³¹

Mansfield (1995) extends the survey to Japanese and German firms, and also undertakes more sophisticated econometric testing. The findings, again, show that weak IPRs may be an important barrier to technology transfer (although Mansfield himself concedes in this later study that the topic is still ‘relatively unexplored’ and that further investigation is needed before any link between strengthened IPRs and technology transfer or FDI can be asserted²³²).

The studies discussed above suggest that strong IPRs may attract increased levels of foreign investment, however, despite this apparent consensus, the academic debate on the issue is far from conclusive – in an empirical analysis of the response of foreign investment to stronger intellectual property protection, Maskus and Eby-Konan found that variations in protection have little impact on foreign investment.²³³ Everson further suggests that ‘the literature does not show strong correlations between direct foreign investment and the strength of IPRs’, and that the steady state rate of innovation will, in fact, be decreased as protection is strengthened, in cases where imitation is the only channel by which production is transferred to the South.²³⁴

Further, in a recent publication by the World Bank, it is acknowledged that improvement in the protection of intellectual property in international trade transactions may result in some substitution of trade for investment: ‘The incentive for rights holders to directly invest in developing country markets – or to transfer technology there – as a means of safeguarding their rights under

228 Mansfield E, *Unauthorised Use of Intellectual Property: Effects on Investment, Technology Transfer, and Innovation. Global Dimensions of Intellectual Property Rights in Science and Technology*, National Academy Press, Washington DC (1993) at 107-145.

229 Mansfield E (ed), ‘Intellectual Property Protection, Direct Investment and Technology Transfer’, *International Finance Corporation Discussion Paper No 19*, World Bank, Washington DC (1994).

230 Mansfield E (1994) cited in Bart Verspagen, see above n 4 at 19.

231 Ibid at 19.

232 Mansfield E, ‘Intellectual Property Protection, Direct Investment and Technology Transfer’, *International Finance Corporation Discussion Paper No 27*, World Bank, Washington DC (1995) 23.

233 See above n 24.

234 Everson, ‘Global Intellectual Property Rights Issues in Perspective’, in Wallerstein, Moguee and Schoen (eds), *Global Dimensions of Intellectual Property Rights*, Washington DC, National Academy Press (1993) 366.

specific domestic regimes may actually be reduced following the TRIPS agreement.²³⁵

IPRs and Innovation

The second issue for determination is whether a strengthened IPR regime leads to an increase in domestic innovation and a growth in local intellectual property industries.

In a 1999 Working Paper, the World Bank argues (largely on the evidence of the Mansfield surveys discussed above) that IPRs introduce a 'static distortion' (ie. access to proprietary knowledge is sold above its marginal cost), which is rationalized as an effective way to foster the dynamic benefits associated with innovative activities.²³⁶

This is, perhaps, the most convincing reason for protecting intellectual property – without adequate laws and aggressive enforcement of those laws, a country is less likely to be able to develop its own intellectual property industries. Local creators could be rewarded economically and be assured that there will be protection for their creations. Further, local entrepreneurs in developing countries would have some assurance that their efforts and investments will be defended from those who would exploit them without compensation.²³⁷

The extension of protection may result in loss of entire industries (eg. pharmaceuticals) in some developing countries,²³⁸ thus it is imperative that the mechanism by which new protection is implemented takes into account the ability of a developing country to sustain innovative industries. One problem with the argument for increased IPR protection is that it relies on new technologies passing through a licensing mechanism. In practice, one observes that only certain countries are able to use technology licensing as an effective way of (inward) technology transfer. Typically, in these cases, technology licensing goes hand in hand with the build-up of domestic technological capabilities.²³⁹

The history of the pharmaceutical industries in Japan and South Korea shows how the effect of stronger IPRs will vary greatly depending on the manner in which they are implemented. Japan formerly protected processes for making

235 World Trade Organisation, 'Chapter 3: Impact of the Uruguay Round', *WTO and Developing Countries: An Interactive Guide*, World Bank (1999), can be down-loaded from the World Bank website <<http://www.wto.org/wto/download/wtodd.zip>>.

236 World Bank, *Working Paper 2051* (February 1999) at 3.

237 Judith M Saffer (President of the Copyright Society of the United States and Assistant General Counsel of Broadcast Music, Inc. (BMI) in New York, one of the world's leading music copyright agencies, after taking part in a regional conference on intellectual property rights held in Cotonou, Benin, in 1997), 'Intellectual Property in the Developing World: Challenges and Opportunities' (May 1998) 3:3 *Economic Perspectives: An Electronic Journal of the US Information Agency* 26, at 27.

238 See above n 84 at 271.

239 See above n 4 at 19.

drugs rather than specific drugs themselves.²⁴⁰ This allowed manufacturers who could figure out and slightly modify the process to make the drug, to adapt or imitate it without infringing upon the patent.²⁴¹ Japan voluntarily strengthened its IPR regime by switching from process to product patents in 1975. The result was that the value of many Japanese drug firms rose dramatically.²⁴² Those gaining spent a lot on research and development and had low process patent rates (meaning they were doing a lot of original research and development). The losers had less research and development and high process patent rates (meaning they were imitating others).²⁴³

South Korea, on the other hand, changed its patent laws a decade later under extreme pressure from the United States. Following implementation of pharmaceutical product patents in 1987, the value of South Korean pharmaceutical firms went down 61 percent over the 14-month transition period.²⁴⁴ The reason for this was simple: the South Korean industry had never developed a new drug that was successful on the international market – research and development employees constituted 1.76 percent of the total employees in South Korea pharmaceutical firms, compared with 23.14 percent of US firms and 18.59 percent of Japanese firms.²⁴⁵ Instead, they absorbed technology by imitation or foreign direct investment. Being far from the technological frontier, the short-run effect of stronger IPR's was to induce higher royalty payments to foreign pharmaceutical firms.²⁴⁶

The differing experiences of Japan and Korea underline the central difficulty in relying on studies which suggest that increased levels of IPR protection lead to, or are needed for, economic growth: it can equally be argued that *until higher levels of economic development in developing countries provide the basis for more advanced industries, developing countries cannot hope to benefit from strong intellectual property protection.*

Indeed, the United States itself was able to deny effective copyright protection to foreigners until 1952. This denial has been compared to the actions of a developing country seeking to protect its infant industries, and is seen as a significant factor in the transfer of technology from Western Europe to the USA in the late nineteenth and early twentieth century.²⁴⁷

This 'chicken and egg' problem has not been adequately addressed in the literature, but what comparison there is available between countries who have implemented greater IPR protection at different stages of development, strongly suggests that until the domestic infrastructure supports high technology

240 See above n 222.

241 See above n 84 at 252.

242 See above n 222.

243 Ibid.

244 Ibid.

245 Ibid.

246 Ibid.

247 See above n 204 at 41.

industries, stronger levels of protection are likely to merely facilitate rent transfer to developed countries.²⁴⁸

The key problem which developing countries face when arguing for lower levels of protection is that the overwhelming proportion of the damage done by strengthened IPRs is to industries which are not viewed as 'legitimate' by developed nations. It was recently stated that there have not been many TRIPS related income transfers from poorer to richer countries in connection with 'legitimate business transactions' – that is, 'excluding the income transfer from the decrease in production and exports of IPR infringing goods'.²⁴⁹ Developing country losses are largely discounted because they 'occurred as a result of the reduction of illegitimate income from IPR piracy'.²⁵⁰

Such an analysis both ignores the different cultural and social notions of 'property', and discounts the potentially overwhelming negative impact of strengthened IPRs on developing countries. In terms of neo-classical trade theory, whether a country will want strong IPRs will depend on whether its comparative advantage lies more in innovation or imitation and adaptation of others' innovations. Thus, ultimately, it is understandable that a country which relies on imitation, or where innovation is not a major source of economic activity and growth, is likely to choose a less stringent intellectual property regime than would a country whose economy is highly dependent on innovation.²⁵¹

It is in light of this reality that Peter Drahos has referred to TRIPS as a story of 'remarkable achievement', whereby the United States was able to persuade more than 100 net importers of technological and cultural information that they should pay more for the importation of that information.²⁵²

Finding a Balance

The problem which many developing countries face, is that they may not yet be at a stage in their development to foster the industries through which benefits from strengthened IPR protection might be developed. A system of IPR protection needs to strike a balance between encouraging innovation and invention and ensuring that the new knowledge is used and diffused efficiently once discovered.²⁵³ Finding a balanced means by which developing countries can progress to stronger levels of protection, after first creating the infrastructure

248 Van Wijk J and Junne G, 'Intellectual Property Protection of Advanced Technology, Changes in the Global Technology System: Implications and Options for Developing Countries' (1993) *Maastricht University of Technology Working Paper 10*, cited in Bart Verspagen, see above n 4 at 19.

249 See above n 75 at 52.

250 See above n 75, at 53.

251 See above n 84, at 250-252.

252 See above n 12, at 7.

253 Hall P, 'Intellectual Property Rights Protection and International Trade: An Economic Survey' (September 1998) 16:3 *Prometheus* 261, at 262.

for innovation and development, seems the key to a more equitable and sustainable system of universal intellectual property rights.

What emerges from the literature is that there is no clear evidence that stronger IPRs will increase foreign investment or domestic innovation in isolation. The likely effect of TRIPS on developing countries is perhaps best summed up by Primo Braga. In the short term, the Agreement is acknowledged as ‘an exercise in rent transfer from the South to the North’.²⁵⁴ In the long term, ‘potential benefits include new inventions fostered by high levels of R&D at domestic and international level and greater technology and foreign direct investment flows’.²⁵⁵ What is unclear, however, is whether – and at what cost – any such long term benefits will be realised.

There are many examples of countries that have achieved high levels of growth through low levels of protection. Weak patent laws have been part of the economic planning of Japan, Taiwan, Singapore and Hong Kong.²⁵⁶ By ignoring the patent rights of American semiconductor companies, these countries built a high-tech industrial base. As developing countries make the transition to producing new technologies and products, they will then have incentives to strengthen their IPR laws and regulations.²⁵⁷

The critical question for most countries is not *whether* they strengthen intellectual property rights, but *when*. At some point in a country’s development, new technology and creative products will emerge at a rate that is sufficient to warrant adoption of stronger intellectual property protection. Currently, many developing countries simply do not yet have the potential for internationally important innovations to be developed.

Conclusions: Future Prospects

Will developing countries gain from the provisions of the TRIPS Agreement that require most to strengthen their IPR regimes? It seems clear that most developing countries will see short-term losses as additional royalty payments to foreign firms push consumer prices higher without producing more foreign investment or higher expenditures on research and development. These countries would be better off if they moved more gradually toward strong intellectual property protection.

Economic analysis suggests that the effects of IPRs protection on bilateral trade flows are theoretically ambiguous.²⁵⁸ From a static welfare point of view, IPRs

254 Primo Braga C, ‘Trade Related Intellectual Property Issues: The Uruguay Round Agreement and Its Economic Implications’, *World Bank Discussion Paper No. 307: The Uruguay Round and the Developing Economies*, The World Bank: Washington DC (October 1995) at 405.

255 Ibid at 399.

256 Warshovsky F, *The Patent Wars: The Battle to own the World’s Technology*, Wiley, New York (1994) 11.

257 See above n 24.

258 World Bank, *Working Paper 2051* (February 1999) at 13.

can be viewed as a rent transfer mechanism which deteriorates the international allocation of production. Most studies conclude that the destination country loses from tighter protection whereas the source country is usually better off. However, benefits of a dynamic nature can be identified for both trading partners. On average, it is not clear whether these dynamic benefits can compensate for the static losses in the countries strengthening their IPRs systems and whether tighter IPRs improve world economic welfare via their impact on trade flows.²⁵⁹

Ultimately, of course, these theoretical considerations may be moot in a world economy in which political economy considerations are clearly in favor of higher standards of protection. The coercive measures of the United States, which are likely to intensify as the TRIPS transitional arrangements for developing countries expire, threaten to see an increase in the value of the intellectual property rights of developed countries at the expense of the developing world.

However, the difficulties experienced by the US in ensuring that developing countries enforce their legislative protection suggests that there will be gaps in the system. This may ensure that technologies continue to flow through to developing countries, allowing a more gradual establishment of enforcement of intellectual property rights.

Recommendations

It is unquestionable that some protection of intellectual property across national boundaries is essential in today's information-based world. The basis for that protection, whether appropriate to all cultures or not, has been formulated and accepted through the TRIPS Agreement. It seems inevitable that the ultimate result will be a uniform system of global protection of intellectual property.

Developing countries have little choice but to implement the protection measures detailed in the TRIPS Agreement. However, there is considerable room for flexibility. The case for a gradual and flexible approach should be put strongly – the preamble to TRIPS recognises 'the special needs of the least-developed country Members' for 'maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base'.

Developed nations should not view flexibility as detrimental to their interests. There is significant evidence that a permissive line on intellectual property rights is beneficial to both developing countries and their industrial trading partners. Elhanan Helpman's comprehensive and influential model of intellectual property

259 Ibid at 5.

rights regime changes indicates that tighter intellectual property rights hurt the developing nation, and if the rate of imitation is sufficiently small, benefit the developed country.²⁶⁰

Additionally, in order to achieve genuine uniformity of intellectual property protection, cooperation between industrialised and developing nations is essential. One of the often ignored benefits of expecting lower or modest levels of IPR protection is that it would discourage the divergence of valuable resources into wasteful, rent-seeking activity.²⁶¹ Such activity, in the pursuit of uniform IPR protection, creates anything but ‘harmony’ in the international order – a uniform framework leaving certain areas to be dealt with by national treatment may provide sufficient harmonisation.²⁶² Balancing mechanisms already exist to facilitate such a notion of harmonisation – for instance, Northern firms move production to the South to take advantage of lower wages, which they balance against the probability that they will lose their monopoly to imitators.²⁶³

As discussed, the coercive approach employed by the United States has been very successful in achieving paper compliance – the implementation of the basic framework within which a system of intellectual property protection can develop – but subsequent enforcement has been far less auspicious. There are numerous additional measures which are required once a new legislative framework is in place. In addition to the difficult and time-consuming process of training officials, the TRIPS accord has been found to require a ‘serious revision’ of national court systems.²⁶⁴

Beyond problems at the official level, countries in Latin America and the Caribbean are grappling with the need to teach their citizens about intellectual property rights, and how these affect development in their own countries. In Costa Rica, implementation of new intellectual property laws has gone hand-in-hand with public education campaigns that target citizens of all ages and backgrounds. Costa Rican Supreme Court Judge Ricardo Zamora Carvajal has said that ‘States need to concern themselves not just with signing international instruments or passing laws – they also have to deal with educational programs that reach the public’.²⁶⁵

These measures are unlikely to be accomplished by developing countries alone. Developed nations should help provide the expertise and the capital required to solve these problems. TRIPS should not be seen as a final objective but as the

260 See above n 24.

261 Hall P, ‘Intellectual Property Rights Protection and International Trade: An Economic Survey’ (September 1998) 16:3 *Prometheus* 261 at 272.

262 Mason A, ‘Trade and Intellectual Property: Some Observations’ (September 1998), 16:3 *Prometheus* 249, at 254.

263 Lai E, ‘International Intellectual Property Rights Protection and the Rate of Product Innovation’ (1998) 55 *Journal of Development Economics* 133 at 135.

264 See above n 53.

265 Ibid.

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beginning of a cooperative process with the end result of achieving a fair and universal system of intellectual property protection.