VIRGINIA JOURNAL OF LAW & TECHNOLOGY

SUMMER 2006	UNIVERSITY OF VIRGINIA	VOL. 11, NO. 5

Philosophy, Trade, and Aids: *Current Failures to Obtain a Substantive Patent Law Treaty*

KRISTEN RIEMENSCHNEIDER†

ABSTRACT

Intellectual property rights (IPRs) are increasingly important to international trade. Developed countries, such as the United States, Japan, and the members of the European Union (EU), have comprehensive IPR schemes; by contrast, many developing countries do not grant IPRs or have adopted IPR regimes that tend to give fewer rights to the holders. This disparate treatment of IPRs gave rise to a thriving counterfeit and piracy trade in the 1980s, which, in turn, prompted the developed countries to seek global harmonization of IPR regimes through a Substantive Patent Law Treaty (SPLT). Thus far, the developed countries have been unsuccessful.

This paper addresses the developed countries' current failures to achieve a SPLT, and posits that this failure arises from the developed countries' failure to address three issues – developing countries' philosophies regarding the proper extent of IPRs, the developed countries' previous use of trade leverage, and the developed countries' responses to the current AIDS epidemic – and the developing countries ability to band together in an unprecedented manner.

† Law clerk to the Honorable Francis M. Allegra of the United States Court of Federal Claims. I gratefully acknowledge the help of Professor Margo A. Bagley, University of Virginia School of Law, under whose supervision this article was written.

TABLE OF CONTENTS

I. INTRODUCTION

¶ 1 Intellectual property rights (IPRs) are increasingly important in the world of international trade. "Intellectual property" is the name given to "the rights given to persons over the creations of their minds,"[1] and most commonly refers to patents, copyrights, and trademarks. IPRs "usually give the creator an exclusive right over the use of his/her creation for a certain period of time,"[2] and are very valuable to global economies; one study shows that in 1950, intellectual property accounted for 7% of U.S. exports, but by 1988, these goods accounted for 23% of U.S. exports.[3]

¶ 2 As property rights, IPRs are typically territorial – generally speaking, IPRs are granted and enforced by one country and are not enforceable in any other countries.[4]

1. WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights: What are intellectual property rights? *at* http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (last visited Jan. 1, 2006).

2. *Id.*

3. STEPHANIE EPSTEIN & JAMES M. JONES, INTELLECTUAL PROPERTY AT A CROSSROADS: GLOBAL PIRACY AND INTERNATIONAL COMPETITIVENESS i-ii (1990).

4. The Netherlands has been willing to issue cross-border injunctions, which prevent individuals from engaging activity in all the EU countries that would infringe a patent granted in one of the EU countries, pursuant to the Convention on Jurisdiction in the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention). Lincoln/ Interlas, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 24 November 1989, NJ 404 (Neth.); s*ee* Convention on Jurisdiction in the Enforcement of Judgments in Civil and Commercial Matters art. 6(1), Sept. 27, 1968, 29 I.L.M. 1417, 1419. As a result, patents granted through the EU system are not strictly territorial. Whether the Brussels Convention actually allows this type of cross-border injunction has been called into question, however, as a result of the Dec.8, 2005 judgment of the European Court of Justice Advocate General in Case C-593/03, Roche Nederland B.V. v. Frederick Primus and Milton Goldenberg, (E.C.R. Dec. 8, 2005) (not yet available in English). The opinion is unreported, but is available at http://www.curia.eu.int/jurisp/cgi-

This principle of territoriality means that an individual attempting to obtain patent protection for a new invention must obtain patents in each country where he desires protection and cannot enforce his rights in countries where he has not obtained patents. For example, a U.S. patentee cannot enforce his patent against intentional copying of the product in China. Furthermore, because each country is mostly free to set its own IPR policy, a patent in one country may have substantially different rights than a patent granted by another country. The United States, Japan, and the members of the European Union (EU) have comprehensive IPR schemes that are typically very favorable to the IPR-holder;[5] by contrast, many developing countries historically did not grant IPRs at all, and those that have adopted IPR regimes are likely to give fewer rights to the holder.

¶3 One example of the vast substantive differences around the world is the definition of "patentability" – in other words, what types of inventions are eligible for patent protection. In the United States "anything under the sun" is eligible for patent protection.[6] Until December 2004, however, India held that pharmaceuticals were not patentable subject matter,[7] which meant that drug companies in India could produce drugs patented elsewhere without penalty. Another example is found in the substantive rights given to the patentee; in the United States, the patentee has no duty to practice his invention,[8] while in many other countries, such as Brazil, the patentee is faced with a "working requirement," which requires the patentee to produce the patented item in the country or else forfeit all of his rights to the patent.[9]

¶4 The territorial nature of IPRs and the various substantive differences between countries gave rise to a thriving counterfeit and piracy trade in the 1980s. The International Trade Commission, a U.S. administrative agency, published a report describing the impact of pirated and counterfeit goods on the American economy in 1988.[10] The report estimated that American industries lost between $43B and $61B in

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bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-539%2F03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100. As the decision is so recent, it is unclear how the decision will affect the Dutch cross-border injunctions. *See* Stéphanie Bodoni, *Opinion Challenges Cross-Border Injunctions*, MANAGING INTELLECTUAL PROPERTY, Dec. 13, 2005, *at* http://www.managingip.com/?Page=9&PUBID=198&ISS=21054&SID=603065. Regardless, the point remains that IPRs are not always strictly territorial.

5. *See, e.g.*, 35 U.S.C. § 271(a) (2003); UK Patents Act of 1977, c. 37, § 30 (Eng.), *available at* http://www.patent.gov.uk/patent/legal/consolidation.pdf and http://www.jenkins-ip.com/patlaw/pa77.htm#s30 (last visited Jan. 2, 2006); Japan Patent Office, *Outline of the Industrial Property Right System*, http://www.jpo.go.jp/seido_e/index.htm (last visited Jan. 2, 2006).

6. Diamond v. Chakrabarty, 447 U.S. 303, 100 (1980).

7. *See* John S. James, *India Changes Patent Law to Meet WTO Treaty, Making New Medicines Less Available to Most Citizens, Other Countries*, *at* http://www.aidsnews.org/2004/12/india-patent.html (last visited Jan. 2, 2006). India has since changed its laws to comply with obligations incurred under the TRIPS agreement, discussed *infra*.

8. *See* 35 U.S.C. 154 (2006).

9. *See, e.g.*, Office of the U.S. Trade Representative, *2002 Special 301 Report Priority Watch List*, *at* http://www.ustr.gov/Document_Library/Reports_Publications/2002/2002_Special_301_Report/2002_Special_301_Report_Priority_Watch_List.html (last visited Jan. 2, 2006) (discussing Brazilian working requirements and U.S. concerns about the working requirements).

10. United States International Trade Commission, *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065 (Feb. 1988) [hereinafter USITC]; *see also The Extension of Fast-Track Authority for the President Relating to the Intellectual Property Aspects*

1986 as a result of "inadequate protection and enforcement of intellectual property rights abroad."[11] The sectors that were affected the most were pharmaceutical and chemical firms ($3.2B), advanced electronics companies ($2.3B), computer firms ($4.1B), and entertainment ($2B) and publishing companies ($127B).[12] The report also stated that almost 5,400 jobs had been lost as a result of this piracy.[13] Shortly thereafter, intellectual property became an important priority for the United States. American policymakers began considering ways to achieve better protection of American IPRs abroad, particularly through the use of international treaties. The Advisory Committee on Trade Negotiations, a private sector advisory committee that had been formed by Congress in 1974 and included the CEOs of Pfizer, IBM, and duPont, advised the US government that "it should pull every lever at its disposal in order to obtain the right result for the US on intellectual property."[14]

¶ 5 Prior to the 1980s, the United States had entered into several international treaties governing IPRs. Two of the most significant treaties affecting the rights of patentees are the 1873 Paris Convention for the Protection of Industrial Property ("Paris Convention") [15] and the 1970 Patent Cooperation Treaty ("PCT").[16] The Paris Convention provides for national treatment of foreign applicants,[17] meaning that applicants from a foreign country will be treated the same as domestic applicants. It also gives a right of priority to applications that were already filed in other Paris Convention countries,[18] meaning that an applicant will not be penalized in one country for having filed first in another country. One hundred years later, the PCT created a unified system for filing patents in multiple countries simultaneously. Shortly after the PCT entered into force, the United Nations organized the World Intellectual Property Organization (WIPO), which was given responsibility for administering both the Paris Convention and the PCT[19] and tasked with negotiating new IPR standards and treaties. While both the Paris Convention and the PCT provide useful services for the patentee, they do not address the substantive rights associated with a patent in member countries, and generally affect only the procedural aspects of filing for patents in multiple countries. They do not address important questions regarding the scope of a patent, such as what types of ideas are patentable, the level of protection an individual should receive, and how long a patent remains in force.

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of the General Agreement of Tariffs and Trade (GATT) Negotiations and the Proposed North American Free Trade Agreements: Hearing on Fast Track: Intellectual Property Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 102d Cong. 7 (1991) (statement of Patrick J. Leahy, Senator from Vermont) [hereinafter Leahy Statement].

11. USITC, *supra* note 10.

12. EPSTEIN, *supra* note 3, at 9.

13. EPSTEIN, *supra* note 3, at iii.

14. Peter Drahos, *Expanding Intellectual Property's Empire: The Role of FTAs* 4 (2003), *at* http://www.bilaterals.org/IMG/doc/Expanding_IP_Empire_-_Role_of_FTAs.doc.

15. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised July 14, 1967) [hereinafter Paris Convention].

16. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231, *available at* http://www.uspto.gov/web/offices/pac/mpep/documents/appxt.htm.

17. Paris Convention, *supra* note 15, art. 2-3.

18. Paris Convention, *supra* note 15, art. 4.

19. World Intellectual Property Organization, About WIPO, *at* http://www.wipo.int/about-wipo/en/ (last visited Jan. 2, 2006); *see also* GRAEME B. DINWOODIE, WILLIAM O. HENNESSEY & SHIRA PERLMUTTER, INTERNATIONAL AND COMPARATIVE PATENT LAW 316 (2002).

As a result, these treaties were unable to combat the widespread piracy occurring in the 1980s. Policymakers began looking for a new tool to combat piracy and achieve harmonization of patent laws.

¶ 6 After initial failures to achieve substantive harmonization in the late 1980s and early 1990s through WIPO, the developed countries changed tactics and began to use their power in trade as a bargaining tool. This tactic was more successful; in 1994, the United States, Japan, and the EU achieved a considerable degree of substantive harmonization of IPR regimes through the Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS),[20] an international treaty adopted at the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).

¶ 7 Spurred by their success during the Uruguay Round, the developed countries are now pushing for further harmonization of IPR regimes. "In the developed countries, adoption of the TRIPS Agreement seems to have further whetted the protectionist appetites of those powerful industrial combinations that have successfully captured the legislative and administrative exponents of trade and intellectual property policies in recent years."[21] The developed countries managed to achieve minor substantive patent harmonization in the form of the WIPO Patent Law Treaty (PLT) in 2000.[22] In 2004, however, the United States, Japan and the EU proposed a trilateral version of the Substantive Patent Law Treaty (SPLT) in WIPO;[23] the substantive harmonization proposed in this trilateral proposal is significant and require substantial changes to a number of systems around the world.[24] Ultimately, the proposed SPLT would raise IPR protection for all signatories to the levels accepted by the developed countries.[25]

¶ 8 The developed countries have not gained the requisite votes in WIPO to pass the

20. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 1869 U.N.T.S. 299 [hereinafter TRIPS].

21. 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, 17 (1997).

22. World Intellectual Property Organization, Patent Law Treaty, *at* http://www.wipo.int/treaties/en/ip/plt/trtdocs_wo038.html (last visited Jan. 2, 2006).

23. World Intellectual Property Organization, Substantive Patent Law Harmonization, *at* http://www.wipo.int/patent/law/en/harmonization.htm (last visited Jan. 2, 2006).

24. The SPLT would create a first-to-file system; this means that if two individuals invented the same product, the inventor who filed the patent application first would receive the patent (provided the other conditions of patentability were met). This is in contrast to the current system in the United States, which has a first-to-invent system, giving the patent to the individual who actually invented the item first. *See* 35 U.S.C. § 102 (2000). The SPLT would also incorporate a grace period, in which prior art would not be counted against the patentee; an official definition of prior art that includes knowledge from indigenous societies ("traditional knowledge"); a "full faith and credit" clause giving credit to other countries' prior art searches; sets standards for novelty, non-obviousness, and utility; and would set standards for claim interpretation. Proposal from the United States of America, Japan and the European Patent to the Standing Comm. on the Law of Patents, Proposal in Response to Document SCP/10/8 Regarding Information on Certain Recent Developments in Relation to the Draft Substantive Patent Law Treaty (SPLT) (Apr. 22, 2004), *at* http://www.wipo.org/scp/en/documents/session_10/pdf/scp_10_9.pdf [hereinafter Trialateral Proposal].

25. Trilateral Proposal, *supra* note 24.

SPLT.[26] In September 2005, the deputy director general of WIPO announced that they had failed to come to an agreement on the SPLT.[27] The developing countries have been much more effective in their resistance to harmonization on the global level, and the United States, Japan, and the European Union have begun to lose their collective power.[28] The developed countries have been forced to resort to other measures, such as bilateral trade treaties, to protect their IPRs abroad.[29] Commentators have now begun to question the relevance and effectiveness of WIPO.[30]

¶ 9 This paper addresses the developed countries' current failures to achieve a SPLT, and posits that this failure arises from the developed countries' failure to address three issues: First, the developed and the developing countries have vastly different philosophies regarding the proper extent of IPRs, which is considered in Part I. Second, the developed countries' heavy-handed negotiating tactics before, during and after the Uruguay Round of the GATT, discussed in Part II, have reduced the amount of leverage that they have with the developing countries, and have induced the developing countries to band together in the World Trade Organization (WTO) against the developed countries. Furthermore, the developed countries' responses to the current AIDS epidemic, discussed in Part III, illustrate that they are not willing to compromise on the issue of IPRs even in the face of mass tragedy. Finally, Part IV provides examples of ways that the developing countries have banded together to increase their leverage against the developed countries in IPR and trade negotiations, which has enabled them to block the SPLT thus far.

II. CONFLICTS OF IDEOLOGIES: DIFFERENCES BETWEEN THE DEVELOPED AND THE DEVELOPING COUNTRIES ON THE PROPER ROLE OF IPRS

¶ 10 "[T]he heart of the conflict between developing and developed countries [is] a conflict of ideologies over what constitutes proper subjects of property rights."[31] The developed countries and the developing countries approach IPRs with vastly different perspectives; while the developed countries prioritize the individual's rights over the collective's rights, developing countries tend to elevate the collective's rights over those of the individual. These differences have greatly contributed to the developed countries' failure to persuade the developing countries to sign onto a substantive patent law treaty.

¶ 11 The moral rights perspective of IPRs focuses on author or an inventor's individual

26. Intellectual Property Watch, *WIPO Sees Silver Lining in Harmonization Failure* (2005), *at* http://ip-updates.blogspot.com/2005_09_01_ip-updates_archive.html.

27. *Id.*

28. Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317, 344 (2005).

29. *See infra* Part II.C.

30. William New, Intellectual Property Watch, *WIPO's Future Work, Past Credibility On Table At General Assemblies*, Sept. 26, 2005, *at* http://www.ip-watch.org/weblog/index.php?p=91&res=1024_ff&print=0.

31. Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 745 (1996).

rights of attribution and integrity of the work.[32] The underlying philosophy of the moral rights perspective is rooted in natural law, which is based on the theory that the authority for certain rights is derived from the nature of human beings, and that these rights would exist even in the absence of legal rights.[33] The attraction to moral rights has existed for thousands of years; the scholars of ancient Greece and Rome possessed the right to be recognized as the authors of their works, even though they had no economic rights to their works.[34] In modern times, the moral rights perspective on IPRs is codified in the domestic IPR laws of the United States[35] and the United Kingdom,[36] as well as the Berne Convention for the Protection of Literary and Artistic Works,[37] entered into by the United States and several European countries in 1886.

¶ 12 Moral rights notwithstanding, "[t]he strongest and most widely appealed to justification for intellectual property is a utilitarian argument based on providing incentives."[38] In the developed countries, the recipient of an IPR receives the legal right to exclusively produce a good or copy a work, which, with few exceptions, in turn gives the IPR-holder an economic monopoly on the good or work; other individuals in the society may not reproduce the good or work, and only the creator of the work may profit from it.[39] The exclusive rights to the good or work are understood to give individuals an incentive to innovate and to create new and useful goods, which, in turn, improves society as a whole. The trade-off for receiving the substantial economic benefit of exclusivity is that the inventor must disclose his invention to society to increase the public knowledge base. "Granting property rights to producers is here seen as necessary to ensure that enough intellectual products . . . are available to users. The grant of property rights to the producers is a mere means to this end."[40] Many commentators in the United States have attributed the United States' continuing economic and technological success to its patent system.[41]

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32. *See, e.g.*, Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a) (2000); Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised at Paris July 24, 1971) [hereinafter Berne Convention].

33. Wikipedia, Natural Law, *at* http://en.wikipedia.org/wiki/Natural_law (last visited Nov. 2, 2005).

34. EPSTEIN & JONES, *supra* note 3, at 1.

35. 17 U.S.C. § 106A(a) (2006) (giving the author of a copyrighted work the right to have his name associated with the work and the right to prevent others from mutilating the work).

36. UK Patents Act of 1977, § 13, c. 37 (Eng.), *supra* note 5 (giving the inventor of a new and useful article the right to have his name on the patent).

37. Berne Convention, *supra* note 32 (giving the author of a copyrighted work, *inter alia*, the right to have his name associated with the work and the right to prevent others from mutilating the work).

38. Edwin C. Hettinger, *Justifying Intellectual Property*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 30 (Adam D. Moore ed., 1997). *See also* U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

39. This is true provided that the IPR is not subject to working requirements, compulsory licensing systems, or other qualifications to the right.

40. Hettinger, *supra* note 38, at 30.

41. For example, in the Senate hearings on the North American Free Trade Agreements and TRIPS, Senator Leahy stated: "We are going to discuss today what I see as the crown jewels of our economy – the works of the American imagination and spirit. The protection of those works around the world – the protection of our intellectual property – to my mind is vital to our trade balance and to our economic health." Leahy Statement, *supra* note 10, at 6.

¶ 13 Many developing countries, by contrast, elevate the collective right over the individual right, and contest the validity of the developed countries' justifications for IPRs. In response to the moral rights justification, many developing countries have cited the conceptual difficulty in making an idea the property of an individual. The most familiar types of property are characterized by the fact that your rights to them are physically exclusive – if you lend someone your wheelbarrow, an item of personal property, you can't use it, and neither can anyone else.[42] As Edwin Hettinger notes, however, "[ideas, the subject matter of IPRs] are nonexclusive: they can be at many places at once and are not consumed by their use."[43] In other words, two individuals may simultaneously understand and use an idea without exhausting the idea – and once the idea has been conveyed from one individual to another, it cannot be returned. The non-exclusive nature of ideas and thoughts makes it difficult to justify giving individuals exclusive rights over them; as Hettinger again notes, "stealing a physical object involves depriving someone of the object taken, whereas taking an intellectual object deprives the owner of neither possession nor personal use of that object."[44]

¶ 14 Similarly, many developing countries believe that thoughts should not be controlled or owned, but should be disseminated for the benefit of society. China, for example, has historically shared these views: according to Professor Ruth Gana, "Knowledge, according to Confucian thought, cannot be owned or controlled, but rather, must be duplicated with exactity."[45] While imperial China did possess a form of copyright, it was used to prevent the dilution of sacred texts, maintain social order, and to prevent the purity of knowledge – it was not concerned with the author or his rights, but with the overall stability of society.[46] India has also ascribed to this view.[47] Even "John Stuart Mill argued that free thought and speech are important for the acquisition of true

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42. Hettinger, *supra* note 38, at 20 (using the wheelbarrow example to demonstrate exclusive versus non-exclusive rights).

43. Hettinger, *supra* note 38, at 19. Thomas Jefferson, in a frequently cited passage in his letter to Isaac McPherson, discussed the intangible characteristics of ideas and intellectual property rights:

> It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.

Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *available at* http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jefl220.htm.

44. Hettinger, *supra* note 38, at 20.

45. Gana, *supra* note 31, at 766.

46. *Id*.

47. *Id* ("The traditional approach to piracy was not that it was appropriate morally, but rather, that knowledge and its expression in works of creativity were like the ocean – 'although robbed of its many jewels by gods, remains even to date a mine of jewels.'").

beliefs and for individual growth and developments."[48] In more modern times, the Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA) issued a statement in 1994 that "for members of indigenous peoples, knowledge and determination of the use of resources are collective and intergenerational. No indigenous population . . . can sell or transfer ownership of resources which are the property of the people and which each generation has an obligation to safeguard for the next."[49] By and large, developing countries tend to believe that the benefits to society from creation are most significant when IPRs are unavailable or limited because the idea may pass into the public knowledge bank sooner, and with less limitations, than if it were constrained by an IPR.

¶ 15 Many developing countries have also argued that the economic rationale for IPRs does not actually hold true for them, under their unique economic conditions. First, IPRs actually result in restrictions on free trade. Rather than encouraging competition and decreasing prices, which is beneficial to consumers, IPRs keep prices artificially high because the holder is able to extract monopoly rents. This argument was particularly common in Germany, Holland, Switzerland and England during the nineteenth century.[50] Furthermore, many developing countries have preferred to make inexpensive imitations of foreign products in order to boost their economies; this was the method used in mid-twentieth century Japan.[51] Finally, many developing countries wish to profit from the transfer of technology; intellectual property "directly implicates a vital and consistent demand by developing countries, namely, the freedom to use transborder technology flows to accomplish socioeconomic objectives."[52]

¶ 16 Ultimately, the value of IPRs will vary according to the economic, social, and political factors in the countries where they are applied.[53] The developed countries must consider these differences when attempting to promulgate global standards for IPR regimes.

> To be taken seriously in developing countries, intellectual property rights must interact with existing social structures to promote indigenous

48. Hettinger, *supra* note 38, at 21.

49. COICA and UNDP, The COICA Statement at the Meeting on Intellectual Property Rights and Biodiversity (Sept. 30, 1994), *at* http://www.mtnforum.org/resources/library/coica94a.htm.

50. Erich Kaufer notes that:

> The Prussian government pushed for free trade among the German territories, and as remnants of mercantilist policy, patents were seen as a barrier to free trade. . . . The Prussian government argued concurrently that all patent laws in the German territories should be abolished. A similarly strong anti-patent movement led to the repeal of the Dutch patent law in 1869. In 1872, the British House of Lords accepted a substantial revision of patent law. Between 1849 and 1863, the Swiss parliament rejected four petitions to introduce a patent law.

DINWOODIE, *supra* note 19, at 303-04.

51. Ana María Pacón, *What Will TRIPS Do For Developing Countries?*, *in* 18 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, 329-___, 329 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996).

52. Gana, *supra* note 31, at 737.

53. Maria Julia Oliva, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 46 (2003).

> technological innovation and capital development. Without the specific conditions of strong property systems, stable government, free market capitalism, and zealous protection of corporate interests, it is unlikely that modern intellectual property in and of itself has the potential to transform developing countries into the technology producers they aspire to become.[54]

III. TRADE AND UNFAIR BARGAINING TACTICS: THE DEVELOPED COUNTRIES' LEVERAGE AGAINST THE DEVELOPING COUNTRIES

A. The Uruguay Round of the General Agreement on Tariffs and Trade

¶ 17 The developed countries began negotiations in WIPO to create a substantive patent law treaty in 1984,[55] but these efforts quickly proved to be fruitless. Within WIPO, each member state has one vote,[56] and discussions are necessarily centered on IPR matters. After early negotiations indicated that the developing countries were gaining ground in WIPO, the United States found itself without sufficient bargaining power in WIPO to achieve its objectives[57] and began to look at alternative routes for achieving substantive harmonization.

¶ 18 The developed countries decided to change the playing field. Since the United States typically has power in trade negotiations, industry policymakers thought that the U.S. could make minimal trade concessions to other countries as a trade-off for IPR harmonization. The pharmaceutical industry, in particular, began a substantial campaign of lobbying to national and international trade associations, chambers of commerce, business councils, and other business bodies.[58]

¶ 19 This theory of using trade leverage to achieve IPR harmonization was not new, but it had never worked before. A brief attempt during the 1940s to use trade to establish some basic global standards for the substantive aspects of IPRs was ultimately unsuccessful.[59] Later attempts by the UN Conference on Trade and Development also

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54. Gana, *supra* note 31, at 738.

55. Lee J. Schroeder, *The Harmonization of Patent Laws*, C567 ALI-ABA 473, 473-78, *in* DINWOODIE, *supra* note 19, at 346-47.

56. Convention Establishing the World Intellectual Property Organization art. 6(3), July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3, *available at* http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html.

57. Drahos, *supra* note 14, at 3.

58. *Id.*

59. In 1948, the Havana Charter tried to establish an International Trade Organization, but the treaty never entered into force because it was not approved by the U.S. Congress. United Nations Conference of Trade and Employment, Mar. 24, 1948, *Havana Charter for an International Trade Organization*, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948), *available at* http://www.globefield.com/havana.htm (last visited Jan. 2, 2006); *see also* Wikipedia.org, Havana Charter, http://en.wikipedia.org/wiki/Havana_Charter (last visited Nov. 1, 2005). The Havana Charter included some references to intellectual property; for example, members of the Charter agreed "not to apply restrictions so as to . . . prevent the importation of such minimum quantities of a product as may be necessary to obtain and maintain patent, trade mark, copyright or similar rights under industrial or intellectual property laws." Havana Charter art. 21(3)(c)(i).

"failed miserably."[60] Something changed in the 1980s, though, and the heavy lobbying effort appeared to work; in 1985 and 1986, President Reagan made several speeches linking trade and IP, and calling for greater protection of US intellectual property abroad.[61] Congress began using trade sanctions against countries that allowed for copying of goods protected in the United States, including South Korea, Argentina, Brazil.[62] Ultimately, however, industry determined that the best way to improve IPR protection around the world was to get IPRs written into the General Agreement on Tariffs and Trade.[63]

¶ 20 The General Agreement on Tariffs and Trade (GATT),[64] originally entered into in 1947, is an agreement among nations seeking to improve their trade relations and reduce barriers to free trade. Some of the most significant provisions of the GATT provide for "national treatment"[65] and "most-favored nation status."[66] The members periodically meet for "rounds" of multilateral trade negotiations, which result in new agreements and updates to the GATT. Once an agreement had been reached that a ministerial conference, or "round," would take place at Punta Del Este, Uruguay, in September of 1986, U.S. industry went into action.[67] In March of 1986, the chairmen of Pfizer and IBM created the "Intellectual Property Committee," a coalition of thirteen major US corporations: Bristol-Myers, DuPont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications.[68] High level officials in the companies that comprised the IPC began targeting their European and Japanese counterparts, who in turn, put pressure on their governments to include IPRs on the Punta Del Este trade agenda.[69]

¶ 21 The developing countries objected to the placement of intellectual property on the agenda; they argued that GATT was an inappropriate method for regulating IPRs because GATT was only intended for use in regulating goods.[70] Furthermore, they argued, it was inappropriate to discuss IPRs in the GATT since discussions on IPRs were already underway in WIPO – what they considered to be the proper organization for discussing IPRs.[71] The developing countries were concerned that GATT was not a fair place to negotiate IPR treaties because the industrialized countries had so much power in trade, and the developing countries believed that negotiations in WIPO or even the United

60. Ulrich Joos & Ranier Moufang, *Report on the Second Ringberg-Symposium*, *in* 11 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 30 (Friedrich-Karl Beier & Gerhard Schricker eds., 1989).

61. *Id.* at 24-25.

62. *Id.* at 21 n.4, 25; Leahy Statement, *supra* note 10, at 25.

63. Drahos, *supra* note 14, at 5.

64. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

65. *Id.* art. III(2) (goods imported from another country are not be subject to internal taxes or charges in excess of those applied to domestic goods).

66. *Id.* art. I(1) (favorable trading conditions provided to one country are provided to all members of the GATT).

67. Drahos *supra* note 14, at 5.

68. *Id.* at 3-5.

69. *Id.* at 6.

70. Pacón, *supra* note 51, at 330.

71. *Id.*; Schroeder, *supra* note 55, at 347.

Nations Conference on Trade and Development (UNCTAD) would have been fairer to their interests.[72] The developing countries were already wary of the developed countries' multilateral trading system – "for most of the history of the multilateral trading system, developing countries clearly remained on the periphery, their relationship to developed countries tainted deeply with mistrust stemming from the colonial experience."[73] And, as noted above, the discussions in WIPO were beginning to swing in the direction of the developing countries.[74]

¶ 22 The United States curbed these discussions quickly, however. It repeatedly stalled negotiations in WIPO, and made it clear that it would not agree to the patent law treaty that was in discussion.[75] On Sept. 20, 1986, the ministerial representatives of the GATT met in Punta Del Este and issued their agenda for the "Uruguay Round."[76] The development of international standards for intellectual property was listed on the agenda.[77] At this time, at least some representatives of the developing countries believed the subject of intellectual property was unlikely to survive the end of the Uruguay Round, as the agenda was already very crowded,[78] and "[i]t appears . . . that the inclusion of [IPRs] on the agenda was a lastminute [sic] political compromise."[79]

¶ 23 Once the developing countries had accepted that GATT would be the fighting ground, the developed countries banded together against the developing countries. The US, the EU, and Japan made three arguments in favor of heightened IPRs. The first argument followed the economic rationale for IPRs: IPRs are good for developing

72. Pacón, *supra* note 51, at 329; WIPO Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as far as Patents are Concerned, The Hague, Neth., June 3-21, 1991, *Volume I: First Part of the Diplomatic Conference, Summary Minutes of the Plenary of the Diplomatic Conference*, 191, 193, 202, 210 [hereinafter WIPO Summary Minutes].

73. Gana, *supra* note 31, at 737.

74. Drahos, *supra* note 14, at 3.

75. Gana, *supra* note 31, at 737.

76. General Agreement on Tariffs and Trade (GATT) Punta Del Este Declaration, Sept. 20, 1986, *at* http://www.sice.oas.org/trade/Punta_e.asp (last visited Nov. 2, 2005).

77. The "Ministerial Declaration" reads:

> Trade-related aspects of intellectual property rights, including trade in counterfeit goods
>
> In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.
>
> Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.
>
> These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

Id.

78. A. O. Adede, *The Political Economy of the TRIPS Agreement: Origins and History of Negotiations* 7-8 (2001), *at* http://www.ictsd.org/dlogue/2001-07-30/Adede.pdf (last visited Jan. 3, 2006).

79. *Id.* at 7.

countries because failure to provide enhanced IPRs impedes trade among nations, and having enhanced IPRs would foster technology and investment flows to developing countries.[80] "The negotiation on TRIPS was presented by developed countries as a necessary condition to promote innovation and to stimulate technology and capital flows to developing countries. The assumption was that people from developed and developing countries will benefit alike from IPRs."[81] They cited the example of the United States as proof of why IPRs would help the developing countries.

¶ 24 The developed countries' second argument was that the developing countries would be able to gain advantages in other areas of international trade, such as textiles and clothing, agriculture, and tropical products, in return for their concession on the issue of IPRs.[82] The developed countries billed the Uruguay Round "as presenting a unique opportunity for developing countries for achieving tangible gains at the negotiations."[83]

¶ 25 While the developed countries' economic arguments did have some sway with the developing countries,[84] Professor Gana notes that the developing countries had "a deep distrust of policies and programs initiated at the behest of Western nations, even if they purport to enhance global welfare."[85] As a result, the developed countries' third argument was probably more persuasive: continue to have low IPR standards, and we will push for unilateral trade sanctions against you; raise your IPRs, and we will leave you alone. To show that they were serious, the United States began imposing Section 301 sanctions[86] on countries with minimal IPR standards. In hearings before the Senate Subcommittee on Patents, Copyrights, and Trademarks, Senator Leahy applauded the U.S. Trade Representative, Carla Hill, for applying Section 301 against countries who did not have strong IPR regimes.[87] "In designating India, China, and Thailand as Priority Countries and naming the EC, Australia, and Brazil to the [Section 301] Priority Watch List, you have sent just the right message: that entry into the U.S. market is not a one-way street; that reciprocity has to guide our trading relations; that countries which raise barriers to American goods and services cannot expect a free ride into our own market."[88] In 1988, the U.S. Congress passed "Special 301,"[89] and began imposing additional trade

80. CARLOS MARÍA CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO, AND DEVELOPING COUNTRIES : THE TRIPS AGREEMENT AND POLICY OPTIONS 23 (2000).

81. *Id.*

82. Adede, *supra* note 78, at 9.

83. *Id.*

84. Gana, *supra* note 31, at 736.

85. Gana, *supra* note 31, at 745.

86. 19 U.S.C. § 2411 *et seq*.

> Section 301of the Trade Act of 1974 . . . is the principal statutory authority under which the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny U.S. rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict U.S. commerce.

Jean Heilman Grier, *Section 301 of the 1974 Trade Act*, Office of the Chief Counsel for International Commerce,

U. S. Department of Commerce (2005), http://www.osec.doc.gov/ogc/occic/301.html (last visited Jan. 2, 2006).

87. Leahy Statement, *supra* note 10, at 7.

88. *Id*.

89. Leahy Statement, *supra* note 10, at 7.

sanctions against developing countries. The United States coupled this unilateral pressure with statements that they would agree to a multilateral dispute resolution process, which would theoretically reduce trade tensions and would avoid the use of unilateral retaliation.[90]

¶ 26 Again, the developing countries were forced to retreat. They agreed to raise their standards for IPR, but were vocal during the negotiations that they were concerned about the effects that TRIPS provisions may have on technology transfer.[91] They were particularly concerned about provisions regarding patentable subject matter, the working of patents, and compulsory licenses.[92] "The underlying concern in all of these areas is a determined effort on the part of developing countries that access to technology be a viable prospect for domestic business."[93]

¶ 27 When the Uruguay Round finished in 1993, the parties had agreed to the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in

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> Section 301 is the statutory means by which the U.S. asserts its international trade rights, including its rights under World Trade Organization (WTO) agreements. In particular, under the 'Special 301' provisions of the Trade Act of 1974, the [U.S. Trade Representative] identifies trading partners that deny adequate and effective protection of intellectual property or deny fair and equitable market access to U.S. artists and industries that rely upon intellectual property protection.

Tech Law Journal, *USTR Releases 2005 Special 301 Report*, April 29, 2005, *at* http://www.techlawjournal.com/topstories/2005/20050429.asp. Because "Special 301" is a Section 301 procedure, the U.S. Trade Representative may therefore impose trade sanctions on countries for their "failures" to provide the level of IPRs desired by the United States.

90. Leahy Statement, *supra* note 10, at 7.

91. For example, Mr. Hien, the representative from Burkina Faso, "expressed the wish to harmonize the laws that protect inventions, but also to harmonize interests, however small they might be, to enable the developing countries to look forward to a degree of technological progress." WIPO Summary Minutes, *supra* note 72, at 190. Similarly,

> Mr. Mtetwa [representative of Zimbabwe] stated that his Delegation had certain reservations concerning the draft Treaty, similar to those already expressed by some of the developing countries . . . . He expressed the view that Contracting Parties to the Treaty could realize substantial benefits from its provisions only on attainment of a certain level of scientific and technical development.

Id. at 210.

> [Mr. Mbuyu, representative of] Zaire, whilst supporting the success of the Conference, was asking that such harmonization should enable the developing countries to exploit the protected technologies. If such were not the case, the protection of inventions without the possibility of working them could, in the end, be felt as a brake. It was for that reason that the Delegation of Zaire invited the developed countries to assist them in emerging from underdevelopment.

Id. at 203.

> [Mr. Jilani, the representative from Tunisia] stated that harmonization was an important and useful process, provided that it took into account the differing levels of technological development of all countries and achieved, on that basis, a just balance with respect to the main elements of the proposed Treaty. In particular, the length of the patent term should be reasonable and the State should have the right to exempt certain technical fields from protection, as well as strike a balance between the rights and the obligations of the inventor.

Id. at 205.

92. Gana, *supra* note 31, at 745.

93. *Id.*

Counterfeit Goods (TRIPS).[94] It was not terribly responsive to the developing countries' needs.

B. The Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS) Agreement

¶ 28 As a preliminary matter, the developed countries managed to incorporate several provisions of the Paris Convention into TRIPS, so TRIPS members that were not parties to the Paris Convention prior to the TRIPS agreement are now required to submit to at least some of its provisions.[95] While the Paris Convention did not establish many standards contrary to developing countries' perceptions of IPRs, several other standards introduced by TRIPS had a significant and detrimental impact. For example, TRIPS uses the developed countries' definition of patent-eligible subject matter: all members must make patents available for "any inventions, whether products or processes, in all fields of technology."[96] This requirement follows the United States' theory that "anything under the sun" should be patentable.[97] However, this contradicts many of the developing countries' systems, which were set up to allow developing countries to benefit from the technology transfer that occurs when certain subject matters are not patentable. As noted *supra*, India had excluded pharmaceuticals from patentability, and has only recently altered its domestic system so that it can comply with the TRIPS requirement.[98] Again in India, a 1988 report showed that their domestic economy and welfare was better when biotechnological products and plant varieties were excluded from patent eligibility.[99] TRIPS does allow for some exceptions to the rule, permitting members to exclude inventions from patentability when it is necessary to prevent their commercial exploitation in order to "protect *ordre public* or morality,"[100] and to exclude diagnostic, therapeutic and surgical methods, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals from patentability.[101] These provisions do make a necessary concession to developing countries, but this concession is small in light of the benefits received by the developed countries.

¶ 29 TRIPS creates patent rights for the patentee along the lines of U.S. patent laws, conferring a negative right on the patentee to prevent third parties from "making, using, offering for sale, selling, or importing" the patented product, or the product resulting from a patented process.[102] TRIPS also established that the term of a patent is set to

94. TRIPS, *supra* note 20.
95. *Id.* art. 2.
96. *Id.* art. 27(1).
97. *Id.* art. 27; *see also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (finding live, human-made micro-organism to be patentable subject matter).
98. James, *supra* note 7; International Centre for Trade and Sustainable Development, *Indian TRIPS-Compliance Legislation Under Fire* (2005), *at* http://www.ictsd.org/weekly/05-01-19/story2.htm.
99. Gana, *supra* note 31, at 746.
100. TRIPS, *supra* note 20, art. 27(2).
101. *Id.* art. 27(3).
102. *Id.* art. 28(1); *see also* 35 U.S.C. § 271(a) (2003).

twenty years from the filing date.[103] These provisions compound the negative effects of the subject matter provisions, because they effectively prevent any widespread technology transfer to developing countries.[104] Developed countries are instructed to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members,"[105] but there are no sanctions for developed countries for failing to do so, nor are there any specific instructions on how they should promote technology transfer. It is merely aspirational language, failing to provide developing countries with an effective tool against the developed nations.

¶ 30 While members of TRIPS may adopt measures necessary to "protect public health and nutrition,"[106] "promote the public interest in sectors of vital importance to their socio-economic and technological development,"[107] and "prevent the abuse of intellectual property rights . . . or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology,"[108] these permissions are generally subject to the proviso that such measures are consistent with the remainder of the TRIPS provisions.[109] Additionally, while countries may implement compulsory licensing programs, this provision is again couched with a multiplicity of limitations.[110] Developing countries, thus far, have been reluctant to exercise these rights because of a lack of clarity as to how they should be applied, and fear of retaliation from the developed countries through use of trade sanctions.[111]

¶ 31 Finally, TRIPS sets forth specific timing requirements for members to come into compliance. Parties to TRIPS were required to apply its provisions within one year after its entry into force on January 1, 1995.[112] Developing countries were given an extra four years to come into compliance, and an additional five years beyond that for subject matter not previously protectable in the territory.[113] Least-developed countries were given ten years from the date of entry into force to comply with the provisions.[114] Countries that fail to comply with TRIPS provisions may be dealt with under the multilateral dispute resolution mechanism provided by the WTO.[115] While the

103. *TRIPS*, *supra* note 20, art. 33.
104. *Id.* at 755.
105. *Id.* art. 66(2).
106. *Id.* art. 8(1).
107. *Id.*
108. *Id.* art. 8(2).
109. *Id.* art. 8(1).
110. *Id.* art. 31.
111. Parliamentary Office of Science and Technology, *Access to Medicines in the Developing World* 2 (2001), *at* http://www.parliament.uk/post/pn160.pdf (last visited Jan. 2, 2006); *see also infra* Part II.C (discussing bilateral free trade agreements with IPR provisions stronger than those in TRIPS, which were negotiated between the developed countries and a number of developing countries).
112. TRIPS, *supra* note 20, art. 65(1).
113. *Id.* art. 65(2), (4). This provision is the basis for India's deadline of January 1, 2005 to make pharmaceuticals patentable subject matter. As a developing country, India had an additional four years to comply with the TRIPS requirement, but received an extra five years because it had not previously made pharmaceuticals patent-eligible.
114. *Id.* art. 66(1).
115. *Id.* art. 64(1).

multilateral dispute resolution mechanism showed some promise for developing countries, because it created a rule-based approach for the resolution of trade disputes, it too has not proven to be a helpful tool – both the United States and the European Union have disregarded WTO reports, which in turn, reflects poorly on the entire system.[116]

¶ 32 The developing countries did receive some trade concessions in textiles and agriculture. The Uruguay Round Agreement on Agriculture phased out many tariffs on agricultural goods and services, and put the phase-out on a tiered schedule for developing and least-developed countries.[117] The Agreement on Textiles and Clothing also provided special treatment to least-developed countries, and phased out over a ten-year period the bilateral quotas negotiated under a previous agreement, the Multifibre Arrangement, into a standardized GATT quota system.[118] Additionally, the Uruguay Round lowered import duties on tropical goods, of which developed countries are the major exporters.[119] History has proven, however, that these concessions were unimportant compared to the substantial gains that the developed countries received from the TRIPS agreement:

> While it appears that the Uruguay Round achieved some sort of procedural balance in the negotiating process, close examination of the TRIPs Agreement reveals an overall disproportionate burden in the area of intellectual property protection in developing countries without any tangible development benefit. In other words, developing countries may have gotten some "benefits" in the agreements over textiles and agriculture, but the concerns over the impact of an international intellectual property regime on development objectives remain unchanged from what existed in the pre-TRIPs Agreement era, and their ability to avoid those principles of protection which undermine development goals has been severely restricted by the TRIPs Agreement.[120]

¶ 33 Overall, TRIPS makes insufficient concessions for welfare effects – it does not recognize that developing countries below a certain threshold of innovation cannot be expected to profit from IPRs.[121] Often, developing countries do not have enough money to develop their own technology. This is compounded by the fact that innovative companies in the developed countries are more likely to sell the products directly to developing countries, rather than transfer the technology.[122] And since most foreign direct investment is in sales and distribution, much of the developed countries' arguments seem to be irrelevant, because the strength of IPRs does not greatly impact these

116. Gana, *supra* note 31, at 773.

117. WTO, *A Summary of the Final Act of the Uruguay Round: Agreement on Agriculture*, *at* http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#aAgreement (last visited Jan. 3, 2006).

118. WTO, *A Summary of the Final Act of the Uruguay Round: Agreement on Textiles and Clothing*, *at* http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#cAgreement (last visited Jan. 3, 2006); Gana, *supra* note 31, at 739.

119. World Trade Organization, *Understanding the WTO: Basics – The Uruguay Round*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 3, 2006).

120. Gana, *supra* note 31, at 740 (citations omitted).

121. CORREA, *supra* note 80, at 27.

122. *Id.*

activities.[123]

C. Bilateral Free Trade Agreements

¶ 34 The United States, Japan, and the European Union have come to view the TRIPS agreement as minimum standards for global IP protections. Notwithstanding their agreement during the Uruguay Round to refrain from unilateral pressure to adopt additional IPR measures, all three have entered into a number of bilateral trade agreements that incorporate more extensive IPR provisions (commonly referred to as "TRIPS+" provisions).[124] Of the three, the United States has been the most successful at negotiating free trade agreements (FTAs) that include TRIPS+ provisions. Speaking to the National Press Club in 2002, the U.S. Trade Representative, Robert Zoellick, stated that the United States' idea is to "create a web of mutually reinforcing trade agreements in which success in one can be translated into progress elsewhere. Working on multiple fronts enables [the United States] to create a competition in liberalization, with the United States as a nucleus for the network."[125] Two years later, in his testimony before the U.S. Congress, he stated that "Added together, the United States is on track to gain the benefits of free trade with more than two-thirds of the Western Hemisphere through state-of-the-art, comprehensive sub-regional and bilateral FTAs."[126]

¶ 35 FTAs with IPR provisions have been concluded with Israel, Jordan, Australia, Morocco, Singapore, Bahrain, Laos, and Chile.[127] The U.S. – Central America Free Trade Agreement (CAFTA), between the United States, El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica, and the Dominican Republic, was signed in 2004.[128] As of 2004, the U.S intended to engage in or had begun FTA negotiations with Panama, Colombia, Peru, Ecuador, Bolivia, Thailand, the Phillipines, Indonesia, Saudi Arabia, Kuweit, Yemen, Qatar, the United Arab Emirates, Botswana, Lesotho, Namibia, South Africa, and Swaziland and Brunei.[129] The U.S. also indicated that it had begun a "blueprint" for a Middle East Free Trade Area, and "The Enterprise for ASEAN Initiative."[130] Many commentators believe that these FTAs present "more of a risk than

123. *Id.* at 29.

124. Oliva, *supra* note 53, at 47.

125. Robert B. Zoellick, Remarks at the National Press Club: Globalization, Trade and Economic Security (Oct. 1, 2002), *transcript available at* http://www.ustr.gov/assets/Document_Library/USTR_Speeches/2002/asset_upload_file910_4237.pdf (last visited Nov. 13, 2005).

126. *International Trade Agenda: Testimony Before the Senate Committee on Finance* (2004) (statement of Robert B. Zoellick, U.S. Trade Representative) (transcript available at 2004 WL 474286) [hereinafter Zoellick Statement].

127. *See* Office of the U.S. Trade Representative, *Bilateral Trade Agreements*, *at* http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Jan. 2, 2006).

128. Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, *at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. *See also* Zoellick Statement, *supra* note 125; Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALB. L.J. SCI. & TECH. 433, 449 (2005).

129. Zoellick Statement, *supra* note 126, 7-9.

130. *Id.* at 7.

an opportunity for intellectual property to act as a tool for sustainable development,"[131] and that "developing countries accept such negotiations as an unavoidable price to pay for increased market access or investment agreements with developed countries."[132]

IV. AIDS

¶ 36 The IPR and trade negotiations following the Uruguay Round have been heavily influenced by the rapid growth of AIDS. The AIDS epidemic is of global proportions; more than 25 million people in Africa have the HIV virus or full-blown AIDS.[133] The UN estimates that eventually one-third of all Africans will be infected with the virus.[134] In response to the AIDS epidemic, in 1997, South Africa availed itself of the public health exception to TRIPS[135] and passed the Medicines and Related Substances Control (Amendment) Act, which allowed for the importation of generic drugs even when a company already had a patent on the drug.[136] While the market price for the required annual dose of anti-retrovirals is $10,000 to $15,000, the cost of generic drugs for a corresponding dose – often produced in developing countries, such as India – can be as low as $350.[137] The South African law required registration of the generic drug with a national authority, and prescribed procedures for use of the generic drugs.[138]

¶ 37 The developing countries retaliated quickly against South Africa. First, the U.S. Congress passed a law in 1998 eliminating all funding to South Africa until it repealed the law.[139] The following year, thirty-nine pharmaceutical companies brought suit in the South African court system, requesting the court to find the generic drug law unconstitutional.[140] In 2000, Glaxo-Smith-Kline (previously Glaxo Wellcome) sent cease and desist letters to the generic drug manufacturers,[141] and the U.S. announced in that it would make $500 million in loans available to African countries each year for buying AIDS medicines, provided that the money was used only to purchase drugs from American manufacturers.[142] In 2001, the Pharmaceutical Research and Manufacturers of America (PhRMA) petitioned the U.S. Trade Representative to list South Africa on the Section 301 Priority Watch List.[143] Finally, in late 2001, in response to heavy public pressure from groups such as Doctors Without Borders – and India's offer to provide the generic drugs to South Africa – U.S. President Bush declared that the U.S. would not

131. Oliva, *supra* note 53, at 2.
132. *Id.* at 3.
133. DINWOODIE, *supra* note 19, at 374.
134. *Id.*
135. TRIPS, *supra* note 20, art. 8, § 1.
136. Medicines and Related Substances Control Amendment Act, Act No. 90 of 1997, s. 15C, 22F, *at* http://www.doh.gov.za/docs/legislation/acts/1997/act90.pdf (last visited Jan. 2, 2006).
137. Kavaljit Singh, *Patents vs. patients: AIDS, TNCs and drug price wars*, THE THIRD WORLD NETWORK, *at* http://www.twnside.org.sg/title/twr131c.htm (last visited Jan. 2, 2006).
138. *Id.*
139. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681, 2681-155 (1998).
140. DINWOODIE, *supra* note 19, at 373.
141. *Id.*
142. Singh, *supra* note 137.
143. DINWOODIE, *supra* note 19, at 373.

seek Section 301 sanctions against South Africa,[144] and the drug companies withdrew their suit pending in the South African courts.[145]

¶ 38 In 2001, the members of the GATT convened in Doha to discuss a number of different issues pertaining to international trade. One of the most important aspects of the Doha Ministerial Declaration ("Doha Declaration"),[146] produced as a result of the discussions, is its statement of commitment to public health.[147] The ministers stated "We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health . . . at the levels it considers appropriate."[148] The ministers continued, "[w]e stress the importance we attach to implementation and interpretation of [TRIPS] in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration."[149]

¶ 39 The "separate declaration" is known as the "Declaration on the TRIPS Agreement and Public Health ,"[150] and it states that TRIPS "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[151] It recognizes that AIDS, and other communicable diseases, can represent a national emergency or circumstance of extreme urgency, allowing member states to invoke TRIPS's compulsory licensing provisions.[152] It also recognizes that some developing countries may not be able to produce compulsorily licensed technology, and instructs developed countries to renew their commitment to transfer technology to developing countries.[153]

¶ 40 Though the Doha Declaration embodies a spirit of generosity and concern for those countries afflicted with high numbers of AIDS-infected individuals, it has not provided these countries significant benefits because it does not force the developed countries to actually transfer the requisite technology to these countries. Additionally, the bilateral FTAs being adopted between developed and developing countries have eliminated or reduced the benefits that are provided in the Doha Declaration, such as the compulsory licensing mechanisms.[154] In the CAFTA, as well as the U.S.-Bahrain FTA and the U.S.-Morocco FTA, the United States was forced to negotiate "understandings" and "side letters" to resolve the problem – but "[w]hile these understandings appear

144. *Id.* at 373-74.
145. Singh, *supra* note 137.
146. WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter Doha Declaration].
147. TRIPS, *supra* note 20, art. 8.1.
148. Doha Declaration, ¶ 6.
149. Doha Declaration, ¶ 17.
150. WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm [hereinafter Doha Public Health Declaration].
151. *Id.* ¶ 4.
152. *Id.* ¶ 5(c).
153. *Id.* ¶¶ 6-7.
154. Abbott, *supra* note 28, at 350.

intended to provide assurance that the FTAs would not prevent effective use of the Decision and the Doha Declaration, they are drafted in a substantially more restrictive way than those texts. Moreover, the USTR has questioned whether the understandings will have legal effect."[155]

¶ 41 The developed countries are increasingly active in programs to contribute money and AIDS medicines to developing countries. The Global Fund, which is a partnership between governments, civil society, the private sector and affected communities, has committed $4.7 billion since 2001 to the fight against AIDS, tuberculosis, and malaria.[156] Under the Bush Administration, the United States has dedicated $15 billion over five years "to support treatment for 2 million people, support prevention for 7 million, and support care for 10 million."[157] It reports that two years into the program, approximately 400,000 sub-Saharan Africans have received treatment. These efforts simply show, however, that the United States is willing to address the AIDS epidemic but only on its own terms, and in a manner that preserves its interests in IPRs.

V. THE DEVELOPING COUNTRIES' RESPONSE

¶ 42 In the last few years, the developing countries have made substantial progress in their fight against the developed countries. In 2003, the GATT ministers met in Cancun to measure their progress after the Doha Declaration.[158] The developed countries again adopted hardball tactics: for example, the U.S. Trade Representative testified to Congress that "[a]t the Cancun WTO meeting in September, . . . some wanted to pocket our offers on agriculture, goods and services without opening their own markets, a position we will not accept."[159] Ultimately, the ministers could not come to agreement on any of the issues, and the conference ended without a consensus.[160]

¶ 43 Many observers have noted, however, that part of the reason the ministers could not achieve a consensus at Cancun was because the developing countries banded together at Cancun to exchange information and to adhere to a common position.[161] India, China, Brazil, Argentina, and South Africa formed a core group, and several smaller countries banded with them against the developed countries.[162] They resisted a number of "carrots" from developed countries, such as the United States, that would have given

155. *Id.* at 352.

156. The Global Fund, How the Fund Works, *at* http://www.theglobalfund.org/en/about/how/ (last visited Jan. 3, 2006).

157. Office of National AIDS Policy, *at* http://www.whitehouse.gov/infocus/hivaids/ (last visited Jan. 3, 2006).

158. WTO, *The Fifth WTO Ministerial Conference*, *at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm (last visited Jan. 3, 2006).

159. Zoellick Statement, *supra* note 126.

160. WTO, *The Fifth WTO Ministerial Conference*, *at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm (last visited Jan. 3, 2006).

161. Amrita Narlikar and Diana Tussie, *The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO* 947 (2004), *at* http://www.lse.ac.uk/collections/internationalTradePolicyUnit/Events/May2005/G-20inworldeconomy-Amrita.pdf.

162. *Id.* at 960.

individual countries some trade benefits but ultimately split the group apart.[163] Rather than simply forming a "blocking coalition" against the developed countries, the developing countries carefully researched and prepared their own positions, with a specific agenda.[164] Their coalition development strategies were the result of the learning curve they had experienced over the last twenty years,[165] during the Uruguay Round, the TRIPS agreement, and the advent of AIDS.

¶ 44 Since Cancun, the developed countries have attempted to divide the trade coalitions built by the developing countries by using a variety of "divide and rule" tactics.[166] In general, however, these coalitions tend to be holding strong. In the most recent round of ministerial conferences, in Hong Kong, the developing countries have managed to stick together and resist new proposals from the developed countries.[167] Similarly, the developing countries have banded together in WIPO to control the progress of the SPLT. In early 2005, fourteen of the developing countries issued a statement "implicitly criticizing" WIPO, by reminding it that "its General Assembly last October had mandated the WIPO Director General to hold informal consultations only to fix the date of the meeting of the Standing Committee on Law of Patents (SCP)" – and not to discuss any of the substantive issues addressed in the SPLT.[168]

VI. CONCLUSION

¶ 45 The developed countries have been trying since the early 1980s to achieve substantive harmonization of patent laws around the world. Their recent failure to gain the necessary votes in WIPO to pass the SPLT can be attributed to three issues: the developed countries' failure to resolve the philosophical differences between their position and the developing countries' position on the role of IPRs; their lack of concessions to the developing countries during the Uruguay Round of the GATT, the TRIPS agreement, and subsequent round of bilateral FTAs; and their inadequate responses to the AIDS crisis. The developed countries' ability to obtain the SPLT is directly proportionate to the amount of compromise they are willing to make with the developing countries. The developed countries will need to accept the growing power of the developing countries and properly address their concerns in the next round of trade and IPR negotiations.

¶ 46 But in the end, it is unclear that the developed countries really need the SPLT they

163. *Id.* at 960-61
164. *Id.* at 961-62.
165. *Id.* at 957-60.
166. Kanaga Raja, *North Tactics to Split Developing-Country Alliances Exposed*, Third World Network (Jul. 26, 2004), *at* http://www.twnside.org.sg/title2/5623c.htm (last visited Jan. 3, 2006).
167. *See* Press Release, Oxfam Hong Kong, Rich Countries Backsliding on Promises, Developing Countries Standing Firm (Dec. 16, 2005), *at* http://www.oxfam.org.hk/public/contents/press?ha=&wc=0&hb=&hc=&revision%5fid=26107&item%5fid=26106; Rangarirai Machemedze & Helene Bank, *Developing Countries Agree to Avoid Signing "Suicide Round" in Hong Kong*, Southern and Eastern African Trade Information and Negotiations Institute (Dec. 13, 2005), *at* http://www.seatini.org/news/noToSuicideRoundInHongKong.html.
168. Martin Khor, *Fourteen Developing Countries Criticize WIPO Patent Treaty Talks*, Third World Network (Mar. 8, 2005), *at* http://www.twnside.org.sg/title2/twninfo186.htm.

are trying so hard to accomplish. "[T]here is growing evidence suggesting that – at least in the United States – patent rights over research opportunities have begun to hinder progress by chilling innovation and impeding the production of new knowledge."[169] Ultimately, all countries will need to find the appropriate balance of IPRs for their particular economies. Whether the developed countries are able to attain the SPLT or not, there will by necessity remain at least some differences in IPR policy around the world.

169. Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431, 433 (2004).