

TRIPs and its Discontents

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TRIPS AND ITS DISCONTENTS

PETER K. YU*

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INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights¹ (TRIPs Agreement) was established at the ministerial meeting in Marrakesh in April 1994. Since its establishment, many less developed countries have been dissatisfied with the international intellectual property system. From their perspective, the system fails to take into consideration their needs, interests, and local conditions. The strong protection mandated under the TRIPs Agreement also threatens their much-needed access to information, knowledge, and essential medicines.

This year marks the tenth anniversary of the TRIPs Agreement. It provides an excellent opportunity to assess the Agreement's achievements and shortfalls, in particular its impact on the international community as well as on other areas not related to intellectual property, such as agriculture, health, environment, education, and culture. As we move into the second decade of this Agreement, it is also appropriate to explore how we can preserve the goals and intentions behind the TRIPs negotiations and to look ahead at the future challenges confronting the international intellectual property system.

This Article traces the development of the TRIPs Agreement and explores what less developed countries need to do to preserve the goals and intentions behind the TRIPs negotiations. Part I describes the four different narratives used to explain the origins of the Agreement. This Part contends that while none of these narratives is complete, each provides valuable insight into understanding the context in which the Agreement was created. Part II focuses on the TRIPs Agreement and explores why less developed countries have been dissatisfied with the international intellectual property system. This Part also discusses the latest developments in the area, such as the recent World Trade Organization (WTO) debacle in Cancún, the proliferation of bilateral and plurilateral free trade agreements, and the increasing use of technological protection measures. Part III offers suggestions on how less developed countries can reform the international intellectual property system. This Article does not call for a complete overhaul or the abandonment of the TRIPs Agreement. Instead, it takes the

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs Agreement].

position that the Agreement is here to stay and explores, from that standpoint, how less developed countries can take advantage of the Agreement and reform the international intellectual property system.

I. THE PAST

A. *The Bargain Narrative*

Four dominant narratives have accounted for the origins of the TRIPs Agreement. The most widely accepted narrative is the bargain narrative,² in which the Agreement was considered the product of a compromise between developed and less developed countries. While developed countries received stronger protection for intellectual property rights and a reduction in restrictions against foreign direct investment, less developed countries obtained, in return, lower tariffs on textiles and agriculture and protection via the mandatory dispute settlement process against unilateral sanctions imposed by the United States and other developed countries.

At the time of the negotiations, the bargaining power between developed and less developed countries was far from equal. A case in point is the difference between the protection developed countries obtained through the TRIPs Agreement and the protection less developed countries obtained through the Agreement on Textiles and Clothing. While developed countries have to “phase out” their quotas on the most sensitive items of textiles and clothing on the last day of the ten-year transitional period, less developed countries are required to “phase in” product patents for pharmaceuticals on the first day of the identical transitional period.³ In addition, although the TRIPs Agreement required less developed countries to strengthen intellectual property protection, it guaranteed the prospects of neither technical assistance from developed countries nor increased foreign investment. As one commentator noted, “[T]o pass and enforce the laws that create the US\$60 billion a year obligation is a bound obligation; however, the implementation assistance and the impact on investment and innovation

2. See, e.g., MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* 12 (1998); Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, in *PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION* 39 (Frederick M. Abbott & David J. Gerber eds., 1997).

3. See JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 20 (2001).

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are not.”⁴

Notwithstanding the unequal bargaining power, each group of countries seemed to have been able to obtain what they considered to be in their self-interests. Before the turn of this century, there was no doubt that agriculture and textile products were more important to less developed countries than intellectual property-related goods and services. Even today, these trade items remain very important—so important that the disagreement over how to handle these items, or more precisely how to handle subsidies in the area, led to the breakdown of the WTO Ministerial Conference in Cancún.⁵ Indeed, the recent Ministerial Conference in Hong Kong would have been another failure had the WTO member states been unable to agree on a deadline for ending subsidies for agricultural exports.⁶

Moreover, less developed countries had been very concerned about unilateral trade sanctions since Congress introduced the Omnibus Trade and Competitiveness Act in 1988.⁷ Aimed at bolstering the leverage of U.S. trade negotiations, that statute amended section 301 of the 1974 Trade Act and requires the United States Trade Representative to identify foreign countries that provide inadequate intellectual property protection or that deny American intellectual property goods fair or equitable market access.⁸

By offering a mandatory dispute settlement process, the TRIPs Agreement shields less developed countries from threats of trade sanctions. Indeed, many less developed countries claimed that it would have been pointless for them to join the WTO had the United States been able to continue imposing unilateral sanctions despite their membership.⁹ Fortunately, in *United States—Sections 301–310 of the Trade Act of 1974*, the WTO dispute settlement panel confirmed that a

4. J. Michael Finger, *Introduction and Overview*, in *POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* 4 (J. Michael Finger & Philip Schuler eds., 2004), available at http://www.worldbank.org/research/Poor_Peoples_Knowledge.pdf.

5. See Elizabeth Becker, *Poorer Countries Pull Out of Talks Over World*, N.Y. TIMES, Sept. 15, 2003, at A1; Editorial, *The Cancun Failure*, N.Y. TIMES, Sept. 16, 2003, at A24.

6. See Keith Bradsher, *Trade Officials Agree to End Subsidies for Agricultural Exports*, N.Y. TIMES, Dec. 19, 2005, at C1.

7. 19 U.S.C. §§ 2101–2495 (2000).

8. *Id.* § 2242(a)(1).

9. See, e.g., David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 909 (1989) (suggesting that states might not accept new multilateral commitments in the intellectual property area if they are going to be vulnerable to unilateral actions).

member state could only pursue unilateral sanctions after it had exhausted all actions permissible under the rules of the international trading body.¹⁰

Although the bargain narrative is fairly convincing and widely accepted, commentators, most notably Susan Sell, have recently provided a counter-narrative challenging the role of the governments of the United States and the European Communities as stated in the narrative.¹¹ As Professor Sell explained:

State-centric accounts of the Uruguay Round are at best incomplete, and at worst misleading, as they obscure the driving forces behind the TRIPS Agreement. . . . In the TRIPS case, private actors pursued their interests through multiple channels and struck bargains with multiple actors: domestic interindustry counterparts, domestic governments, foreign governments, foreign private sector counterparts, domestic and foreign industry associations, and international organizations. They vigorously pursued their IP objectives at all possible levels and in multiple venues, successfully redefining intellectual property as a trade issue. . . . [I]t was not merely their relative economic power that led to their ultimate success, but their command of IP expertise, their ideas, their information, and their framing skills (translating complex issues into political discourse).¹²

B. The Coercion Narrative

The second narrative is the coercion narrative. This narrative is common among scholars who originate from, or who are sympathetic to, less developed countries. In this narrative, the TRIPs Agreement is considered an unfair trade document that developed countries imposed on their less developed counterparts. The Agreement is “coercive,” “imperialistic,” and does not take into consideration the goals and interests of less developed countries.¹³ As Jagdish Bhagwati noted:

10. Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report].

11. See, e.g., SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819, 830 (2003) [hereinafter Okediji, *Public Welfare and the Role of the WTO*] (observing that “successful rent-seeking transforms the state into an agent of a particular segment of society instead of a guardian of welfare for all”).

12. SELL, *supra* note 11, at 8; see also Okediji, *Public Welfare and the Role of the WTO*, *supra* note 11, at 846 (noting that “the negotiation of the TRIPS Agreement was a combination of sub-sets of coalitions of private industry and their respective states”).

13. See sources cited in Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving*

“TRIPS does not involve mutual gain; rather, it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations.”¹⁴

Consider, for example, geographical indications. Article 23 of the TRIPs Agreement offers special protection to geographical indications for wines and spirits.¹⁵ However, it does not offer similar protection to Basmati rice and Darjeeling tea, which are important to less developed countries.¹⁶ Even worse for these countries, the protection granted under the Agreement focuses on individual creations—often with an identified author or inventor. It, therefore, does not protect those outside the existing model, such as “custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties.”¹⁷

While the coercion narrative is thought-provoking, especially from the perspective of international development, it is far from complete. Although it is hard to deny that the stronger protection required by the TRIPs Agreement favors developed countries, it is also difficult to argue that the TRIPs Agreement is completely unfair to less developed countries. Indeed, the bargain narrative has suggested otherwise. As the TRIPs Agreement was created as a compromise between developed and less developed countries, developed countries received concessions in the intellectual property area while less developed countries received benefits elsewhere. Thus, it is logical for the TRIPs Agreement to be one-sided in the intellectual property area. Viewed from this

Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists, 70 U. CIN. L. REV. 569, 580 (2002) [hereinafter Yu, *Toward a Nonzero-sum Approach*].

14. Jagdish Bhagwati, *What It Will Take to Get Developing Countries into a New Round of Multilateral Trade Negotiations*, in DEP'T FOREIGN AFFS. & INT'L TRADE, TRADE POLICY RESEARCH 2001, at 19, 21 (2001), available at <http://www.dfait-maeci.gc.ca/eet/pdf/02-en.pdf> (last visited Aug. 14, 2005).

15. TRIPs Agreement, *supra* note 1, art. 23.

16. See KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 239 (2000) (noting that “the evolving language in TRIPs on geographical indications remains largely . . . confined to wines and spirits, while many developing countries point to food products that could be protected to their advantage, such as Basmati rice and Darjeeling tea”). Obviously, it is much easier to settle on the protection of geographical indications used in wines and spirits than to develop comparable protection for Basmati rice and Darjeeling tea. While the former has been widely accepted in Europe, questions remain as to whether the latter fits well in the geographical indications category. Nevertheless, this example shows that the TRIPs Agreement covers issues more important to developed countries than to their less developed counterparts.

17. The Bellagio Declaration, *reprinted in* JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 192, 193 (1996).

perspective, the TRIPs Agreement is not biased because developed countries are unfair to less developed countries. Rather, it is biased because those who find it biased focus solely on the Agreement while ignoring the context of the WTO bargaining process and the cross-sectoral concessions less developed countries have gained in other areas.

Moreover, as Ruth Okediji noted:

Rationalizations that depict the TRIPs Agreement as another example of North-South power disparities tell a much too simple story. Indeed, one of the noted triumphs of the Uruguay Round was the unprecedented level of developing country participation in the negotiations. Within the specific context of the TRIPs negotiations, alliances that formed over a variety of subjects crossed the traditional North-South divisions. These alliances also included industry groups whose positions on issues (ultimately of tremendous influence on official government positions) also had to be reconciled with competing intra-industry priorities.¹⁸

C. *The Ignorance Narrative*

The third narrative is the ignorance narrative. In this narrative, less developed countries are portrayed as countries that did not understand the importance of intellectual property protection during the TRIPs negotiations. Because of their ignorance, many less developed countries did not understand the consequence of the Agreement and how the required protection would impact their countries in such other areas as agriculture, health, environment, education, and culture.

While the TRIPs Agreement no doubt has awoken many less developed countries, as well as nongovernmental organizations,¹⁹ it is factually incorrect to assume that less developed countries did not understand *any* importance of intellectual property protection. Since the mid-1960s, less developed countries have been making demands for reforming the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Paris Convention for the Protection of Industrial Property (Paris Convention).²⁰ During the revision of the Berne Convention at the Stockholm Revision

18. Okediji, *Public Welfare and the Role of the WTO*, *supra* note 11, at 839–40 (footnote omitted).

19. See SELL, *supra* note 11, at 181.

20. See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323 (2004) [hereinafter Yu, *Currents and Crosscurrents*].

Conference, for example, less developed countries, led by India, demanded “that unless some major copyright concessions were made for developing countries, they would have to make drastic changes in their international copyright arrangements.”²¹ In addition, it was the breakdown of the 1981 Diplomatic Conference in Nairobi over the revision of the Paris Convention that forced developed countries to shift to the General Agreement on Tariffs and Trade (GATT)/WTO forum.

D. The Self-interest Narrative

The final narrative is the self-interest narrative. In an article that sought to respond to the bargain narrative, Edmund Kitch offered an alternative story that suggested that less developed countries agreed to stronger intellectual property protection because they found such protection in their self-interests.²² Focusing on the patent system, he found three reasons why less developed countries were interested in implementing stronger protection called for by the TRIPs Agreement. First, “[t]echnology does not simply consist of a collection of instructions as to how to proceed, and patents do not, standing alone, contain the necessary information.”²³ As Professor Kitch put it memorably, “technology is not a collection of recipes[,] and patents are not a cookbook.”²⁴ Second, the technology needed by those countries is unique and, therefore, different from what developed countries need.²⁵ Third, “the ability of patent owners to charge for the use of their patent rights, either in the form of royalties or through end product prices[,] is constrained by the ability of the country granting the patent rights to pay.”²⁶ The economic impact of stronger patent protection on less developed countries is therefore limited, because they, as poor countries, pay less than the more wealthy counterparts for patent use.²⁷

21. Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 *GEO. L.J.* 1050, 1065 (1968).

22. See Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 *UCLA PAC. BASIN L.J.* 166 (1994).

23. *Id.* at 171; see also *id.* at 171–76 (discussing how patents alone might not contain all the necessary information to promote technological advances).

24. *Id.* at 171.

25. See *id.* at 176–77.

26. *Id.* at 171.

27. This argument ignores the fact that patent rights holders might decide to withhold their technology from less developed countries because the royalties or product prices available in those countries are too low to be attractive. It therefore understates the economic impact created by the lack of access to unaffordable technologies needed by less developed countries.

These benefits are important to less developed countries, as knowledge production is cumulative,²⁸ and it takes time for the intellectual property system to develop. As Rochelle Dreyfuss noted insightfully, there is a major difference between the decision by policymakers to forgo the manufacture of automobiles and the decision to forgo the development of an intellectual property system:

The decision to forgo the manufacture of, say, automobiles is not permanent. Should a nation decide it no longer wishes to rely on foreign supply, or should the market for motor vehicles grow more lucrative, there is nothing in the GATT to prevent the citizens of that nation from entering the automobile sector. The same is not true of intellectual property. Innovation is knowledge-intensive. Educating a citizenry to the level where it is technically and culturally sophisticated enough to innovate at globally competitive levels may become prohibitively expensive once intellectual property rights are recognized. Thus, unless some concession is made to user interests, any nation that is now behind will likely stay there.²⁹

Notwithstanding the benefits of intellectual property protection, countries sometimes might not be able to implement policy changes that are in their best interests, at least in the best interests of the country as a whole. As Professor Kitch explained in the patent context:

If patent protection is weak or non-existent, industries will develop that rely for their existence on their ability to ignore the international patent system. Once these industries have developed, they have an interest in resisting any change in the rules. Although it may be in the overall, long run interest of the country to participate in both form and substance in the international patent system, the adversely affected industries will have incentives to expend their political capital to keep that from happening. Thus even if full participation is as a theoretical matter the optimum strategy in the long run, once a country departs from that strategy it may find that internal political forces block a return to the optimum. Outsiders can play a constructive role by insisting that the issues be addressed within a larger and principled framework.³⁰

28. See Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 22 (2004).

29. *Id.* at 29 (footnote omitted).

30. Kitch, *supra* note 22, at 178; see also Robert P. Merges, *Battle of the Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 243–44 (1990) [hereinafter Merges, *Battle of the Lateralisms*] (observing that “representatives of the ‘pirate’ industries may have enough political clout to block the proposed changes” even though those changes might be in

In that scenario, multilateral negotiations such as the TRIPs Agreement become important, as they “plac[e] larger interests of the nation at risk in the negotiations . . . [and] invite participation from larger economic players who can offset the political influence of the entrenched pirate groups.”³¹ Nevertheless, it is mistaken to assume that pirate industries are always “overrepresented” in the legislative processes of those less developed countries that opposed stronger intellectual property protection.³² Moreover, as I pointed out elsewhere in the context of U.S.-led intellectual property reform efforts in China, foreign pushes have serious limitations and sometimes may backfire on those pushing the policy.³³

In sum, the self-interest narrative provides a convincing explanation why less developed countries need to embrace stronger intellectual property protection. As Professor Kitch noted in the beginning of his article, “[t]he purpose is to identify issues that technologically deprived countries must face if they desire to encourage the development of enhanced domestic technological capability, based on the assumption that their system of intellectual property resembles the American system—as the GATT agreement requires.”³⁴ Because the article is “conceptual,”³⁵ the narrative it advanced sits uneasily with the historical facts advanced by the three other narratives.

For example, the self-interest narrative directly contradicts the coercion narrative, which posits that the TRIPs Agreement was imposed upon less developed countries against their self-interests. It also sits uneasily with the ignorance narrative, which holds that less developed countries failed to understand the importance of intellectual property protection during the TRIPs negotiations. Moreover, the self-interest narrative challenges the bargain narrative by suggesting that negotiators from developed countries had given their less developed counterparts concessions in other areas even though it is in their adversaries’ self-interests to sign on to the TRIPs Agreement. Given their

the best interests of a country as a whole).

31. Merges, *Battle of the Lateralisms*, *supra* note 30, at 244.

32. *See id.* (maintaining that “[t]here is no reason to assume that pirate industries are overrepresented in the legislative processes of all countries that oppose broadened rights”).

33. *See* Peter K. Yu, *The Copyright Divide*, 25 *CARDOZO L. REV.* 331, 437–42 (2003) (discussing the limitations of a coercive foreign intellectual property policy); *see also* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 *AM. U. L. REV.* 131, 140–54 (2000) (discussing the cycle of futility in the U.S. foreign intellectual property policy toward China).

34. Kitch, *supra* note 22, at 167.

35. *Id.*

sophistication, these negotiators are unlikely to be as ineffective as the ignorance narrative has suggested.

E. Summary

The TRIPs Agreement had very complex origins. It is very difficult to pinpoint how the Agreement was created. Thus, instead of attempting the impossible task of suggesting which narrative is correct, this Article highlights the tension between the different, and sometimes competing, narratives in the hope that readers will have a better understanding of the background behind the TRIPs negotiations and be able to draw their own conclusions.

II. THE PRESENT

Since the TRIPs Agreement went into effect, less developed countries have been very dissatisfied with the international intellectual property system. Commentators generally attribute this discontent to the ten-year-old Agreement. While these commentators were correct in making this link, less developed countries are more frustrated with the larger WTO system than with the TRIPs Agreement. This Part focuses primarily on the bargain narrative, but it also touches on the ignorance and self-interest narratives. It, however, omits a large portion of the coercion narrative, because such a narrative, by definition, assumes the existence of an unfair international trading system and, therefore, suggests discontent among less developed countries.

Let us start with the bargain narrative. If one is to believe that the TRIPs Agreement is a compromise, empirical records have indicated that less developed countries not only got a bad bargain, as some would say, but also a failed bargain. Although developed countries promised to reduce tariffs and subsidies in the agricultural and textile areas in exchange for stronger intellectual property protection and wider market access, they failed to honor these promises.³⁶ This failure was highlighted in the recent WTO debacle in Cancún, in which less developed countries were disillusioned from the process and became

36. See COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROP. RIGHTS & DEV. POLICY: REPORT OF THE COMM'N ON INTELLECTUAL PROP. RIGHTS 8 (2003) [hereinafter IPR COMM'N REPORT] (noting that many less developed countries "feel that the commitments made by developed countries to liberalise agriculture and textiles and reduce tariffs, have not been honoured, while they have to live with the burdens of the TRIPS agreement"); SELL, *supra* note 11, at 173 (stating that "there is . . . no evidence that developed countries are making good on their commitments to open their markets more widely to developing countries' agricultural and textile exports").

unwilling to negotiate other issues, such as investment, competition policy, government procurement, and trade facilitation.³⁷

Even if these countries were able to obtain what they bargained for during the TRIPs negotiations, the Agreement would remain problematic because they would still come out as a group of “loser” countries. The twenty-first century is primarily about the knowledge-based economy, rather than agriculture and manufacturing industries.³⁸ Gains by less developed countries in the areas of agriculture and textiles, therefore, would not make up for losses in the intellectual property and information technology areas. In fact, by conceding positions in the latter, less developed countries would be required to play catch-up using an outdated competition model.

Moreover, intellectual property protection often spills over into other areas, and “[i]ncreasingly, agricultural goods are the subject of intellectual property rights as patents are extended to seeds and plants.”³⁹ As a study by the World Bank has shown, less developed countries could lose up to \$20 billion if the TRIPs Agreement were fully implemented.⁴⁰ Even worse, some commentators have pointed out that “the implementation of international IP rules represents a net short-term financial loss that, it may be plausibly argued, is unlikely to be offset by economic and social gains for a very long time.”⁴¹ Even if these countries are able to obtain gains in selected areas, there is no guarantee that the wealth will be transferred from the beneficiary sectors to the disadvantaged ones.⁴² As a result, the disparity of wealth between the

37. See sources cited *supra* note 5.

38. See, e.g., LESTER C. THURLOW, *BUILDING WEALTH: THE NEW RULES FOR INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY* (2000).

39. PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 11 (2002).

40. WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002*, at xvii (2001), available at <http://siteresources.worldbank.org/INTGEP2002/Resources/gep2002complete.pdf> (noting that “[i]f TRIPs were fully implemented, rent transfers to major technology-creating countries—particularly the United States, Germany, and France—in the form of pharmaceutical patents, computer chip designs, and other intellectual property, would amount to more than \$20 billion”).

41. Ricardo Meléndez-Ortiz, *Foreword* to *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPs, TRADE AND SUSTAINABILITY*, at x (Christophe Bellmann et al. eds., 2003) [hereinafter *TRADING IN KNOWLEDGE*].

42. As Frederick Abbott noted in the context of pharmaceuticals:

The problem with . . . using net economic gains or losses as the developing country benchmark is that gains for a developing country’s textile or agricultural producers do not directly translate into higher public or private health expenditures Salaries for part of the workforce may increase and government tax revenues may

rich and the poor in these countries will grow.

Policymakers and industry groups from developed countries have challenged these claims by suggesting that stronger intellectual property protection would allow countries to use the system to “leap frog” their economies. Indeed, in painting the self-interest narrative, Edmund Kitch provided very strong justifications for adopting stronger intellectual property protection. Unfortunately, scholars and commentators thus far have been unable to demonstrate empirically how stronger protection would benefit less developed countries and how such protection would maximize global welfare.⁴³ When Congress undertook a critical examination of the American patent system, one of its experts, Fritz Machlup, could not help but conclude that he could not say for certain whether the patent system was good for his country. As he remarked famously in a widely-cited quote:

If one does not know whether a system . . . is good or bad, the safest “policy conclusion” is to “muddle through”—either with it, if one has long lived with it, or without it, if one has lived without it. If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it.⁴⁴

In fact, many commentators, especially those who found the coercion narrative convincing, have suggested that the existing

rise, and this may indirectly help offset pharmaceutical price increases. However, in order for the health sector not to be adversely affected, there must be some form of transfer payment, whether in the form of increased public health expenditures on pharmaceuticals, by providing health insurance benefits, or other affirmative acts. In a world of economic scarcity, the prospect that governments will act to offset increases in medicines prices with increased public health expenditures is uncertain.

Frederick M. Abbott, *The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health*, in *NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES* 27, 33 (Pedro Roffe et al. eds., 2006).

43. See Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 *N.Y.U. J. INT'L L. & POL.* 109, 126 (1997); see also Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 89, 103–05 (Mitchel B. Wallerstein et al. eds., 1993) (urging countries to develop their intellectual property rights regime according to their own needs); Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141, 152 (Stephen D. Krasner ed., 1983) (arguing that an international regime may not yield overall welfare benefits and that actors outside the regime may suffer).

44. STAFF OF S. COMM. ON THE JUDICIARY, 85TH CONG., *AN ECONOMIC REVIEW OF THE PATENT SYSTEM* 80 (Comm. Print 1958) (prepared by Fritz Machlup).

intellectual property system became universal only because it was backed by great economic and military might.⁴⁵ The existing system, therefore, does not embody universal values. Rather, it was successfully transplanted to less developed countries because they were less powerful and had been subjected to colonial rule during the nineteenth and early twentieth centuries.

The lack of empirical support is particularly troublesome, because intellectual property systems require balance, and overprotection is just as dangerous as underprotection. As Rochelle Dreyfuss pointed out, “[k]nowledge production is a cumulative enterprise; the storehouse of information does not grow unless creators have the freedom to learn from, and build on, earlier work.”⁴⁶ Thus, if the system overprotects, intellectual creators will not have enough raw materials to develop their creations, and the public will not have adequate access to the needed information and knowledge. In contrast, if the system underprotects, intellectual creators will not have adequate incentives to create. Many of them will find the system unfair and unattractive and will prefer to take up other, more remunerative jobs.

To make matters worse, an inappropriate intellectual property system would hurt less developed countries more than it would hurt their developed counterparts. While developed countries may have the resources and regulatory mechanisms to reduce the impact of an unbalanced system, the same does not apply to less developed countries.⁴⁷ Many of these countries lack the national economic

45. See, e.g., ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES* 93 (1996) (“[W]hether or not [intellectual property] was consciously designed to serve economic policies in any of the [industrialized countries], it has always evolved in response to economic and political necessity.”); William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 *UCLA PAC. BASIN L.J.* 8, 17 (1994); see also ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 247 (1998) (stating that “[t]he range of Western beliefs that define intellectual and cultural property laws . . . are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world’s peoples”); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 92 (1996) (noting that Western culture and ideology are sometimes attractive because they are linked to hard economic and military power).

46. Dreyfuss, *supra* note 28, at 22.

47. See *IPR COMM’N REPORT*, *supra* note 36, at 4; see MASKUS, *supra* note 16, at 237 (noting that developed countries “have mature legal systems of corrective interventions” in which “the exercise of IPRs threatens to be anticompetitive or excessively costly in social terms”); Dreyfuss, *supra* note 28, at 31 (noting that although “[t]he TRIPS Agreement recognizes that members may need law to control the abuse of intellectual property rights, . . .

strengths and established legal mechanisms to overcome problems created by an unbalanced system. Even if the system is beneficial in the long run, these countries might lack the needed wealth, infrastructure, and technological base to take advantage of the opportunities created by the system in the short run.⁴⁸

Thus, it is no surprise that less developed countries have been concerned about the heightened protection required by the TRIPs Agreement and its deleterious impact in the areas of agriculture, health, environment, education, and culture. They are also disappointed and disturbed by the fact that their developed counterparts, through the enactment of the TRIPs Agreement, have “kicked away the ladder” that would have allowed them to catch up and climb to economic success.⁴⁹ As one commentator noted:

From the start of the industrial revolution, every country that became economically great began by copying: the Germans copied the British; the Americans copied the British and the Germans, and the Japanese copied everybody. The trust of the TRIPs Agreement is to ensure that this process of growth by copying and learning by doing will never happen again.⁵⁰

Unfortunately, for less developed countries, this story of discontent did not end with the TRIPs Agreement. Today, many developed countries have sought to ratchet up their protection by negotiating around the TRIPs Agreement, seeking what commentators have called “TRIPs-plus” protection.⁵¹ In recent years, for example, the European Communities and the United States have used bilateral and plurilateral

countries that did not have enforceable intellectual property laws prior to joining the WTO had little reason to develop competition law to control right holders” (footnote omitted)).

48. See MASKUS, *supra* note 16, at 237 (noting that “[l]ong-run gains would come at the expense of costlier access in the medium term”).

49. See HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002).

50. William Kingston, *An Agenda for Radical Intellectual Property Reform*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 653, 658 (Keith E. Maskus & Jerome H. Reichman eds., 2005) [hereinafter *INTERNATIONAL PUBLIC GOODS*].

51. Many commentators have become concerned about the “one-way ratchet” of intellectual property protection. Dreyfuss, *supra* note 28, at 22; see LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33 (2003). *But see* Robert P. Merges, *A New Dynamism in the Public Domain*, 71 *U. CHI. L. REV.* 183 (2004) (highlighting public actions taken to invigorate the public domain).

free trade agreements to strengthen their protection.⁵²

To be certain, there are some benefits to using bilateral and plurilateral treaties. For example, they are more effective in addressing the individual concerns and circumstances of the contracting parties.⁵³ They also enable parties to resolve difficult transnational problems in a more expeditious manner.⁵⁴ Indeed, by using standardized terms, the United States successfully used free trade agreements to maximize the effectiveness and efficiency of its negotiation strategy in the international trade area. As Peter Drahos observed,

the BIT [bilateral investment treaty] which the United States signed with Nicaragua in 1995 was based on the prototype that the United States had developed for such treaties in 1994. Similarly, the Free Trade Agreement (FTA) that the United States has negotiated with Jordan will serve as a model for the other FTAs being negotiated with Chile and Singapore.⁵⁵

However, the bilateral or plurilateral negotiation strategy remains disturbing to countries that reluctantly joined the TRIPs Agreement to avoid unilateral trade sanctions, as the bargain narrative has suggested. Because most of the items negotiated under the bilateral and

52. For excellent discussions of the recent bilateral and plurilateral free trade agreements, see generally DAVID VIVAS-EUGUI, *REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE FREE TRADE AREA OF THE AMERICAS (FTAA)* (2003), available at [http://www.geneva.quno.info/pdf/FTAA\(A4\).pdf](http://www.geneva.quno.info/pdf/FTAA(A4).pdf); Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT'L L. 79 (2004) [hereinafter Correa, *Bilateralism in Intellectual Property*]; Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791 (2001) [hereinafter Drahos, *BITs and BIPs*]; Richard E. Feinberg, *The Political Economy of United States' Free Trade Arrangements*, 26 WORLD ECON. 1019 (2003); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 127 (2004) [hereinafter Okediji, *Back to Bilateralism?*].

53. See PAUL GOLDSTEIN, *INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS* 139 (2001) (noting that the lengthy enforcement action plan annexed to the 1995 China-U.S. Agreement Regarding Intellectual Property Rights "imposed more detailed procedural obligations than could be provided in a multilateral agreement such as TRIPS"); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 339 (1993) (contending that "[b]ilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection"). For discussions of bilateral agreements, see C. Michael Aho, *More Bilateral Agreements Would Be a Blunder: What the New President Should Do*, 22 CORNELL INT'L L.J. 25 (1989), Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT'L L.J. 1 (1989), and Merges, *Battle of the Lateralisms*, *supra* note 30.

54. See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 295 (1991).

55. Drahos, *BITs and BIPs*, *supra* note 52, at 794.

plurilateral agreements were considered outside the scope of the TRIPs Agreement, the Agreement would not shield less developed countries from trade sanctions. Thus, less developed countries were in no better position, as far as unilateral sanctions are concerned, than they would have been had they not signed the TRIPs Agreement.

More problematically, the recent free trade agreements came at a time when the intellectual property system was under siege domestically in the developed world. As the ignorance narrative has shown, intellectual property was not of popular interest until recently.⁵⁶ Instead of obscure and technical issues that have no relevance to daily lives, less developed countries now see intellectual property as very important to them. In light of this changing perspective and the resulting resistance to the expansion of intellectual property rights at home, Keith Maskus and Jerome Reichman were right to note that it was very difficult to find it “timely to harmonize and elevate international standards of patent protection—even if that were demonstrably beneficial—when there is so little agreement in the US itself on how to rectify a dysfunctional apparatus that often seems out of control.”⁵⁷

In addition to free trade agreements, the increasing use of technological protection measures by intellectual property rights holders in developed countries has elicited concerns among policymakers in the less developed world. By using these alternative protection measures, rights holders in developed countries are now able to lock up materials that otherwise would be available to less developed countries.⁵⁸ The 1996 WIPO Internet Treaties, for example, require measures that prevent the circumvention of copy-protection technologies used to protect copyrighted works in digital media.⁵⁹ The

56. See SELL, *supra* note 11, at 99 (“To a certain extent IP law is reminiscent of the Catholic Church when the Bible was in Latin. IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy.”).

57. Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279, 300 (2004) (footnote omitted).

58. See IPR COMM’N REPORT, *supra* note 36, at 106 (“For developing countries, where Internet connectivity is limited and subscriptions to on-line resources unaffordable, it may exclude access to these materials altogether and impose a heavy burden that will delay the participation of those countries in the global knowledge-based society.”); Peter K. Yu, *The Trust and Distrust of Intellectual Property Rights*, 18 REVUE QUEBECOISE DE DROIT INTERNATIONAL (forthcoming 2005) (discussing increasing anti-circumvention protection and the growing erosion of the fair use/fair dealing privilege).

59. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, 36 I.L.M. 76 (1997). For comprehensive discussions of the 1996 WIPO Internet Treaties, see generally MIHÁLY

deployment of genetic use restriction technologies, which are generally known as GURTs or “terminator” technologies, also could render seeds sterile, thus making it physically impossible for them to grow a second crop.⁶⁰

In sum, the TRIPs Agreement has provided many reasons why less developed countries are dissatisfied with the current international intellectual property system. However, the Agreement *alone* does not result in the current state of dissatisfaction. New developments, such as the increasing use of TRIPs-plus free trade agreements as well as the growing use of technological protection measures, have made the system unbearable.

III. THE FUTURE

In light of the growing discontent among less developed countries and the inequitable nature of the existing international intellectual property system, many commentators have called for a radical reassessment of the existing system. For example, Samuel Oddi has suggested ways to alleviate the adverse impact of the Paris Convention.⁶¹ Alan Story contended that “it is in the interests of countries of the South that [the Berne Convention] be repealed and a new framework be established on radically different grounds.”⁶² This Article, however, does not call for either a complete overhaul or the abandonment of the TRIPs Agreement. Rather, it takes the position that the Agreement is here to stay and explores, from that standpoint, how less developed countries can take advantage of the Agreement and reform the international intellectual property system. This Part proposes eight courses of action.

FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* (2002), and JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996: THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY* (2002).

60. See IPR COMM’N REPORT, *supra* note 36, at 60. For a discussion of the impact of GURTs on less developed countries, see generally Timothy Swanson & Timo Goeschl, *Diffusion and Distribution: The Impacts on Poor Countries of Technological Enforcement Within the Biotechnology Sector*, in *INTERNATIONAL PUBLIC GOODS*, *supra* note 50, at 669.

61. See A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 *DUKE L.J.* 831, 855–65.

62. Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 *HOUS. L. REV.* 763, 769 (2003).

A. Interpret the TRIPs Agreement Through a Pro-Development Lens

As the bargain narrative has taught us, the TRIPs Agreement was partly the result of a compromise between developed and less developed countries. While the WTO member states settled on a wide array of issues, which range from minimum standards of intellectual property protection to the inclusion of the mandatory dispute settlement process, they compromised on many others and refused to agree on a select few.⁶³ Thus, the existing Agreement contains many “constructive ambiguities”⁶⁴ that provide countries with “wiggle room,” or “policy space,” to implement the Agreement.⁶⁵ By interpreting the Agreement to take advantage of these ambiguities, less developed countries may be able to push for language that meets their needs while preserving the national autonomy appropriately reserved to them during the negotiation process. They might also be able to use these provisions as a bulwark against the continuous expansion of intellectual property rights, which, in turn, may allow less developed countries to “claw[]” back much of what was lost in the negotiating battles in TRIPs.”⁶⁶

Consider, for example, the word “review” in article 27(3)(b) of the TRIPs Agreement, which concerns the patentability of diagnostic,

63. The exhaustion issue is a prime example of the failure by the developed and less developed countries to come to an agreement. Article 6 of the TRIPs Agreement stipulated that “nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.” TRIPs Agreement, *supra* note 1, art. 6; *see also* Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPs, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT’L L. 333 (2000) (discussing the disagreement over the exhaustion issue during the negotiation of the TRIPs Agreement). Even though the WTO member states “agree to disagree” on the exhaustion issue, recent developments seem to suggest that the European Communities and the United States have been using bilateral and regional free trade agreements to negotiate around the TRIPs Agreement. For example, the United States-Singapore Free Trade Agreement “deals with the exhaustion issue by requiring each Party to give the patent owner a remedy against a third party who disturbs a contractual arrangement between a patent owner and licensee.” Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT’L L. 53, 60 (2004) (citing United States-Singapore Free Trade Agreement, U.S.-Sing., art. 16.7.2, May 6, 2003, available at <http://www.ustr.gov/new/fta/singapore.htm>).

64. WATAL, *supra* note 3, at 7.

65. *See* J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPs Agreement*, 29 N.Y.U. J. INT’L L. & POL. 11, 28 (1997) [hereinafter Reichman, *From Free Riders to Fair Followers*] (contending that “the TRIPs Agreement leaves developing countries ample ‘wiggle room’ in which to implement national policies favoring the public interest in free competition”).

66. WATAL, *supra* note 3, at 7.

therapeutic, and surgical methods and plants and animals other than micro-organisms. As Carlos Correa pointed out, “there ha[d] been no agreement in the Council for TRIPS on the meaning of ‘review.’”⁶⁷ While developed countries would have interpreted the word to mean “review of implementation,” less developed countries were likely to interpret the word to suggest the possibility for “revising” the Agreement to meet their needs and interests.⁶⁸

How the treaty is interpreted ultimately will affect the rights and obligations of less developed countries. Thus, it is very important to interpret the TRIPS Agreement through a pro-development lens. It is also essential to develop a model law that is “development friendly,” or a set of model intellectual property systems that take account of local needs. These model laws and systems will serve as a good starting point for international negotiations, especially in light of the recent proliferation of bilateral and plurilateral free trade agreements. They are also important because many less developed countries still lack experience with intellectual property protection and the needed human capital to develop laws that are tailored to their interests and local conditions.⁶⁹ As a result, they might have no option but to “meet their TRIPS obligations by simply transcribing its mandates into law.”⁷⁰

This is problematic because the TRIPS Agreement focuses primarily on laying out the *minimum* standards of intellectual property protection, as compared to describing the different possible intellectual property systems. Consider, for example, the well-illustrated example of trade secret protection. “[S]ince TRIPS does not mention a right to reverse engineer [which exists in the United States], transcription would create a level of protection surpassing that found in the United States, where the right to copy is privileged.”⁷¹ The unexamined transcription of the TRIPS Agreement into law, therefore, might result in an unbalanced intellectual property system.

Most recently, the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD) teamed up to implement the

67. CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* 211 (2000).

68. *See id.*

69. *See* Dreyfuss, *supra* note 28, at 25 (noting that many less developed countries “experience with intellectual property protection [and] sufficient human capital (in the form of legal talent) to codify wiggles into law”).

70. *Id.*

71. *Id.*

Capacity Building Project on Intellectual Property Rights and Sustainable Development. Among the achievements of this project is the publication of the *Resource Book on TRIPS and Development*.⁷² Conceived as a practical guide to the TRIPs Agreement, the book seeks to improve understanding of the development implications of the Agreement. It offers detailed analysis of each provision of the Agreement and highlights areas in which the Agreement leaves WTO member states “wobble room” to pursue their own policy objectives based on their levels of development. While one might disagree on the authors’ interpretation of the Agreement, it is hard to ignore the importance and promise of this project.

Like interpretation, how one frames the intellectual property debate is equally important, because such framing might affect the receptiveness of the WTO member states to the demands, or perhaps pleas, of the less developed world. As Susan Sell noted insightfully, “grants talk” is preferable to “rights talk” from the standpoint of international development, because it “highlights the fact that what may be granted may be taken away when such grants conflict with other important goals,”⁷³ such as freedom of expression, public health, and protection of human rights. Rights talk, by contrast, is likely to encourage policymakers to focus on the entitlement of the rights holders while ignoring the public interest safeguards of and the potential conflicts created by those rights.

B. Explore the Public Interest Safeguards in the TRIPs Agreement

While the TRIPs Agreement created many obligations in less developed countries, some of which are also new to developed countries,⁷⁴ it also includes many important public interest safeguards. Commentators have noted the importance of articles 7 and 8 of the Agreement, which provide a basis for seeking waivers “to meet

72. UNCTAD-ICTSD, *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* (2004).

73. SELL, *supra* note 11, at 146.

74. See Yu, *Currents and Crosscurrents*, *supra* note 20, at 365 (noting that changes required by the TRIPs Agreement “were dramatic for less developed countries, as they went beyond just intellectual property and affected such other areas as agriculture, health, environment, education, and culture”); see also WATAL, *supra* note 3, at 4 (noting that “at least one, undisclosed information, has never been the subject of any multilateral agreement before, and another, protection for integrated circuit designs, had no effective international treaty, while others, like plant variety protection or performers’ rights, were geographically limited”).

unforeseen conditions of hardship.”⁷⁵ As Jerome Reichman explained:

[C]ountries could attempt to trigger the safeguards implicit in Articles 7 and 8 in one of two ways. The least destructive approach would be to convince the Council for TRIPS itself to recommend narrowly described waivers to meet specified circumstances for a limited period of time. This approach would strengthen the mediatory powers of the Council for TRIPS and help to offset the problems arising from the inability of that body to quash or stay requests for consultations and dispute-settlement panels launched by trigger-happy governments.

Alternatively, developing country defendants responding to complaints of nullification and impairment under Article 64 might invoke the application of Articles 7 and 8(1) to meet unforeseen conditions of hardship. This defense, if properly grounded and supported by factual evidence, could persuade the Appellate Body either to admit the existence of a tacit doctrine of frustration built into the aforementioned articles or to buttress those articles by reaching out to the general doctrine of frustration recognized in the Vienna Convention on the Law of Treaties. Either way, overly aggressive complainants could wind up with what would amount to a judicially imposed waiver.⁷⁶

In addition, there are many other important provisions in the TRIPs Agreement that less developed countries could use to their advantage. For example, article 4 of the Agreement provides that “any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”⁷⁷ It therefore may constrain reciprocal clauses that are increasingly used by developed countries in their free trade agreements.⁷⁸ Article 27(2) allows WTO member states to exclude certain inventions from patentability provided that the prevention of the commercial exploitation of those inventions “is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health, or to avoid serious prejudice to the environment.”⁷⁹ Article 30 enables member states to “provide

75. J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441, 461 (2000) (footnote omitted).

76. *Id.* at 461–62 (footnote omitted).

77. TRIPs Agreement, *supra* note 1, art. 4.

78. See Yu, *Currents and Crosscurrents*, *supra* note 20, at 380 (discussing the tension between reciprocity provisions and article 4 of the TRIPs Agreement).

79. TRIPs Agreement, *supra* note 1, art. 27(2).

limited exceptions to the exclusive rights conferred by a patent,”⁸⁰ on the condition that such exceptions satisfy the three-step test—i.e., they “do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”⁸¹ Article 31 lays down the conditions in which member states can use patented products without the right holder’s authorization “in the case of a national emergency or other circumstances of extreme urgency.”⁸² Article 73 stipulates exceptions for member states to pursue their essential security interests and to fulfill obligations under the United Nations Charter in relation to the maintenance of international peace and security.⁸³

Until recently, although the WTO dispute settlement panels at times had “referred to these [limitations and public interest safeguards] favorably,” the legal literature and WTO panel decisions have underexplored them.⁸⁴ Thus, it is very important to highlight them and develop strategies that help inject them into WTO panel decisions. As Gregory Shaffer explained, it is important to develop WTO jurisprudence through the dispute settlement process:

Participation in WTO judicial processes is arguably more important than is participation in analogous judicial processes for shaping law in national systems. The difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. WTO law requires consensus to modify, resulting in a rigid legislative system, with rule modifications occurring through infrequent negotiating rounds. Because of the complex bargaining process, rules often

80. *Id.* art. 30.

81. *Id.* This three-step test, however, “is not a public interest limitation to exclusive rights. Instead, it is a limitation on the *scope of limitations* that member states can implement to promote access and dissemination of works domestically.” Ruth L. Okediji, *Fostering Access to Education, Research and Dissemination of Knowledge Through Copyright* 3–4, available at http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf (last visited Jan. 24, 2006) [hereinafter Okediji, *Fostering Access to Education*]. Thus, the three-step test circumscribes the scope of a state’s discretion to create limitations and exceptions to rights in its national intellectual property laws. Cf. Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1 (2005) (proposing to create a new international copyright norm that is in harmony with the U.S. fair use doctrine based on the Berne Convention’s three-step test).

82. TRIPs Agreement, *supra* note 1, art. 31.

83. *Id.* art. 73.

84. Dreyfuss, *supra* note 28, at 23 (citing Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, § 7.26, WT/DS114/R (Mar. 17, 2000)).

are drafted in a vague manner, thereby delegating *de facto* power to the WTO dispute settlement system to effectively make WTO law through interpretation.

As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law's interpretation and application over time.⁸⁵

C. Take Advantage of the WTO Dispute Settlement Process

One of the major strengths of the TRIPs Agreement is the mandatory dispute settlement process.⁸⁶ As Rochelle Dreyfuss and Andreas Lowenfeld entitled their article, the two achievements of the Uruguay Round are *Putting TRIPS and Dispute Settlement Together*.⁸⁷ In the first few years since its establishment, the dispute settlement process had been used primarily by developed countries.⁸⁸ It is no surprise that the first intellectual property dispute to reach the Dispute Settlement Body concerned the United States' challenge to the noncompliance of India's patent system with the TRIPs Agreement.⁸⁹

However, as the Agreement matures, less developed countries have begun to use the process more frequently.⁹⁰ As William Davey pointed

85. Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 470 (2004). *But see* Dreyfuss, *supra* note 28, at 27 (contending that negotiation within the WTO membership might be more effective than using the dispute settlement process in effectuating the recognition of positive rights in the TRIPs Agreement).

86. *See* TRIPs Agreement, *supra* note 1, arts. 63–64 (requiring all disputes arising under the TRIPs Agreement to be settled by the WTO dispute settlement process).

87. Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997); *see also* William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 32 (2005) [hereinafter Davey, *WTO Dispute Settlement System*] (noting that “[d]ispute settlement is one of the great successes of the WTO”); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 149–50 (2000) [hereinafter Okediji, *International Fair Use Doctrine*] (noting that “[o]ne of the most celebrated accomplishments of the WTO system is the dispute resolution mechanism which adds legitimacy to the overall design of the new trading system” (footnote omitted)).

88. *See* Davey, *WTO Dispute Settlement System*, *supra* note 87, at 17 (noting that “[t]he first half of [the first ten years' operation of the WTO dispute settlement process]—from 1995 through 1999—was characterized by extensive use of the system by the United States initially, and later by the EU”).

89. Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997).

90. *See* Davey, *WTO Dispute Settlement System*, *supra* note 87, at 24 (noting that “the

out:

In the first five years of the system's existence, developing countries initiated by themselves roughly one-quarter of the consultation requests. In the four and one-half years from 2000 to June 2004, developing countries initiated 62% of the consultation requests—more than doubling their relative share of initiations. . . . Thus, in the last few years developing countries have become more frequent users of WTO dispute settlement, both in absolute and relative terms. Interestingly, the majority of those cases have involved developing country respondents. That is to say, developing countries seem to have found the WTO dispute settlement system to be a useful mechanism to deal with a wide range of trade disputes—using it not only against developed countries, but also in their trading relations with other developing countries.⁹¹

A case in point is Brazil, which has made extensive use of the system in its dealings with other less developed countries, in particular those in South America.⁹² Cases brought by the country “involved trade remedies imposed by Argentina (textile safeguards; poultry antidumping duties); Mexico (antidumping duties on transformers); Peru (countervailing duties on buses); and Turkey (antidumping duties on pipe fittings).”⁹³ Most recently, the tiny Caribbean islands of Antigua and Barbuda successfully defeated the United States in their challenge of U.S. laws against Internet and telephone gambling.⁹⁴ Ironically, the United States Trade Representative declared “victory” after the WTO Appellate Body narrowed the earlier panel decision by upholding only some of the U.S. laws.⁹⁵

To be certain, there are still many problems with the dispute

US and the EC no longer were as dominant as complainants in the system,” and that “developing country use of the system increased dramatically” in the second half of the first decade of operation of the WTO dispute settlement process).

91. *Id.*

92. *See id.*

93. *Id.* at 41.

94. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

95. *See* Press Release, Office of the U.S. Trade Rep., U.S. Internet Gambling Restrictions Can Stand as U.S. Wins Key Issues in WTO Dispute, Apr. 7, 2005, available at <http://www.ustr.gov> (declaring that “[t]he United States won an important victory today when the World Trade Organization (WTO) Appellate Body sided with the United States on key issues in a challenge to U.S. laws on internet gambling”); *see also* Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

settlement process, such as the lack of transparency of the institution, limited access by non-Members to the dispute settlement process, the technical and financial difficulties confronting less developed countries in their implementation of the treaty obligations, the insensitivity and undemocratic nature of the decision-making process, and the lack of accountability of policymakers to the global citizenry.⁹⁶ The United States' recent attempt to substitute compensation for compliance in its dispute with the European Communities over the Fairness in Music Licensing Act of 1998 also raises concerns that the WTO system might not equally protect developed and less developed countries.⁹⁷ Indeed, as one commentator noted, the United States' approach might encourage other WTO member states "to replace effective enforcement of intellectual property rights with a cynical 'exemptions plus compensation' approach to TRIPS."⁹⁸ Such an approach, therefore, might undercut the minimum standards of intellectual property protection under the TRIPs Agreement while creating instability in the international trading system.

Notwithstanding these shortfalls, the WTO dispute settlement process offers promise to less developed countries. As Professor Shaffer pointed out, the strategies used by less developed countries in the WTO process will "have implications for their leverage in international political negotiations and for the policy space in which they implement domestic intellectual property and public health regimes."⁹⁹ The use of the dispute settlement process may even help lower the negotiation costs. As he explained:

96. For sources discussing the structural defects of the World Trade Organization, see Yu, *Toward a Nonzero-sum Approach*, *supra* note 13, at 585–86.

97. See Award of the Arbitrators, *United States—Section 110(5) of the US Copyright Act: Recourse to Arbitration Under Article 25 of the DSU*, ¶ 5.1, WT/DS160/ARB25/1 (Nov. 9, 2001) (determining the award at €1,219,900 per year). For excellent discussions of the dispute, see generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001), and Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000).

98. Richard Owens, *TRIPS and the Fairness in Music Arbitration: The Repercussions*, 25 EUR. INTELL. PROP. REV. 49, 53 (2003). Compare John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109 (2004) (articulating a view that the result of a WTO dispute settlement panel report "is to create an international law obligation to comply with that report"), with Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002) (examining the WTO dispute settlement process using the economic theory of contract remedies and the concept of "efficient breach").

99. Shaffer, *supra* note 85, at 476–77.

[P]articipation in WTO political and judicial processes are complementary. The shadow of WTO judicial processes shape bilateral negotiations, just as political processes and contexts inform judicial decisions. If developing countries can clarify their public goods priorities and coordinate their strategies, then they will more effectively advance their interests in bargaining conducted in WTO law's shadow, and in WTO legal complaints heard in the shadow of bargaining. They, in turn, will be better prepared to exploit the 'flexibilities' of the TRIPS Agreement, tailoring their intellectual property laws accordingly, and will gain confidence in their ability to ward off US and EC threats against their policy choices.¹⁰⁰

To level the playing field and enable less developed countries to take greater advantage of the dispute settlement process, the Advisory Centre on WTO Law was established to provide legal advice and support in WTO matters and to train government officials in WTO law.¹⁰¹ India, for example, has been "a relatively frequent user" of this Centre.¹⁰² Unfortunately, the Centre is understaffed and has only a small number of lawyers who have to be prepared to litigate all of the WTO agreements.¹⁰³ Moreover, because the Centre focuses primarily on WTO dispute settlement, it does not satisfy all of the needs of less developed countries, which "need to coordinate political and judicial strategies since intellectual property matters are advanced in a strategic fashion before multiple fora."¹⁰⁴

Thus, Professor Shaffer proposed to "pool . . . resources through national, regional, and international centers specializing in trade-related intellectual property issues."¹⁰⁵ As he maintained, "[r]egional centers could create benchmarks for policy, provide a forum for the sharing of experiences, and identify best practices. [They] could also better coordinate training of developing country officials and non-governmental representatives."¹⁰⁶ In addition, the centers would develop human capital and know-how in WTO law that could be tapped

100. *Id.*

101. Information about the Advisory Centre on WTO Law is available at <http://www.acwl.ch/>.

102. Davey, *WTO Dispute Settlement System*, *supra* note 87, at 45.

103. See Shaffer, *supra* note 85, at 478 ("The Advisory Centre has only seven lawyers who must be prepared to litigate over 19 WTO agreements. It thus lacks specific expertise in trade-related intellectual property matters.").

104. *Id.*

105. *Id.* at 477.

106. *Id.* at 478.

for WTO matters, when needed.¹⁰⁷ They also would enable countries to take advantage of their collective position as repeat players in WTO litigation and thus benefit from the greater economies of scale in deploying legal resources, even though they individually bring only a very

small number of WTO cases vis-à-vis their developed counterparts.¹⁰⁸ As less developed countries are better able to take advantage of the WTO dispute settlement process, they will have more faith in the WTO system, which in turn will create more satisfaction and stability in the international trading system.¹⁰⁹

D. Add Explicit Access Rights to the TRIPs Agreement

One of the biggest deficiencies of the TRIPs Agreement and the existing international intellectual property system is the lack of explicit

107. *See id.* at 474. As Professor Shaffer explained:

Because of developing countries' less frequent use of the WTO system and their lack of local legal capital, the alternative for a developing country to train internal lawyers with WTO expertise is typically worse than hiring expensive US or European outside legal counsel. Training internal counsel entails a significant long-term allocation of resources, which is not cost-effective if a country is not an active player in the litigation system. Start-up costs are high and potential economies of scale low. Moreover, where a developing country's internal lawyers develop expertise and exhibit talent, they can be snatched up by private law firms that pay salaries against which governments in developing countries cannot compete.

Although lawyers regularly leave government in the United States for the private sector, the fact that they largely remain in Washington and often subsequently return to government as part of Washington's 'revolving door' bureaucratic culture means that US trade authorities are much more likely to take advantage of their acquired expertise. . . . The spillover effects for developing countries, in contrast, are largely negative, since, once a developing country trade official leaves to work for the private sector in the United States or Europe, that individual is not available locally within the developing country and almost never returns to government service.

Id. at 475.

108. *See id.*

109. As Professor Shaffer explained:

Developing countries' perceptions of the WTO system also feed back on their awareness of whether they have legal defenses and claims available. Where developing countries and their commercial constituents have little faith in the WTO system, they are less likely to develop mechanisms to detect manipulations and violations of WTO law that affect their interests. Even when they become aware of measures against which they could invoke their legal rights, developing countries are less likely to develop pro-active strategies to defend these rights and interests if they believe that the system is structured in a way that they cannot do so in a cost-effective manner.

Id. at 475.

rights in obtaining public access to protected materials.¹¹⁰ Indeed, “[p]ublic interest objectives, typically represented by user groups such as libraries, educational institutions, research institutes, or non-governmental organizations[,] were noticeably absent during TRIPS negotiations.”¹¹¹ While the lack of explicit rights might be less problematic in a system where intellectual property rights are the exception, rather than the rule, such a lack becomes a major problem in today’s system where such rights are more the rule than the exception.¹¹² As Rochelle Dreyfuss noted, “[u]ser access did not need specific delineation when it was the background rule; only the exceptionalism of intellectual property rights required express definition. But if the new background is proprietary control, then the exceptionalism of user rights now needs to be embedded into positive law.”¹¹³

In recent years, commentators have pushed for proposals that call for greater protection of the fair use/fair dealing privilege.¹¹⁴ As Professor Dreyfuss explained:

110. See, e.g., Dreyfuss, *supra* note 28 (arguing for the need to use the next round of GATT negotiations to add explicit user rights to the TRIPs Agreement); Okediji, *International Fair Use Doctrine*, *supra* note 87, at 87 (arguing the lack of an international fair use doctrine in existing international copyright law and that “such a doctrine is vital for effectuating traditional copyright policy in a global market for copyrighted works *as well as* for capitalizing on the benefits of protecting intellectual property under the free trade system”). As Professor Dreyfuss explained:

[It is not surprising that the TRIPs Agreement] does little . . . to explicitly safeguard the interests of those who seek to use protected works. . . . Because the free traders who negotiated the GATT worked in an environment in which the core concern, reducing market barriers, was viewed as producing (at least in the long term) unmitigated welfare gains, they were not likely to appreciate the social importance, in TRIPs, of balancing proprietary interests against public access needs. Moreover, to the extent that the United States was a prime mover in the Uruguay Round, its intent was to ease U.S. trade deficits by creating broader exclusive markets for intellectual products, a goal with rather a scant role for user rights. As a result, the TRIPs Agreement specifies levels of protection that can be exceeded, but not easily diminished. User interests are largely left to domestic practice through provisions like the famous (now notorious) “three-part” tests, which permit members to create limited derogations from protection, but only so long as they do not unreasonably conflict with normal exploitation of the protected work or unreasonably prejudice the right holder (taking into account, in the case of patents, the interests of third parties).

Dreyfuss, *supra* note 28, at 21.

111. Okediji, *Public Welfare and the Role of the WTO*, *supra* note 11, at 858.

112. See Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577, 587 (1999) (discussing “the shifting baseline in the intellectual property field”).

113. Dreyfuss, *supra* note 28, at 27.

114. See sources cited *supra* note 110.

[E]xperience with the aspirational aspects of other constitutive agreements suggests that [the approach to stress the aspirational aspects of the TRIPs Agreement] has its limits. Institutionally, dispute resolution panels and the Appellate Body are, at best, courts. They are not well positioned to engage in the kind of lawmaking that can forge delicate balances among interests and create equilibria durable over a range of factual circumstances. Infusing content into precatory statements is, in any event, difficult, especially when antithetical interests are explicitly codified.¹¹⁵

However, such proposals alone would not be enough to satisfy all of the needs of less developed countries—especially concerning their needs for education, research, and knowledge dissemination. While less developed countries need *fair* use, they are in more desperate need of *discounted bulk* use, if not *free* use.¹¹⁶ Unless such use is considered “fair,” the international intellectual property system will need more reforms than just the introduction of international fair use/fair dealing principles.

In light of these special needs, Ruth Okediji recently called for the revision of the Appendix to the Berne Convention,¹¹⁷ which permits

115. Dreyfuss, *supra* note 28, at 23.

116. See Okediji, *Fostering Access to Education*, *supra* note 81, at 5 (noting that most less developed countries need “bulk access to copyrighted works to meet [their] educational needs”).

117. See *id.* As Professor Okediji described:

The Appendix requires countries [that] intend to avail themselves of the Appendix to self-identify by notifying WIPO. Under Article II, a developing country must wait three years after first publication before it can exercise the compulsory license for translations. Even then, the compulsory license cannot be issued if the original right owner has exercised the translation right in the language at issue. During the three year ban, the only means of bulk access would be negotiations with the copyright owner. For most scientific works, waiting three years means that there is a risk of the information becoming less relevant. Another noteworthy problem with the Appendix is that after a citizen in a developing country has filed for a license, there is a six-month grace period during which the copyright owner can exercise the translation right. Only if the owner does not do so in this period will the compulsory license proceed to issue. Finally, it is important to note that Article II licenses apply only to teaching, scholarship and research.

Article III licenses are the second major component of the Appendix. An Article III license can only be obtained to reproduce and publish for use in connection with systematic instructional activities. These licenses may be issued after a five-year period from the date of first publication. For scientific works, the waiting period is three years. For works of fiction, poetry, drama, music and art, the waiting period is seven years.

There are other features of the Appendix, but a few notable ones include the fact that the Appendix bans parallel imports and requires compensation on specified

unauthorized, compensated uses of copyrighted works, but is largely unused by less developed countries.¹¹⁸ As she noted, “At the very least, the time barriers and other features that have rendered the Appendix a failure must be positively addressed. Otherwise, the Appendix simply remains a dull sword for advancing development interests.”¹¹⁹ She also called for “more specific adaptation of the Appendix to the digital environment”¹²⁰ and the development of “countervailing principles that preclude countries from negotiating around access rules.”¹²¹ Deborah Hurley, the former director of the Harvard Information Infrastructure Project, called for the abolition of copyright ownership in government works, or the so-called crown copyrights.¹²² To her, the removal of crown copyrights is “[t]he step that would make the biggest sea change tomorrow in intellectual property protection and access to information.”¹²³ Uma Suthersanen articulated the need to forge an

terms.

Id. at 10.

118. *See id.* at 9 (describing the Berne Appendix as “a dismal failure”). As Professor Okediji explained,

[t]he complex conditions imposed on countries that may be interested in using the Appendix, coupled with a lack of understanding of the Appendix, has stymied any significant examination of the viability of the Appendix to address the chronic undersupply of educational materials in developing countries. Following the TRIPS Agreement, developing countries interested in utilizing the Appendix were required to notify the WTO of their intention. Very few countries filed a declaration to this effect. It is unclear whether this will have any material effect on the right of developing countries to use the Appendix notwithstanding this omission.

Id. at 9–10.

119. *Id.* at 10.

120. *Id.* at 11.

121. *Id.* at 12.

122. *See* DEBORAH HURLEY, POLE STAR: HUMAN RIGHTS IN THE INFORMATION SOCIETY 36–37 (2003), available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wsis/polestar.pdf>; *cf.* 17 U.S.C. § 105 (2000) (stipulating that “[c]opyright protection under this title is not available for any work of the United States Government”). As she explained:

There would be two immediate benefits. First, large quantities of information would become freely available, increasing access to information. Governments, by and large, produce political, social services, economic, and research information, in other words, the types of information that people need for carrying out their lives, helping others, and bettering their own situations. Secondly, governments, by placing their large thumbs firmly on the side of the scale tipped toward more access to information, would reframe the debate and send a strong signal to other content providers.

HURLEY, *supra*, at 36–37.

123. HURLEY, *supra* note 122, at 36.

international public interest rule.¹²⁴ Ernst-Ulrich Petersmann and Jerome Reichman advocated the application of the misuse doctrine and competition law at the international level to curb the abuse of market power.¹²⁵

In addition, many commentators have articulated the needs for explicit exemptions, compulsory licensing, and facilitation of cheap parallel imports to advance development goals.¹²⁶ Such an arrangement is not limited only to the education context. Commentators, for example, have discussed at length the need for such accommodation in the public health arena.¹²⁷ In the Doha Declaration on the TRIPs Agreement and Public Health, less developed countries have requested language that protects their needs to have access to affordable drugs in light of the public health crises they experience.¹²⁸ The Declaration clarified article 31 of the TRIPs Agreement by recognizing in each WTO Member “the right to grant compulsory licenses and the freedom to determine the grounds on which such licenses are granted.”¹²⁹ The Declaration also stated explicitly that “[e]ach Member has the right to

124. See Uma Suthersanen, *The Future of Copyright Reform in Developing Countries: Teleological Interpretation, Localized Globalism and the “Public Interest” Rule 24* (Int’l Ctr. for Trade & Sustainable Dev., Oct. 24–28, 2005), http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf (last visited Jan. 24, 2006).

125. See Ernst-Ulrich Petersmann, *The Institutional and Jurisdictional Architecture: International Competition Rules for Governments and for Private Business: A “Trade Law Approach” for Linking Trade and Competition Rules in the WTO*, 72 CHI.-KENT. L. REV. 545, 563 (1996) (“Not only developing countries with underdeveloped national competition and intellectual property rights laws, but also developed countries will need more systematic rules on the protection of competition among trade-related intellectual property rights and on the prevention of their anticompetitive abuse.”); Reichman, *From Free Riders to Fair Followers*, *supra* note 65, at 52–58 (proposing to use “competition law to curb the abuse of market power” as a pro-competitive strategy for implementing the TRIPs Agreement in less developed countries).

126. See, e.g., Okediji, *Fostering Access to Education*, *supra* note 81, at 11–12.

127. See, e.g., Carlos M. Correa, *Public Health and Patent Legislation in Developing Countries*, 3 TUL. J. TECH. & INTELL. PROP. 1 (2001); Carlos M. Correa, *TRIPs and Access to Drugs: Toward a Solution for Developing Countries Without Manufacturing Capacity?*, 17 EMORY INT’L L. REV. 389 (2003); Thomas F. Cotter, *Market Fundamentalism and the TRIPs Agreement*, 22 CARDOZO ARTS & ENT. L.J. 307 (2004); Srividhya Ragavan, *The Jekyll and Hyde Story of International Trade: The Supreme Court in PhRMA v. Walsh and the TRIPs Agreement*, 38 U. RICH. L. REV. 777 (2004); Alan O. Sykes, *TRIPs, Pharmaceuticals, Developing Countries, and the Doha “Solution,”* 3 CHI. J. INT’L L. 47 (2002); Ellen ‘t Hoen, *TRIPs, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT’L L. 27 (2002).

128. See World Trade Organization, Declaration on the TRIPs Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

129. *Id.* ¶ 5(b).

determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”¹³⁰

In addition, the Declaration “recognize[d] that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.”¹³¹ To implement the Declaration, the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health “create[d] a means for the grant of licenses from any third country to developing countries that lack the capacity and know-how to produce high-quality pharmaceuticals, as they lack the market size to justify the investment.”¹³² In the recent WTO Ministerial Conference in Hong Kong, this decision was made permanent when the WTO member states agreed to amend the TRIPS Agreement.¹³³

E. Explore the Use of Alternative International Regimes

Commentators have recently discussed the regime- or forum-shifting phenomenon, in which countries move their treaty negotiations from one international forum to another in an effort to maximize payoffs.¹³⁴ Although developed countries have more political leverage and are more likely to engage in a regime shift,¹³⁵ less developed countries have

130. *Id.* ¶ 5(c).

131. *Id.* ¶ 6.

132. Shaffer, *supra* note 85, at 481; *see also* General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 2, 2003), 43 I.L.M. 509 (2004). This decision will not terminate until “the date on which an amendment to the TRIPS Agreement replacing its provisions takes effect for that Member.” *Id.* ¶ 11.

133. Council for Trade-Related Aspects of Intellectual Property Rights, *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement And Public Health: Proposal for a Decision on an Amendment to the TRIPS Agreement*, IP/C/41 (Dec. 6, 2005), available at http://www.wto.org/english/news_e/news05_e/trips_decision_e.doc.

134. *See, e.g.*, JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 564–71 (2000); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT’L L.* 1 (2004) [hereinafter Helfer, *Regime Shifting*]; Okediji, *Back to Bilateralism?*, *supra* note 52; Yu, *Currents and Crosscurrents*, *supra* note 20, at 408–16.

135. *See* BRAITHWAITE & DRAHOS, *supra* note 134, at 565 (maintaining that “[f]orum-shifting is a strategy that only the powerful and well-resourced can use”). A good example of

increasingly used regime shifting to enhance their negotiating positions and to demand what they otherwise would not be able to get in a forum, especially one in which their interests are ignored or marginalized.

Although less developed countries still have little ability to increase bargaining power by shifting regimes, they have successfully used regime shifting to develop the political groundwork needed for stronger counterbalancing language in international treaties.¹³⁶ The Doha Declaration is a good example. Had it not been for increasing action by less developed countries in these other regimes, these countries might not have been successful in pushing for favorable language in the Declaration.¹³⁷ Moreover, the international intellectual property regime, to some extent, is handicapped by its lack of *maximum* standards.¹³⁸ By exploring language used in other regimes, such as the biodiversity regime or the human rights regime, less developed countries, therefore, might be able to develop counterregime norms that set up maximum standards of intellectual property protection.¹³⁹

regime shifts initiated by developed countries is the shift from WIPO to GATT/WTO in the 1980s to negotiate heightened standards of intellectual property protection.

136. See Helfer, *Regime Shifting*, *supra* note 134, at 59 (noting that regime shifting “function[s] as an intermediate strategy that allows developing countries to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO”).

137. By laying down the principles, this language could be very important. As Professors John Braithwaite and Peter Drahos explained:

The globalization of regulation is played out as a contest of principles. Agreements would rarely be made if they started as enforceable bodies of rules. Any precision in the rules would immediately create a veto coalition disadvantaged by that way of framing the rules. The uncertainty implicit in principles concerning a problem (that everyone agrees is a problem) allows everyone to sign on. All hope the regime will not become more specific over time in a way that will hurt their future interests. But since they may not be sure of what those future interests will be (e.g. whether they will more frequently end up as complainants or defendants under the rules), they sign. Indeed, a virtue of a thicker veil of uncertainty is that it “increases incentives to formulate provisions that are fair or equitable.” Sometimes this causes parties to intentionally thicken the veil of uncertainty initially (e.g. by lengthening the time or the range of issues to which a regime will apply) to ensure that all parties can lock in to mutually acceptable and just foundational principles for a new regime.

BRAITHWAITE & DRAHOS, *supra* note 134, at 619 (citations omitted).

138. See, e.g., Dreyfuss, *supra* note 28, at 27 (noting that “the WTO system must begin to recognize substantive maxima on the scope of available protection”); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 *MINN. INTELL. PROP. REV.* 47, 58 (2003) (noting the need to articulate “maximum standards” of intellectual property protection because “[t]reaties from Berne to Paris to TRIPS are all concerned with articulating ‘minimum standards’”); Okediji, *International Fair Use Doctrine*, *supra* note 87, at 168 (proposing to develop an international fair use doctrine as a “ceiling”).

139. Helfer, *Regime Shifting*, *supra* note 134, at 14 (discussing how regime shifting

F. Facilitate Coalition Building

The strategy behind the recent proliferation of free trade agreements and bilateral and plurilateral negotiations is divide-and-conquer. Since the failure of the WTO Ministerial Conference in Cancún, the United States has initiated a divide-and-conquer, or “coalition busting,”¹⁴⁰ policy that seeks to reward those willing to work with the country while undermining the efforts by Brazil, India, and other members of the Group of 21 to establish a united negotiating front for less developed countries. As United States Trade Representative Robert Zoellick wrote in the *Financial Times* shortly after the conference, the United States will separate the can-do countries from the won’t-do and “will move towards free trade with [only] can-do countries.”¹⁴¹

This strategy was not new. Indeed, it has been used by the United States to increase its leverage vis-à-vis less developed countries during the TRIPs negotiations. In the 1980s, the United States successfully used section 301 sanctions to isolate such opposition countries as Argentina, Brazil, India, Japan, Mexico, South Korea, and Thailand.¹⁴² As Jayashree Watal noted in the case of South Korea, which was threatened with sanctions for inadequate protection for computer programs, chemicals, and pharmaceuticals and in the copyright, patent, trademark areas:

[A]n important subsidiary objective . . . was to separate Korea from joining developing country opposition to the GATT initiative on IPRs. Korea was a soft target not only because of its dependence on exports and more particularly on the US, but because it had already reached a certain level of development and could make the transition to strengthened IPR protection more easily.¹⁴³

To counterbalance this divide-and-conquer strategy, less developed countries need to initiate a combine-and-conquer strategy—or, simply

provides an opportunity to generate “counterregime norms”).

140. ASIA-PACIFIC TRADE AND INVESTMENT INITIATIVE, UNDP REGIONAL CENTER IN COLOMBO, THE GREAT MAZE—REGIONAL AND BILATERAL FREE TRADE AGREEMENTS IN ASIA: TRENDS, CHARACTERISTICS, AND IMPLICATIONS FOR HUMAN DEVELOPMENT 50 (2005), available at http://www.undprcc.lk/web_trade/publications/Policy%20Paper%20Book%203.pdf.

141. Robert B. Zoellick, *America Will Not Wait for the Won’t-Do Countries*, FIN. TIMES (London), Sept. 22, 2003, at 23.

142. See Yu, *Currents and Crosscurrents*, *supra* note 20, at 413.

143. WATAL, *supra* note 3, at 18 (footnote omitted).

put, to build more coalitions. A case in point is what the Group of 21 did in the Cancún Ministerial: They successfully prevented the WTO member states from reaching agreement on such issues as investment, competition policy, government procurement, and trade facilitation.¹⁴⁴ Notwithstanding the success of this coalition, less developed countries need to remain vigilant, because such success might be short-lived due to the widely divergent interests among the group members. As Sungjoon Cho explained:

One could not confidently predict that [the collective stance taken by the Group of 21] will remain as solid in the future as it was in Cancún. Interests of G-21 members are not homogenous. For instance, while India still wants to protect domestic agricultural industries, Brazil, a member of the Cairns Group consisting of agricultural product exporters, wants to further liberalize trade in this area. Moreover, we witnessed other groups of developing countries, such as the G-33, which advocated the inclusion of strategic products and a special safeguard mechanism in the agriculture negotiation; the coalition of the African Union, the African, Caribbean, and Pacific countries, and the LDCs (AU/ACP/LDCs) which collectively want the preservation of current preferential treatment in addition to G-33 demands.¹⁴⁵

Moreover, less developed countries have had limited success in using coalition building to increase their bargaining leverage, partly due to the fact that they are “highly dependent on the developed countries as the source of capital, whether it is provided through the IMF or World Bank, or through investment bankers and securities exchanges.”¹⁴⁶ As Frederick Abbott observed:

Over the past 50 years, there have been a number of efforts to achieve solidarity or common positions among developing countries in international forums. At the broad multilateral level there was (and are) the Group of 77, and the movement for a New International Economic Order. At the regional level, the Andean Pact in the early 1970s developed a rather sophisticated common plan to address technology and IP issues (*ie* Decisions 84 and 85). Yet these efforts were largely unsuccessful in shifting

144. See sources cited *supra* note 5.

145. Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219, 236 (2004) (footnotes omitted).

146. Frederick Abbott, *The Future of IPRs in the Multilateral Trading System*, in *TRADING IN KNOWLEDGE*, *supra* note 41, at 36, 43.

the balance of negotiating leverage away from developed countries. In fact, developing country common efforts to reform the Paris Convention in the late 1970s and early 1980s are routinely cited as the triggering event for movement of intellectual property negotiations to the GATT.¹⁴⁷

This combine-and-conquer strategy is also useful in the WTO dispute settlement context. Based on the United States' past refusal to implement successful GATT findings against the United States by smaller countries, commentators have rightly questioned whether less developed countries will "have the diplomatic or economic muscle to ensure that the decision is implemented" even if they win their case.¹⁴⁸ Indeed, as William Davey has suggested, there is a good chance that "even massive retaliation by a small country would be unnoticed by a larger one."¹⁴⁹ Thus, it is important to combine the efforts of various less developed countries to maximize the impact on a violating developed country.¹⁵⁰

In addition to building coalitions among themselves, less developed countries "need to work consistently with U.S. and European political allies to alter the U.S. and European domestic political contexts."¹⁵¹ As Gregory Shaffer noted in the public health context:

If developing countries cannot neutralize the clout of large pharmaceutical firms in the formation of US and European positions, then developing countries will face the full brunt of US and European coercion in the negotiation and enforcement of pharmaceutical patent rights. In a world of asymmetric power, developing countries enhance the prospects of their success if other US and European constituencies offset the pharmaceutical industry's pressure on US and European trade authorities to aggressively advance industry interests.¹⁵²

In her book, Susan Sell recounted how twelve corporate executives have successfully pushed for the introduction of the TRIPs Agreement despite limited intellectual property expertise at the national and international policymaking levels.¹⁵³ As she boldly declared, "[i]n effect,

147. *Id.* at 42.

148. William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 90 (1987).

149. *Id.* at 102.

150. *Cf. id.* (offering a different proposal "to allow smaller nations 'excess' retaliation").

151. Shaffer, *supra* note 85, at 479.

152. *Id.* at 479-80.

153. As Professor Sell explained:

twelve corporations made public law for the world.”¹⁵⁴ While some might query whether Professor Sell exaggerated the role of multinational corporations in the TRIPs negotiations, one could not ignore her important message that the domestic political contexts could play an important role in influencing international developments. Indeed, as Helen Milner pointed out, international cooperation, to some extent, is the continuation of domestic politics by other means.¹⁵⁵ “The structure of domestic preferences,” she maintains, “holds a key to understanding international cooperation.”¹⁵⁶

G. Explore the Tension Between the European Communities and the United States

Less developed countries need to explore the tension between the European Communities and the United States. Although the United States and Members of the European Communities are all developed countries, they do not have a convergent position on intellectual property protection. In the copyright context, for example, they harbor wide disagreement concerning “the protection of moral rights, fair use, the first sale doctrine, the work-made-for-hire arrangement, and protection against private copying in the digital environment.”¹⁵⁷ There is also a wide disagreement in such issues as the protection of geographical indications.¹⁵⁸ Indeed, the European Communities’ initial ambivalent position toward the creation of the TRIPs Agreement might not have changed had the United States refused to include geographical

Not all ideas are equally privileged in political life; therefore how one defines “interests” is central to understanding which sets of ideas affect policy. Furthermore, it is important to identify *who* is defining them. By promoting their particular vision as a solution to pressing US trade problems, the IP activists captured the imagination of policymakers and persuaded them to adopt their private interests as US national interests. Additionally, their initiative in producing concrete negotiating proposals significantly strengthened their hand.

SELL, *supra* note 11, at 8.

154. *Id.* at 96.

155. See HELEN V. MILNER, INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 246–47 (1997).

156. *Id.* at 33; *see also id.* at 239 (suggesting that the legislature is more likely to adopt a proposal that it does not fully understand when it can depend on one or more informed domestic groups to signal it about the proposal).

157. Yu, *Toward a Nonzero-sum Approach*, *supra* note 13, at 625–26 (citations omitted).

158. For a discussion of the protection of geographical indications, see generally Paul J. Heald, *Trademarks and Geographical Indications: Exploring the Contours of the TRIPs Agreement*, 29 VAND. J. TRANSNAT’L L. 635 (1996).

indications in the proposed GATT.¹⁵⁹

Thus, it is very important to develop a list of differences between the European Communities and the United States. It is also important to develop a list of exceptions commonly found in intellectual property laws in the United States and Members of the European Communities. Both lists will be helpful in preparing policymakers to understand the divergent positions taken by the European Communities and the United States and will enable them to have more desirable negotiation outcomes. An understanding of the tension between the European Communities and the United States will also prevent them from committing to conflicting obligations under the free trade agreements.¹⁶⁰ It is bad enough to be forced to sign a bilateral agreement that does not meet local conditions. It is even worse to be put in a position in which they have to juggle two conflicting agreements that do not meet local conditions and that they cannot honor.

Sadly, negotiators from the European Communities and the United States are likely to be more concerned about the intellectual property standards they demand than those they dislike. For example, the United States is likely to be more concerned about the lack of protection against circumvention of copy-protection technologies than the fact that the target country offers strong protection to geographical indications. Likewise, the European Communities will be more concerned about the target country's refusal to offer strong moral rights protection than its adoption of the Uniform Domain Name Dispute Resolution Policy¹⁶¹ or the Anticybersquatting Consumer Protection Act of the United States.¹⁶²

If less developed countries do not understand the tension between the European Communities and the United States, they ultimately might adopt the stronger protection of both trading blocs. In other words, their protection might be stronger than what is offered in the developed world. Indeed, commentators have noted that the recent

159. See WATAL, *supra* note 3, at 23 (noting that the European Communities began to root for a GATT treaty "perhaps after a decision among developed countries to include the subject of geographical indications").

160. See Yu, *Currents and Crosscurrents*, *supra* note 20, at 398–99.

161. Uniform Domain Name Dispute Resolution Policy (Aug. 26, 1999), available at <http://www.icann.org/dndr/udrp/policy.htm>. The UDRP sets forth the terms and conditions related to a dispute between the registrant and a third party over the registration and use of a domain name.

162. 15 U.S.C. § 1125(d) (2000). The Anticybersquatting Consumer Protection Act provides civil remedies to victims of cybersquatting.

protection required by the free trade agreements signed by the United States is sometimes higher than what is offered in the United States. As Carlos Correa has noted, “[b]y creating through bilateral negotiations standards of protection higher than those applied domestically, the powerful U.S. [industries] may be able to force an amendment of U.S. domestic law in ways simpler and less costly that [sic] through lobbying in Congress.”¹⁶³

H. Assess the Compatibility Between the Free Trade Agreements and the Multilateral Trading System

In recent years, the United States has signed free trade agreements with a number of less developed countries, including Chile, Singapore, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Australia, Morocco, Bahrain, Peru, and Oman.¹⁶⁴ Although these agreements include primarily “TRIPs-plus” provisions, it remains unclear whether the agreements will be fully compatible with the multilateral trading system.

Consider, for example, the mandatory dispute settlement process, which is one of the crowning achievements of the Uruguay Round. As the bargain and self-interest narratives have shown, many countries signed on to the TRIPs Agreement because they wanted to be protected from the unilateral sanctions imposed by the United States and other developed countries. This major bargain, however, has been significantly undercut by the choice-of-forum provisions of the recent bilateral and regional free trade agreements, which allow treaty parties to file a complaint in a forum other than the WTO Dispute Settlement Body.¹⁶⁵

To be certain, the United States will still have to defend a WTO complaint using the mandatory dispute settlement process, unless it can persuade, or compel, other member states to file the complaint in the alternative forum. Nevertheless, when the United States serves as the complainant, it will have a choice of forums, and may be able to use the

163. Correa, *Bilateralism in Intellectual Property*, *supra* note 52, at 93.

164. Press Release, Office of the U.S. Trade Rep., United States and Oman Sign Free Trade Agreement (Jan. 19, 2006), available at http://www.ustr.gov/assets/Document_Library/Press_Releases/2006/January/asset_upload_file25_8774.pdf.

165. For a discussion of the choice-of-forum provisions in the bilateral and regional free trade agreements initiated by the United States, see generally Peter Drahos, *The Bilateral Web of Trade Dispute Settlement*, available at <http://www.twinside.org.sg/title2/FTAs/DisputeResolution/TheBilateralWebOfTradeDisputeSettlementPeterDrahos.doc> (last visited Jan. 24, 2006).

alternative forum *in the shadow of* the WTO dispute settlement process. Even more problematic for less developed countries, the bilateral forum may not offer similar pro-development safeguards that have been recognized by the WTO Dispute Settlement Body. There is also a strong likelihood that the treaty provisions will be interpreted based on the U.S. legal tradition, even if such a tradition may not sit well with the less developed country party.

Moreover, due to the bilateral nature of the alternative dispute settlement process, the outcome of the process will be limited to the parties involved. Such a process, therefore, may threaten to undermine the international trading system. As Professor Drahos observed:

[T]hese choice-of-forum provisions to be found in US bilaterals do not sit very comfortably with the goal of strengthening the multilateral trading system. WTO members are meant to have recourse to the DSU [Dispute Settlement Understanding] when they decide to pursue a remedy for a breach of a WTO agreement. . . . There are good reasons in principle to encourage parties to use the DSU. When parties resolve a trade dispute that requires a determination of obligation in one or more of the covered agreements of the WTO they deliver a public good for other members, assuming that the dispute results in a greater certainty of the interpretation of the rules. Where an infringing state brings a measure into conformity with an obligation it has under a covered agreement it will be of benefit to all other members by virtue of the MFN principle. In short, the third party benefits of two states obtaining a ruling to a dispute under a multilateralized dispute resolution mechanism may be considerable. The same cannot be said of bilateral dispute resolution proceedings. By their nature they prop up preferential trading arrangements that operate outside of scope of the MFN principle.¹⁶⁶

Thus, it is important for less developed countries to assess the compatibility between the free trade agreements they have signed and the multilateral trading system. It is also essential to evaluate whether the agreements will have any adverse impact on the bargains the countries have struck during the TRIPs negotiations. While the free trade agreements may not be in violation of the TRIPs Agreement, those agreements could, in effect, cut back the gains obtained by less developed countries during the negotiation process.

166. *Id.* at 12–13.

CONCLUSION

The TRIPs Agreement had very complex origins. To account for these origins, commentators have advanced four dominant, and sometimes competing, narratives. Unfortunately, none of these narratives fully explains the development of the Agreement. Rather, each provides valuable insight into understanding the context in which the Agreement was created. While it is important to understand how the TRIPs Agreement came into existence, it is more important to understand why it came about and what countries need to do to preserve the goals and intentions behind the TRIPs negotiations. Although there has been much discussion about the “one-way ratchet” of intellectual property protection recently pushed by developed countries, the battle to protect less developed countries against this enhanced protection has not been lost. Whether less developed countries will be able to have an intellectual property system that meets local needs will depend on whether they can take advantage of the TRIPs Agreement and reform the international intellectual property system.