

***TRIPS and Domestic Control:
Implications for Developing Countries***

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ABSTRACT

This paper examines the impact of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) on domestic control. The paper explains why intellectual property became part of the global trade agenda. The author considers arguments both for and against stronger global protection for intellectual property rights. Through analysis of the World Trade Organization (WTO) cases on the TRIPS Agreement, the author argues that the TRIPS Agreement has effectively removed from WTO Member states control over their intellectual property regimes. The author focuses on the negative impact that a rigid application of the TRIPS Agreement is likely to have on developing countries.

Cet article examine l'impact de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (Accord de l'ADPIC) sur le contrôle domestique des États membres de l' OMC. L'article examine les raisons pour lesquelles la protection des propriétés intellectuelles est devenue une partie intégrante du commerce international. L'auteur discute les argumentations pour et contre la protection accrue des propriétés intellectuelles sur le plan mondial. Par une analyse des différends concernant l'Accord de l'ADPIC, l' auteur conclue que l' Accord de l'ADPIC a eu l' effet de démunir les États membres de l' OMC de la capacité à contrôler leurs régimes de protection des propriétés intellectuelles. Dans cette analyse, l'auteur met l'accent sur les effets négatifs qu'une application rigide de l'Accord de l'ADPIC pourrait avoir sur les pays en voie de développement.

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INTRODUCTION

For several decades governments and international corporations focused on policies regarding trade and investment in physical goods. It is now a widely held view that technology and know-how are essential to economic growth and development. As the current rate of technological change made businesses more aware of the need to ensure returns on their investments in research and development by protecting their rights in the products they create,¹ the protection of new technologies and other intellectual goods became part of the international trade agenda. The growing global demand for intellectual property protection is evidenced by the doubling of the number of applications and grants for various forms of intellectual property between 1981 and 1995.²

The Uruguay Round negotiations on the *General Agreement on Tariffs and Trade* [hereinafter "GATT"]³ began in September 1986 in Punta del Este, Uruguay and concluded on April 15, 1994 in Marrakesh, Morocco. These negotiations resulted in the creation of the World Trade Organization [hereinafter "WTO"] and the first international agreement to establish legally enforceable minimum standards for the protection of intellectual property. The *Agreement on the Trade Related Aspects of Intellectual Property Rights*⁴ [hereinafter "TRIPS" or "the TRIPS Agreement"], an annex to the *Agreement Establishing the World Trade Organization*⁵ [hereinafter "the WTO Agreement"] has been described as one of the most significant achievements of the Uruguay Round negotiations.⁶

¹ A. Posnick "Foreword" in F. W. Rushing & C.G. Brown eds., *Intellectual Property Rights in Science, Technology and Economic Performance* (Boulder: Westview Press, 1990) 1.

² C.A. Primo Braga, C. Fink, C. Paz Sepulveda, *Intellectual Property Rights and Economic Development* World Bank Discussion Paper No. 412, (Washington: International Bank for Reconstruction and Development/The World Bank, 2000) [hereinafter World Bank Paper No. 412] at 23. From 1981 to 1995, the number of trademarks granted globally more than doubled, the number of patents granted doubled, and the number of industrial designs and utility models also increased.

³ Can. T.S. 1947 No. 27.

⁴ *Agreement Establishing the World Trade Organization*, Annex 1 C, Marrakesh, 15 April 1994, 33 I.L.M. 81 [hereinafter TRIPS].

⁵ Marrakesh, 15 April 1994, 33 I.L.M. 13.

⁶ A. Moncayo von Hase, "The Application and Interpretation of the Agreements on Trade-Related Aspects of Intellectual Property Rights", in C. M. Correa & A. A. Yusuf eds., *Intellectual Property and International Trade: The TRIPS Agreement*, (London: Kluwer Law International, 1998) 93 at 93.

This paper will provide an analysis of the impact of the TRIPS Agreement on WTO Members. The author will focus on the ability of Member states to design domestic intellectual property regimes to suit their needs and their level of economic development. Absent the TRIPS Agreement, every state would have the independence to determine the extent to which it would protect intellectual property rights. However, the TRIPS Agreement has created broad protections for intellectual property rights, which are legally enforceable through the use of the WTO dispute settlement mechanism. Prior to TRIPS, industrialized nations differed on what they considered adequate levels of protection. They also differed on what were the most beneficial regimes for their economies, and more recently on how best to implement the TRIPS Agreement. Such differences are exemplified by the fact that Canada, an industrialized country, recently found itself in the position of defending its intellectual property laws before the WTO in cases brought by the United States and the European Communities.

Although the questions relating to the level and extent of intellectual property protection are not clearly divided in terms of North (the technologically advanced or industrialized world) and South (the developing world), the developing world has been more resistant to the concept of strong international intellectual property rights than have the industrialized countries.⁷ Overall, the less developed countries have less stringent protection for intellectual property than do the industrialized countries. This is partly because the benefits of strong intellectual property protection only increase as a country develops domestic industries.⁸ This paper will, while addressing these questions more generally, focus on issues of particular relevance to the developing world.

It may be too late to consider whether TRIPS is appropriate for all nations, given that most countries in the world have already signed the Agreement and it will be difficult to turn back. The challenge is to examine the likely impact of the implementation of TRIPS on developing countries, and to consider whether there is a valid argument for the differential application of

⁷ C.A. Primo Braga, "The North-South Debate on Intellectual Property Rights", in M. G. Smith ed., *Global Rivalry and Intellectual Property: Developing Canadian Strategies* (Toronto: Institute for Research on Public Policy, 1991) 173 at 173.

⁸ *Ibid.* at 177.

TRIPS to developing nations. The fundamental question this writer seeks to address is whether it is necessary for the entire world to operate from a single paradigm. After all, the application of TRIPS is a question of the application of *international* law. Arguably, no one state or small group of states should determine the international standard, as has largely been the case with TRIPS. Though consistency and harmonization may be desirable, exceptions have already been made for developing countries to take into account their different circumstances. This is neither unusual, nor irrational - in fact it is perfectly logical to treat various countries differently, depending on their stage of economic, political and social development. Since the WTO Member states have achieved various levels of economic development, with huge gaps between the most developed and the least developed countries, the impact of TRIPS on these countries will be different. This paper seeks to provide a legal analysis of TRIPS, the WTO cases on TRIPS, and the potential impact of this significant intellectual property agreement on domestic control.

In the first chapter of the paper, the underlying theories for the protection of intellectual property will be discussed. The second chapter will explain the international context that led to the union between international trade and intellectual property. In the third chapter of this paper, the author will provide an analysis of the decided WTO cases on the TRIPS Agreement. Finally, in the fourth chapter, the author will consider the advantages and disadvantages of stronger intellectual property protection for developing countries. This author argues that when interpreting TRIPS, particularly as it applies to developing countries, the WTO should not interpret the TRIPS obligations broadly while according the exceptions in the TRIPS Agreement a strict and narrow interpretation.

In this paper, the author will seek to demonstrate that whether or not strong protection for intellectual property rights is beneficial for a country depends on the country's level of economic development. The TRIPS Agreement is the result of efforts to protect the interests of industrialized countries, primarily the United States. Although it has been suggested that it is in the interest of developing countries to protect intellectual property rights, there is little or no empirical evidence to support this proposition. To the contrary, a historical analysis reveals that during the early stages of their development, many states utilized weak intellectual property laws

to their advantage. In order to develop a technological base, it is essential for developing countries to obtain new technologies at a low cost. Thus, an inflexible interpretation of the TRIPS Agreement is likely to hinder the technological and economic advancement of these countries.

This author will argue that the economic and technological development of the less developed countries is advantageous for all states. Presently, most citizens of developing countries are unable to afford expensive products that are protected by intellectual property rights. However, as the average income rises in developing countries, industrialized countries will have additional markets to which they can export their intellectual goods. In addition, the paper will point out problems related to the monitoring and enforcement of TRIPS, the dangers of over-protecting intellectual property, and the controversy surrounding the use of genetic resources and traditional knowledge. Moreover, this writer will argue that in order to ensure the legitimacy of TRIPS, it is critical for important societal interests to be taken into consideration when interpreting and applying the Agreement. The recent rise in anti-globalization sentiment is evident from the large protests in various cities since 1999, including Seattle, Vancouver and Genoa. A rigid application of TRIPS could be seen by some as undermining democracy. This could have the detrimental effect of undermining the TRIPS Agreement and perhaps even the WTO itself.

CHAPTER I

THE THEORETICAL FRAMEWORK

Traditional Justifications for the Protection of Intellectual Property

The reference to property as a bundle of rights reflects the fundamental concept that property is a right rather than a thing. That is, property is a bundle of rights that can be enforced against others.⁹ Though general theories of property may or may not be applicable to all forms of property, intellectual property rights, like other forms of property rights, create relations between individuals.¹⁰ The distinctive characteristic of intellectual property rights is that they create rights in the abstract.¹¹

The term "intellectual property" refers to a wide range of rights which do not necessarily have much in common except that they all create property rights in the products of intellectual effort. Intellectual and industrial property rights [hereinafter "intellectual property" or "IPRs"] encompass patents, utility models, industrial designs, trademarks, geographical indications, copyright and neighboring rights and trade secrets. Intellectual property rights in the context of the TRIPS Agreement include protection for copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit topographies and undisclosed information or trade secrets.¹² However, this paper will focus primarily on the major areas of intellectual property protection: patents, copyright and trademark.¹³

⁹ B. Ziff, *Principles of Property Law* 2nd ed., (Scarborough: Carswell, 1996) at 2.

¹⁰ P. Drahos, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth Publishing Co., 1996) at 1.

¹¹ *Ibid.*

¹² TRIPS, *supra* note 4, Article 1.2.

¹³ *Patent rights* give the owner of the patent the exclusive right to make commercial use of inventions. An invention must meet a novelty requirement and must have potential for commercial exploitation in order to be patentable. *Utility models* or utility patents are closely related to patents but offer a lesser form of protection for new creations. There is also a novelty requirement that must be met, but the criteria are less stringent than the criteria for a patent. Utility models are generally used to protect incremental innovations and the term of protection is shorter than that for patents. *Trademarks* protect words, symbols, signs or sounds that identify a product as originating from a particular producer. Trademark protection can continue as long as the trademark is in use. Similar to trademarks, *geographical indications* serve to identify the geographical regions from which an item originates. *Copyright* protects the musical, artistic or literary creations of an author. This protection arises immediately upon the creation of a work and usually lasts for a minimum term of the life of the author plus 50 years; and *neighbouring rights* are closely related to copyright but protect the interests of performers, broadcasting companies, and music producers.

When one considers the justification for private property, that is the theoretical justifications for the ownership of physical goods, it is apparent that the conception of Southern countries is historically different from Western conceptions of property. Even when Western countries had well developed regimes for protecting physical property, they had not yet developed strong legal regimes for the protection of intellectual property.¹⁴ Though international agreements for the protection of intellectual property date back to 1883, it is only recently that the protection of intellectual property and the harmonization of international standards have become a significant part of the international agenda. Arguably, many developing countries have not yet fully accepted the notion of protection for individual physical property, much less the concept of abstract private property rights.

There are various theories that support the existence of rights in intellectual creations. These philosophies in support of intellectual property rights range from moral justifications to economic ones. However, the notion that intellectual creations should be protected is not universally accepted. Thus, there is much debate over whether intellectual property rights are beneficial to society and the extent to which they should be protected or limited.¹⁵

Natural Law Theories

Private property rights, of which intellectual property rights are one form, are sometimes justified as being related to the moral development of human beings.¹⁶ According to Hegelian theory, for example, property is essential to the development of human will and the transformation of human beings into moral and political persons.¹⁷

"Right to the Fruit of One's Labour"

Justification of private property based on Locke's theory holds that each person is entitled to the fruits of his or her labour. According to Locke, in the state of nature, all property is held in

¹⁴ A private property regime, in the form of tenurial landholding systems existed in England and other parts of Europe prior to the Norman Conquest in 1066. See B. Ziff, *supra* note 9 at 50. Though the European concept of rewarding inventors can be traced back to 400 B.C (World Bank Paper No. 412, *supra* note 2 at 9), the first modern British copyright law, for example, was enacted in 1710 (Bettig, *infra* note 18 at 23).

¹⁵ World Bank Discussion Paper No. 412, *supra* note 2 at 9.

¹⁶ Ziff, *supra* note 9 at 24.

common, but since everyone owns their own person each individual also has a right to his or her labour. Once an individual uses his effort to create something from the common, he mixes his labour with the material world which then entitles him to claim rights over that particular material.¹⁸ The limitation is that one cannot claim more than one can make use of, nor should one take so much that there will be little or nothing left for others.¹⁹ A variation on this concept is that it is fair to reward the labourer for his hard work, and to award him his "just desserts".²⁰ However, it is debatable whether Locke's labour theory extends to intellectual creations and intangible goods in the same way it applied to tangible goods.²¹

Instrumentalist Theories

Penrose argued that although attempts were made to justify the patent system by using natural or moral rights theories, the origins of the patent system were clearly economic.²² Instrumentalist theories justify private property as promoting economic efficiency.²³ Likewise, the protection of intellectual property is justified as stimulating economic growth and development. The theory is that if owners of intellectual property cannot exclude others from making use of their creations, they will suffer a loss of revenues and therefore be less able and less willing to produce new intellectual products.²⁴ Protecting intellectual property rights provides an incentive for further innovation and a method for ensuring that innovators are able to recover their costs. Patents and copyrights are also intended to function as a means for disseminating information to the public and to increase the public pool of knowledge and the sharing of ideas.²⁵

Discussions of patent law, for example, frequently turn to economic analysis. Patent protection is considered essential for certain industries. For instance, in the pharmaceutical industry patent

¹⁷ *Ibid* at 24; See *Hegel's Philosophy of Right*, Translated with Notes by T.M. Knox, (London: Clarendon Press, 1952).

¹⁸ J. Locke, *Two Treatises of Government*, A Critical Edition with an Introduction and Apparatus Criticus 2nd ed. by Peter Laslett (London: Cambridge University Press, 1967), Second Treatise at paras. 27-30; R.V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996) at 19.

¹⁹ J. Locke, *Ibid* at para. 31.

²⁰ Ziff, *supra* note 9 at 31.

²¹ Bettig, *supra* note 18 at 19.

²² E. Penrose, *The Economics of the International Patent System*, (Baltimore: Johns Hopkins Press, 1951) at 233.

²³ Ziff, *supra* note 9 at 10.

²⁴ Bettig, *supra* note 18 at 80.

²⁵ D. Vaver, *Intellectual Property Law* (Concord: Irwin Law, 1997) at 7.

protection is seen as necessary in order to allow the company that created the product to recoup its investment in research and development [hereinafter "R&D"]. Though a pharmaceutical company may spend millions of dollars in R&D to create a product and obtain approval to sell it on the open market, once the product has been invented the pharmaceutical compound can be easily reproduced by other companies in the absence of adequate intellectual property protection.²⁶ Likewise, patent protection is important for the chemical and agricultural research industries. However, many other industries do not find patent protection as important as entering the market before one's competitors.²⁷

Limitations/Shortcomings of Intellectual Property Protection

Though intellectual property rights provide some form of guarantee for the investor who risks his capital in order to create or promote the intellectual property, it is not clear that copyright protection, for example, creates an incentive for the author of the work to actually create. Human creativity could be the natural result of human productivity, a desire to contribute to society or various cultural activities, for example.²⁸ The reality is that it is often not the author or the inventor to whom the intellectual property right belongs, but rather the firm for which the individual works or the company with which the creator has contracted that owns the right.²⁹ It has been suggested that many Western copyright laws, and particularly those of the United States, the United Kingdom and the Commonwealth were historically not concerned with the rights of the author. Rather, the real focus of such laws has been to reward the entrepreneur who invests time and money to exploit the work. This is evidenced, it is argued, by the significantly higher percentage of royalties that accrues to the entrepreneur (the publisher for example) as compared to the author of the work.³⁰

While patents require disclosure of the know-how, the protection of confidential information and trade secrets has been criticized as lacking any consideration of whether the protection of such

²⁶ World Bank Discussion Paper No. 412, *supra* note 2 at 28.

²⁷ R. Mazzoleni & R.N.Nelson, "The Benefits and Costs of Stronger Patent Protection: A contribution to the current debate." *Research Policy* (1998) 27: 273-84.

²⁸ Bettig, *supra* note 18 at 104.

²⁹ D. Vaver, *supra* note 25 at 11.

information is more beneficial to the public if disclosed.³¹ Moreover, it has been pointed out that though intellectual property is credited for encouraging innovation, there was much creative activity before such laws were established and enforced. Professor Vaver points out that the length of time between the 1624 *Statute of Monopolies* and the arrival of the industrial revolution in England more than a century later suggests a lack of cause and effect between intellectual property rights and inventiveness.³² Moreover, most intellectual property rights are for incremental advances as compared to the public knowledge on which these developments are based.³³

Though modern society operates from the premise that one has a right to private property, some caution that the moral justification of private property has always been problematic for philosophers.³⁴ While private property may seem natural, it is actually a social construct which can be criticized as much as it can be justified.³⁵ For example, it has been pointed out that there is no reason in nature or in natural law why any individual should have private property rights in a specific piece of land, particularly if God gave the earth to all persons to share in common.³⁶

Professor Drahos³⁷ cautions that while there are good justifications for private property rights, intellectual property rights run the risk of stimulating patterns of organization that threaten negative liberty. He characterizes IPRs as "liberty-intruding privileges of a special kind," which can promote "dangerous levels of private power" and argues that their scope should therefore be limited.³⁸ The existence of competition law, or anti-trust law as it is called in the United States, reflects a recognition that while limited monopolies in the form of intellectual property may be desirable, there must be limits to the scope of these rights. Private property reflects a competition for control over objects, whether abstract or otherwise, that people may need or want

³⁰ M.D. Pendleton, *Intellectual Property Law in the People's Republic of China* (Singapore: Butterworths, 1986) at 40

³¹ D. Vaver, *supra* note 25 at 7.

³² *Ibid* at 7-8.

³³ *Ibid* at 8.

³⁴ Ziff, *supra* note 9 at 1.

³⁵ *Ibid* at 9.

³⁶ P. Drahos, *supra* note 10 at 3.

³⁷ Professor of Law, Australian National University, Faculty of Law.

³⁸ Drahos, *supra* note 10 at 5.

and upon which they may depend for their survival. Once this is acknowledged, it becomes clear why state sanctioned IPRs must be carefully considered in light of other relevant interests.³⁹ These rights can have a detrimental effect if ownership becomes concentrated or when these rights make it difficult for others to make use of the goods for further innovation or other purposes. Intellectual property rights can encourage a tendency towards concentration. This is due to factors such as economies of scale and IP-based control of derivative products.⁴⁰

In addition, there are computer and Internet-related arguments against the protection of intellectual property. There are various organizations that advocate the unrestricted sharing of information on the Internet and the free distribution of software.⁴¹ Some makers of computer software, such as Linux, for example, promote sharing computer programs rather than protecting them with IPRs. As such, in the software industry one can not only purchase software but also make use of “freeware” and “shareware”. It is argued that free reproduction of a good can actually increase its popularity and its ultimate market value. For example, one writer suggests that there may be a positive connection between the extent to which software is pirated and its level of commercial success. When software is broadly pirated, it becomes the standard and benefits from increasing returns because people are more familiar with it than with other software.⁴² A quote from Thomas Jefferson, making the case against the protection of ideas and concluding that “inventions then cannot, in nature, be a subject of property” is cited as support for the case against intellectual property.⁴³ Rather, it is natural that ideas should be freely shared for the moral and mutually beneficial improvement of the human condition.⁴⁴

There are many different economic approaches which, with respect to the economic justifications of intellectual property, must ultimately result in a cost-benefit analysis of intellectual property

³⁹ *Ibid* at 4.

⁴⁰ Bettig, *supra* note 18 at 103. Bettig makes this analysis with respect to copyright but it is equally applicable to other form of intellectual property.

⁴¹ For example, the Electronic Frontier Foundation argues against the use of IPRs on the Internet. See www.eff.org

⁴² J. P. Barlow, "The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property is Wrong" at section III: online at <<http://www.eff.org/café/barlow.html>> (date accessed: 2 July 2001).

⁴³ Thomas Jefferson as cited by J.P. Barlow in *The Economy of Ideas, Ibid.*

⁴⁴ *Ibid.*

rights.⁴⁵ Deciding on the extent to which intellectual property rights should be protected requires careful consideration. There are social costs to the overprotection of intellectual property, such as deterring others from engaging in activities which would otherwise be desirable.⁴⁶ The social contract approach to patent law views patentees as not only obtaining a right but also as having an obligation to the public. Historically, patents were seen in a contractual light, as bargains between the state and the inventor. The inventor's limited monopoly is conditional upon certain factors, including the obligation to fully disclose the invention.⁴⁷

Cultural Factors: Communal Property

Today, the existence of communal property is not unknown in various parts of the world.⁴⁸ When there is a shared right to use without the ability to exclude others, this is referred to as common property. Some cultures have forms of communal or collective ownership where the community as a group shares a collective interest in the property.⁴⁹ While this may mean a right to exclude others from making use of the property, and therefore differ from the purest form of common property,⁵⁰ it may not have been historically conceived as excluding others. For example, in some instances a certain item of property may be available for universal use, that is you can use the boat to cross the river as long as you leave it for the next person, regardless of your status as a member or non-member of a particular community.⁵¹

Cultural Factors: The Chinese Example

It has been asserted that, in part because of the Chinese political culture, China did not develop a sustained indigenous regime for the protection of intellectual property.⁵² In addition, it has been suggested that the attempts to introduce Western intellectual property law into China have not

⁴⁵ Drahos, *supra* note 10 at 6-7.

⁴⁶ Vaver, *supra* note 25 at 11.

⁴⁷ *Ibid.* at 12.

⁴⁸ M. C. Howard, *Contemporary Cultural Anthropology* 5th ed. (New York: Harper Collins, 1996) at 109

⁴⁹ Ziff, *supra* note 9 at 7.

⁵⁰ *Ibid.*

⁵¹ Such practices are not uncommon in certain West African countries for example.

⁵² W. P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995) at 2.

been completely successful because of the failure to consider the relevance of Western models of intellectual property protection for China.⁵³

Historically, the Chinese made efforts to prevent the unauthorized reproduction of certain documents. For example, at different periods of time before the twentieth century, it was prohibited to reproduce items such as calendars, almanacs, astronomical charts, Chinese classics, and official histories without authorization. However, other works were not protected from unauthorized reproduction. Though the Chinese state was involved to some extent in overseeing matters of commerce and industry, it did not develop any formal centralized legal system for the protection of inventions nor for trademarks prior to the twentieth century. Nonetheless, efforts were made, through various mechanisms, to protect marks associated with particular wares, and the use of certain official or royal symbols was prohibited.⁵⁴

By the seventeenth and eighteenth century, the concept that authors and inventors had a proprietary right in their inventions had developed in Europe. There was no parallel development in China at that time.⁵⁵ It is argued that this was because of the dominant Confucian vision of the nature of civilization and the role played by a shared past. Knowledge of the past functioned as an instrument for moral development and as a method for measuring relationships, which made it crucial that all Chinese have broad access to such knowledge. Therefore, the role of the past was inconsistent with concept of the fruits of intellectual efforts as private property.⁵⁶ As well, Chinese civilization emphasized the community rather than the individual. The protection of individual property rights in intellectual creations was therefore not well suited to Chinese culture.⁵⁷ It was not uncommon for one to reproduce or imitate the works of highly regarded artists from the past as part of one's own artistic work.⁵⁸

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 15-16.

⁵⁵ G. Lara, "The Piracy of American Films in China: Why the U.S. Art Form is not Protected by Copyright Laws in the People's Republic of China" (97/98) 2 UCLA J. Int'l L. & For. Aff. 343 at 344-345.

⁵⁶ Alford, *supra* note 32 at 18-20.

⁵⁷ G. Lara, *supra* note 55 at 345.

⁵⁸ Alford, *supra* note 32 at 27-29.

Early 20th century attempts to implant modern intellectual property law in China were not very successful.⁵⁹ This was partly because it was not clear how intellectual property rights such as patent rights, for example, which were without precedent in China, could successfully become part of Chinese cultural and legal norms. In the area of copyright law, for instance, the focus of the Chinese government was the use of copyright as a method for controlling ideas and maintaining order rather than protecting private property interests.⁶⁰ Piracy remains a significant problem for U.S. firms operating in China.⁶¹

⁵⁹ Though China was party to both the *Berne Convention* and the *Paris Convention*, the government resisted pressure to implement its treaty obligations. See Alford, *Ibid.* at 41-42.

⁶⁰ N. Zhang, "Intellectual Property Law in China: Basic Policy and New Developments" (1997) 4 Ann. Surv. Int'l & Comp. L. 1 at 7; G. Lara, *supra* note 55 at 344-345.

⁶¹ W.M. Morrison, "IB91121 U.S.- China Trade Issues," CRS Issue Brief for Congress, online: National Council for Science and the Environment, Foreign Affairs, Defence and Trade Division <http://www.cnie.org/nle/econ-35.html#_1_9> (date accessed: 11August 2001).

CHAPTER II

INTERNATIONAL INTELLECTUAL PROPERTY LAW BEFORE TRIPS

The two main international conventions which address intellectual property rights are the *Paris Convention for the Protection of Industrial Property*⁶² and the *Berne Convention for the Protection of Literary and Artistic Works*.⁶³

The Paris Convention

This is the principal international convention on patents, trademarks, and other industrial property. It was established in 1883 and has 162 signatories. The *Paris Convention* is a comprehensive treaty which is administered by World Intellectual Property Organization [hereinafter "WIPO"]. This convention protects "industrial property" which "has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition."⁶⁴ The national treatment principle is a key element of the *Paris Convention*.⁶⁵ National treatment requires that nationals of foreign countries receive the same treatment as nationals of the jurisdiction at issue.

The Berne Convention

The *Berne Convention*, established in 1885, sets minimum standards for authors' rights. Like the *Paris Convention*, the *Berne Convention* is administered by WIPO and is also based on the concept of national treatment.⁶⁶ The minimum term of copyright protection for member states is the life of the author plus 50 years. The *Berne Convention* requires that member states recognize authors' moral rights in their works. This refers to the right of an author to be named as author of the work or to keep his name confidential and to object to any modification or distortion of the work that would be prejudicial to his honor or reputation.⁶⁷

⁶² 20 March 1883, 828 U.N.T.S. 107 [hereinafter *Paris Convention*].

⁶³ 9 September 1886, 828 U.N.T.S. 221 [hereinafter *Berne Convention*].

⁶⁴ *Paris Convention*, *supra* note 62, Article 1, para. 2.

⁶⁵ M.J. Trebilcock & R. Howse, *The Regulation of International Trade*, 2nd ed. (London: Routledge, 1999) at 13.

⁶⁶ Gutterman & Anderson, *Intellectual Property in Global Markets: A Guide for Foreign Lawyers and Managers* (London: Kluwer Law International, 1997) at 12.

⁶⁷ *Berne Convention*, *supra* note 63, Article 6Bis.

Under the Convention, authors and other copyright holders shall be granted exclusive rights to reproduce the work, subject to national legislative exceptions which do not prejudice the legitimate interests of the author. They shall also be granted exclusive right to control translation of the work; and exclusive rights with respect to public performance and broadcasting, subject to national legislation with respect to how such rights may be exercised. As well, copyright holders shall be given exclusive rights over the adaptation of the work, including rights to cinematographic adaptations. Distribution and rental rights are not covered under the *Berne Convention*.⁶⁸

TRADE, INTELLECTUAL PROPERTY & NORTH-SOUTH RELATIONS

How Intellectual Property Became Part of the Trade Agenda

The GATT, negotiated in 1947, was intended as a provisional arrangement among the world's major trading partners as a prelude to the creation of the International Trade Organization. However, GATT became the permanent institutional basis for the international trading regime.⁶⁹ Subject to qualification, intellectual property is exempt from the basic trade obligations of the GATT by virtue of Article XX of the GATT.⁷⁰ However, In 1994, the Uruguay Round Negotiations on the GATT led to the creation of the World Trade Organization as the international body responsible for regulating international trade, and the conclusion of the TRIPS Agreement. TRIPS is the first multilateral trade-related intellectual property agreement.

Prior to the TRIPS Agreement, international conventions on intellectual property were not related to trade or international business. However, protection for intellectual property rights had been incorporated into a trade agreement before the conclusion of the *WTO Agreement* and TRIPS. Chapter 17 of the *North American Free Trade Agreement* ("NAFTA")⁷¹ established certain minimum levels of protection for intellectual property rights in Canada, the United States,

⁶⁸ *Ibid.*, Articles 2, 11, 11bis, 11ter, 12, 13, 14.

⁶⁹ Trebilcock & Howse, *supra* note 65 at 21.

⁷⁰ *Ibid.* at 312.

⁷¹ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can T.S. 1994 No.2 (entered into force 1 January 1994).

and Mexico.⁷² The NAFTA provisions on intellectual property closely parallel the provisions of the TRIPS Agreement.⁷³ However, unlike the TRIPS Agreement, NAFTA does not provide any specialized dispute settlement mechanism for intellectual property matters. The European Community, by comparison, protects intellectual property rights under Community law through various directives.⁷⁴

Globalization and Trade Liberalization

The premise behind international trading arrangements like the GATT is that trade liberalization is economically advantageous to the international community. However, this was not always the most commonly held view of international trade. This theory of international trade has evolved over time.

Early mercantilist theories of trade were replaced over time by economic arguments in support of free trade. Mercantilism requires close government involvement in the regulation of trade aimed at maintaining a favourable balance of trade through aggressive export and restrictive import practices.⁷⁵ Secondly, the mercantilist government role requires the promotion of manufacturing at home rather than the importation of manufactured goods. Importation of goods was seen to present the risk of stifling domestic industry and eliminating domestic employment. During the latter half of the eighteenth century, the mercantilist theories of trade began to be discredited and replaced by more economic theories of trade.⁷⁶

In 1776, Adam Smith in *The Wealth of Nations*⁷⁷ advanced the position that it is more logical to import a commodity from a foreign nation that can produce it and supply it more cheaply than to

⁷² Attempts were made to include intellectual property rights into the *United States-Canada Free Trade Agreement*, the predecessor to the NAFTA. These attempts, however, were unsuccessful. See N. Fyfe, "Agreements Not Reached: Intellectual Property" in *United States/Canada Free Trade Agreement: the Economic and Legal Implications* (Washington: ABA, 1988) 377 at 379-380.

⁷³ At the time the NAFTA was negotiated, a draft of the TRIPS Agreement was available and NAFTA negotiators made use of the Uruguay Round drafts as precedents. See Jon R. Johnston, *International Trade Law*, (Concord: Irwin Law, 1998) at 5 & 31 [hereinafter *Trade Law*].

⁷⁴ See the Europa Homepage, online: <http://europa.eu.int/eur-lex/en/lif/reg/en_register_1720.html>

⁷⁵ Trebilcock & Howse, *supra* note 65 at 2.

⁷⁶ *Ibid.* at 2.

⁷⁷ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Random House, 1937) at 424-439, 441-443.

produce it domestically. This provides the theoretical basis for international trade as it has developed today. Smith argued that since tropical countries could produce tropical fruit more cheaply than temperate countries, it made more sense for the countries with temperate climates to purchase these items from the tropical countries. Likewise, since the more industrialized countries could produce industrial equipment of better quality and at a lower cost than the countries that were not industrialized, it made more sense for the latter to buy from the former.⁷⁸

Unlike the current paradigm of free trade, Smith's theory posited that unilateral trade liberalization was beneficial, regardless of what other nations did.⁷⁹ This theory was refined by subsequent trade theories such as Ricardo's theory of Comparative Advantage and the requirement for reciprocity.⁸⁰ The theory of Comparative Advantage postulates that though one nation may have an absolute advantage over another in terms of the cost of production of a certain good, international trade should take into account the comparative advantage of one nation over another.⁸¹

Though the mercantilist theory of trade may have been replaced as the leading theory of international trade, it has not become irrelevant. It is often argued that the developing countries need to develop their domestic industries by minimizing imports. As well, citizens of various nations have recently expressed significant concern over increased trade liberalization, citing factors such as the loss of domestic employment, or industry. Additionally, citizens have protested the loss of government control and citizen influence over areas such as health and the environment. The recent protests at various international meetings (i.e., Quebec City, Seattle and Genoa) reflect a level of discontent with current trade practices which is not insignificant.

Trade has been linked to intellectual property because of the notion that trade and investment are most lucrative where property rights are respected, and that technological development will

⁷⁸ *Ibid.*

⁷⁹ Trebilcock & Howse, *supra* note 65 at 3.

⁸⁰ D. Ricardo, *The Principles of Political Economy and Taxation, with An Introduction by William Fellner* (Homewood: Irwin, 1963) at 69-78.

⁸¹ Trebilcock & Howse, *supra* note 65 at 3-7.

flourish in countries that reward innovation.⁸² Advocates of trade liberalization argue that cross border investment will be inhibited where a nation's domestic laws do not adequately protect the intellectual property rights of investors from other nations.⁸³ Since the value of IPRs can be diminished if they are not adequately enforced, weak protection is seen as undermining free trade.⁸⁴ Where it is possible to sell cheap imitation goods rather than the product available for sale from the innovator, the intellectual property right of the innovator loses much of its economic value. Without sufficient protection for IPRs, the innovator cannot recover the costs of R&D and will not benefit financially from trading in such an environment.

Furthermore, it is argued that inadequate intellectual property protection has an adverse effect on international trade because it inhibits innovation and interferes with commitment to R&D, thereby reducing the number of innovative high quality goods available in the market.⁸⁵ Differing national standards of intellectual property protection distort trade and investment since producers of intellectual goods will be reluctant to trade in these goods with nations that do not provide adequate protection.⁸⁶ As such, protection of IPRs is seen as beneficial in stimulating both exports and imports.⁸⁷

Stronger international protection for intellectual property rights was pursued because it was seen by some nations as critical for the development of new technologies and continued investment in increasingly expensive R&D. While the cost of R&D increased and the cost of protecting intellectual property rose, the cost of pirating intellectual goods decreased as access to video cassette recorders, photocopiers and computers reduced the costs of reproduction.⁸⁸ Stronger

⁸² A. Posnick, *supra* note 1 at 1.

⁸³ Jon R. Johnston, *The North American Free Trade Agreement: A Comprehensive Guide* (Aurora: Canada Law Book, 1994), at 423-24 [hereinafter Johnston, NAFTA].

⁸⁴ A. D' Amato & D.E. Long eds., *International Intellectual Property Law* (London: Kluwer Law International, 1997) at 62.

⁸⁵ Multilateral Trade Negotiations, The Uruguay Round MTN.GNG/NH11/W/47, 25 October 1989, Submission from Canada.

⁸⁶ *Ibid.*

⁸⁷ R. Rozek, "Protection of Intellectual Property Rights: Research and Development Decisions and Economic Growth" in F. W. Rushing & C. G. Brown eds., *supra* note 1, 31 at 35.

⁸⁸ D' Amato & Long, *supra*, note 84 at 66.

global protection was viewed as necessary to enhance international distribution of intellectual goods.⁸⁹

Although international agreements on intellectual property existed prior to TRIPS, these agreements did not ensure any enforceable minimum international standards. Rather than establish norms and standards, the pre-existing international treaties on intellectual property sought to minimize differences between national intellectual property laws and practices.⁹⁰ The main principles in these agreements, national treatment and most-favoured nation non-discrimination principles, can be inadequate in protecting intellectual property rights because a nation that treats foreigners in the same way that it treats its own nationals may nonetheless provide insufficient protection for IPRs.⁹¹ TRIPS changes this situation by creating minimum intellectual property standards for all WTO Members which are enforceable through a formal dispute resolution process.

The goal in developing TRIPS was to reach an agreement which would supplement existing intellectual property law. There was substantial disagreement between nation states during the negotiation of the TRIPS agreement, and in November 1991 many key issues had still not been agreed upon.⁹² Advocates of a trade-related international agreement protecting intellectual property had three major objectives. The first was to establish minimum standards of intellectual property protection based on the pre-existing principles of international intellectual property treaties. The second objective was to institute mechanisms for effective enforcement of these rights, and the third objective was to ensure a formal dispute settlement mechanism.⁹³ They were eventually successful. TRIPS, which was finally concluded in April 1994, has been described as “one of the most significant achievements of the Uruguay round of the General Agreement on

⁸⁹ R. B. Hardy, "Foreward" in Rushing & Brown eds., *supra* note 1 at 1.

⁹⁰ T.L. McDorman, "Unilateralism (Section 301) to Multilateralism (GATT): Settlement of International Intellectual Property Disputes After the Uruguay Round" in *International Trade and Intellectual Property: The Search for a Balanced System* (Boulder: Westview Press, 1994) at 121.

⁹¹ *Ibid.*

⁹² Gutterman & Anderson, *supra* note 66, at 17.

⁹³ Johnston, NAFTA, *supra* note 83 at 430; See generally UNCTAD Secretariat, *The TRIPS Agreement and Developing Countries* (New York: UNCTAD, 1996).

Tariffs and Trade ('GATT')).⁹⁴ Since the standards adopted in the TRIPS Agreement are predominantly those that were already in existence in the industrialized world, there is a heavy onus on less developed nations to adapt their laws over time to provide the increased intellectual property protection required by TRIPS.⁹⁵

Intellectual property became an important issue in international trade discussions as the United States and other industrialized nations faced increased competition from the newly industrialized nations in Latin America and Asia over the past two decades.⁹⁶ The developed nations had to increasingly rely on their comparative advantage in the production of intellectual property as manufacturing industries in developing countries grew and began to penetrate distant markets for traditional industrial products.⁹⁷ The industrialized nations, particularly the United States, engaged in significant efforts to strengthen global protection for intellectual property in an attempt to reduce global infringement of their intellectual goods.⁹⁸ The financial losses to the United States as result of piracy of intellectual products was estimated to exceed several billion dollars per year.⁹⁹ These losses occurred even though the U.S. already had a well developed regime for the protection of intellectual property which provided economic incentives to invest in R&D and create innovative products.¹⁰⁰ As it sought to maintain its technological superiority, the U.S. became an advocate for stronger global protection of IPRs.¹⁰¹

In an attempt to encourage developing countries to protect intellectual property, the issue of global IPRs was addressed within the trade context. The leverage of those seeking to improve international IPRs was that developing countries would likely protect intellectual property where

⁹⁴ A. Moncayo von Hase, "The Application and Interpretation of the Agreements on Trade-Related Aspects of Intellectual Property Rights", *supra* note 6 at 93.

⁹⁵ *Ibid.*

⁹⁶ Trebilcock & Howse, *supra* note 65 at 307.

⁹⁷ J.H. Reichman, "Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement", in C. M. Correa & A. A. Yusuf eds., *Intellectual Property and International Trade: The TRIPS Agreement* (London: Kluwer Law International, 1998) 21 at 23.

⁹⁸ F.W. Rushing & C.G. Brown, "Intellectual Property Rights in the 1990's: Problems and Solutions" in Rushing and Brown eds., *supra* note 1, 1 at 3.

⁹⁹ Trebilcock & Howse, *supra* note 65 at 307; Sci Tech at 28.

¹⁰⁰ E.S. Yambrusic, *Trade-Based Approaches to the Protection of Intellectual Property* (New York: Oceana Publications, 1992) at 3.

¹⁰¹ *Ibid.*

they saw a need to do so in order to encourage foreign investment or to gain or maintain access to markets of the industrialized world.¹⁰²

Unilateral American Efforts - Special 301

Since access by developing countries to the markets of developed nations could be used to negotiate for stronger protection for intellectual property in the global market, the United States opted for a trade-oriented approach to the protection of intellectual property.¹⁰³ American efforts have included both bilateral and multilateral negotiations as well as unilateral trade measures.¹⁰⁴ The American efforts resulted in the addition of IPRs to the GATT agenda.¹⁰⁵

The main statutory authority under which the U.S. may take retaliatory trade action against other nations is section 301 of the *U.S. Trade Act 1974*.¹⁰⁶ The section 301 investigation may either be requested by an interested party or initiated by the United States Trade Representative [hereinafter "the U.S.T.R."]. If the U.S.T.R. determines that the foreign country is engaging in unjustifiable practices, including the denial of American intellectual property rights, section 301 requires that retaliatory action be taken. Despite the existence of the GATT, the U.S. used "Special 301" of the *U.S. Trade Act 1974* on a number of occasions prior to the conclusion of TRIPS.¹⁰⁷ The "Special 301" provisions require the U.S.T.R. to conduct a review at least annually to identify those countries that deny adequate intellectual property rights to American companies. Countries with the most egregious practices are designated as "priority foreign countries" or placed on a "priority watch list" or a "watch list".¹⁰⁸ Special 301 creates a direct role for the American government in assessing the adequacy of foreign intellectual property protection by requiring the U.S. trade office to monitor foreign intellectual property laws and

¹⁰² D' Amato & Long, *supra* at 43.

¹⁰³ J.H. Reichman, *supra* note X, p.23. See also Gadbar & Richards eds., *infra* for an analysis of the advantages to the United States in taking a trade-based approach to the protection of intellectual property.

¹⁰⁴ F.W. Rushing & C.G. Brown, *supra* note 98 at 3.

¹⁰⁵ E. Mansfield, "Intellectual Property, Technology and Economic Growth" in Rushing and Brown eds, *supra* note 1, 17 at 29.

¹⁰⁶ 19 U.S.C. 2411.

¹⁰⁷ as amended by the *Omnibus Trade and Competitiveness Act 1988*.

¹⁰⁸ Office of the United States Trade Representative, *Fact Sheet: Monitoring and Enforcing Trade Laws and Agreements* (May 2000) at 7, online: <<http://www.ustr.gov/pdf/fact.pdf>> (date accessed: 3 June 2001 8:01) [hereinafter 301 Fact Sheet].

practices and report on them yearly to the U.S. Congress.¹⁰⁹ These countries are then subject to a section 301 investigation and can be subjected to section 301 retaliatory action.¹¹⁰

Special 301 allows the U.S. to take unilateral action against nations that engage in what the U.S. views as unfair trade practices, including the inadequate protection of American intellectual property rights. Whether action is taken is determined on the basis of whether the offending nation's intellectual property law and practices meet American standards, even if the offending nation is meeting TRIPS standards.¹¹¹ The "Super 301" provisions refer to an annual process in which the U.S.T.R. identifies the foreign country practices which are of primary concern to the U.S. and the elimination of which will significantly increase American exports.¹¹² In addition, the U.S. frequently initiates proceedings under section 337 of the *U.S. Tariff Act* 1930¹¹³ as a method to protect U.S. IPRs. Section 337 allows the U.S. International Trade Commission to ban the import and sale of goods that infringe on the rights of holders of U.S. IPRs.¹¹⁴

The use of the Special 301 unilateral measure by the U.S. may undermine the GATT dispute settlement process by enabling the U.S. to take action before a decision has been rendered and irrespective of the results.¹¹⁵ The use of Special 301 led to a complaint in 1998 by the EU that the U.S. is violating the GATT. On March 2, 1999, the Dispute Settlement Body established a panel.¹¹⁶ In 2000, however, the WTO panel held that the U.S. law was not inconsistent with WTO rules. The Panel report was adopted by the dispute settlement body on January 27, 2000. No appeal is being taken by the EU.¹¹⁷ Effectively, the apparent advantage smaller countries

¹⁰⁹ McDorman, *supra* note 90 at 122.

¹¹⁰ *Section 301 of the 1974 Trade Act*, online: <<http://www.ita.doc.gov/legal/301.html>>.

¹¹¹ 301 Fact Sheet, *supra* note 108.

¹¹² *Ibid.*

¹¹³ as am. 19 U.S. C. 1337.

¹¹⁴ Masterson, J.T., *Intellectual Property Rights: A Post Uruguay Round Overview* (1998) 1 at 4, online: I.T.C. Homepage <<http://www.ita.doc.gov/legal/ipr.html>>.

¹¹⁵ McDorman, *supra* note 90 at 123.

¹¹⁶ World Trade Organization, Dispute Settlement Overview, United States - Sections 301-310 of the *Trade Act* 1974, complaint by the European Communities (WT/DS152/1), online: <<http://www.wto.org>> (date accessed 20 June 2001).

¹¹⁷ Office of the U.S. Trade Representative, Press Release, online: <<http://www.ustr.gov>> (date accessed 15 June 2001).

may have had in being part of a multilateral trading regime such as the WTO, rather than being subjected to American use of Special 301, no longer exists.

In its *2000 Special 301 Report*, the U.S.T.R. identified 59 countries as denying adequate and effective protection of intellectual property rights to American businesses.¹¹⁸ Sixteen trading partners of the U.S. were placed on the Priority Watch list. These included Argentina, the Dominican Republic, the European Union, Greece, Guatemala, India, Israel, Italy, Korea, Malaysia, Peru, Poland, Russia, Turkey and Ukraine.¹¹⁹ Thirty-nine additional countries were placed on the Watch List, including industrialized countries such as Canada and Denmark. A number of developing and newly industrializing countries were also placed on the list, including Brazil, Chile, Colombia, Ecuador, Indonesia, Jamaica, Lebanon, Pakistan, Singapore, and Taiwan.¹²⁰

The Relevance of Intellectual Property for Global Markets.

The push for an international agreement to increase global protection of IPRs stemmed from the reality that the increase of knowledge-based industries has changed the nature of competition and international business. The cost of R&D of some forms of intellectual property has become disproportionately higher than it was in the past, while the ability to reproduce such intellectual property without permission or remuneration to the holder of the intellectual property right has become simpler. Thus, a knowledge-based economy depends on strong intellectual property laws and adequate enforcement of those laws.¹²¹

With increased international trade, producers of intellectual goods became more concerned about obtaining the full economic value for their products. Since every nation has artists and innovators who may benefit economically from the protection of intellectual property, and since producers of intellectual goods may suffer some degree of economic harm when their creations

¹¹⁸ Office of the United States Trade Representative, *2000 Special 301 Report* at 1 (2000), online: <<http://www.ustr.gov/html/special.html>> (date accessed: 10 June 2001) [hereinafter Special 301 Report].

¹¹⁹ *Ibid* at 11-19.

¹²⁰ *Ibid* at 11, 19-31.

¹²¹ M.P. Ryan, "Markets, Institutions, Intellectual Property Rights and Development in a Knowledge-based World Economy" in O. Lippert ed., *Competitive Strategies for the Protection of Intellectual Property* (Vancouver: Fraser Institute, 1999) 7 at 8.

are used or reproduced without authorization, it is potentially in the interest of every nation to protect intellectual property.¹²² However, the reality is that there is an imbalance among nations with respect to the amount of exportable intellectual creations they produce. For example, the American motion picture industry generates global licensing revenues in excess of the worldwide licensing income of all other countries combined. Therefore, it is more economical for certain countries, such as China for example, to tolerate the domestic reproduction of American films without authorization in order to avoid the high cost of paying licensing fees.¹²³

It has been suggested that the countries which do not produce large amounts of exportable intellectual goods may nonetheless benefit from stronger international IP laws for a number of reasons. The inequalities may shift over time; that is, the countries that are not currently large producers of intellectual goods may increase their level of production over time. Moreover, weaknesses in one area may be balanced by strengths in another area. For example, a country that is not a major producer of pharmaceuticals may produce significant quantities of quality literature or artwork. A further consideration for the "have-not" countries is that they may suffer retaliatory trade measures from countries whose intellectual products are being infringed upon.¹²⁴

Developing countries may also benefit from strengthened IP laws in terms of increased foreign investment. Businesses based in industrialized countries tend to be reluctant to invest or to engage in joint ventures in countries where their intellectual property rights can easily be violated.¹²⁵ A 1997 study on the impact of patent protection on technology diffusion concludes that the strength of patent rights affects the economic growth of a nation. The study suggests that developing countries stand to benefit by implementing systems to protect intellectual property because the result is an environment where investment, research and innovation can occur. Where strong patent laws exist, a country is likely to attract both human capital and financial investment for R&D. Developing countries could thereby attract increased foreign investment

¹²² Robert M. Sherwood, "Intellectual Property: A Chip Withheld in Error," *Competitive Strategies for the Management of Intellectual Property*, ed. Owen Lippert (Vancouver: the Fraser Institute, 1999) 73 at 76; D'Amato at 12.

¹²³ D' Amato & Long, *supra* note 84 at 2.

¹²⁴ *Ibid.*

¹²⁵ Ryan, *supra* note 121 at 31.

which could in turn stimulate a domestic research sector.¹²⁶ However, there is no concrete evidence to suggest that this is an accurate assumption.¹²⁷ The involvement of multinational companies in the developing world has not necessarily led to the creation of domestic industry nor has it helped in the process of industrialization.¹²⁸ It is more probable that foreign companies will seek to maximize profits and to establish and maintain market dominance in developing country markets.

Though it is argued that stronger patent protection is in the interests of the developing world, it is also acknowledged that some countries depend on imitation for their livelihood and that it is expensive to create an infrastructure for the protection of intellectual property.¹²⁹ Developing countries that have not yet developed a vibrant domestic research sector have little incentive to create a strong patent regime.¹³⁰ The main incentive for developing countries in protecting IPRS is the theory that stronger IPRs will encourage the industrialized world to share its knowledge and technology - but of course, this will come at a price. In this writer's view, it is not rational for all developing countries, particularly those which are not at a stage where their own industries stand to gain from stronger IPRs, to implement strong intellectual property laws.

¹²⁶ W. Park, "Impact of the International Patent System on Productivity and Technology Diffusion" in Owen Lippert, ed. *Competitive Strategies for the Protection of Intellectual Property* (Vancouver: The Fraser Institute, 1999) 47-72 at 58.

¹²⁷ R. M. Sherwood, *supra* note 122 at 74. Though Sherwood is an advocate of strong international intellectual property protection, he acknowledges that there is "little empirical indication of what robust protection for intellectual property will produce in the economies of developing countries."

¹²⁸ In some cases, the involvement of multinational corporations in the developing world has led to the destruction of communities and some companies have even been implicated in civil war and internal conflict. For example, deBeers, the multinational corporation that controls the global diamond industry, has been implicated in the war in Sierra Leone. See I. Smillie, L. Gberie & R. Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security* (Ottawa: Partnership Africa Canada, 2000) online: Partnership Africa Canada Homepage <<http://www.partnershipafricacanada.org/english/esierra.html>>. In Nigeria, the involvement of Royal Dutch Shell led to environmental degradation and the death of a number of Ogoni peoples and an unknown number of activists. By 1998 nine hundred million barrels of oil worth more than \$30 million dollars had been taken from the land of the Ogoni. Yet the people received almost none of the financial benefits even as their land was destroyed. See Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (January 1999), online: Human Rights Watch Homepage <<http://www.hrw.org/reports/1999/nigeria/index.htm>> accessed 23 March 2001; *The Role of Shell in Ogoni*, online: <<http://www.mosopcanada.org/text/shell.html>> (last modified 25 October 1998).

¹²⁹ W. Park, "Impact of the International Patent System on Productivity and Technology Diffusion in O. Lippert ed., *Competitive Strategies for the Protection of Intellectual Property* (Vancouver: Fraser Institute, 1999) 47 at 63.

¹³⁰ *Ibid.*

Nonetheless, many developing countries agreed to TRIPS in order to gain concessions in other areas, such as agriculture. This will be elaborated upon in the final chapter of this paper.

The Importance of IPRs for Industrialized Nations

As mentioned earlier, the share of knowledge-based or high technology products in global trade in goods doubled between 1980 and 1984. Most of the trade in such goods was among the industrialized countries.¹³¹ Though there are no accurate statistics on the economic value of intellectual property rights in the developing world, it is clear that the holders of IPRs are primarily concentrated in industrialized countries, particularly in the area of patents. Though the gap between the developed and the developing worlds is less pronounced in the area of trademarks and domestic utility models, local residents of developing countries own fewer trademarks and patent rights than do foreigners.¹³²

Industrialized nations objected to the practice of some of the developing countries and the newly industrialized nations of tolerating the reproduction and sale of private sound recordings and cinematography without compensation to the holder of the IPR. As well, in many of these countries famous trademarks were being appropriated and attached to cheap imitations of the original product and sold. This lack of enforcement of intellectual property rights in the less developed nations meant a loss of business for the United States and other intellectual property producing nations.¹³³ Weaker laws in newly industrializing countries also facilitated domestic imitation in these countries and thus the loss of foreign sales by the original Western producers. Western industrialized countries were concerned that the less developed countries were providing shorter periods of patent protection to intellectual property rights than the United States and most industrialized nations in areas such as pharmaceuticals. As well, there was some concern that the process of granting patents and the enforcement of patent protection in the developing world lacked transparency and legal certainty.¹³⁴

¹³¹ World Bank Discussion Paper No. 412, *supra* note 2 at 16.

¹³² *Ibid.* at 25.

¹³³ *Ibid.*

¹³⁴ Trebilcock & Howse, *supra* note 65 at 307.

The United States is the largest exporter of intellectual products and therefore the nation that benefits the most economically from stronger global IPRs. From 1980 to 1982 the United States received an average of \$6.7 billion in royalties and license fees. This figure tripled to reach an average of \$23.2 billion from 1993 to 1995. During this period, royalties and license fees accounted for 3.3% of U.S. exports of goods and services.¹³⁵ The majority of exports of American IPRs are from U.S. parent companies to foreign affiliates. With respect to unaffiliated parties, receipts from developing countries accounted for 27% of all receipts for industrial processes, 22% of all receipts for books, records and tapes, and 34% of receipts for neighbouring rights.¹³⁶ Given these figures, it is clear why the U.S. pushed for increased global protection of IPRs.

THE TRIPS AGREEMENT

Paragraph 4 of Article XVI of the *WTO Agreement* states that Members must ensure conformity with the annexed Agreements, one of which is TRIPS. The TRIPS Agreement requires WTO members to provide nationals of other member states a minimum standard of intellectual property protection as provided in the agreement.¹³⁷ This ensures a uniform minimum level of intellectual property protection internationally. As part of TRIPS ("the Agreement"), Member states must comply with the basic substantive provisions of the *Paris Convention* and the *Berne Convention* with the exception of the provision on moral rights. Members must also comply with the *Treaty on Intellectual Property in Respect of Integrated Circuits* (the "IPIC treaty").¹³⁸ TRIPS allows Member States to enact domestic legislation that provides more extensive intellectual property protection than what is required by the Agreement.¹³⁹

National treatment, which requires that a nation treat foreign nationals as it would treat its own, is one of the basic principles of TRIPS.¹⁴⁰ Another principle arising from the requirement that WTO members treat foreign nationals equally is the principle of most favoured nation (MFN)

¹³⁵ World Bank Discussion Paper No. 412, *supra* note 2 at 18.

¹³⁶ *Ibid.* at 18.

¹³⁷ TRIPS, *supra* note 4, Article 1(3).

¹³⁸ *Ibid.*, Articles 2, 9 & 35.

¹³⁹ *Ibid.*, Article 1.

treatment.¹⁴¹ Article 4 of TRIPS states that “any advantage, favor, 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.”

The MFN principle is not absolute but rather is subject to certain exceptions. The MFN principle does not apply, for example, where the privilege is one deriving from pre-existing international agreements on judicial assistance or law enforcement which are not particularly related to the protection of intellectual property rights.¹⁴² As well, existing and future free trade areas and customs unions are exempt from the MFN principle under Article XXIV of the GATT.¹⁴³ If one extends this to intellectual property, the advantages granted under regional agreements such as NAFTA need not be extended to other nations.

Under TRIPS, intellectual property includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits, and trade secrets.¹⁴⁴ The MFN and national treatment principles do not apply generally to neighbouring rights covered under the *Rome Convention* but only to those specified in the TRIPS agreement.¹⁴⁵

PATENTS

TRIPS requires a minimum standard of patent protection which reflects those of Western industrialized countries. In particular, the Agreement implements basic criteria with respect to eligibility and the duration of a patent which the *Paris Convention* did not address.¹⁴⁶ It builds on standards established by the *Paris Convention* which even Members who do not adhere to the *Paris Convention* are now obliged to respect.¹⁴⁷ The minimum term of patent duration must be

¹⁴⁰ In other words, every nation must accord foreigners at least the same level of treatment that is accorded to nationals of the state. *Ibid.*, Articles 1-8.

¹⁴¹ Reichman, *supra* note 97 at 26.

¹⁴² TRIPS, *supra* note 4, Article 4.

¹⁴³ Reichman, *supra* note 97 at 26.

¹⁴⁴ TRIPS, *supra* note 4, Article 1(2).

¹⁴⁵ *Ibid.*, Articles 3(1), 4(b).

¹⁴⁶ Reichman, *supra* note 97 at 30.

¹⁴⁷ TRIPS, *supra* note 4, Article 2.1; see also Reichman, *ibid* at 31.

20 years from the filing date.¹⁴⁸ Patents must be available and enjoyable without discrimination as to the place of invention, the field of technology or as between domestic and imported products.¹⁴⁹ A number of countries had to amend their laws to make the term of patent protection TRIPS compliant. Canada recently had to change its patent law to extend the term of patent protection as a result of a WTO challenge based on this provision of TRIPS.¹⁵⁰ An analysis of this case and its likely impact will be provided in Chapter III of this paper.

The TRIPS Agreement establishes the patentability of bio-genetically engineered products.¹⁵¹ However, Members may exclude from patentability certain inventions where necessary to protect public order or morality, including the protection of human, animal or plant life, health or the environment. Inventions must not be precluded from patentability merely because the commercial exploitation of such an invention is prohibited by the domestic legislation.¹⁵² This provision is interesting because it allows a Member to exclude certain inventions from patentability on the basis of protecting public order or morality but not on the basis that patenting of such inventions violates domestic law. Therefore, if the domestic law prohibiting the commercial exploitation of the patent does not have any of the purposes listed in this article as a rationale for exclusion, the Member State cannot rely on the law as grounds for refusing to patent the invention. This provision illustrates the manner in which TRIPS diminishes national sovereignty though it allows Members some minimal amount of flexibility. Thus, even where TRIPS appears to provide Members some discretion, it clearly prescribes the basis on which it is permissible to take domestic action to limit the scope of the Agreement.

Members may exclude from patentability inventions involving diagnostic, therapeutic or surgical methods for the treatment of humans, animals, and plants, or essentially biological processes for the production of plants and animals. However, micro-organisms and non-biological processes may not be excluded from patentability, and new varieties of plants must be protected either by

¹⁴⁸ TRIPS, *Ibid.*, Article 33.

¹⁴⁹ *Ibid.*, Article 28.

¹⁵⁰ See *Canada Patent Term* case, *infra*. Canada recently amended the Patent Act to implement the changes required as a result of the WTO Panel decision. See Bill S-17, *An Act to Amend the Patent Act* 1st Sess., 37th Parl., 2001 (assented to 14 June 2001).

¹⁵¹ Reichman, *supra* note 97 at 38.

patents or an effective *sui generis* system of protection.¹⁵³ This distinction is based on the not entirely logical premise that the patenting of micro-organisms and non-biological processes does not involve the patenting of life forms.¹⁵⁴ With the development of new technologies and increased harmonization of intellectual property laws, this section of TRIPS may come under closer scrutiny. The debate over the patentability of gene sequences, public concern over human or animal cloning, concern about genetically modified foods, and the possibility of acquiring intellectual property rights over the processes or products relating to some of these new technologies has led to increased public interest in patents.

Article 30 of TRIPS states that Members may "provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties." This section forms the substance for one of the Canadian arguments in defense of the complaint by the European Communities ("EC") against Canada.¹⁵⁵ Ultimately, the WTO panels may, through their decisions, reshape global intellectual property law. To the extent that the WTO panels determine what constitutes a limitation that reasonably conflicts with the rights of the patent holder, the WTO will determine the appropriate standard in what would otherwise be a question of domestic government policy.

Compulsory licensing remains the standard form of remedial licensing as under the *Paris Convention*. Compulsory licenses or other such licenses are only permitted after consideration of the individual situation. Except in the case of a national emergency, any individual requesting the license shall make best efforts to obtain a voluntary license on reasonable commercial terms. The compulsory license shall terminate if the circumstances leading to its grant have terminated and are not likely to recur. The holder of the compulsory license must pay adequate compensation for the right to use the invention. Such amount shall be subject to independent

¹⁵² TRIPS, *supra* note 4, Article 27(2).

¹⁵³ *Ibid.*, Article 27(3).

¹⁵⁴ Reichman, *supra* note 97 at 38.

¹⁵⁵ See *Canada Pharmaceuticals* case, *infra*.

review. When an official license is granted in order to enable the use of a subsequent patented invention, the license may only be granted if the subsequent invention is an important technical advance of considerable economic significance.¹⁵⁶

Recently, multinational pharmaceutical companies have come under significant attack over the question of accessibility of AIDS drugs to the poor, particularly those in certain developing countries where the problem of AIDS continues to grow.¹⁵⁷ On questions of domestic policy relating to health, for example, the loss of ultimate decision making power may be critical not only for the least developed countries, but is significant for developed countries like Canada as well. The author will elaborate on this point in the third and fourth chapters of this paper.

COPYRIGHT AND RELATED RIGHTS

TRIPS requires WTO members to adhere to most of the standards set out in the *Berne Convention*. However, moral rights protected under Article 6*Bis* of the *Berne Convention* are not protected under TRIPS.¹⁵⁸ Neither ideas, procedures, methods of operation or mathematical concepts may be protected by copyright.¹⁵⁹

The minimum term of protection for copyrighted materials is the life of the author plus fifty years. The only exception to this is with respect to photographs and works of applied art. Where the term of protection is not based on the life of the author, it must be no less than 50 years from the end of the calendar year of authorized publication, or if not published, 50 years from the end of the calendar year in which the work was made.¹⁶⁰

Computer programs must be protected under national copyright laws as literary works and compilations of data must also be protected as intellectual creations if they are the result of some intellectual creativity in the arrangement or selection. The data itself shall not, however, be

¹⁵⁶ TRIPS, *supra* note 4, Article 31.

¹⁵⁷ R. DiManno, "A dire time: the International Aids Conference Ends Where the Pandemic Began, no Closer to a Cure," *The Toronto Star* (16 July 2000) B 01.

¹⁵⁸ TRIPS, *supra* note 4, Article 9(1).

¹⁵⁹ *Ibid.*, Article 9(2).

¹⁶⁰ *Ibid.*, Article 12.

protected by copyright.¹⁶¹ With respect to computer software, it appears that Members have the liberty to determine the level of patent protection that should be given to program-related inventions within their jurisdiction but not to impose the decision to provide such protection to computer software on other nations.¹⁶²

Members must also provide rental rights to authors of computer programs and cinematographic works which allow the authors of the works to prohibit the commercial rental of their works. Rental rights do not extend to computer programs where the program is not the essential object of the rental. With respect to cinematographic works, Members must only protect such rights where the rental has led to widespread copying of the works such that it is impairing the author's exclusive right of reproduction.¹⁶³

Rights to protect the interests of performers, producers of sound recordings, and broadcasting organizations, collectively referred to as neighbouring rights, are also recognized by TRIPS. The Agreement provides minimum standards of protection to neighbouring rights as derived from the *Rome Convention*.¹⁶⁴ It obliges Members to confer upon performing artists the right to prevent the unauthorized fixation of their unfixed performances and the reproduction of such fixation. As well, broadcasting organizations may prevent others from fixing, reproducing fixations, or re-broadcasting programs to the public without authorization. Performer's rights must endure for at minimum of fifty years.¹⁶⁵ This is thirty years more than what is required under the *Rome Convention*. Article 14(6) of TRIPS allows Members to invoke the conditions, limitations, exceptions and reservations recognized by the *Rome Convention*. The provisions of the *Berne Convention* with respect to works in the public domain also apply to the rights of performers and producers of phonograms.

¹⁶¹ *Ibid.*, Article 10.

¹⁶² Reichman, *supra* note 97 at 42.

¹⁶³ TRIPS, *supra* note 4, Article 11.

¹⁶⁴ Done at Rome 26 October, 1961, WIPO Database of Intellectual Property Legislative Texts, online: <<http://www.wipo.org/treaties/ip/rome/index.html>>.

¹⁶⁵ TRIPS, *supra* note 4, Article 14.

Article 13 of TRIPS, provides that any provision which limits the rights of the copyright owner (for example, fair use exceptions) must be limited to those situations which do not conflict with the reasonable exploitation of the work and do not unreasonably prejudice the legitimate interests of the intellectual property right holder.

TRADEMARKS & GEOGRAPHICAL INDICATIONS

The *Madrid Agreement*¹⁶⁶ and the *Madrid Protocol*¹⁶⁷ are the main international agreements on trademarks, the goal of which was to create a central registration system. The aims of the agreements have not been achieved largely because many states have not ratified these treaties for various reasons.¹⁶⁸ As of April 2001, the *Madrid Protocol* had 68 signatories but neither the United States nor Canada were among them. However, Japan became a signatory to the *Madrid Protocol* in 2000 as did the United Kingdom.¹⁶⁹ TRIPS does not incorporate the standards set out in either of these treaties.

Another weakness of the international regime governing trademarks was the ineffectual enforcement of trademark rights. TRIPS augments the minimum standards of protection for trademarks and establishes higher standards for geographic indications of origin. Furthermore, it mandates enforcement of both the old and new standards.¹⁷⁰ The agreement requires all Members to comply with the *Paris Convention*.

A trademark includes any sign, or any combination of signs that distinguish the goods of one undertaking from those of another. Under TRIPS, actual use of a trademark shall not be a prerequisite to filing an application to register a trademark. Hence, a trademark application may be filed on the basis of proposed use, although the ability to register the trademark may depend on use. TRIPS prohibits any discrimination based on the nature of the goods and services. All

¹⁶⁶ Madrid 14 April 1891, WIPO Database of Intellectual Property Legislative Texts, online: <<http://www.wipo.org/treaties/registration/madrid/index.html>>.

¹⁶⁷ Madrid 27 June 1989, WIPO Database of Intellectual Property Legislative Texts, online: <<http://www.wipo.org/treaties/registration/madrid/index.html>>.

¹⁶⁸ A.S. Gutterman & B. Anderson, *supra* note 66 at 14

¹⁶⁹ List of signatories available online at <<http://www.wipo.org>>.

¹⁷⁰ Reichman, *supra* note 97 at 44.

trademarks must be published prior to registration, thereby allowing public notification so that the trademark registration may be opposed.¹⁷¹

Article 6bis of the *Paris Convention* is applicable in determining whether a trademark is “well known” under TRIPS.¹⁷² Protection of well-known marks is strengthened because it now expressly applies to services. The protection extends to registered trademarks where the goods and services are not similar if: (a) use of the registered trademark would indicate a connection between the goods and services in question and the owner of the registered trademark; and (b) the interests of the registered trademark owner are likely to be damaged by such use.¹⁷³ All registered trademarks must be protected for a minimum term of 7 years renewable indefinitely.¹⁷⁴ It is not necessary to use a registered trademark to maintain it, and one can prevent others from using a similar or confusing trademark.¹⁷⁵ Like the sections relating to patents and copyright, the section on trademarks has a provision allowing members to limit the rights conferred on a trademark holder, provided the measures take into account the legitimate interests of the trademark owner and third parties.¹⁷⁶

Geographical indications of origin are addressed in Articles 22, 23 and 24 of TRIPS. These are defined in the Agreement as indications which identify a product as originating from the territory of a Member, or a region or locality where a particular quality, reputation or characteristic of the good is essentially attributable to its geographical origin.¹⁷⁷ TRIPS offers strong protection against the misleading use of geographical indications of origin, compelling Members to implement the legal means to prevent the misuse of geographical indications. Article 23 provides additional protection for geographical indications for wines and spirits, while Article 24 addresses exceptions to geographical indications and further international negotiations.

¹⁷¹ TRIPS, *supra* note 4, Article 15.

¹⁷² *Ibid.*, Article 16.

¹⁷³ *Ibid.*, Article 16(3).

¹⁷⁴ *Ibid.*, Article 18.

¹⁷⁵ *Ibid.*, Article 26.

¹⁷⁶ *Ibid.*, Article 17.

¹⁷⁷ *Ibid.*, Article 22(1).

TRADE SECRETS & CONFIDENTIAL INFORMATION

TRIPS is the first international convention to expressly require nations to protect confidential information.¹⁷⁸ The Agreement gives natural and legal persons the right to prevent confidential information within their control from being disclosed or acquired without their consent in a manner contrary to honest commercial practices so long as the information is secret and reasonable efforts have been made to maintain the confidentiality of the information. Additional protection is available for the undisclosed data of new pharmaceutical and agricultural chemical products, the "origination of which involves a considerable effort."¹⁷⁹ The inclusion of trade secret protection in TRIPS is noteworthy. In Canada, for example, there is no statutory protection for trade secrets in the domestic intellectual property regime. The explicit TRIPS protection for trade secrets and confidential information not only bolsters protection for such information in countries that already offer common law protection, but also imposes a new obligation on countries that previously provided little or no protection for trade secrets and confidential information.

ESCAPE CLAUSES

Article 8 of the Agreement allows Members to limit the exclusive rights of intellectual property rights holders when necessary to "protect public health and nutrition" and to promote interest in sectors of vital importance to the socio-economic and technological development of the nation. Furthermore, this article allows Members to implement measures necessary to prevent the abuse of intellectual property rights and of practices which unreasonably restrain trade or have an adverse effect on the international transfer of technology. However, such exceptions to the full protection of intellectual property are permitted only if such measures are "consistent with the provisions of this Agreement". This limitation presents an interesting paradox. A nation is allowed to derogate from the requirements of the TRIPS Agreement as long as such measures are consistent with the TRIPS Agreement.

¹⁷⁸ *Ibid.*, Article 39.

¹⁷⁹ *Ibid.*

The objectives of TRIPS, stated in Article 7 of the agreement, include a balancing of rights and interests. Article 7 provides:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in manner conducive to social and economic welfare, and to a balance of rights and obligations.

Governments may attempt to rely on Article 7 as additional grounds for limiting exclusive intellectual property rights since this section mentions a balancing of interests and the protection of intellectual property in a manner conducive to the social and economic welfare of a nation.¹⁸⁰ Thus, this provision was utilized as part of the Canadian defence against the EC complaint in the *Canada Pharmaceutical* case, *infra*.

One writer suggests that Articles 7 and 8 not only preserve pre-existing grounds for limiting the exclusive rights of an intellectual property holder under Article 5A of the *Paris Convention* but actually expand them.¹⁸¹ Article 5A of the *Paris Convention* allows nations to implement compulsory licensing to prevent the abuse of patent rights. Some developed nations sought to completely eliminate grounds for limiting the patentee's exclusive rights. Nonetheless, these articles were included in the agreement, primarily at the insistence of a group of developing countries.¹⁸²

Developing Country Exceptions

TRIPS includes transitional arrangements to allow developing countries some additional time before they have to make their systems TRIPS compliant. All Members were given a one year grace period during which they did not have to apply the provisions of the Agreement. Developing country Members and Members with economies in transition from centrally planned to free market economies were allowed a further four year delay.¹⁸³ These countries must now ensure that their domestic legislation meets the minimum standards set out in TRIPS. The Agreement allows a further exception with respect to patents. If there are areas of technology

¹⁸⁰ Reichman, *supra* note 97 at 34.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

that are patentable under TRIPS but not patentable under a developing country Member's domestic law, the Member may have an additional five years, for a total of nine years from the date of entry into force to apply the TRIPS patent provisions.¹⁸⁴

TRIPS also takes into account the "special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base...". The least-developed country Members therefore have 10 years from the date the Agreement came into force to implement the Agreement domestically.¹⁸⁵ Since the TRIPS came into force in 1995, the least-developed country Members have only until 2005 before they have to adhere to TRIPS standards.

DOMESTIC CONTROL

Any country that participates in the international system is required to make some compromises. Though every nation-state is sovereign, concessions must be made in order to reach inter-governmental agreements. The compromise of sovereignty is, therefore, not new in international law because no nation has complete liberty to take action without contemplating the response of other nations. The nature of international treaties is such that they "constrain domestic political sovereignty through the assumption of external obligations."¹⁸⁶ The alternative, it has been suggested, is international anarchy. Barring this, nations must accept that the benefits of reciprocal obligations outweigh the costs of any loss of political and economic sovereignty.¹⁸⁷ However, the creation of the WTO, with its well organized dispute settlement mechanism will test the extent to which nations are willing to compromise their sovereignty in order to function in the international system. This is particularly so since the regulation of international trade has expanded beyond commodities to cover matters such as financial services and intellectual property.

¹⁸³ TRIPS, *supra* note 4, Article 65 (1), (2), (3).

¹⁸⁴ *Ibid.*, Article 65(4).

¹⁸⁵ *Ibid.*, Article 66.

¹⁸⁶ Trebilcock & Howse, *supra* note 65 at 14.

¹⁸⁷ *Ibid.*

Prior to TRIPS, each nation state was at liberty to determine, taking into account international treaties to which it was party, what could be protected under its laws as intellectual property, the scope of protection which would be provided, and the extent to which it was willing to enforce respect for IPRs. Now, under the TRIPS, WTO Member States have obligated themselves to implement certain minimum standards of intellectual property protection. Any derogation from the standards set out in TRIPS must be justified under the Agreement. As a result of TRIPS, many nations had to make extensive changes to their domestic laws and regulations. Since the standards in TRIPS are generally consistent with the prior practices of many industrialized countries, most of their intellectual property laws did not change significantly. Nonetheless, Canada, a country with a well-developed IP regime, has been faced with repeated complaints before the WTO with respect to its intellectual property laws. The challenges developing countries face will be even greater.

CHAPTER III

Although international conventions on intellectual property existed prior to the Uruguay Round discussions, TRIPS is unique in that it was executed by most of the world's trading partners and it is subject to enforcement through the GATT dispute settlement mechanisms. Furthermore, the scope and breadth of protection provided by the TRIPS Agreement surpasses that of any prior international agreement on intellectual property.¹⁸⁸ Other international intellectual property conventions merely state the intellectual property rights which signatories must respect while TRIPS delineates civil and criminal sanctions that Members should implement to allow holders of intellectual property rights to enforce such rights.¹⁸⁹

TRIPS & THE GATT FRAMEWORK - DISPUTE SETTLEMENT AND COMPLIANCE

TRIPS sets out special dispute settlement mechanisms for complaints relating to intellectual property. Article 64 of TRIPS states that Articles XXII and XXIII of the GATT 1994 as elaborated under the Dispute Settlement Understanding [hereinafter "the DSU"] shall apply to the settlement of disputes under TRIPS. Pursuant to the DSU, the parties to the WTO Agreement shall first engage in consultations. If no solution is reached within 60 days, the parties may request the establishment of a panel. The parties may make written submissions and have meetings with one another or with third parties. A final report must be released to the parties within 6 months from the date of the panel composition. Unless the Panel Report is appealed within 60 days, it must be adopted by the Dispute Settlement Body [hereinafter "the DSB"].¹⁹⁰

A party may decide to appeal the decision to the Appellate Body.¹⁹¹ Appellate proceedings are generally not to exceed 60 days and the Appellate Body report must be adopted within 30 days.¹⁹² Pursuant to Article 21 of the DSU, the Member concerned has 30 days to inform the

¹⁸⁸ Moncayo von Hase, *supra* note 6 at 93.

¹⁸⁹ *Ibid.*

¹⁹⁰ *WTO Agreement, supra* note 2, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 33 I.L.M. 147 [hereinafter DSU], Articles 4-6, & 16.

¹⁹¹ *Ibid.*, Articles 16-17.

¹⁹² *Ibid.*, Article 17.

DSB of its intentions with respect to its implementation of the decision. If the Member cannot comply with the decision immediately, a "reasonable period of time" will be permitted for implementation. Such reasonable period should generally not be more than 15 months from the establishment of a panel.¹⁹³

It has been suggested that as a quasi-permanent standing tribunal, the Appellate Body will have an important impact in the development of WTO jurisprudence and future practice.¹⁹⁴ Though there is some debate about the legal effect of WTO final rulings, it is argued that they are legally binding insofar as they create international law obligations.¹⁹⁵ According to one legal scholar, "[t]here is no doubt that a member is bound to implement a decision under international law."¹⁹⁶ This can and should, another scholar suggests, have an important effect on the domestic jurisprudence of WTO member states.¹⁹⁷ The WTO system of dispute resolution, which includes the right to appeal to an appellate body, is equivalent to a judicial system. The Panel and Appellate Body reports are of a judicial nature and cannot be changed once they have been adopted by the DSB. Therefore, WTO panel decisions should be treated as international judicial decisions.¹⁹⁸

WTO Member States must comply with the established rules for dispute settlement. A nation may choose not to be part of the WTO if it does not want to operate within the established system. However, the advantage of WTO Membership is that Member States participate in an organized system for trade liberalization which confers certain benefits such as lower tariffs and MFN treatment. Smaller nations may gain more from trade liberalization than do large nations like the U.S. The reason for this is that trade liberalization provides the smaller nation access to more new potential trading relationships than in the case of a larger nation gaining access to the

¹⁹³ *Ibid.*, Article 21.

¹⁹⁴ D. Steger & S. Hainsworth, "New Directions in International Trade Law: WTO Dispute Settlement" in J. Cameron & K. Campbell eds., *Dispute Resolution in the World Trade Organization* (London: Cameron May, 1999) 28 at 32.

¹⁹⁵ J. H. Jackson, "The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation" in Cameron & Campbell eds., *supra* note 194, 69 at 69-74.

¹⁹⁶ Thomas Cottier, "The Impact of the TRIPS Agreement on Private Practice and Litigation," in Cameron & Campbell eds., *supra* note 194, 111 at 126.

¹⁹⁷ J.H. Jackson, *supra* note 195 at 69-74.

¹⁹⁸ Cottier, *supra* note 196 at 26-27.

markets of a smaller country.¹⁹⁹ Consequently, it is probably not economically beneficial for nations like Canada, nor for small developing countries to refuse to participate in the world trading order.²⁰⁰ Though China, the most populous country in the world, is not currently a member of the WTO, China has been making efforts to join the WTO and it now appears that China will soon be successful in its efforts.²⁰¹

WTO CASES

A rigid application of TRIPS can lead to IPRs being treated as natural rights which can rarely be limited. This is contrary to the balancing of interests which necessarily occurred when IPRs were within domestic control. It is doubtful that IPRs were ever intended to be absolute - whether in the context of TRIPS or otherwise. The effect of TRIPS has been the creation of protection which is more akin to a natural rights theory of IP protection. However, this approach to IP has its limitations. IP rights are inherently anti-competitive and must therefore be offset by other interests. If the ability to control the negative effects of IP rights is removed from the state, there is a risk of IPRs taking precedence over other equally if not more important concerns, such as health and education.

The WTO cases on TRIPS demonstrate that the limitations a Member state can place on these rights are only those which are permissible within the WTO framework, not those which make the most sense for the Member state. This is the natural consequence of according the TRIPS a strict and narrow interpretation. This author would suggest that more weight should be given to the other interests recognized in Articles 7 & 8 of the TRIPS, as well as to the spirit of Article 1.1, which allows Members the flexibility to implement the Agreement as they see best. The WTO panels should not take on a role in which they effectively dictate domestic policies from a supranational level. It should not be the role of the WTO to act as a world government. Each nation's elected representatives should have some degree of latitude to implement policies beneficial to their citizens.

¹⁹⁹ Trebilcock & Howse, *supra* note 65 at 14-15.

²⁰⁰ Johnston, NAFTA, *supra* note 83 at 430.

²⁰¹ Office of the United States Trade Representative, "USTR Releases Details on U.S.-China Consensus on China's WTO Accession" (2001), online: <<http://www.ustr.gov/releases/2001/06/01-38.pdf>> (date accessed: 26 June 2001).

While there is no *stare decisis* in WTO cases, meaning that the panels are not bound to follow decisions of other panels, these cases do have precedential value insofar as the panels tend to refer to decisions of previous panels to support their analysis. Moreover, unless the facts are clearly distinguishable, it would be difficult for a WTO panel to reach a conclusion on the application of TRIPS that is in direct conflict with the decision of another panel. The practical effect of these cases is that they set a standard which will be followed by other WTO panels in their interpretation of TRIPS. The impact of these decisions on the Member states will be significant.

The U.S. has been the most frequent complainant before the WTO.²⁰² The United States has brought complaints under TRIPS against several countries including Argentina, Canada, the European Communities, Ireland, Denmark, and Greece. Cases brought by the United States against Sweden, Pakistan, Japan and Portugal were settled by mutually agreed solutions to the disputes.²⁰³ In April 2000, the U.S. commenced a dispute with Brazil over Brazil's patent law. The U.S. recently requested the establishment of a dispute resolution panel to review a section of Brazil's patent law that provided for a local manufacturing requirement. Brazilian law allowed the government to grant a compulsory license if the holder of a Brazilian patent did not manufacture the product in Brazil within three years of the date the patent was issued. The U.S. contended that the Brazilian measure was contrary to Article 27.1 of the TRIPS, which prohibits discrimination with respect to whether the goods are imported or produced locally.²⁰⁴ Like several others, this dispute was settled by a mutually agreed solution, which provided for the protection of American intellectual property interests while allowing Brazil to attain its objective of receiving the pharmaceutical drugs necessary to combat HIV in Brazil.²⁰⁵

²⁰² Steger & Hainsworth, *supra* note 194 at 34. See also www.wto.org for a list of complaints and cases.

²⁰³ "Overview of the state of -play of WTO disputes" online: <http://www.wto.org/tratop_e/dispu_e/stplay_e.doc>> (date accessed: 25 Aug 2000) [hereinafter Overview].

²⁰⁴ Office of the United States Trade Representative, *Press Release 25 June 2001: United States and Brazil Agree to Use Newly Created Consultative Mechanism to Promote Cooperation on HIV/AIDS and address WTO Patent Dispute*, online: <<http://www.ustr.gov/releases/2001/06/01-46.htm>> (date accessed: 26 June 2001).

²⁰⁵ *Ibid.*

The European Communities and other countries have also filed complaints against various countries, including the U.S. and Canada. Canada has filed complaints against other nations and has recently been the subject of two intellectual property related complaints before the WTO. Various nations have had to adjust their laws or practices to comply with TRIPS.²⁰⁶ As disputes are heard and countries are required to alter their domestic legislation, the considerable impact of TRIPS on international intellectual property law will become clearer.

Canada, the United States, and India will be the focus of the discussion in this section since there are decided WTO decisions respecting their compliance with the TRIPS intellectual property standards.

India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaints by the United States²⁰⁷ and the EC²⁰⁸

The complaints against India by the U.S. and the EC led to the first WTO Panel decisions on TRIPS. The U.S case preceded the EC complaint, which was heard and decided just months after the Appellate Body rendered a decision in the U.S. case. The U.S. complained that India had not implemented patent protection for agricultural and pharmaceutical chemicals in violation of Articles, 70.8, 70.9 and 63 of TRIPS.²⁰⁹ The EC was a third party in the dispute. The WTO Panel concluded that India had not complied with its obligations under Article 70.8(a) of TRIPS. In the alternative, the Panel concluded that India violated Articles 63.1 and 63.2 of TRIPS in failing to provide adequate protection for patents during the transitional period. The WTO Panel recommended that that India bring its transitional regime for patent protection in line with TRIPS.²¹⁰

²⁰⁶ Overview, *supra* note 203.

²⁰⁷ *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the United States)* (1997), WTO Doc. WT/DS50/AB/R (Appellate Body Report), online: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter *U.S.-India case*]

²⁰⁸ *India - Patent Protection of Pharmaceutical and Agricultural Chemical Products (Complaint by the European Communities and their Member States)* (1998) WTO Doc. WT/DS79/R (Panel Report), online: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter *EC-India case*]. The two cases shall be collectively referred to as the "*India cases*".

²⁰⁹ *U.S-India case* Appellate Body (hereinafter "*AB*") Report, *supra* note 207 at para. 1

²¹⁰ *U.S-India case* AB Report at para. 2

India appealed the Panel decision to the Appellate Body. In the Appeal, the Appellate Body was asked to consider whether the Panel had given a correct interpretation to the requirement in Article 70.8(a); whether the Panel had erred in its application of the burden of proof or in its treatment of Indian municipal law; whether Article 70.9 requires the mechanism stated therein to be put in place as of the date of entry into force of the *WTO Agreement*; and finally, whether the Panel erred in rendering a decision on the alternative claim by the U.S. under Article 63 after having decided in favour of the U.S. on its principle claim.²¹¹

Article 1.1 of TRIPS provides that Members are free to determine the appropriate method of implementing TRIPS within their own domestic legal context. India argued that this was precisely what it had done. Nonetheless, the Appellate Body agreed with the Panel decision that India was in violation of its obligations under Articles 70.8 and 70.9 of TRIPS.²¹² However, the Panel erred in making conclusions on the alternative claim by the U.S. under Article 63 of TRIPS.²¹³ Since the U.S. and EC cases against India mirror one another, the details of the arguments in the Appellate Body case will be incorporated into the discussion of the EC case.

As both the U.S. and the EC did in *U.S.-India* case, the EC complained in the *EC-India* case that India had not implemented Articles 70.8 and 70.9 of TRIPS. Since this complaint by the EC was identical to that of the U.S. in the previous case, the EC relied heavily on the decisions of the Panel and the Appellate Body in the *U.S.-India* case. Despite having third party status in the *U.S.-India* case, the EC requested consultations with India in April, 1997 regarding the absence of protection in India for pharmaceutical and agricultural chemical products or formal systems to permit the filing of such patent applications and to provide for the grant of exclusive marketing rights.²¹⁴ The Panel in the *U.S.-India* case issued its report in September 1997. India appealed the decision in the *U.S.-India* case. However, the Panel's decision was upheld by the Appellate Body. The Dispute Settlement Body [hereinafter "the DSB"] adopted the Panel and Appellate Body reports from the *U.S.-India* case in January 1998.

²¹¹ *Ibid* at para. 28

²¹² *Ibid* at 97, 98

²¹³ *Ibid* at para. 96

²¹⁴ *EC-India* case, *supra* note 208 at para. 1.1

The Panel in the *EC- India* case heard the parties to the dispute in March and April 1998, just months after the *same* Panel members from the *U.S.-India* dispute (with the exception of the Chairman since he was no longer available) decided in favor of the U.S. on identical issues.²¹⁵ As the U.S. explained in its third party submissions in this case, the same matters had been the subject of a WTO dispute which had been concluded not long before. Thus, India and the U.S. had not reached an agreement on a time frame for implementation of the changes and India had not yet, therefore, made any changes to its laws.²¹⁶ The Panel in the *EC-India* case issued its report in favor of the EC on August 24, 1998.

In India's legal system, though international agreements do not automatically become part of India's domestic law, there is a presumption that Parliament does not intend to act in breach of its international obligations.²¹⁷ Prior to the entry into the force of the TRIPS Agreement, India began the process of changing its patent law to bring it into conformity with TRIPS.²¹⁸ Due to timing issues and the nature of the domestic process, the law was not changed before the dissolution of the Lower House of the Indian Parliament. In order to rectify the situation, administrative arrangements were made under the authority of the Indian Constitution for the separate storage of pharmaceutical and agricultural chemical patent applications.²¹⁹

Like the U.S., in the earlier case, the EC submitted that India had not complied with its obligations under Article 70.8(a) of TRIPS to establish a means by which applications for such inventions could be filed that adequately preserved the novelty and priority of these applications (referred to as "mailbox applications"), and that Indian law was inconsistent with Article 70.9 of TRIPS.²²⁰ Articles 70.8 states:

²¹⁵ *Ibid.* at paras. 1.2-1.3

²¹⁶ *Ibid.* at para. 5.2

²¹⁷ *Ibid.* at para. 2.1

²¹⁸ At the time of the US. and EC complaints there was no protection under Indian patent law for agricultural and pharmaceutical product patents.

²¹⁹ *EC-India* case, *supra* note 208 at paras. 2.3-2.7

²²⁰ In the report, the Panel used the term "mailbox system" as shorthand for a system which allows the filing of patent applications for pharmaceutical and agricultural chemical products in accordance with Article 70.8 of TRIPS.

Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

- (a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;
- (b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and
- (c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

Article 70.9 provides:

Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

At the time this case was heard, India was obligated to implement subparagraph (a) of Article 70.8 but not the other two subparagraphs of that Article.²²¹

India first tried to establish that the EC should have made its complaint with the U.S. rather than bringing a separate complaint. India submitted that the actions of the EC in bringing the separate complaint were inconsistent with Articles 9.1 and 10.4 of the DSU, which requires parties to submit multiple complaints to a single panel "whenever feasible" or "whenever possible".²²² The Panel rejected this argument, concluding that it was not mandatory for the EC to submit its

²²¹ Part VI of TRIPS governs the Transitional Arrangements. As a developing country, India had an additional 10 years after the after entry into force of the WTO Agreement to provide patent protection for pharmaceutical and agricultural chemical products pursuant to Article 65 of TRIPS.

²²² *EC-India case*, *supra* note 208 at para. 3.2

complaint together with the U.S. and that Article 9.1 of the DSU should not limit the substantive or procedural rights of the Member states.²²³ Moreover, the Panel concluded that it had not been feasible for the EC to submit its case to a panel together with the U.S. because at the time the U.S. requested the establishment of a panel in 1996, the EC had not even requested consultations with India and was therefore not entitled to request the establishment of panel. It would appear, therefore, that a Member state could be subjected to repeated complaints by different parties on the same issue. Hopefully this will not result in some states using the WTO panels to intimidate and harass other Members, as was arguably the situation in the *India cases*.

Since the EC asked the Panel to extend its findings in the *U.S.-India* case to the present case, the Panel referred to the WTO case *United States-Restrictions on Imports of Tuna*²²⁴ for the proposition that though there is no *stare decisis* in the GATT, the panels strive for coherence in their decisions.²²⁵ The Panel concluded that it could, therefore, take the decisions of the previous panels or the Appellate Body into consideration. The Panel also noted the importance of avoiding inconsistency in the decisions.²²⁶

On the issue of burden of proof, the Panel concluded that India had the onus of demonstrating that its law was not inconsistent with TRIPS.²²⁷ The Panel took this approach despite India's assertions that the onus in the first case was incorrectly allocated and that the Panel and the Appellate Body in the *U.S.-India* case had violated established principles governing the burden of proof, and that the first case was incorrectly decided.²²⁸ India had argued in the *U.S.-India* case that the Panel violated established principles on burden of proof by incorrectly interpreting TRIPS as requiring a Member to eliminate any reasonable doubts that it has met the requirements of the Agreement. The Appellate Body in the *U.S.-India* case concluded that the Panel had erred on this point and that Article 70.8(a) does not require a Member state to establish a means to eliminate any reasonable doubts regarding whether mailbox applications could be

²²³ *Ibid.* at paras. 7.14-7.15

²²⁴ (*Complaints by the EEC and the Netherlands*), (1994) WTO Doc. DS29/R

²²⁵ *EC-India* case, *supra* note 208 at para. 7.27

²²⁶ *Ibid.* at para. 7.30

²²⁷ *Ibid.* at para 4.12

²²⁸ *Ibid.*

rejected on the basis that the matter for which protection was sought was not patentable at the relevant time under the laws of that state.²²⁹ According to the Appellate Body, however, the Panel was correct in deciding that 70.8(a) requires Member states to allow mailbox applications to be filed and must allocate filing and priority dates to those applications.²³⁰

Since the Panel in the *U.S.-India* dispute found that India's system of administrative instructions did not provide a sound legal basis for preserving the novelty and priority of the inventions, the Panel in the *EC-India* case decided that the EC had established a *prima facie* case of inconsistency on the basis of its reference to the *U.S.-India* case.²³¹ India submitted that it was not the role of the Panel to decide whether the mailbox system was consistent with Indian law but whether India was complying with its TRIPS obligations.²³²

India pointed out that in the *U.S.-India* case, India and the U.S. had presented conflicting views on what was possible under Indian law, but the Panel had agreed with the American interpretation of Indian law.²³³ India argued that the Panel in the *U.S.-India* case had not assessed Indian law as a fact to be established by the U.S. but rather as law to be interpreted by the Panel.²³⁴ India submitted that the Panel and the Appellate Body had incorrectly based their conclusions in the earlier case on their own interpretations of Indian law.²³⁵ India further submitted that Member states should be given the benefit of the doubt when it comes to their interpretations of their municipal law. The U.S. acknowledged that it was proper to seek guidance from Members regarding their domestic law and to give Members the benefit of the doubt when it comes to the interpretation of their domestic laws. However, the U.S. argued, WTO Panels do not have to give total deference to national authorities.²³⁶

²²⁹ *U.S.-India* case AB Report, *supra* note 207 at para. 58.

²³⁰ *Ibid.* at para. 57.

²³¹ *EC-India* case, *supra* note 208 at paras.7.42-7.43.

²³² *Ibid.* at para. 4.11.

²³³ *Ibid.* at para. 4.12.

²³⁴ *U.S.-India* case AB Report, *supra* note 207 at para. 9.

²³⁵ *EC-India* case, *supra* note 208 at para.4.14.

²³⁶ *U.S.-India* case AB Report, *supra* note 207 at para. 17.

Although the Appellate Body acknowledged that Article 1.1 allows Members the freedom to determine the appropriate method of implementing TRIPS, the Appellate Body held that it was appropriate for the Panel to engage in a detailed examination of the domestic law in question in order to assess whether the domestic law was consistent with the TRIPS Agreement.²³⁷ Article XVI.4 of the *WTO Agreement* requires each member to "ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements". Like the Panel in the *U.S.-India* case, therefore, the Appellate Body in the *U.S.-India* case engaged in an examination of Indian law. Though the Appellate Body stated that it was not interpreting Indian law *per se* but rather examining the law to see whether it was consistent with TRIPS, the Appellate body appeared to provide its own interpretation of the Indian law and how Indian authorities should interpret and apply Indian law.²³⁸ At paragraph 69 of the Appellate Body Report, the tribunal stated:

We note also that, in issuing these 'administrative instructions', the Government of India did not avail itself of the provisions of section 159 of the Patents Act, which allows the Central Government 'to make rules for carrying out the provisions of [the] Act' or section 160 of the Patents Act, which requires that rules be laid before each House of the Indian Parliament. We are told by India that such rulemaking was not required for the 'administrative instructions' at issue here. But this, too, seems to be inconsistent with the mandatory provisions of the Patents Act.

The Appellate Body was not persuaded by India's explanation of "these seeming contradictions".²³⁹

India noted that interpretation of TRIPS given by the Panels and the Appellate Body in these cases would result in the consequence that the transitional arrangements which were intended to allow developing countries to postpone certain legislative changes would not allow such action in the areas of technology that are most sensitive for developing countries - product patents for pharmaceutical and agricultural chemical products. This, India argued, would be an absurd result.²⁴⁰ However, the Panel viewed this as a "critical part of the deal" that was struck in

²³⁷ *Ibid.* at paras. 66-69.

²³⁸ *Ibid.* at paras. 66-69.

²³⁹ *Ibid.* at para. 70.

²⁴⁰ *EC-India* case, *supra* note 207 at para. 7.71.

allowing the developing countries to delay the introduction of product patent protection into their national laws.²⁴¹ The Panel's view, though it may be an absurd result as India suggested, does appear to be a reasonable interpretation of what the text of TRIPS requires. Unfortunately, some of the developing countries may not have been fully cognizant of the nature of the changes they were agreeing to make to their national laws or they may have expected that TRIPS would be interpreted to allow more flexibility for Member states.

Like the Panel and the Appellate Body in the *U.S.-India* case, the Panel in the EC case examined India's laws, rejected the Indian interpretation of Indian law and decided the case in the favor of the EC. The Panel in the *EC-India* case recommended that the DSB request that India bring its transitional regime into conformity with its obligations under TRIPS.

One legal commentator questioned whether the Panels and Appellate Body in the *India cases* should have interpreted Indian law as though they were interpreting a WTO Agreement even though the decision may have been valid given the detailed requirements imposed by TRIPS.²⁴² Both tribunals have been criticized for failing to provide any real analysis, and for not considering any expert views on the Indian legal system with respect to patent protection.²⁴³ These early TRIPS decisions were an indication that the WTO framework could substantially reduce domestic control over intellectual property regimes.

In the *U.S.-India* case, the parties agreed that India could have 15 months from the date of the adoption of the reports to implement the necessary changes. This deadline expired on April 16, 1999. At the DSB meeting on April 28, 1999, India presented its final status report on implementation, in which it disclosed the enactment of legislation to implement the recommendations and rulings of the DSB. India presented a joint statement with the EC in which it agreed to implement the changes within the time frame agreed to in the U.S. dispute on this matter.²⁴⁴

²⁴¹ *Ibid.* at para. 7.40.

²⁴² Trebilcock & Howse, *supra* note 65 at 331.

²⁴³ *Ibid.*

²⁴⁴ Overview, *supra* note 203 (date accessed: 15 July 2001)

Canada - Term of Patent Protection - Complaint by the United States²⁴⁵

This case was about the term of protection for Canadian patents granted before 1989. Alleging that Canada was not complying with TRIPS, the United States requested consultations with Canada on May 6, 1999.²⁴⁶ Since the consultations which were held in June 1999 did not resolve the dispute, the U.S. requested the establishment of a dispute settlement panel, which was established on September 22, 1999.²⁴⁷ The dispute was heard in Geneva on December 20, 1999 and January 25, 2000.²⁴⁸ Canada defended its position by arguing that Canadian law effectively complied with TRIPS.²⁴⁹

Under Article 65, all Members, with the exception of developing countries, are obligated to implement the Agreement within one year of entry into force of the Agreement. Since TRIPS came into force January 1, 1995, all developed country Members had to ensure that their IP laws were compliant by January 1, 1996.²⁵⁰ The Canadian *Patent Act* distinguishes between patent applications filed or issued before October 1, 1989 ("Old Act") and those filed or issued after that date ("New Act").²⁵¹ Before October 1, 1989 the term of protection for patents was 17 years from the date of *issue* rather than 20 years from the date of filing.²⁵² For patents filed on or after October 1, 1989, the term of protection is 20 years from the date of filing.²⁵³

In this case, which the Americans described as "an exceedingly simple one,"²⁵⁴ the U.S. argued that TRIPS obligates members to grant a term of patent protection of at least 20 years from the date of *filing*, and requires all Members to extend this minimum term of protection to all patents in existence at the time TRIPS became applicable to the Members.²⁵⁵ Relying on Article 31 of the *Vienna Convention* as authority for the principle that any subsequent practice in the

²⁴⁵ *Canada - Term of Patent Protection (Complaint by the United States)* (2000), WTO Doc. WT/DS170/R (Panel Report), online: <http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm> [hereinafter *Patent Term* case]

²⁴⁶ *Ibid.*, Attachment 1.1 First Submission of the United States.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* at paras. 2.1.6, 1.7.

²⁴⁹ *Ibid.*, Attachment 2.1, First Submission of Canada.

²⁵⁰ TRIPS, *supra* note 4, Article 65.

²⁵¹ *Patent Act*, R.S.C. 1985, c. P-4, ss. 44, 45.

²⁵² *Ibid.* s. 45.

²⁵³ *Ibid.*, s.44.

²⁵⁴ *Patent Term* case, *supra* note 245, Attachment 1.1, First Submission of the United States at para. 1.

application of an agreement can establish the agreement of the parties regarding its interpretation, the U.S. referred to changes that were made by the U.S. and various other nations, including Australia, Germany, Greece, New Zealand and Portugal, to make their legislation TRIPS compliant.²⁵⁶

The U.S. alleged that Canada was not complying with TRIPS since section 45 of the Canadian *Patent Act* provided a term of protection of 17 years from the date of *issue* of the patent for patents filed before October 1, 1989, rather than 20 years from date of filing.²⁵⁷ TRIPS, the U.S. argued, outlines the minimum term of protection Member states must provide in their domestic legislation, not a maximum term.²⁵⁸ In support of this argument, the U.S. referred to part of Article 1.1 of TRIPS which states:

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to implement in their law more extensive protection than is required by this Agreement, provided such protection does not contravene the provisions of this Agreement.

Clearly, the U.S. argued, Members are free to provide more protection for IP rights than what is set out in the Agreement but not less.²⁵⁹

In addition, the U.S. relied on Article 70 of TRIPS which governs the protection of existing subject matter. TRIPS does not give rise to any obligations with respect to acts which occurred prior to the application of the agreement but it does give rise to obligations with respect to all subject matter existing at that date.²⁶⁰ Articles 70.1 and 70.2 of TRIPS state:

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.
2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on

²⁵⁵ *Ibid.* at paras. 3, 9, 10, 11.

²⁵⁶ *Ibid.* at paras. 16, 17.

²⁵⁷ *Patent Term* case, *supra* note 231, Attachment 1.1 at para 3.

²⁵⁸ *Ibid.* at paras. 10-12.

²⁵⁹ *Ibid.*

²⁶⁰ TRIPS, *supra* note 4, Article 70; *Ibid* at paras. 1 & 2.

the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement.

According to the U.S. submission, Article 70.2 means that the TRIPS applied to patents already existing at the time TRIPS came into force.²⁶¹ The Canadian position was that, by virtue of Article 70.1 of TRIPS, patents granted prior to the application of TRIPS should be exempt from TRIPS.²⁶² Canada submitted that since Article 70.2 uses the phrase "except as otherwise provided for in this Agreement," it is subject to the provisions of Article 70.1.²⁶³ Since Article 70.1 provides that the Agreement does not apply to acts which occurred before it came into force, TRIPS should not retroactively apply to pre-existing patents.²⁶⁴ The American response to this argument was that Canada's interpretation of this Article would render TRIPS meaningless for all IP rights existing before TRIPS came into force.²⁶⁵ This, it was suggested, would have devastating consequences for intellectual property rights holders and would dramatically undermine the TRIPS agreement.²⁶⁶

If the Canadian position on this issue had been accepted by the Panel, the result would have been to give all countries more time before they would have to comply with their TRIPS obligations with respect to existing patents. This is critical because much of the developing country resistance to TRIPS stems from a negative reaction to patent protection, particularly in the area of pharmaceuticals. If Member states could avoid applying TRIPS to pre-existing patents, the developing countries would have more time to effectively "catch up" before TRIPS would have a substantive effect on their domestic intellectual property regimes. However, in this writer's view, this interpretation of TRIPS appears to be contrary to the language and the spirit of the TRIPS Agreement.

According to the Canadian records, more than 60% of the Old Act patents (pre-1989 filings) would not expire until or after twenty years from the filing date.²⁶⁷ Of the 40% of Old Act patents that would expire before the end of twenty years from the date of filing, more than three

²⁶¹ *Patent Term* case, *supra* note 245, Attachment 1.1 at para. 11.

²⁶² *Ibid.*, Attachment 2.1 at para. 10.

²⁶³ *Ibid.* at para 13.

²⁶⁴ *Ibid.*, Attachment 2.1 at paras 13, 14, 113-126.

²⁶⁵ *Ibid.*, Attachment 1.2, Oral Statement of the United States at the First Meeting with the Panel at para. 17.

²⁶⁶ *Ibid.*

quarters of them would expire in the nineteenth year.²⁶⁸ Of those that would expire in the nineteenth year from the date of filing, the majority of them would expire in the last half of the nineteenth year.²⁶⁹ While the changes to the *Patent Act* reduced incentives to delay prosecution of the patent application, the legislation still allowed the applicant to retain control of the prosecution process.²⁷⁰ The average time between the date of filing and grant or issue for applications filed under after 1989 in Canada is five years for the majority of applications.²⁷¹ However, the applicant had the discretion to either accelerate or retard the prosecution process.²⁷²

Canada argued that section 45 of the Canadian *Patent Act* was not directly comparable to Article 33 of TRIPS.²⁷³ While section 45 of the Canadian *Patent Act* expressed a term of protection with reference to the date of grant, there was no reference to the date of filing.²⁷⁴ Hence, Canada argued, section 45 of the Canadian *Patent Act* did not require a term of protection that ended before 20 years from the date of filing. Since section 45 made no reference to the filing date, there could be no TRIPS violation.²⁷⁵ One would need to consider, therefore, whether the protection provided under section 45 of the *Patent Act* was effectively equivalent to the protection required by Article 33 of TRIPS.²⁷⁶ The Canadian government argued that since it took an average of three years from date of filing for a Canadian patent to be issued, a term of protection of 20 years from the date of filing was equivalent to 17 years from the date of issuance, more or less, depending on how long it took for the patent to be issued.²⁷⁷ If it took 5 years for the patent to be issued, the patentee would have 15 years left on the patent after issuance based on TRIPS requirements, totaling 20 years from the date of filing. On the other hand, if it took 2 years to process the patent application, the patentee would have 18 years of

²⁶⁷ *Ibid.*, Attachment 1.1 at paras. 42-45.

²⁶⁸ *Ibid.* at paras. 42-45.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.* at para. 49.

²⁷¹ *Ibid.* at paras. 52-54.

²⁷² *Ibid.* at para. 49.

²⁷³ *Ibid.* at paras. 59-64.

²⁷⁴ *Patent Act*, *supra* note 251, s.45; *Ibid.*, Attachment 2.1 at para. 85.

²⁷⁵ *Patent Term* case, *supra* note 245, Attachment 2.1 at paras. 85-86.

²⁷⁶ *Ibid.*, Attachment 1.1 at paras. 59-64.

²⁷⁷ *Ibid.*, Attachment 2.1 at para. 64.

protection after the date of issue, based on a term of protection of 20 years from the date of filing.

The section 45 term of protection, it was argued, was equivalent or superior to the 20 year TRIPS requirement.²⁷⁸ Moreover, section 45 did not require that the term of protection end before 20 years from date of filing.²⁷⁹ In fact, Canada submitted, it was within the strategic control of the applicant to extend the length of the term of protection.²⁸⁰ The applicant had various options available to retard the prosecution of a patent. These included asking the examiner to postpone the examination, waiting until the end of all prescribed periods before responding to the examiner's reports, allowing the application to become abandoned, or not paying the final fees.²⁸¹ In the case of applications that were abandoned, the applicant could have the application reinstated within twelve months from the date of abandonment.²⁸² In addition, applicants who wanted to prolong their period of protection under the Canadian *Patent Act* were able to do so without any prejudice to the security of their invention because under the old *Patent Act*, applications were only opened to public inspection after the patent was granted.²⁸³

Canada also submitted that Article 62 of TRIPS further addresses the scope of the obligation set out in Article 33 of the Agreement.²⁸⁴ Article 62 states:

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the Provisions of the Agreement.
2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

²⁷⁸ *Ibid.*, Attachment 2.1, at para. 5.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* at paras. 5, 93-95.

²⁸¹ *Ibid.*, Attachment 1.1 at paras. 36, 37.

²⁸² *Ibid.* at para. 37.

²⁸³ *Ibid.* at paras. 38, 39.

²⁸⁴ *Ibid.*, Attachment 2.1 at para. 7.

The Canadian government took the position that the phrase "unwarranted curtailment" in Article 62.2 were an indication that Article 33 could not be understood to require a minimum term of protection of a full 20 years of exclusivity.²⁸⁵ Therefore, it was argued, Article 33 is properly characterized as a substantive rather than a technical rule.²⁸⁶ Canada encouraged the Panel to consider the substance of the domestic legislation; that is, look at the "effectiveness" and "adequacy" of the law in implementing the TRIPS obligation.²⁸⁷ It was argued that the practical effect of the Canadian legislation was to provide a term of patent protection that was equivalent to that required by the TRIPS Agreement.²⁸⁸

In support of the position that its term of protection was essentially equivalent to that required by TRIPS, the Canadian government referred to Article 1709 of the *North American Free Trade Agreement*, which requires a term of protection of 20 years from the date of filing, or 17 years from the date of grant.²⁸⁹ It was argued that the fact that the U.S., the complaining party, agreed to Article 1709 suggested that the U.S. viewed the terms as equivalent. Moreover, Canada attempted to establish that in providing a 17 year from grant term of protection it was acting within "the scope of freedom afforded Members under paragraph 1 of Article 1" to determine the appropriate method of implementing TRIPS.²⁹⁰ Had the Canadian government been successful on this point, it would have been foreseeable that TRIPS would allow Member states to retain a fair level of domestic control over their intellectual property regimes. If the "equivalency" argument had been successful, it also would have facilitated arguments supporting the ability of various nations to implement the Agreement in a flexible manner suitable to their particular conditions. However, the WTO had already rejected such flexible interpretation on TRIPS in the *India case*, *supra*.

The Panel concluded that section 45 of the Canadian *Patent Act* violated Article 33 of the TRIPS Agreement, holding that effective substantial compliance with TRIPS is not sufficient. The

²⁸⁵ *Ibid.*, Attachment 1.1. at para. 68.

²⁸⁶ *Ibid.* at para. 69.

²⁸⁷ *Ibid.* at para. 70.

²⁸⁸ *Ibid.* at paras 71-79.

²⁸⁹ *Ibid.*, Attachment 2.1 at paras 80-81.

²⁹⁰ *Ibid.* at para 82.

Panel was of the view that Member states must implement domestic law according to the specific standards prescribed by the Agreement. Hence, the Panel requested that the Canadian government bring its measures into conformity with TRIPS.²⁹¹

On the question of the burden of proof, the Panel agreed with the Canadian assertion that the U.S. had the burden to establish a *prima facie* case of inconsistency with the TRIPS.²⁹² The Panel referred to prior WTO jurisprudence which held that the party who asserts the affirmative of a particular claim or defence, whether complaining or defending, has the burden of proof.²⁹³ Once that party has raised a sufficient presumption in favour of its position, the burden shifts to the other party to refute the presumption.²⁹⁴ Thus, once the U.S. established a *prima facie* case of inconsistency, Canada had the burden of rebutting the presumption.²⁹⁵

As required by Article 31 of the *Vienna Convention*, the Panel interpreted the Agreement in accordance with the ordinary meaning to be given to the terms in the context and in light of the object and purpose of the Agreement.²⁹⁶ The Panel agreed with the U.S. Submission that "subject matter" which was protected at the time TRIPS came into force on January 1, 1996 included inventions that had patent protection in Canada on that date.²⁹⁷ Since patented inventions were protected subject matter pursuant to Article 70.2 of TRIPS, the Panel declined to decide whether the administrative act of granting a patent was excluded from TRIPS application by virtue of Article 70.1.²⁹⁸

The Panel also rejected the Canadian submission that Article 70.2 did not apply because of the words "except as otherwise provided in this Agreement" in Article 70.1. The Panel rejected this submission on the basis that Article 70.1 refers to "acts" while Article 70.2 refers to "subject

²⁹¹ *Canada Patent Term* case, Panel Report, *supra* note 245.

²⁹² *Ibid.* at para 6.10.

²⁹³ *Ibid.* at, para. 6.9.

²⁹⁴ *Ibid.* at paras. 6.9, 6.10.

²⁹⁵ *Ibid.* at para 6.10.

²⁹⁶ *Ibid.* at para 6.13.

²⁹⁷ *Ibid.* at para 6.37.

²⁹⁸ *Ibid.* at para. 6.41.

matter", which the Panel considered to be two different concepts.²⁹⁹ Therefore, the acts mentioned in Article 70.1 did not fall within the exception in Article 70.2.³⁰⁰ The Panel adopted this interpretation in order to avoid any conflict between the first two paragraphs of Article 70, consistent with the presumption in international law against conflict.³⁰¹

The Panel pointed out that if Canada's argument that patents granted before January 1, 1996 are not subject to Article 70.6 of TRIPS (which states that Members do not need to apply the provisions regarding compulsory licensing "before the date this Agreement became known") were accepted, the effect would be to render Article 70.6 redundant or useless.³⁰² In other words, there would be no need to include this provision in the Agreement if patents granted before the Agreement came into effect were not subject to TRIPS. The Panel concluded that the Canadian interpretation of the Agreement was contrary to the principle of effective interpretation - that is, the interpreter is not to interpret the treaty in such a manner that the interpretation renders entire paragraphs or clauses of a treaty meaningless.³⁰³ If the Panel had interpreted Article 70 of TRIPS as not having retroactive effect, that is, not applying to pre-existing intellectual property, the object and purpose of TRIPS would have been, at least for the next several years, defeated.

The Panel found, therefore, that the U.S. had established a *prima facie* case that Article 70.2 applied to patents granted prior to the time TRIPS came into force for developed country Members.³⁰⁴ According to the Panel, Canada was obligated to grant the term of patent protection set out in Article 33 to inventions protected by "Old Act" patents that were still in force at the time TRIPS came into effect.³⁰⁵

In the view of the Panel, the language of Article 33, which requires a term of protection that "shall not end before" twenty years from the filing date, establishes the minimum term of

²⁹⁹ *Ibid.* at para. 6.44.

³⁰⁰ *Ibid.* at para. 6.44.

³⁰¹ *Ibid.* at para. 6.45.

³⁰² *Ibid.* at para. 6.48.

³⁰³ *Ibid.* at paras. 6.48, 6.49.

³⁰⁴ *Ibid.* at para. 6.56.

³⁰⁵ *Ibid.* at para. 6.56.

protection that must be afforded to Members.³⁰⁶ Section 45 of the *Patent Act* was therefore found to be inconsistent with TRIPS because it did not meet the minimum term set out in Article 33 in all cases.³⁰⁷ With respect to the equivalency argument put forward by the Canadian government, the Panel concluded that the Canadian interpretation would require one to read into the TRIPS Agreement language that is not in the Agreement. Citing an earlier WTO decision, the Panel pointed out that interpretation of the treaty must be based on the text above all else.³⁰⁸

The Panel also rejected the Canadian argument that since it was free to determine the appropriate method of implementing TRIPS, it could retain the term of protection of 17 years from grant. This Canadian position was based on a combined reading of Articles 33, 62.2 and 1.1. The Panel held that while Members are, according to Article 1.1, free to determine the appropriate method of implementing TRIPS, they cannot ignore the requirements of either Article 33 or Article 62.2.³⁰⁹ Though Canada did not argue that the overall average term of protection under section 45 for Old Act patents was consistent with TRIPS, the Panel took it upon itself to eliminate any such potential arguments, stating clearly that averages cannot be used to maintain an equivalency argument.³¹⁰

Likewise, the Canadian position that there was no TRIPS violation since the applicant could control the approval process through various statutory delays and thereby effectively extend the term of protection was rejected by the Panel.³¹¹ Moreover, such delays were found to be unreasonable contrary to Article 62.³¹² Article 62.1 of TRIPS allows Member states to require reasonable procedures and formalities in order to acquire and maintain intellectual property rights. However, as with all provisions which provide some flexibility within TRIPS, there is a requirement that such procedures and formalities be consistent with TRIPS. In the view of the Panel, the procedural delays described by Canada were not reasonable procedures since they

³⁰⁶ *Ibid.* at para 6.85-6.87.

³⁰⁷ *Ibid.* at para 6.88-6.89.

³⁰⁸ *Ibid.* at para 6.92. The panel referred to the WTO decision in *Japan -Alcoholic Beverages* (1997) WTO Doc. WT/Dee/AB/R.

³⁰⁹ *Patent Term* case, *ibid.* at para 6.94.

³¹⁰ *Ibid.* at para 6.97-6.100.

³¹¹ *Ibid.* at paras. 6.103-6.111.

³¹² *Ibid.* at paras. 6.112-6.115.

were not related to valid requirements for a proper examination. Therefore, requiring applicants to resort to such delays would be inconsistent with Article 62.1 of TRIPS.³¹³

At the DSB meeting of 23 October 2000, Canada stated that it intended to implement the DSB's recommendations and rulings but that it would require a reasonable period of time for implementation. The matter was submitted to an Arbitrator, who decided that 10 months would be a reasonable period of time for implementation. Therefore, Canada had until August 12, 2001 to amend its laws.³¹⁴

This case is useful for the present analysis because it demonstrates that no flexibility will be accorded to Members when implementing a provision which appears to be clear. Twenty years from filing means exactly that. Though Canada argued that seventeen years from grant is more or less the same as twenty years from filing, this is apparently not acceptable under WTO rules. If TRIPS were to be interpreted in a manner that allowed more discretion on the part of Member states as Canada argued, the Panel could have found that there was substantial compliance with the Agreement in this case. Though this writer does not disagree with the outcome of this case, it demonstrates an inclination to give TRIPS a strict interpretation. The message is that it is not acceptable to effectively comply with the Agreement, nor with the spirit of the Agreement. If Members do not conform to the precise requirements of TRIPS, they may be in violation. The TRIPS Agreement does not accord Members the flexibility to modify their laws so that they are in compliance with TRIPS in a general sense. It may be that this was the only approach for the WTO Panel to take in order to avoid applying different standards in each case, especially in a case such as this where the requirement is clearly stated to be a term of protection of twenty years from the date of filing.

³¹³ *Ibid.* at paras. 6.114-6.115.

³¹⁴ Overview, *supra* note 203 (date accessed 16 August 2001)

Canada - Patent Protection of Pharmaceutical Products, Complaint by EC³¹⁵

This case, brought by the EC against Canada, presents a more interesting problem than the *Patent Term* case. This case raised important questions regarding the legal interpretation of the language of the TRIPS Agreement and the balancing of the interests that has to be considered, or that should be considered, when interpreting TRIPS. Unfortunately, the Panel chose to decide the matter without addressing some of these critical issues.

On December 19, 1997, the EC filed a complaint against Canada, alleging that there was inadequate protection for pharmaceutical inventions under the Canadian *Patent Act*. The EC alleged that Canada's legislation violated Canada's obligations under TRIPS because it did not provide complete protection for patented pharmaceutical products for the full duration of the term of protection required by Articles 27.1, 28 and 33 of TRIPS. The EC requested a panel on November 11, 1998 and the DSB established a panel on February 1, 1999. The EC requested that the Panel find subsections 55.2(1) of the *Patent Act*, the "regulatory review exception" and 55.2(2) of the *Patent Act*, the "stockpiling exception," to be inconsistent with Canada's obligations under Articles 27.1, 28.1 and 33 of TRIPS.³¹⁶ Since this case raises interesting issues that are particularly relevant to this paper, the case will be discussed in some detail.

Article 27.1 of the TRIPS requires that patent rights be available without discrimination as to the place of the invention, the field of technology and whether products are imported or produced locally. Article 28 of TRIPS provides that a patent shall confer on the patent holder the right to prevent third parties from making, using, selling or offering for sale or importing the invention without consent. Where the patent applies to a process, in addition to the aforementioned rights, the patent holder may also prevent anyone from using the process. Article 33 of TRIPS sets a minimum term of patent protection of 20 years from the date of filing.

³¹⁵ *Canada - Patent Protection of Pharmaceutical Products, Complaint by the European Communities and their Member States* (2000), WTO Doc. WT/DS114/R (Panel Report) online: <www.wto.org/english/tratop_e/dispu_e/distab_e.htm> [hereinafter *Canada Pharmaceuticals* case].

³¹⁶ *Ibid.* at paras. 1.1 & 7.11.

Under the Canadian *Patent Act*, it is not an infringement to make, use, or sell a patented invention without consent of the patent owner solely for uses related to the development and submission of information as required under Canadian law with respect to the regulation of the manufacture, sale and use of any product ("regulatory review exception").³¹⁷ Nor is it an infringement to make, use, construct or sell the invention for manufacture and storage during the 6 months before the expiration of the patent for sale on the date that the patent expires ("stockpiling exception").³¹⁸

Section 55.2 of the *Patent Act* allows companies that produce generic drugs to conduct the necessary trials and generate the information necessary for submission to Canadian authorities in order to obtain approval to sell the drug as soon as the patent expires. It also enabled the generic drug industry to have a stockpile of drugs ready for sale as soon the patent expired, provided they had obtained the necessary approval.³¹⁹ The underlying policy rationale of the exception was to provide Canadians access to reasonably priced drugs: generic pharmaceutical drugs are less expensive than brand name pharmaceutical drugs.

In response to the EC complaint, Canada argued that these two measures were limited exceptions within the meaning of Article 30 of TRIPS which states:

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions 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.

Canada took the position that the provisions of section 55.2 the *Patent Act* "allow the patent owners complete freedom to exploit their rights throughout the full term of patent protection, leaving the monopoly of commercial exploitation and the exclusivity of economic benefits unimpaired for the life of the patent."³²⁰ Canada also submitted that these measures would not

³¹⁷ *Patent Act*, *supra* note 251, s.55.2(1).

³¹⁸ *Ibid.*, s.55.2(2), (3); *Manufacturing and Storage of Patented Medicines Regulations*, s.2.

³¹⁹ This section was amended as a result of this case by *Bill S-17*, *supra* note 130.

³²⁰ "Panel Cases to which Canada is a Party" online: <<http://www.dfait.maeci.gc.ca/tna-nac/menu-e.asp>> (date accessed: 10 Nov 1999).

conflict with the normal exploitation of the patent or prejudice the rights of the patent owner since the *Patent Act* provided for the sale of the invention only after the patent had expired.³²¹

Furthermore, it was submitted that these exceptions took into account the legitimate interests of third parties by allowing competitors to compete after the patent expired. It was argued that this was consistent with the underlying policy of open competition in Article 29 of TRIPS, which requires an applicant for a patent to disclose the invention in a sufficiently clear manner so that the invention may be reproduced by a person skilled in the art. Public disclosure of the invention is required in return for the grant of a patent so that once the patent expires others may produce the invention. It was submitted that this was also consistent with Article 33 of TRIPS which specifies a limited term of patent protection (a minimum of 20 years), and Article 40 of TRIPS which allows Members to implement national measures to prevent an abuse of intellectual property rights which are having an adverse effect on competition.³²²

Canada referred to Article 7 of TRIPS to support its position that the objective of TRIPS is to protect intellectual property rights in a manner that takes into consideration other legitimate interests. Article 7 of TRIPS states as the objectives of TRIPS the following:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Thus, Canada argued, the Dispute Settlement Body (DSB) should take into account Canada's national interest in measures which are conducive to the social welfare of the nation and in achieving a balance of rights and obligations. Canada submitted that, as stated in Article 7 of TRIPS, the Agreement provides flexibility for Members to adopt measures that balance the interests of the intellectual property right holder with the other legitimate interests.³²³

³²¹ *Canada Pharmaceuticals* case, *supra* note 315 at paras. 4.10-4.14.

³²² *Ibid.* at para. 4.14.

³²³ *Ibid.* at paras. 4.12-4.14.

In addition, Canada relied upon Article 8.1 of the TRIPS, which allows Members to adopt measures based on other considerations, such as health and public policy. Article 8.1 sets out the following as the principles of TRIPS:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Canada argued that the exceptions in section 55 of the *Patent Act* sought to protect public health by promoting access to low cost generic medicines after the expiry of the patent. As required under Article 30 of TRIPS, this regime took into account the legitimate interests of third parties such as individuals, private insurers and public sector bodies that finance health care by maintaining access to affordable medicines. TRIPS, Canada submitted, had as one of its key goals, a balance between intellectual property rights and these other socio-economic considerations of governments.³²⁴

In addition, Canada submitted that Article 30 of TRIPS authorizes measures that limit exclusive rights provided that no unauthorized commercial exploitation of the patent occurs during the patent term. This part of the submission was based on the word “unreasonably” in Article 30 of TRIPS, which allows uses that do not unreasonably conflict with the normal exploitation of the patent or the legitimate interests of the patent holder. It was submitted that any other interpretation would ignore the existence of the word “unreasonably” and disregard the public policy principles underlying Articles 29 and 33, which encourage open competition. Canada argued that this would promote the practice of enforcing patent rights during the patent term so as to effectively extend the monopoly of the patent owner beyond the duration of the patent. The reason this would create an extension of the patent term is because it would only be after the expiry of the patent term that the generic companies could begin testing the drug and taking the necessary steps to obtain approval to sell the drugs, which can take several months.³²⁵

³²⁴ *Ibid.* at para. 7.24.

³²⁵ *Ibid.* at paras. 4.11-4.14.

Canada further argued that it was not within the contemplation of TRIPS that important societal interests such as the promotion of full competition after the expiry of the patent and the cost saving benefits of such competition be overridden by the alleged right of patentees to exploit time consuming regulatory review systems so as to extend the term of patent protection. These regulatory systems were neither designed nor intended for such use. In its submission, Canada pointed out that the policy of extending the patent monopoly beyond the duration of the 20 year period was something which the EC unsuccessfully sought to have included in TRIPS. Canada alleged that the EC was attempting to secure through litigation, protection which it could not obtain through negotiation.³²⁶

Despite the fact that the parties, and many third parties raised other critical issues relating to the balance that TRIPS attempts to strike, the Panel chose to decide the case based on an interpretation of the language contained in Article 30 of TRIPS.

In this case, the Panel concluded that the burden of proof was on the EC to establish a *prima facie* case that Canada had violated Articles 27.1, 28.1 and 33 of TRIPS. Canada would then have to establish evidence to rebut the EC case. The Panel was of the view that by arguing that Article 30 created an exception to Article 28, Canada had effectively conceded that there was a violation of Article 28. Therefore Canada bore the burden of proving that subsections 55.2(1) and (2) of the Canadian *Patent Act* met the criteria set out in Article 30.³²⁷

This approach by the Panel assumed that Canada was correct in its interpretation of Article 30 of TRIPS and that the EC was correct in its interpretation of Article 28. It also assumed that activity which does not fall within parameters of one section (Article 30) of the TRIPS Agreement constitutes a violation of another section of the Agreement (Article 28). This approach also failed to take into consideration the reliance of the Canadian government on other sections of TRIPS, such as Articles 7 and 8, in defense of its position. Thus, if a Member argues that its laws fall within an exception to the rights conferred by the TRIPS, the Member will bear

³²⁶ *Ibid.* at para. 4.11.

³²⁷ *Ibid.* at para. 7.16.

the burden of proving that its laws meet the criteria set out in the exception. The complaining party would have to do very little to make its case.

As in other WTO cases, the Panel was guided in its interpretation of the treaty by Article 31 of the *Vienna Convention on the Law of Treaties* which requires that a treaty be interpreted in good faith and accordance with the ordinary meaning of the terms of the treaty in the light of its object and purpose. The Panel also referred to Article 31(3)(b) which allows one to take into account "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Since the Panel referred to the *Berne Convention* to support its interpretation of TRIPS, it also cited Article 32 of the *Vienna Convention* for the authority to take into consideration the *travaux preparatoire* of the treaty and the circumstances leading to its conclusion. The Panel concluded that in its interpretation of TRIPS it could consider not only the negotiating history of TRIPS itself, but also that of the international agreements that were incorporated into the TRIPS Agreement.³²⁸

The EC alleged that Canada's legislation infringed Articles 27.1, 28.1 and 33 of TRIPS. Article 27.1 requires Members to make patent protection available for product and process inventions without discrimination as to the place of the invention, the field of technology or whether the products are imported or locally produced. Article 33 requires a term of twenty years from the filing date. Article 28.1 gives the patent holder the exclusive rights to prevent third parties from making, using, offering for sale, selling, or importing for these purpose of making, using, or selling the patented product without the consent of the patent holder. The same rights extend to the holder of a process patent, including the right to prevent third parties from importing products obtained directly by the patented process without the consent of the patent holder.

The parties did not dispute the meaning of the protection described under Article 28.1. They disagreed, however, on the meaning of the exception contained within Article 30 of TRIPS. While they agreed that Article 30 establishes three conditions that must be met, there was disagreement over the meaning of these criteria. Article 30 allows for: 1) limited exceptions to

³²⁸ *Ibid.* at paras 7.13-7.14.

the rights conferred by patent; 2) provided that the exceptions do not unreasonably conflict with the normal exploitation of the patent; and 3) do not unreasonably prejudice the legitimate interests of the patent owner, taking into consideration the legitimate interests of third parties.³²⁹

The Panel concluded that the three conditions must each have different meanings in order to avoid redundancy.³³⁰ With respect to the interaction between Articles 30, 28, 7 and 8 the Panel stated at paragraph 7.26 of its report:

...Article 30's very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement. Obviously, the exact scope of Article 30's authority will depend on the specific meaning given to its limiting conditions. The words of those conditions must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes.

Unfortunately, despite the submissions by Canada and some of the third parties on the balancing of interests in TRIPS, the Panel did not engage in any meaningful discussion of non-intellectual property considerations that are acknowledged in the TRIPS Agreement. This could be because the Panel did not consider these discussions relevant to the disposition of the matter or because the Panel wanted to avoid a potentially controversial discussion.

The Panel analyzed each of the criteria set out in Article 30 of TRIPS. On the question of the meaning of "limited exceptions," the Panel preferred the interpretation put forward by the EC to that of Canada. The Canadian interpretation of limited as meaning "confined within definite limits", "restricted in scope, extent, amount" was broader than the interpretation offered by the EC which was that of a narrow exception that could be described as "narrow, small, minor, insignificant or restricted."³³¹

³²⁹ *Ibid.* at paras. 7.18-7.20.

³³⁰ *Ibid.* at para. 7.21.

In deciding which was ultimately the correct interpretation, the Panel referred to Article 9(2) of the *Berne Convention*, upon which the text of Article 30 of TRIPS was modeled.³³² Article 9(2) of the *Berne Convention* states:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The Panel could not ascertain from the negotiating history of TRIPS the reason why the term "limited exceptions" was used in Article 30 of TRIPS rather than the phrase "in certain special cases" which was used in the *Berne Convention*. However, the Panel was able to determine that the term "limited exception" was used early in the drafting process and well before the decision was made to adopt a text based on Article 9(2) of the *Berne Convention*, and concluded that the term "limited" must narrow the scope of the word "exception" which already implies some limitation itself.³³³ Thus, a "limited exception" would mean a narrow or restricted exception. Whether a particular action constitutes a limited exception will require an assessment of the extent to which the rights of the intellectual property owner have been curtailed.³³⁴

The Panel also clarified that there can be no hierarchy of patent rights within the context of the TRIPS Agreement. As a result, the fact that one is not selling a patented product though one is making and using it does not result in a lesser infringement. The Panel's conclusion is interesting, particularly since TRIPS does not contain any provision that explicitly prohibits Members from creating a hierarchy of rights with respect to patent protection. Since the Panel could not find support for the hierarchy of rights that was, in its view, implicit in the Canadian argument (the right to exclude others from selling being the primary right and the right to exclude others from making or using being secondary rights) such hierarchy was unacceptable within the context of TRIPS. Of course, since TRIPS is the standard that determines what a nation can do domestically, the practical effect of this pronouncement is that a hierarchy of

³³¹ *Ibid.* at paras. 7.27-7.28.

³³² *Ibid.* at para. 7.29.

³³³ *Ibid.*

³³⁴ *Ibid.* at paras. 7.31-7.33.

patent rights cannot be created by a Member state in its domestic regime, regardless of whether this was or would have been acceptable under the law of some countries.³³⁵

The stockpiling exception under the Canadian *Patent Act* was disposed of on the basis that it did not create a limited exception to the rights conferred by patent. The Panel held that since the stockpiling exception permitted the using and making of a patented product six months prior to the expiry of the patent term without any restriction on the amounts produced and with no regard to the subsequent consequences it might have, it failed to meet the first condition of Article 30 of TRIPS.³³⁶ It seems that the Panel did not contemplate the possibility that it was only after giving due regard to the consequences of the stockpiling exception that the Canadian government implemented that provision. The aim of the provision was to encourage a faster entry of less expensive drugs onto the market. Thus, it could only be with regard to the consequences of such an exception, taking into account financial and health considerations, that this exemption was created.

The Panel was of the view that the stockpiling exception in section 55.2(2) of the Canadian *Patent Act* was not sufficiently limited in its scope. Though the Panel accepted that the exception could only be used by persons who had made use of the regulatory review exception in section 55.2(1), the Panel decided that "this was not a real limitation since only persons who satisfy regulatory requirements would be entitled to market the product."³³⁷ The Panel did not provide a convincing explanation, however, of why this makes the limitation less "real".

The six month time period was not a sufficient limitation in the Panel's opinion because "six months was a commercially significant period of time, especially since there were no limits on the volume of production allowed, or the market destination of such volume".³³⁸ It would not have been as surprising that the Panel concluded that six months was a commercially significant period of time on a *twenty year* patent term had the Panel not also decided that the "short period

³³⁵ Whether a hierarchy of patent rights would otherwise be acceptable in some countries is an interesting question which requires a discussion that goes beyond the scope of this paper.

³³⁶ *Canada Pharmaceuticals* case, *supra* note 315 at paras. 7.34-7.38.

³³⁷ *Ibid.* at para. 7.37.

of extended market exclusivity after the patent expires"³³⁹ was not only acceptable but was necessarily incidental to the patent right.³⁴⁰

The Panel's analysis illustrates how a strict interpretation of TRIPS could leave national governments very little freedom to limit IPRs after taking other relevant considerations into account. The Panel expressed the view that in both theory and practice, the market advantage gained by the patent owner in the months after the patent had expired could be considered the purpose of the patent owner's right to exclude others from making and using the patented item during the term of protection. Since the rights of the patent owner are generally characterized as the right to prevent others from engaging in competitive commercial activity, the Panel reasoned that manufacturing for commercial purposes as allowed by the stockpiling exception in the *Patent Act* was a competitive commercial activity that the patent owner should be able to prevent.³⁴¹ Of course, this analysis is only valid if one focuses on the commercial purpose of patent protection, the ultimate objective being sale.³⁴² Given such strong protection for patents, it is difficult to imagine many instances where a national government could limit patent rights based on a balancing of competing interests and public policy considerations.

Since the Panel was able to dispose of the first issue on this basis, it did not consider the consistency of section 55.2(2) with other sections of TRIPS, nor did it consider any of the other arguments that were advanced on this issue. The Panel proceeded to consider the question of the regulatory review exemption, which it concluded was consistent with TRIPS.

In determining whether the regulatory review exception under section 55.2(1) of the Canadian *Patent Act* was consistent with TRIPS, the Panel considered three Canadian arguments. As the Panel had already rejected the Canadian argument that the exception in section 55.2 (1) of the *Patent Act* was limited because it did not stop the patent holder from preventing commercial

³³⁸ *Ibid.* at para 7.36-7.

³³⁹ *Ibid.* at para. 7.35.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.* at para. 7.35.

sales of the patented product during the term of the patent, it rejected this argument in its analysis of section 55.2(2) as well.³⁴³ The additional arguments considered by the Panel on the issue of the regulatory review exception were with respect to the subsequent practices of other Member States and the negotiating history of Article 30 in light of the American "bolar exemption".³⁴⁴ The Panel stated that it accorded no weight to either of these arguments because there was no documented evidence to support the argument that TRIPS was negotiated with the understanding that the bolar exemption could be retained under TRIPS. Nor did the subsequent practice of the Member states fall within the meaning of practice in the application of the treaty in the *Vienna Convention*.³⁴⁵

However, the position that the Canadian regulatory review exception was a limited exception within the meaning of Article 30 of TRIPS was acceptable to the Panel. As long as the conduct was confined to those acts needed to obtain regulatory approval, the extent of the acts unauthorized by the patent holder could be considered narrowly bounded and therefore limited. Though the Panel acknowledged that large amounts of a patented item may have to be produced in order to demonstrate reliable manufacturing, it concluded that these production runs would not be inconsistent with TRIPS "as long as they are solely for regulatory purposes and no commercial use is made of resulting final products."³⁴⁶

Yet again, the Panel related the limitation to commercial purposes. The exception was not problematic in the Panel's view as long as the product was not produced for the purpose of sale. Despite its own commercial analysis, the Panel rejected the Canadian suggestion that the section 55.2 exceptions were limited because they would not affect the commercial rights of the patent holder. It appears that this conclusion was reached because the Panel determined that the patent

³⁴² Yet the panel earlier criticized the Canadian government for making an argument which, in the view of the panel, implicitly focused on the commercial aspect of patent protection - the right to exclude others from selling the patented product. See para 7.33 of the Report of the Panel.

³⁴³ *Canada Pharmaceuticals* case, *supra* note 315 at para. 7.44.

³⁴⁴ *Ibid.* at paras. 7.41-50. The provision referred to as the American "bolar exemption" is the American equivalent of the Canadian regulatory review exemption. Canada submitted that it was well known during the TRIPS negotiations that this exemption existed in U.S. law and that the American negotiators had expressed the view that they had ensured that the TRIPS Agreement would allow the U.S to maintain the bolar exemption.

³⁴⁵ *Ibid.* at para. 7.47.

³⁴⁶ *Ibid.* at para. 7.45.

term is twenty years plus an additional incidental period of market exclusivity after the expiry of the patent. By this logic, it follows that the regulatory review exception would not necessarily conflict with TRIPS because it does not appear to have a direct impact on the post-term period of market exclusivity (as long as the products made for testing are not ultimately for sale) whereas the stockpiling provision eliminates this additional term completely. Nonetheless, the aim of the pre-expiry regulatory approval process is to accelerate the entry of generic products into the market. The regulatory review exception has the same practical effect as stockpiling insofar as it effectively reduces the post-expiry period of market exclusivity by several years.³⁴⁷ By comparison, the stockpiling exception reduces the period of post-term market exclusivity by several days or months, depending on how long it takes to manufacture sufficient product for commercial sale.

As one would expect, the Panel acknowledged that without the regulatory review exception, the patent holder would have a *de facto* term extension of several years. The Panel decided that it was therefore necessary to determine whether a measure which had such a significant economic impact on the patent holder could be considered a limited exception to the rights conferred by patent.³⁴⁸ Rather than analyzing this question under the condition of "limited exception", the Panel decided that the issue should be addressed by the other two conditions of Article 30 since the latter two conditions were the ones designed to directly address economic impact.³⁴⁹

The second condition contained in Article 30 of TRIPS is that the exception should not "unreasonably conflict with a normal exploitation of the patent". The Panel concluded that the Canadian view that there was no conflict with the normal exploitation of the patent because section 55.2 did not interfere with the patent owner's exclusive marketing rights was implicit in the Canadian argument. As well, Canada had argued that the *de facto* period of market exclusivity after the expiry of the patent term was never part of the bargain between patent

³⁴⁷ On average, the overall time for obtaining regulatory approval for pharmaceutical products in Canada is 8- 12 years for innovators and 3 - 6 1/2 years for generics. See Report of the Panel, para 2.5. Since the patent term is twenty years, innovators lose an average of 8 - 12 years on their term of market exclusivity. Under the regulatory review exception, generic drug manufacturers could have approval to produce and sell the drug by the time the patent expires.

³⁴⁸ *Canada Pharmaceuticals case*, *supra* note 315 at para. 7.48.

holders and society.³⁵⁰ Once again, the Panel rejected this argument when considering the "limited exception" condition, and in its discussion on the normal exploitation of a patent, it reiterated its position on this point. However, the Panel was of the view that Canada's argument on this point was stronger with respect to the regulatory review exception than with respect to the stockpiling exception.³⁵¹

The Panel found that the normal exploitation of a patent referred to the right of the patent owner to obtain the economic value of the patent through ordinary commercial activity. This would include the right to exclude others from engaging in competitive activity which would have a negative impact on the expected commercial gains from the patent.³⁵² However, the Panel found it unacceptable for the patent holder to make use of the regulatory review period to create a *de facto* extension of the patent term by several years and that this result was "an unintended consequence of the conjunction of the patent law with product regulatory laws."³⁵³ Hence, the regulatory review exception did not conflict with the normal exploitation of the patent.³⁵⁴ Of course, one could equally argue, that since the market entry of the patent owner was also delayed by the process of obtaining regulatory approval, this was a normal part of the process involved in bringing products of this nature to the market. The distinction between this exception and the stockpiling exception is that this *de facto* extension of the term of protection was characterized as not being purely a function of the patent right.

The next condition under Article 30 was that the exception should not unreasonably prejudice the legitimate interests of the patent owner. The Panel rejected the EC argument which equated legitimate interest with legal interests.³⁵⁵ The Panel accepted an interpretation similar to the Canadian position, which indicated a reference to interests beyond the legal rights themselves.³⁵⁶ This would include interests that can be justified insofar as they are supported by "relevant

³⁴⁹ *Ibid.* at para. 7.49.

³⁵⁰ *Ibid.* at para. 7.52.

³⁵¹ *Ibid.* at paras. 7.56-7.57.

³⁵² *Ibid.* at paras. 7.54-7.55.

³⁵³ *Ibid.* at para. 7.57.

³⁵⁴ *Ibid.* at para. 7.59.

³⁵⁵ *Ibid.* at para. 7.62.

³⁵⁶ *Ibid.* at para. 7.66-7.73.

public bodies or other social norms".³⁵⁷ In order to find support for its interpretation of Article 30 of the TRIPS, the Panel referred to Article 9(2) of the *Berne Convention*, upon which Article 30 of TRIPS was obviously based, according to the Panel. It also relied upon the drafting committee report for a better explanation of Article 9(2) of *Berne*.³⁵⁸ The Panel chose this approach despite the fact that Article 9(2) of *Berne* refers to the legitimate interests of the author of a copyrighted work, while Article 30 of TRIPS address the legitimate interests of the patent owner (not the inventor, which is more akin to the author)³⁵⁹ and the legitimate interests of third parties.

The Panel acknowledged the difficulties with its approach and stated that it did not place too much weight on the meaning of the clause in the *Berne Convention*. However, it is questionable whether it is appropriate to refer to the negotiating history of international intellectual property agreements incorporated into the TRIPS for an interpretation of TRIPS provisions which do not refer to those agreements. Unlike the prior agreements, TRIPS does not address intellectual property in isolation, but rather addresses intellectual property in a trade context. Moreover, the interests of the parties to the TRIPS are unique insofar as they can be required to comply with the provisions of the TRIPS Agreement through the use of the WTO dispute settlement mechanism. It cannot be forgotten that there are sanctions for non-compliance within the WTO framework. Thus, the international IP agreements, such as *Berne*, were first negotiated over a century ago when the context was completely different. The language of the *Berne Convention*, for example, could have no effect on a nation's domestic health policy. There was nothing comparable to the force of the WTO which lies behind TRIPS and gives it the potential for immense impact. Prior to TRIPS, there was nothing to force a nation to comply with any provision of the *Berne Convention* or other international treaty on intellectual property. The negotiating history, therefore, may not be an appropriate consideration when interpreting the language of TRIPS, even where the TRIPS language appears to be based on that of an intellectual property treaty such as the *Berne*. Furthermore, it cannot go unnoticed - as the Panel itself commented - that the

³⁵⁷ *Ibid.* at para. 7.69.

³⁵⁸ *Ibid.* at para. 7.71-7.72.

³⁵⁹ An inventor is not necessarily, and often is not, the owner of a patent just as the author is not necessarily the holder of copyright.

language of the *Berne Convention*, which deals with copyright, was used in this context to interpret a section which addresses patent rights.

The EC argued that since it takes innovators eight to twelve years to complete the process of obtaining regulatory approval, patent owners who suffer a reduction in the period of market exclusivity should benefit from similar delays that competitors have to face before they can enter the market.³⁶⁰ It was acknowledged by the Panel that a number of states had chosen to enact extensions of the patent term to compensate innovators for this lost period of market exclusivity.³⁶¹ On the other hand, the Panel noted, a number of countries with provisions similar to the regulatory review exemption in the Canadian *Patent Act* or that were in the process of enacting similar provisions did not create legislation or plan to create legislation to compensate for the removal of the *de facto* extension of the term of market exclusivity. However, since several countries had not enacted such legislation, the Panel concluded that the interest claimed on behalf of patent owners whose effective term of market exclusivity had been reduced by the regulatory review process was neither compelling enough nor so widely recognized that it could be considered a legitimate interest within the meaning of Article 30 of TRIPS.³⁶²

The Panel recognized that the decision to remove the *de facto* extension of market exclusivity could have represented a conclusion on the part of those governments that there were other legitimate interests that outweighed those of the patent owner.³⁶³ Yet it would seem that one could make the same argument about the stockpiling exception as well. Presumably, the same public policy concerns that would justify a government taking measures to eliminate the *de facto* term of market exclusivity that would result from the regulatory approval process could justify the related stockpiling exception. However, the question of the legitimate interest of the patent owner in the loss of *de facto* extension of the period of market exclusivity relating to the process

³⁶⁰ *Canada Pharmaceuticals case*, *supra* note 315 at para. 7.74.

³⁶¹ *Ibid.* at para. 7.76.

³⁶² *Ibid.* at para. 7.78-7.82.

³⁶³ *Ibid.* at para. 7.79.

of regulatory approval was characterized by the Panel as an ongoing policy debate among Member states which the Panel did not view as an issue to be decided through adjudication.³⁶⁴

The Panel found no conflict with Article 27.1 of TRIPS which prohibits discriminatory protection based on the field of technology since it was not proved that the adverse effects of section 55.2 of the *Patent Act* were limited to the pharmaceutical industry.³⁶⁵ The Panel did not engage in an analysis of section 55.2 of the *Patent Act* in relation to other sections of TRIPS.

The Panel recommended that the DSB require Canada to bring its legislation into conformity with TRIPS. On April 25, 2000, Canada informed the DSB that it would require a reasonable period of time in order to implement the changes. Since the parties failed to agree on a reasonable period of time for the implementation of the recommendations of the DSB, the matter went to arbitration. The Arbitrator gave Canada until October 7, 2000 to implement the recommendations of the DSB. At the DSB meeting of 23 October 2000, Canada informed Members that it had implemented the changes as of that date.³⁶⁶

TRIPS has been criticized as not allowing states to adopt national intellectual property systems appropriate to their particular economic, cultural and social conditions. Rather, Members must adhere to a multilaterally determined norm.³⁶⁷ While there have been attempts to construe TRIPS as allowing Members some amount of flexibility, the decision of the Panel in this case reinforces the earlier panel decisions on TRIPS which give the Agreement a strict and narrow interpretation.

In the context of patents, and pharmaceutical patents in particular, the public policy considerations may be of more significance in limiting the patent right than with other forms of intellectual property protection. This is so not only because of concerns over matters such as health care but because an underlying theory of patent protection is based on the notion of a

³⁶⁴ *Ibid.* at para. 7.82.

³⁶⁵ *Ibid.* at para. 7.105.

³⁶⁶ Overview, *supra* note 203 (date accessed: 16 August 2001)

³⁶⁷ T.L. McDorman, " *supra* note 90 at 120.

contract between the state and the inventor. In exchange for the disclosure of the invention for the benefit of society, the state gives the inventor a limited term monopoly. Because there has been a bargain made, the state can determine the scope of the protection granted, taking into account other public policy considerations that may affect the nature of the bargain.

As this case demonstrates, in the WTO context the state may no longer have the liberty to take these public policy concerns into consideration. It is primarily the text of the TRIPS Agreement that matters. The grant of letters patent becomes less of a bargain between the state and the inventor and more of a right which can be limited only by the terms of TRIPS. The underlying justifications for patent protection may need to be re-examined in light of the new context. The various justifications for patent protection tend to refer to the benefits to society that come about with patent protection: innovation, and the disclosure of the patent which promotes the dissemination of information.

Yet one must question the benefit to the citizens of a nation if the government of that nation is not at liberty to determine the length of the term and the scope of patent protection based on the needs of that particular society at a given point in time. Is there any reason why the elected representatives of Canada, India or South Africa should not be able to implement policies that will give their citizens faster access to cheaper drugs, especially if such access does not have any negative economic impact on the patent holder during the patent term? Though patents in particular tend to be justified by instrumentalist theories of protection, there is little utility in preventing a government from allowing competitors to enter the market immediately after the patent term expires. The relevant standard for national governments now is not that of the best bargain that can be struck between the inventor and the state, but rather the standards of the TRIPS Agreement.

U.S. - Section 110(5) of the US Copyright Act, Complaint by the EC³⁶⁸

In this case, section 110(5) of the U.S. *Copyright Act* was at issue. The EC requested consultations with the U.S. on this matter on January 26, 1999 pursuant to Article 4 of the DSU. Since the parties failed to reach a mutually acceptable solution, the EC requested the establishment of a panel. The DSB established a panel in May 1999 and the case was heard in November of that same year.³⁶⁹ The EC contended that the U.S. *Copyright Act* was inconsistent with TRIPS and with the *Berne Convention* because it allowed one to play music on the radio and television in public places such as bars, shops and restaurants (provided they were within a certain size range) without the payment of a royalty.

Section 110(5) of the U.S. *Copyright Act*, which entered into force on January 26 1999, placed certain limitations on the rights conferred by section 106 of the Act.³⁷⁰ Section 106 of the U.S. *Copyright Act* confers on copyright holders the exclusive right to publicly perform a literary, musical, dramatic or choreographic work or to authorize another to publicly perform such work. The provision extends the same rights with respect to the public display of a copyrighted work.

The relevant part of section 110(5) of the *Copyright Act* read as follows:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(5)(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be

³⁶⁸ *United States - Section 110(5) of the US Copyright Act (Complaint by the European Communities and their member states)* (2000), WTO Doc. WT/DS160/R (Panel Report) [hereinafter *U.S. Copyright case*, online: <http://www.wto.org/english/tratop_e/dispu_e/distab.htm> (date accessed: 13 March 2001).

³⁶⁹ *Ibid.* at paras.1.1-1.7.

³⁷⁰ *Ibid.* at para. 2.2.

received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space ..., or the establishment ... has 2,000 or more gross square feet of space ...and—

...

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space ..., or the establishment ... has 3,750 gross square feet of space or more ...

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed; and³⁷¹[emphasis added].

The purpose of this section of the legislation was to exempt from copyright liability anyone who turned on a radio or television to play music in a public place. However, the exemption would only apply if the radio or television were of the kind that is normally sold for private use in a home. Thus, if one were to turn on a sound system there would be no exemption from liability.³⁷² Subparagraph 110(5) was referred to as the "homestyle exemption" while subparagraph 110(5)(b) was known as the "business exemption".

The EC alleged that these exceptions in section 110(5) of the U.S. *Copyright Act* violated Article 9.1 of the TRIPS Agreement together with Articles 11 and 11*bis* of the *Berne Convention*. The U.S., on the other hand, argued that the TRIPS Agreement, which incorporated the substantive provisions of the *Berne Convention*, allows Members to place limitations on copyright protection

³⁷¹ *United States Copyright Act* 19 October 1976, Pub. L. 94-553, 90 Stat. 2541 (as am.) The *Copyright Act* was amended by the Fairness in Music Licensing Act of 27 October 1998, Pub. L. 105-298, 112 Stat. 2830, 105th Cong., 2nd Session (1998).

³⁷² *U.S. Copyright case, supra* note 368 at para.2.5

provided such limitations are consistent with Article 13 of TRIPS. Section 110(5) of the *Copyright Act*, the U.S. submitted, fell within the standard set out in Article 13 of TRIPS.³⁷³

An interesting aspect of this case was that the Panel received a copy of a letter from a law firm that represented one of the copyright management organizations in the U.S. The letter was sent from the law firm to the U.S. Trade Representative and a copy was forwarded to the Panel. The American government distanced itself from the positions expressed in the letter and suggested that the letter was of limited probative value since it did not provide any factual information that the parties had not provided, but supported the right of private parties to make their views known to WTO panels.³⁷⁴ The EC agreed that the letter had little probative value. In addition, the EC emphasized that panels only had the authority to consider factual information and technical advice from foreign bodies and individuals and thus could not properly take into consideration any legal arguments or legal interpretations contained therein. The Panel, however, decided not to reject outright the information contained in the letter because, as the Appellate Body has recognized in previous decisions, panels have the authority to accept information that was not requested. However, the Panel agreed with the parties that the letter did not add much by way of new information and stated that it did not rely on the letter for its reasoning or its findings.³⁷⁵ This suggests that it may be possible for private parties to successfully have their views considered by WTO dispute settlement panels, even where the information, including the views and opinions of those individuals, has not been requested.

Like the other panels, following the principles set out in *the United States -Shirts and Blouses*, the Panel concluded that the burden of proof rests with whichever party asserts the affirmative of a particular claim or defence. Once that party has brought sufficient evidence to establish its case, the burden shifts to the other party to adduce sufficient evidence to rebut the other party's case.³⁷⁶

³⁷³ *Ibid.* at paras. 3.1-3.4.

³⁷⁴ *Ibid.* at paras. 2.17, 6.3-6.5.

³⁷⁵ *Ibid.* at paras. 6.6-6.8.

³⁷⁶ *Ibid.* at para. 6.12.

Article 9(1) of TRIPS requires Member states to comply with Articles 1-21 of the *Berne Convention* (1971) with the exception of the provision on moral rights under Article 6bis of *Berne*. Since the EC alleged that section 110(5) of the U.S. *Copyright Act* was inconsistent with Article 11bis(1)(iii) and Article 11(1)(ii) of *Berne*, the Panel had to decide how to apply the relevant TRIPS provisions, taking into consideration the fact that TRIPS incorporates the substantive provisions of the *Berne Convention*. Article 11bis(1)(iii) of the *Berne Convention* grants authors of literary and artistic works the exclusive right to authorize "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." Likewise, Article 11(1) of *Berne* give authors of dramatic and musical works the exclusive right to authorize the public performance of their works and any communication to the public of the performance of their works.

In order to determine whether these provisions of the *Berne Convention* would include implied exceptions such as the "minor reservations" or "minor exceptions" doctrine, the Panel considered the negotiating history of the *Berne Convention* as it related to such exceptions.³⁷⁷ The Panel concluded that the negotiating history revealed an intention to allow parties to the *Berne Convention* to retain minor exceptions in their national law.³⁷⁸ The state practice as reflected in the national copyright laws confirmed for the Panel the correctness of their interpretation.³⁷⁹ Since these provisions of the Convention were explicitly incorporated into TRIPS, a consideration of the negotiating history of *Berne* was appropriate in this case. This is distinguishable from the *Canada-Pharmaceutical* case in which the Panel referred to the negotiating history of *Berne* to interpret the language of a TRIPS provision.

The Panel concluded that the minor exceptions doctrine formed part of the context of the *Berne Convention* and, in the absence of any express exclusion, was incorporated into TRIPS by virtue of the incorporation of Articles 11 and 11bis of the *Berne Convention*. The Panel confirmed, after a review of the TRIPS negotiating history, that this interpretation was correct and that there

³⁷⁷ *Ibid.* at paras. 6.48-6.51.

³⁷⁸ *Ibid.* at para. 6.53.

³⁷⁹ *Ibid.* at para. 6.55. The panel commented that it was not expressing any view on whether the state practice fell within the meaning of the term "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*.

was no intention to exclude application of the minor exceptions doctrine from TRIPS.³⁸⁰ The Panel also rejected the assertion by the EC that Article 13 of TRIPS, which defines the circumstances in which Members may create exceptions to copyright, is limited to the exclusive rights newly introduced under TRIPS.³⁸¹ It concluded that an exception to the exclusive rights under Article 11*bis*(1) of the *Berne Convention* as incorporated into the TRIPS would be permissible under TRIPS provided it met the three requirements of Article 13 of TRIPS.³⁸²

Article 13 of TRIPS requires Member states to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder." Thus, the Panel assessed paragraphs 110(5)(a) and (b) and the U.S. *Copyright Act* according to this standard. The three conditions which had to be met were that the exception 1) be confined to certain special cases, 2) not conflict with a normal exploitation of the work, and 3) not unreasonably prejudice the legitimate interests of the right holder.³⁸³

In the view of the Panel, the evidence presented indicated that the exception created by paragraph 110(5)(b) of the U.S. *Copyright Act* was not limited to certain special cases as required by the first condition of Article 13 of TRIPS.³⁸⁴ To meet this condition, the exception would have to be "clearly defined and narrow in scope and reach"³⁸⁵ or pursue a special purpose.³⁸⁶ However, the scope of the exemption in paragraph 110(5)(b) was such that it would cover a substantial majority of restaurants and retail establishments in the U.S. The exception could not, therefore, qualify as being limited to a certain special case.³⁸⁷ Paragraph 110(5)(a), however, was able to meet all three criteria established in Article 13 of TRIPS. The Panel considered the U.S. court practice regarding the exception and its legislative history in

³⁸⁰ *Ibid.* at paras. 6.62-6.66.

³⁸¹ *Ibid.* at para. 6.80.

³⁸² *Ibid.* at para. 6.88.

³⁸³ *Ibid.* at para. 6.97.

³⁸⁴ *Ibid.* at para. 6.133.

³⁸⁵ *Ibid.* at para. 6.112.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.* at paras. 6.132-133.

concluding that it had a narrow application and well defined limits.³⁸⁸ On the issue of Internet transmissions, raised by the EC, the Panel declined to declare paragraph 110(5)(a) invalid based on possible future uses of this technology, particularly in the absence of any evidence on the application of the exemption to Internet transmissions. As a result, paragraph 110(5)(a) met the first condition of Article 13 of TRIPS while paragraph 110(5)(b) did not.

Despite the fact that the Panel found paragraph 110(5)(b) inconsistent with the first condition of Article 13, it went on to examine this subparagraph in light of the other two conditions. The second condition was that the limitation not interfere with the normal exploitation of the work. Since Article 13 would be meaningless if the normal exploitation of the work meant the full use of all exclusive rights, the Panel held that it must mean something less than the full use of an exclusive right.³⁸⁹ The limitation must be judged in light of each exclusive right individually.³⁹⁰ In this context, the Panel stated that the exception would conflict with the normal exploitation of a work "if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work... and thereby deprive them of significant or tangible commercial gains."³⁹¹ Paragraph 110(5)(b) also failed to meet this condition since rights holders would normally expect to authorize the use of radio and television broadcasts and, where appropriate, receive compensation for their works in the situations covered by this exception.³⁹² However, paragraph (a) was not an exception that would have any considerable impact on the economic interests of rights holders of musical works.³⁹³

This analysis appears to be similar to the approach taken by the Canadian government in the *Canada Pharmaceuticals* case insofar as it creates a distinction between uses that have a negative impact on commercial activity and those which do not. However, the Panel in the *Canada Pharmaceuticals* case rejected the Canadian position, stating that there could be no

³⁸⁸ *Ibid.* at para. 6.159.

³⁸⁹ *Ibid.* at para. 6.167.

³⁹⁰ *Ibid.* at para. 6.173.

³⁹¹ *Ibid.* at para. 6.183.

³⁹² *Ibid.* at para. 6.210.

³⁹³ *Ibid.* at para. 6.218.

hierarchy of patent rights. Though the issues in this case are different from those in the *Canada Pharmaceuticals* case, the underlying rationale of the Panel in this case, and of Canada in the *Canada Pharmaceuticals* case, distinguishes between harmful and acceptable activity based on the significance of the economic impact on the holder of the IPR.

The final condition of Article 13 of TRIPS required an assessment of whether the exception could cause some damage or injury to the standard or normal interests of the rights holder. The degree of prejudice to these interests would also have to be assessed.³⁹⁴ Again, subparagraph (b) did not meet this condition while subparagraph (a) would not cause any unreasonable prejudice to the legitimate interests of the rights holder.³⁹⁵ The Panel concluded that subparagraph 110(5)(a) of the *Copyright Act* was consistent with TRIPS while subparagraph 110(5)(b) was not.³⁹⁶ The Panel recommended that the DSB recommend the U.S. amend its legislation to bring it into conformity with the TRIP Agreement. The DSB adopted the Panel Report at its meeting on July 27, 2000.³⁹⁷

The significance of this case is that it was not possible, prior to the TRIPS, for a nation to enforce the provisions of international intellectual property treaties such as the *Berne Convention*, or any of the other treaties that have been incorporated into the TRIPS.³⁹⁸ The Panel in this case clarified that, to the extent that provisions of such treaties have been incorporated into TRIPS, they can be enforced through the WTO dispute resolution mechanism. The Panel also had to examine the interaction between the requirement established in TRIPS and the standards set out in *Berne Convention*. The EC did not base its case on explicit requirements set out in the TRIPS Agreement with respect to copyright protection but rather on Article 9(1) of TRIPS which simply incorporates certain sections of the *Berne Convention*. As a result, the U.S. was also able to have the Panel consider an exception which was not explicit in the TRIPS Agreement, but which was an implied exception consistent with the *Berne Convention*.

³⁹⁴ *Ibid.* at paras. 6.224-6.229.

³⁹⁵ *Ibid.* at paras 6.237-6.272.

³⁹⁶ *Ibid.* at para. 7.1.

³⁹⁷ Overview, *supra* note 230, (date accessed: 16 August 2001).

³⁹⁸ For example, TRIPS mentions provisions of the *Paris Convention*, the *Rome Convention*, and the *Treaty on Intellectual Property in Respect of Integrated Circuits*.

United States - Section 211 Omnibus Appropriations Act 1998, Complaint by the EC³⁹⁹

The EC requested consultations with the U.S. in July 1999. In consultations held on September 13 and December 13, 1999 the parties failed to reach a mutually agreeable solution. In June 2000, the EC requested the establishment of a Panel, which heard the case in the early months of 2001 and issued a Panel Report in August 2001.⁴⁰⁰ The Panel assessed whether section 211 of the U.S. *Omnibus Appropriations Act* was inconsistent with TRIPS in a number of respects. However, this discussion will focus primarily on the issue of the TRIPS exception for trademark protection raised in this case.⁴⁰¹ It will be useful to consider this part of the decision since the manner in which exceptions are treated by WTO Panels is a good indicator of the extent to which TRIPS allows Member states to retain domestic control.

The EC alleged that section 211(a)(1) of the U.S. legislation disallowed transactions related to the registration or renewal of trademarks in which either Cuba or Cuban nationals had an interest. Since, according to the EC, the American law prevented the trademark owner from paying the fees required to register or renew a trademark in the U.S., the EC claimed that the U.S. was in violation of Article 15.1 of TRIPS.⁴⁰² Furthermore, the EC was of the view that registration under section 15.2 could only be refused in exceptional cases as provided for under the TRIPS Agreement and the *Paris Convention*.⁴⁰³

³⁹⁹ *United States - Section 211 Omnibus Appropriations Act (Complaint by the European Communities and their member states)* (2001), WTO Doc. WT/DS176/R (Panel Report) [hereinafter *U.S. Section 211 case*], online: <http://www.wto.org/english/tratop_e/dispu_e/distab.htm> (date accessed: 11 August 2001).

⁴⁰⁰ *Ibid.* at paras. 1.1-1.9

⁴⁰¹ Unfortunately, due to the limited time between the release of this decision and the submission of this paper, the author of this work was unable to provide a more detailed analysis of this Panel Report.

⁴⁰² *U.S. Section 211 case*, *supra* note 399 at para. 8.42.

⁴⁰³ *Ibid.* at para. 8.43.

Articles 15.1 and 15.2 of TRIPS state:

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.
2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the *Paris Convention* (1967).

In light of the language in Article 15.2 which refers to Article 15.1, the Panel concluded that Article 15.1 must be read in conjunction with Article 15.2. The Panel concluded that the language of Article 15.2 allows Members to deny trademark registration on grounds other than those listed in the TRIPS Agreement, provided those grounds do not detract from or impair the provisions of the *Paris Convention* (1967) as incorporated into the Agreement.⁴⁰⁴ The U.S. provision denying trademark registration to an applicant who was not the proper owner of a trademark that was the same or substantially similar to a trademark used in connection with a business or assets that were confiscated by the Cuban government was within the purview of these "other grounds". Since Article 6(1) of the *Paris Convention* (1967) provided that the conditions for the filing and registration of trademarks was to be determined by each country, the Panel was of the view that "other grounds" for denying trademark registration could include denial on the basis that the applicant was not the owner of the trademark under U.S. law.⁴⁰⁵

Recognizing that this level of flexibility accorded to Member states could result in abuse, the Panel referred to Article 7 of TRIPS which, in the opinion of the Panel, embodied an expression of the "good faith principle".⁴⁰⁶ Article 7 of TRIPS provides that the protection of intellectual

⁴⁰⁴ *Ibid.* at paras.8.50-8.55.

⁴⁰⁵ *Ibid.* at para. 8.56.

⁴⁰⁶ *Ibid.* at para. 8.57.

property rights should contribute to the achievement of a number of goals including a balance of rights and obligations. The Panel held that this expression of the good faith principle means that Member states must not abuse their rights. Thus, whenever a state asserts a right that impinges on a treaty obligation, the state must exercise this right reasonably so as to avoid breaching the treaty rights of the other Members and violating its own treaty obligations. The Panel concluded, "Members must therefore implement the provisions of the TRIPS Agreement in a manner consistent with the good faith principle enshrined in Article 7 of the TRIPS Agreement."⁴⁰⁷

Though section 211(a)(1) had the practical effect of denying trademark renewal or registration, the Panel was of the view that it was not inconsistent with Article 15.1 of TRIPS. The requirement of the domestic legislation that the applicant either be the owner or assignee of the trademark or have the consent of the owner or assignee of the trademark fell within the scope of the "other grounds" in Article 15.2.⁴⁰⁸ The Panel also rejected the argument by the EC that section 211 captured trademarks which did not exist in the U.S. at the time of confiscation but which were subsequently acquired and which therefore had no legal or factual relationship with Cuban businesses. The Panel noted that trademark ownership in the U.S. is determined by use and that the use of a trademark outside the U.S. can establish ownership in the U.S. The procedure under section 211 did not deny registration to marks considered trademarks under U.S. law but only denied registration to those individuals or entities not considered the proper owner of the trademark under American law.⁴⁰⁹ The Panel also dismissed EC arguments with respect to section 211 applying to classes of products other than trademarks used in connection with confiscated assets, and dismissed the EC argument made regarding abandoned trademarks.⁴¹⁰ The Panel concluded, therefore, that section 211 was not inconsistent with Articles 15.1 and 15.2 of TRIPS.⁴¹¹

⁴⁰⁷ *Ibid.* at para.8.57.

⁴⁰⁸ *Ibid.* at para. 8.60.

⁴⁰⁹ *Ibid.* at paras. 8.61-8.65.

⁴¹⁰ *Ibid.* at paras.8.66-8.70.

⁴¹¹ *Ibid.* at para. 8.70.

The EC also claimed that the U.S. law was inconsistent with Articles 2.1, 3.1, 4, 16.1, and 42 of the TRIPS Agreement.⁴¹² The EC was unsuccessful with all but one of its arguments. The Panel concluded that sections 211(a) and (b) were not inconsistent, or had not been proved to be inconsistent, with all of these sections of TRIPS with the exception of section 42. The EC contended that section 211(a)(2) prevented a U.S. court from enforcing a trademark at the request of certain holders of U.S. trademark rights.⁴¹³ Section 211(a)(2) was found to be inconsistent with TRIPS because it limited the trademark owner's effective access to and thus the availability of civil judicial procedures as required by section 42 of TRIPS.⁴¹⁴

Other Intellectual Property - Related Disputes

*Indonesia - Certain Measures Affecting the Automobile Industry, complaints by Japan, the EC and the United States*⁴¹⁵

In October and November 1996, Japan, the EC and the U.S., each requested consultations with Indonesia on certain measures relating to the Indonesian automobile industry. On April 17, 1997, Japan requested the establishment of a panel. The EC and the U.S. did the same on May 12, 1997 and June 12, 1997 respectively. The three complainants alleged that Indonesia was violating the GATT, the *Agreement on Trade-Related Investment Measures* (TRIMS) and the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). In addition, the U.S. alleged a violation of Articles 3, 20, 64 and 65 of the TRIPS Agreement. The DSB agreed to establish a panel to hear the complaints of the EC, Japan, and the U.S. together.⁴¹⁶

The following measures related to the automobile industry in Indonesia were at issue: (1) "the 1993 Incentive System", (the "1993 programme"), (2) "the National Car Programme", and (3) a \$US690 million loan to PT Timor Putra Nasional. All three complainants took issue with National Car Programme, and the EC and the U.S. also alleged trade violations with respect to

⁴¹² *Ibid.* at paras. 8.71-9.3.

⁴¹³ *Ibid.* at paras. 4.7 & 8.90.

⁴¹⁴ *Ibid.* at paras. 8.92-8.102.

⁴¹⁵ *Indonesia - Certain Measures Affecting the Automobile Industry (Complaints by Japan, the United States, and the European Communities and their member states)* (1998), WTO Doc. WT/DS54R, WT/DS55R, WT/DS59R & WT/DS64R (Panel Report), online: <http://www.wto.org/tratop_e/dispu_e/distab_e.htm> (date accessed: 10 July 2001).

⁴¹⁶ *Ibid.* at paras. 1.1-1.14.

the 1993 Programme. The U.S. was the only party that raised issues regarding \$US690 million loan to PT Timor.⁴¹⁷

The 1993 incentive system provided exemptions or reductions on import duties on imports of automotive parts, subparts and accessories, based on the percentage of local content of the finished motor vehicle in which the parts or accessories were used, and the type of vehicle in which the parts were used. It also provided an exemption or reduction on luxury sales tax on goods for certain categories of automobiles.⁴¹⁸ Under the National Car Programme, Indonesian car companies that met certain conditions regarding ownership of facilities, use of trademarks, and technology could obtain “pioneer” or National Car Company status. In order to maintain this pioneer status, the National Cars would have to meet increasing local content requirements over a three year period. As well, National Cars manufactured in a foreign country by Indonesian nationals and which met the local content requirements prescribed by the Minister of Industry and Trade would be treated the same as National Cars manufactured in Indonesia. This pioneer status allowed one to obtain an exemption from luxury tax on sales of National Cars and from import duties on parts and components.⁴¹⁹

The trade mark issue arose due to two of the 1996 Presidential Instructions that created the National Programme. One of the Presidential Instructions directed the responsible government ministers to collectively implement “measures...to realize as fast as possible the development of the national car industry, which meets the following criteria: (a) the use of a brand name of its own; (b) domestically produced; (c) the use of components which are domestically produced.”⁴²⁰ A second Presidential Instruction directed the Minister of Industry and Trade “to foster, guide and grant facilities, in accordance with the use of provisions of laws in effect such that the national car industry: (a) uses a brand name of its own; (b) uses components produced domestically as much as possible; (c) is able to export its products.”⁴²¹

⁴¹⁷ *Ibid.* at para. 2.3.

⁴¹⁸ *Ibid.* at paras. 2.4-2.14.

⁴¹⁹ *Ibid.* at paras. 2.16-2.17.

⁴²⁰ *Ibid.* at para. 2.21.

⁴²¹ *Ibid.* at para. 2.22.

The U.S. claimed that Indonesia's National Car Programme discriminated against nationals of other WTO Members with respect to the acquisition and maintenance of trademarks, as well as the use of trademarks. Thus, the U.S. argued, this program was inconsistent with Articles 3 and 20 of the TRIPS Agreement. In addition, the U.S. alleged that Indonesia was in violation of its obligations under Article 65.5 of the TRIPS Agreement because the National Car Programme put special requirements on nationals of other WTO Members in respect of the use of their trademarks, contrary to the requirements of Article 20 of the TRIPS Agreement.⁴²²

Article 3 of TRIPS, the provision on national treatment, requires Members to accord nationals of other states "treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property" subject to the exception already provided for in the international intellectual property agreements that TRIPS incorporates.

Article 20 of TRIPS states:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Article 65 of the TRIPS Agreement provided a one year moratorium on the implementation of TRIPS, allowing Members until January 1, 1996 to make their laws TRIPS compliant. Developing country Members and Members with economies in transition were entitled to an additional four years before they had to implement the Agreement. However, all Members, including the developing countries and countries with economies in transition were required to respect the provisions relating to national treatment and most favoured nation treatment as of January 1996.

According to the United States, any trademark that could apply to a "national motor vehicle" had to be acquired by an Indonesian company, regardless of whether the company was party to a

⁴²² *Ibid.* at para. 14.263.

joint venture or was a wholly-owned Indonesian company. Thus, the program discriminated against foreign nationals with respect to the acquisition of trade marks.⁴²³

The Panel concluded that the U.S. did not produce any evidence to support the claim that under Indonesian law, the treatment of foreign nationals with respect to the acquisition of trademarks was any less favourable than that accorded to Indonesian nationals. The applicable law for acquiring trademark rights was the same for companies of WTO Members and companies operating under the National Car Programme. The Panel acknowledged that the cars marketed under the National Car Programme would have to use a domestic trademark belonging to an Indonesian-owned company and that American and other foreign companies would not be able to use their own trademarks for this purpose. However, the Panel did not see this as discrimination with respect to the acquisition of trademarks but rather as a measure that affected the scope of the use of American owned trademarks on cars under the National Car Programme. The Panel stated, "[t]he fact that only certain signs can be used as trademarks for meeting the relevant qualifications under the National Car Programme, and many others not, does not mean that trademark rights, as stipulated in Indonesian trademark law, cannot be acquired for these other signs in a non-discriminatory manner."⁴²⁴

The U.S. claimed that if American companies were able to become partners in the National Car Programme, they would probably not use the mark that they would normally use on the vehicle marketed as a "national motor vehicle" in Indonesia. To do so might create confusion because of the use of different marks on the same car. Therefore, the Indonesian system would likely result in cancellation of the American trademark for non-use in Indonesia.⁴²⁵ The Panel rejected this argument because "no evidence has been put forward to refute the Indonesian statement that the system, in requiring a new, albeit Indonesian-owned, trademark to be created, applies equally to pre-existing trademarks owned by Indonesian nationals and foreign nationals." Also, it was the view of the Panel that if a foreign company entered into an arrangement with a Pioneer company,

⁴²³ *Ibid.* at para. 14.267.

⁴²⁴ *Ibid.* at para. 14.268.

⁴²⁵ *Ibid.* at para. 14.270.

it would be aware of the implications for its ability to maintain pre-existing trademark rights and the decision to enter into such arrangement would be voluntary.⁴²⁶

The U.S. also alleged that foreigners suffered discrimination with respect to the maintenance of trademark rights in Indonesia because, as compared to the Indonesian rights holder who was part of the National Car Programme, they were at a *de facto* disadvantage in meeting use requirements. This was because the financial and other benefits granted to the Indonesian company would give it competitive advantage in the marketing of trademarked vehicles.⁴²⁷ The Panel pointed out that any customs tariff, subsidy or other governmental measure of support could have a "*de facto*" effect of giving such an advantage to the beneficiaries of this support. In addition, the Panel commented that "considerable caution needs to be used in respect of 'de facto' based arguments of this sort, because of the danger of reading into a provision obligations which go far beyond the letter of that provision and the objectives of the Agreement." The Panel did not consider it reasonable to interpret the TRIPS national treatment obligation as preventing the grant of tariff, subsidy or other measures of support to national companies on the grounds that this would make it relatively more difficult for foreign companies wishing to export to that market to maintain a trademark.⁴²⁸

Thus, the Panel concluded that Indonesia was not in violation of Article 3 of TRIPS with respect to the acquisition of and maintenance of trademark rights.⁴²⁹ The alleged violations of Articles 20 and 65 of TRIPS were dismissed based on similar reasoning.⁴³⁰ Though the Panel concluded that the Indonesian measures violated the GATT, the SCM Agreement, and the TRIMs Agreement, they found that there was no violation of the TRIPS Agreement.⁴³¹

It is difficult to reconcile the treatment of trademark rights in this case with the treatment of intellectual property rights in the other cases discussed above. In this case, trademarks were not treated as absolute rights. By contrast, the Panel in the *Canada Pharmaceuticals* case appears to

⁴²⁶ *Ibid.* at para. 14.271.

⁴²⁷ *Ibid.* at para. 14.272.

⁴²⁸ *Ibid.* at para. 14.273.

⁴²⁹ *Ibid.* at paras. 14.269 - 14.274.

⁴³⁰ *Ibid.* at paras. 14.275-14.282.

⁴³¹ *Ibid.* at para. 15.1.

have treated the patent right almost as a natural right which could be limited only in exceptional circumstances. Perhaps the treatment of intellectual property rights in this case was different since the Panel had to consider not only trademark rights, but various alleged trade violations, and therefore considered trademarks in the context of its relation to trade rather than considering the right to trademark protection in the absolute sense. It could be that since intellectual property rights were not the primary consideration in this case, the Panel took a more global approach to the case and a less stringent approach to TRIPS.

*European Communities - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs, complaint by the United States*⁴³² and *Greece - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs, complaint by the United States*⁴³³

On April 30, 1998 the U.S. requested consultations with the EC and with Greece regarding the lack of enforcement of intellectual property rights in Greece. The U.S. contended that a number of television stations in Greece were regularly broadcasting copyrighted motion pictures and television programs without the authorization of copyright owners. Moreover, the U.S. alleged that effective remedies against copyright infringement did not appear to be available, nor was copyright protection enforced in Greece with respect to these broadcasts. Thus, the U.S. claimed that there was non-compliance with Articles 41 and 61 of TRIPS. On March 20, 2001, the parties to the dispute notified a mutually satisfactory solution on the matter to the DSB

*Sweden - Measures Affecting the Enforcement of Intellectual Property Rights, complaint by the United States*⁴³⁴

The U.S. alleged that Sweden failed to make provisional measures available in civil proceedings involving intellectual property rights in violation of its obligations under Articles 50, 63 and 65 of the TRIPS Agreement. Consultations were requested by the U.S. on May 28, 1997 and on December 2, 1998, the two parties gave notification that they had reached mutually agreeable solution to the dispute.

⁴³² Overview, *supra* note 203, WTO Doc. WT/DS124/1 online: <http://www.wto.org/tratop_e/dispu_e/stplay_e.doc>.

⁴³³ Overview, *Ibid.*, WTO Doc. WT/DS125/1.

⁴³⁴ Overview, *Ibid.*, WTO Doc. WT/DS86/1, online: <http://www.wto.org/tratop_e/dispu_e/stplay_e.doc>

Japan - Measures Concerning Sound Recordings, complaint by the United States,⁴³⁵ and *Japan - Measures Concerning Sound Recordings, complaint by the European Communities*⁴³⁶

The United States alleged that Japan's copyright regime for the protection of intellectual property in sound recordings was not consistent with Article 14 of the TRIPS Agreement. The U.S. requested consultations on February 9, 1996 and on January 24 1997, the parties informed the DSB that they had reached a mutually acceptable solution to the dispute. This was the first WTO dispute settlement case involving the TRIPS Agreement. On May 24, 1996, the EC requested consultations on the same matter, complaining that Japan was in violation of Articles 14.6 and 70.2 of the TRIPS Agreement. On November 7, 1997, Japan and the EC notified the DSB that they had reached mutually satisfactory solution.

At the time the TRIPS Agreement was concluded, it was apparent that the Agreement could have a substantial effect on the laws of WTO Member states. There have been a number of TRIPS-related complaints since the Agreement came into force in 1996, most of which were settled. In the cases which developed into formal disputes, the WTO Panels required Member states to ensure that their laws complied precisely with the language of TRIPS, and they narrowly interpreted the scope of the exceptions available under TRIPS. Overall, these cases demonstrate that TRIPS is making a significant impact on Member states' domestic control of their intellectual property regimes.

⁴³⁵ Overview, *Ibid.*, WTO Doc. WT/DS28/1.

⁴³⁶ "Overview of the state of -play of WTO disptues" WTO Doc. WT/DS42, online:<http://www.wto.org/tratop_e/dispu_e/stplay_e.doc>

CHAPTER IV

Under TRIPS, all WTO Member states are obligated to provide certain minimum standards of protection for IPRs. As mentioned earlier, the standards that exist in the TRIPS are generally consistent with the current standards of the industrialized world. As was shown by the cases discussed earlier, there is still dispute over appropriate levels of protection, even among industrialized countries.⁴³⁷ Although the levels of IP protection required by the TRIPS Agreement may be appropriate for industrialized countries and for some newly industrializing countries, it is doubtful that such strong protection for IPRs is appropriate for developing countries. During their developmental stage, most countries provided weak protection for IPRs. This allowed them inexpensive access to new technologies, and enabled them to imitate and build upon what others had done so that they could develop their own industries. Developments in North America and certain Latin American and Asian countries will be discussed in the following paragraphs.⁴³⁸

The North American Experience

Though the transfer of technology from Britain to settlements in America occurred as early as 1607, the U.S. was eager to obtain British industrial technology after the British industrial revolution. The transfer of people and equipment from Europe helped the U.S. to develop its technological skills.⁴³⁹ Intellectual property rights were not always well protected in the United States. During the 1970s the United States did not, in practice, provide strong patent protection and the courts did not hesitate to invalidate patents. This, it is suggested, was in part due to the preference at the time for antitrust rather than intellectual property rights.⁴⁴⁰

⁴³⁷ See, for example, the *Patent Term* case, the *Canada-Pharmaceutical* case, and the *U.S.-Copyright* case. Although these disputes could be viewed as based on differences of interpretation of TRIPS, they also reflect discordance between these states in their approach towards the protection of intellectual property.

⁴³⁸ The introduction of IPRs in African countries such as Ghana and Nigeria is a result of the colonial history. See G. Sipa-Adjah Yankey, *International Patents and Technology Transfer to Less Developed Countries* (Brookfield: Gower, 1987) at 98. However, many African countries yet to develop an industrial base.

⁴³⁹ S. K. Sell, *Power & Ideas: North-South Politics of Intellectual Property and Anti-trust* (New York: SUNY Press, 1998) at 47.

⁴⁴⁰ M. J. Adelman, "Patent Law in India" in H.C. Hansen ed., *International Intellectual Property Law and Policy* vol. 1 (Sweet & Maxwell, 1996) 131 at 131-132.

In the area of copyright, the United States denied foreigners protection until 1952. This was, it has been suggested, consistent with the actions of a developing country, which the United States was during the 19th and early 20th centuries. In seeking to protect its infant industries, it was in the national self interest for the U.S to deny copyright protection to foreigners. This denial of copyright protection was an important factor in the transfer of technology from Western Europe to the U.S. during the late 19th and early 20th centuries.⁴⁴¹ Another strategy employed was the use of local working requirements to ensure the development of domestic industries. In Canada, for example, before the commencement of the Uruguay Round negotiations one could obtain a compulsory license on a patented invention if the invention was not sufficiently worked in Canada.⁴⁴²

The Asian Experience

In recent decades, copyright infringement has been common in Asia.⁴⁴³ The practice in countries such as South Korea and Taiwan was to imitate innovations until they developed a sufficient knowledge base to rely on their own innovations.⁴⁴⁴

Japan

Japan accounted for 2% of gross domestic product [hereinafter "GDP"] in the industrialized countries in the 1950s but by 1985 the country accounted for 16% of the GDP of industrialized countries.⁴⁴⁵ Japan began to industrialize during the Meiji Restoration in the late 19th century. The Japanese made efforts to develop their technological capabilities by relying heavily on borrowed technologies. Japan made use of foreign intellectual property, including American materials, in the course of developing its technological base.⁴⁴⁶ As part of this process, Japanese

⁴⁴¹ M.D. Pendleton, *supra* note 30 at 41.

⁴⁴² The compulsory licensing provisions were amended to eliminate the availability of licenses of non-working of a patent in Canada. See *An Act to Implement the North American Free Trade Agreement*, S.C. 1993, c.44, s.196.

⁴⁴³ E.H. Smith, "Key Copyright Issues in Asia: A Country by Country Analysis," in H. C. Hansen ed, *International Intellectual Property Law & Policy* vol. 1 (London: Sweet & Maxwell, 1996) 79 at 79

⁴⁴⁴ M.P. Ryan, *supra* note 121 at 26

⁴⁴⁵ M.G. Smith, "Global Rivalry and Intellectual Property: Implications for Canadian Economic Policies" in M.G. Smith ed., *Global Rivalry and Intellectual Property: Developing Canadian Strategies* (Toronto: Institute for Research and Public Policy, 1991) 145 at 148-9.

⁴⁴⁶ A. Wineburg "Intellectual Property Regimes of East Asia-An Overview" in A. Wineburg ed., *Intellectual Property Protection in Asia* (New Hampshire: Butterworths Legal Publishers, 1991) 2-1 at 2-2.

students were sent abroad to learn new skills and techniques.⁴⁴⁷ Japan accessed foreign technology at a low cost and sheltered domestic markets from foreign competition.⁴⁴⁸ Rather than developing as a liberal market economy, Japan developed through heavy state in economic affairs.⁴⁴⁹ As one of the leaders in the industrialized world, Japan's intellectual property regime is comparatively strong.

In contrast to other East Asian countries, Japan's intellectual property regime is uniquely Japanese. Though Japan's intellectual property laws are based on German law, the Japanese system has been adapted to suit Japanese culture and needs. This is unlike the laws of many other East Asian countries which reflect the colonial influence and economic dominance of Western countries and Japan.⁴⁵⁰ In the area of patent, Japan modeled its laws after those of developed countries. This established the foundation for the modern patent system in 1899.⁴⁵¹ The first Japanese patent law was enacted in 1871. Prior to this time, however, inventions were prohibited. Under the revised the law of 1888, food, drinks and pharmaceutical processes were not patentable and foreigners did not have the right to obtain patents in Japan.⁴⁵² The exclusion of patents for aliens provoked debate. Those opposed to patent protection for foreigners were concerned that foreigners would obtain most of the patents and interfere with the development of local industry.⁴⁵³ However, patent rights were extended to foreigners under the Patent Law of 1899 under specific conditions.⁴⁵⁴

When the patent law was revised in June 1975, food, drinks, medicines, processes for manufacturing medicines, and chemical processes were no longer excluded from patentability. This change came about because the Japanese Industrial Property Council was of the view that this was a necessary change for Japan to compete with the developed countries. The weak

⁴⁴⁷ S. K. Sell, *supra*, note 439 at 48.

⁴⁴⁸ H. Baum, "Emulating Japan?" in H. Baum ed., *Japan: Economic Success and Legal System* (New York: Walter de Gruyter, 1997) 1 at 8.

⁴⁴⁹ S. K. Sell, *supra* note 439 at 48. Russia developed in a similar manner, relying heavily on imported capital and technology.

⁴⁵⁰ A. Wineburg, *supra* note 446 at 2-2

⁴⁵¹ T. Doi, *The Intellectual Property Law of Japan* (The Netherlands: Sijthoff & Noordhoff International, 1980) at 5

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ For example, the patentee had to appoint a Japanese resident as his or her agent. See Doi, *ibid* at 6.

position of Japanese companies in the food, pharmaceutical and chemical industries was no longer a concern because Japanese industry had advanced enough to be competitive.⁴⁵⁵ Though plant and animal varieties were patentable under Japanese law, the practice of the Patent Office was to deny patents to any purely biological process for creating a new variety of plant or animal.⁴⁵⁶ Japan also had a system of compulsory licensing on the grounds of non-working of the patent by the patentee or in the public interest.⁴⁵⁷ Japan now has a well developed regime for the protection of patents, trademarks, copyright, industrial designs and integrated circuit topographies.⁴⁵⁸

Singapore

Patent protection in Singapore was provided under the laws of the United Kingdom. For example, a patent could be granted in Singapore as long as the patent application contained evidence that a patent had been approved in the United Kingdom. However, Singapore had domestic regimes for the protection of copyright and trademarks. Nonetheless, enforcement of intellectual property rights in Singapore was not consistent. Although the U.S. pressured Singapore to improve its intellectual property regime, the Singaporean government was already predisposed to taking such action. The government of Singapore viewed stronger intellectual property laws as essential to enable Singapore, a newly industrializing country, to continue its level of economic development.⁴⁵⁹ Singapore is a good example of a country which recently reached a level of economic development such that a stronger regime for the protection of intellectual property made economic sense for the country.

China

Copyright and patents arrived in China in the late 19th century. However, when the People's Republic of China was founded in 1949, the copyright laws of 1928 and 1944 were revoked.⁴⁶⁰

⁴⁵⁵ *Ibid.* at 10.

⁴⁵⁶ *Ibid.* at 11.

⁴⁵⁷ *Ibid.* at 41.

⁴⁵⁸ See generally D.S. Guttman and L.S. Eccleston "Intellectual Property Regime of Japan" in Arthur Wineburg ed., *Intellectual Property Protection in Asia* (New Hampshire: Butterworth Legal Publishers, 1991) 5-1.

⁴⁵⁹ T. Richards, "Singapore" in M. Gadbar & T. Richards eds., *Intellectual Property Rights: Global Consensus, Global Conflict?* (Boulder: Westview Press, 1998) 311 at 324-338

⁴⁶⁰ M.D. Pendleton, *supra* note 30 at 39

Copyright piracy in China was common by the 1970s and it was only in 1979 that China began to rebuild a formal legal system.⁴⁶¹

For a number of reasons, IPRs have not been effectively enforced in China. Enforcement of legal obligations requires significant investment in official and private legal specialists as well as public education on intellectual property.⁴⁶² Like Taiwan, the development of intellectual property protection in the People's Republic of China was also largely due to American pressure.⁴⁶³ Given the cultural differences therefore, one impediment to the development of intellectual property rights in China was that the Chinese society had not adopted a belief in individual rights that could or should be asserted against everyone, including those in authority.⁴⁶⁴

Part of the difficulty for China (and a difficulty for many developing countries) was that an effective copyright law would result in a net outflow of capital in the payment of royalties to foreign copyright holders.⁴⁶⁵ Since copyright extends to cover items such as industrial drawings, technical literature, and computer programs, upon which China is dependent for upgrading its technology, it is understandable that the Chinese government would be reluctant to ensure effective enforcement of copyright.⁴⁶⁶ However, since China has the largest population in the world and is emerging as the largest market for many industries, it is viewed by the West as presenting a significant IP problem. China's desire to attract foreign investment and technology transfer has made it amenable to altering its IP practices.⁴⁶⁷ Efforts are being made to train

⁴⁶¹ P. Feng, *Intellectual Property Law in China* (Hong Kong: Sweet & Maxwell Asia, 1997) at preface & 3.

⁴⁶² J.A. Cohen, "Enforcement of Intellectual Property Rights in Asia: The Case of China" in Hugh C. Hansen ed., *International Intellectual Property Law & Policy* Vol. 1 (London: Sweet & Maxwell, 1996) 63 at 63.

⁴⁶³ Alford, *supra* note 32 at 112.

⁴⁶⁴ Frost, R.B., "Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States" 4 Tul. J. Int'l & Comp. L. at 119 at 122; Alford, *supra* note 32 at 117.

⁴⁶⁵ M.D. Pendleton, *supra* note 30 at 40.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ J. Cohen, *supra* note 462 at 64-65. In addition, the U.S. threatened to block China's accession to the WTO. As a bargaining tool, the U.S. pressured China to sign agreements to improve its protection and enforcement of intellectual property. See Prohaska, F., "The 1995 Agreement Regarding Intellectual Property Rights Between China and the United States: Promises for International Law or Continuing Problems with Chinese Piracy?" (1996) 4 Tulsa J. Comp. & Int'l L. 169

judicial officials in the various intellectual property areas and new IP courts have been established.⁴⁶⁸ However, Piracy remains a problem in China.

Taiwan

Like mainland China, intellectual property protection in Taiwan was minimal. By the mid twentieth century, American publishers began to pay a significant amount of attention to the pirating of intellectual property in Taiwan because of the illegal copying of current editions of major works, such as the *Encyclopedia Britannica*, *Webster's Dictionary*, and *Gray's Anatomy* and the export of these works to Western nations and elsewhere.⁴⁶⁹ In response to pressure from the American government, Taiwan justified the copying on the basis that students could not afford to purchase the most update foreign information, particularly the science materials. However, in 1959 the government agreed to amend the copyright laws to include, among other things a reduction of the registration fee, and a provision granting foreigners the same period of protection as Chinese copyright holders.⁴⁷⁰

Several measures taken in response to U.S. pressure were not effective at reducing piracy in Taiwan. This was due in part to the difficulty in proving infringement or obtaining effective sanctions should one prove infringement. The situation in the area of patents and trademarks was similar to that of copyright.⁴⁷¹ By the early 1980's, Taiwan was referred to as the "counterfeiting capital of the world". Though Taiwanese laws were amended during this time in response to American pressure to improve the enforcement of intellectual property rights, piracy continued to be common. Some observers alleged that the Taiwanese government was aware of what was going on and in some cases, was complicit in the piracy.⁴⁷²

⁴⁶⁸ J. Cohen, *supra* note 462 at 64-65; N. Zhang, *supra* note 60 at 14-17

⁴⁶⁹ Alford, *supra* note 32 at 96.

⁴⁷⁰ *Ibid.* at 97.

⁴⁷¹ *Ibid.* at 97-98.

⁴⁷² *Ibid.* at 98-101. At this time, the American government increased the level of pressure on Taiwan to protect intellectual property using trade related sanctions.⁴⁷² The U.S. *Trade and Tariff Act of 1984* made adequate enforcement of intellectual property rights a condition for favourable treatment under the Generalized System of Preferences (GSP). The GSP was a system intended to help developing countries by eliminating tariffs on certain items.

Despite American efforts, Taiwan remained one of the largest producers of counterfeit software, and a center for copyright piracy and trademark infringement in the 1990s.⁴⁷³ In 1992, the USTR commenced a formal investigation of Chinese and Taiwanese activities pursuant to Special 301 of the U.S. Trade Act 1974. Both governments subsequently approved amendments to their intellectual property laws.⁴⁷⁴ Further amendments were made to Chinese laws in 1995.⁴⁷⁵ Thus, it was due to American pressure that Taiwan and China agreed to improve the enforcement of intellectual property rights in their territories. Naturally, the American interference was denounced by both Chinese and Taiwanese commentators.⁴⁷⁶

It is worth noting that Taiwan resisted implementing changes for several years even though it was highly dependent on both American military and economic support at the time. Taiwan began to take intellectual property protection more seriously only after the nation had developed economically. The country also developed an increasing commitment to formal legal processes, and it recognized the need for the development of indigenous technologies which would allow Taiwan to compete internationally with developed and newly industrialized countries. In essence, protection of intellectual property came to be viewed as a necessary element for Taiwan's further industrial development. Consequently there was greater support from burgeoning local industries.⁴⁷⁷

South Korea

South Korea's intellectual property law is primarily the result of foreign influence, mainly Japanese, German and American.⁴⁷⁸ The initial response of the South Korean government when the U.S. complained of the lack of intellectual property protection during the 1980s was to point

⁴⁷³ *Ibid.* at 106.

⁴⁷⁴ *Taiwan Intellectual Property (310_89)*, online: <<http://www.ustr.gov/html/act301.htm>> (date accessed: 3 June 2001). The Taiwanese government also agreed to compile statistics that would facilitate a periodic review by the United States of intellectual property protection in Taiwan. See Frost, *supra* note 464 at 126-135.

⁴⁷⁵ Frost, *Ibid.*

⁴⁷⁶ Alford, *supra* note 32 at 102-103, 106-107.

⁴⁷⁷ *Ibid.* at 108-9.

⁴⁷⁸ Japanese laws on intellectual property, which were based on German law, were implemented after Japan annexed Korea in 1910. See J. Leibowitz & S. Lee, "Intellectual Property Regime of Korea" in A. Wineberg, ed., *Intellectual Property Protection in Asia* (New Hampshire: Butterworth Legal Publishers, 1991) 6-1 at 6-4. The American occupation of Korea in the late 1940's and the subsequent American pressure on Korea (successfully using the threat of trade sanctions) to revise its intellectual property laws have also resulted in intellectual property laws which are comparable to American laws in many respects. See A. Wineberg, *supra* note 446 at 2-2.

out that the U.S. had allowed Japan to develop its technology by using American intellectual property without compensation.⁴⁷⁹ However, the U.S. was insistent and during the 1980s South Korea ("Korea") implemented various reforms in response to American pressure, revising the law to include product protection for pharmaceutical and agricultural chemicals and to extend the patent term from 12 years to 15 years from the date of publication.⁴⁸⁰ Korean copyright and trademark laws were also revised as a result of American pressure to improve the level of protection.⁴⁸¹ By way of contrast, patent protection is not available in North Korea for chemical or pharmaceutical products, food items or biotechnological methods for creating plant varieties or animal breeds.⁴⁸²

Though Korean law, after a number of reforms, was satisfactory to the U.S., there was still a problem of enforcement.⁴⁸³ At the time the Uruguay Round negotiations began, a significant level of economic activity in Korea was generated by copyright piracy. Korea had a thriving industry based on the piracy of books, films, videotapes, software and musical recordings.⁴⁸⁴ Some Americans alleged that the practice of the Korean courts had the effect of permitting patent infringement. In addition, the counterfeiting of trademarks was commonplace.⁴⁸⁵ This lack of enforcement of intellectual property law can be attributed to the fact that the revision of Korean intellectual property laws was largely due to external pressure as opposed to pressure from domestic industries. Koreans did not support the revisions and many government officials viewed the reforms as based on political considerations rather than the nation's economic interests.⁴⁸⁶ It is understandable that Korea was reluctant to improve its intellectual property regime. In a country where piracy creates a great deal of economic activity, both domestically and for export, it would not make sense to strengthen the intellectual property laws. However, unauthorized reproduction of intellectual goods dropped significantly in Korea by the 1990s.⁴⁸⁷

⁴⁷⁹ A. Wineberg, *Ibid.* at 2-2.

⁴⁸⁰ J. Leibowitz & S. Lee, *supra* note 478; Gadbow at 292.

⁴⁸¹ M. Gadbow, "Korea" in Gadbow & Richards eds., *supra* note 459, 272 at 299-305.

⁴⁸² E. Hanellin, ed. *Patents Throughout the World* 4th ed. (New York: West Group, 2001) at K-13

⁴⁸³ United States Trade Representative, *Korea Intellectual Property Rights (301_52)*, online:

<<http://www.ustr.gov/html/fact301.htm>> (date accessed: 3 June 2001).

⁴⁸⁴ Gadbow, *supra* note 431 at 302.

⁴⁸⁵ *Ibid.* at 298 & 307.

⁴⁸⁶ *Ibid.* at 309-310.

⁴⁸⁷ E. H. Smith, *supra* note 443 at 79.

Indonesia

Intellectual property law in Indonesia was not developed domestically, but instead imported from Western culture. The intellectual property laws in place at the time Indonesia gained its independence from the Netherlands were those created by the Dutch. For several decades after Independence, the Indonesian government was not interested in intellectual property law. Since there was little or no pressure from the local industries for the government to make any changes in the law, these laws were not revised until the 1980s when the U.S. identified Indonesia as a major violator of intellectual property rights.⁴⁸⁸ Indonesia's copyright, patent and trademarks statutes were revised during the 1980s and 1990s. Despite the reforms, patents are not available for food or drink products or processes, plant and animal varieties, methods of treatment or inventions contrary to public morality under Indonesian law.⁴⁸⁹

After Indonesia ratified the TRIPS Agreement in 1994, it continued revisions to its copyright law.⁴⁹⁰ The 1997 revision of the Indonesian copyright revealed strong Anglo-American influences which had begun to develop in the 1980s.⁴⁹¹ Indonesia's copyright law contains cultural influences from both the continental European and the Anglo-American traditions. It has been argued that this left Indonesia with an inadequate intellectual property regime. For example, there is confusion in the law on both originality and neighboring rights. The result, it suggested, is a consequence of legislation hastily implemented under pressure. This demonstrates that the importation of principles which create legal certainty in countries with strong intellectual property systems does not necessarily work in developing countries where the administration of intellectual property laws need to be improved.⁴⁹²

The Latin American Experience

The Latin American approach to intellectual property has changed significantly in the last decade. Latin American countries historically viewed intellectual property, particularly when

⁴⁸⁸ C. Antons, "Indonesian Copyright Law after TRIPS: Between Dutch Tradition and Anglo-American Influences" in J.J.C. Kabel & G.J.H. Mann eds., *Intellectual Property and Information Law* (The Hague: Kluwer Law International, 1998) 79 at 79.

⁴⁸⁹ E. Hanellin, ed., *Patents Throughout the World* 4th Ed. (New York: West Group, 2001) I-13 to I-15.

⁴⁹⁰ Antons, *supra* note 488 at 79-80.

⁴⁹¹ *Ibid.* at 80.

owned by foreign interests, with suspicion. Many Latin American nations were concerned about the possibility that their domestic industries would be stifled and that they would suffer economic domination from foreign multinationals.⁴⁹³ Latin American drug companies vigorously opposed changes to patent laws in Latin America, arguing that paying licensing fees to foreign multinational pharmaceutical companies would raise the cost of medicines beyond that which the average citizen could afford. At the Uruguay Round meetings, developing country efforts to avoid the consideration of intellectual property rights within the GATT context were led by Brazil, Argentina and India.⁴⁹⁴

Until recently, patent laws in many Latin American countries excluded agricultural and pharmaceutical products from patentability. Even after TRIPS came into force, Argentina and Brazil did not have patent protection for pharmaceutical inventions although Argentina had provisions for "black box"⁴⁹⁵ filings. However, due in part to the GATT, Latin American countries have altered their laws substantially to bring them into conformity with American standards of intellectual property protection.⁴⁹⁶ The following discussion will focus on Mexico, Brazil and Argentina as the examples from Latin America.

At the time the Uruguay Round negotiations began in 1986, most Latin American countries had intellectual property laws in the three main areas: patent, trademark, and copyright. However, Latin American countries excluded a number of items from patentability, including food and drinks, pharmaceutical products and processes, chemicals, and biological products or processes.⁴⁹⁷ The government authority responsible for granting patents in Mexico also had the role of reviewing all contracts for the licensing of technology from abroad and approved only those that were determined to be in the national interest.⁴⁹⁸ The patent laws of some countries

⁴⁹² *Ibid.* at 84-85.

⁴⁹³ A.S. Pilson, "Overview of Intellectual Property Developments in Latin America" in H. C. Hansen ed., *International Intellectual Property Law & Policy* vol. 2 (London: Sweet & Maxwell, 1998) 27-1 at 27-1.

⁴⁹⁴ T. Richards, "Brazil" in Gadbow & Richards eds., *supra* note 459, 149 at 184.

⁴⁹⁵ The term "black box" filings refers to a system which permits the filing of applications for the grant of patents on such applications at a future time.

⁴⁹⁶ Pilson, *supra* note 493 at 27-1, 27-2.

⁴⁹⁷ T. Richards, "Argentina" in Gadbow & Richards eds., *supra* note 459, 109 at 125-128; T. Richards, "Brazil", *supra* note 494 at 168-9; R.E. Gynn, "Mexico" in Gadbow & Richards, *supra* note 459, 234 at 253-254.

⁴⁹⁸ Gwynn, *supra* note 497 at 168.

also had local working requirements which, if not met, could result in the issuance of a compulsory license or the lapse of the patent.⁴⁹⁹ Under Argentine law, contracts for the licensing of foreign technology had to be approved by and registered with the National Institute of Industrial Technology.⁵⁰⁰ In addition, the enforcement of patents in Latin America was poor. Rather than attempting to strengthen its patent laws, Argentina, for example, was preparing to make changes which would encourage the use of generic drugs at the time the Uruguay Round negotiations began.⁵⁰¹

In the areas of patent and trademark law, the U.S. pressed for, and achieved, improved protection in Mexico. Since the Mexican government did not have an interest in increasing the level of protection in these areas, the laws would have been far weaker than they were at the time the Uruguay Round commenced had the American government not become involved. By using trade-related measures, the U.S. was able to pressure the Mexican government to revise its laws. Though there was resistance to the American driven changes, there were some Mexican businesses that supported increased patent protection, in part because they viewed it as a method of attracting foreign investment and as a means of encouraging domestic research and development.⁵⁰²

The Brazilian government was not engaged in efforts to revise its intellectual property laws and, absent outside interference, would not likely have strengthened its intellectual property regime. U.S. attempts to create change in the Brazilian law were largely ineffective. This was due in part to the fact that most people in the Brazilian government did not consider it beneficial to strengthen intellectual property protection in areas in which Brazilian nationals were not engaged in innovative activity. Also, the U.S. alone was not significant enough a market to Brazil.

⁴⁹⁹ Gwynn, *supra* note 497 at 168-169; Richards, "Brazil", *supra* note 494 at 155. Both Brazil and Argentina had local working requirements.

⁵⁰⁰ Richards, "Argentina", *supra* note 497 at 125-128.

⁵⁰¹ *Ibid.* at 131.

⁵⁰² R.E. Gwynn, *supra* note 497 at 269-270.

Therefore, the U.S. could not successfully use the trade based approaches to intellectual property rights that it had used in Korea, Singapore and Taiwan in Brazil.⁵⁰³

In contrast to the other forms of intellectual property protection, copyright laws in Brazil, Mexico and Argentina were more in line with the standards of most industrialized countries.⁵⁰⁴ These governments were interested in maintaining and improving their copyright laws, even without external interference.⁵⁰⁵ Apparently, the domestic interests of these countries were best served by having relatively strong copyright laws but weak patent protection. This was probably a reflection of the national strength of these countries in producing artistic and literary works.

THE RELEVANCE OF STRONGER INTERNATIONAL IPRS FOR THE DEVELOPING WORLD

There is no conclusive economic evidence to support the theory that intellectual property rights promote economic growth and development.⁵⁰⁶ The economic value of intellectual property protection for a particular nation depends on its unique set of circumstances.⁵⁰⁷ Historically, intellectual property rights were territorial in nature, meaning that right only subsisted within the territory in which it was granted.⁵⁰⁸ Therefore, each nation had domestic control over its intellectual property regime and determined the extent to which it would protect intellectual property rights. Though IPRs remain territorial in nature, WTO Member states have agreed through TRIPS to relinquish some of their control over the provision and enforcement IPRs within their territory.

⁵⁰³ Richards, "Brazil", *supra* note 494 at 181-183. These authors recommended that the U.S. attempt to combine its market power with that of Japan and the EC because together they would account for over 70% of Brazil's exports and could use that as leverage in negotiating for strong IP protection in Brazil.

⁵⁰⁴ Richards, "Brazil", *Ibid.* at 172; Gwynn, *supra* note 497 at 268; Richards, "Argentina", *supra* note 497 at 133-140.

⁵⁰⁵ Gwynn, *supra* note 497 at 268.

⁵⁰⁶ World Bank Discussion Paper No. 412, *supra* note 2 at 27, 28; See Josh Lerner, *150 Years of Patent Protection* (Working Paper), online: Harvard Business School Faculty Publications <<http://www.people.hbs.edu/jlerner>> (date accessed: 5 August 2001).

⁵⁰⁷ World Bank Discussion Paper No. 412, *supra* note 2 at 27-28

⁵⁰⁸ D'Amato & Long, *supra* note 84 at 48

The importance placed on intellectual property rights varies from country to country and is influenced by the amount of resources devoted to the creation of new intellectual products.⁵⁰⁹ In the area of patents, and other intellectual property rights, it tends to be companies rather than individuals who benefit from the intellectual property system.⁵¹⁰ This is consistent with the goal of rewarding the entrepreneurial entity that takes the risk of investing in the intellectual property.⁵¹¹ In industrialized countries, it is taken for granted that a well developed corporate economy exists in which the patent system can function to provide an incentive for corporate enterprises to invest in the development of new technologies. Indeed, one writer describes the patent system as:

an inherent component of a free enterprise economy, of private property, of a part of western commercial morality and an indispensable spur to economic and technological progress. The bottom line justification for the patent system is since one does not know whether the system as a whole is good or bad, industrialized countries feel it is safer to stay with it....⁵¹²

The other factor that is of importance with respect to intellectual property protection is the extent to which the economy is a knowledge and information based economy. IPRs impact economic activity through the use of intellectual goods in both production and consumption. However, it is difficult to evaluate the significance of IPRs for developing countries, in part because IPRs influence economic behavior indirectly and because data on business activities relating to intellectual property is not easily accessible for interpretation.⁵¹³

In lower income countries, a greater portion of GDP comes from agricultural output, whereas high income countries produce significantly higher GDP from the service sector. However, it is not clear to what extent proprietary information contributes to the development of a given sector in a given country.⁵¹⁴ However, developing countries spend far less money on R&D than do industrialized nations. The private sector is an increasingly important source of R&D funding, particularly in the developed world. The developing countries that spend the greatest amount of

⁵⁰⁹ World Bank Discussion Paper No. 412, *supra* note 2 at 12.

⁵¹⁰ Umesh Kumar, *An Introduction to the African Industrial Property System* (Lesotho: Umesh Kumar, 1993) at 319.

⁵¹¹ M.D. Pendleton, *supra* note 30 at 40.

⁵¹² U. Kumar, *supra* note 310 at 319.

⁵¹³ World Bank Discussion Paper No. 412, *supra* note 2 at 12-14.

⁵¹⁴ *Ibid.* at 14.

money on R&D are China, Brazil, India, and the Asian newly industrialized countries. The United States devotes greater resources to R&D than any other country, spending more than the entire developing world. In 1992, the United States spent approximately \$167 billion or 2.8% of its GDP on R&D. Europe and Japan were second and third in terms of financial investment in R&D.⁵¹⁵

In the agricultural sector, IPRs have historically been less important because in both developed and developing countries most agricultural research has been conducted by public sector institutions. Thus, the most significant impact on agriculture arises from the dissemination of farming technologies and seeds that fall within the public domain. Moreover, prior to TRIPS, many nations did not permit the patenting of agricultural inventions.⁵¹⁶ However, in the last two decades private funding of agricultural research has risen and nearly half of agricultural R&D in the developed world is funded by private institutions. This has resulted in an increased reliance on IPRs in the agricultural sector.

With respect to the manufacturing sector, little systematic research has been done in developing countries. This sector in the developing world is not necessarily comparable to that of the industrialized world because it may be more labour intensive and less reliant on proprietary information. Thus, it is difficult to reach any conclusion about the importance of IPRs for this sector.⁵¹⁷

In light of the lack of any conclusive evidence to demonstrate that better protection for IPRs is advantageous for developing countries, it is not surprising that the developing and developed countries take different attitudes towards the protection of intellectual property. Since new technologies are primarily controlled by the industrialized nations, they are the primary advocates for better international protection for intellectual property.⁵¹⁸ On the other hand, developing countries which are not major producers of intellectual goods do not have much

⁵¹⁵ *Ibid.* at 12-14.

⁵¹⁶ *Ibid.* at 14.

⁵¹⁷ *Ibid.*

⁵¹⁸ D' Amato & Long, *supra* note 84 at 43.

incentive to vigorously protect intellectual property.⁵¹⁹ Countries with few inventions to sell and that do little or no trade in industrial goods have little to gain from the patent system.⁵²⁰

Regardless of the debate about the protection of intellectual goods, it is clear that intellectual creations and innovations are a factor in industrialization. Developing countries are of the view that access to technology has a direct impact on their ability to develop economically.⁵²¹ As a result, stringent standards are seen by developing countries as debilitating. Therefore, many developing countries had ineffective mechanisms for the enforcement of IPRs. Others refused to recognize certain forms of intellectual property.⁵²² Many developing countries take the position that innovations should be considered the "common heritage of mankind". This model promotes access to innovations and free transfer of technology among nations. Technology is to be used as an instrument of public policy and a tool for economic and social development for the benefit of all peoples.⁵²³

Another concern is that of foreign interests in the less developed countries. The transnational corporations would be the beneficiaries of stronger IPRs, at least until domestic industry developed. There was widespread perception during the Uruguay Round negotiations that the U.S. was trying to convert its domestic intellectual property law into the international standard.⁵²⁴ Stronger IPRs mean that the producers of the goods ensure an economic return from developing countries when their intellectual products are imported or otherwise used. This increases the costs of acquiring technology because it requires one to pay the innovator for the use of the product through the use of licensing fees or royalties. Since importers of technology seek to obtain the technology at the lowest possible price, developing countries have opted for transfer of technology either gratuitously or for reasonable consideration. The developing world

⁵¹⁹ *Ibid.* at 62.

⁵²⁰ Kumar, *supra* note 310 at 320; E. Penrose, *supra* note 28 at 116.

⁵²¹ D' Amato & Long, *supra* note 84 at 43.

⁵²² *Ibid.* at 62.

⁵²³ *Ibid.* at 61.

⁵²⁴ *Ibid.* at 48.

views this as a necessary measure in order to narrow the technological gap between themselves and the industrialized world.⁵²⁵

Furthermore, the industrialized world's increased interest in IPRs has been characterized as an attempt to control the diffusion of new technologies in the struggle between those nations that have industrialized and those that have not. Developing countries resisted increased IPRs on the ideological level, rejecting the model as a new form of colonialism. The perception was that stronger protection of intellectual property would interfere with the diffusion of knowledge and technology from the industrialized world to the developing world.⁵²⁶

Proponents of stronger IPRs argued that developing countries would benefit because there is a high social rate of return from investment in R&D and that insufficient protection of intellectual property has a negative impact on investment. Nonetheless, the developing world resisted stronger IPRs on the basis that increased protection would not necessarily lead to increased research and development at the local level, and that the growth impact of any additional R&D would not be significant. The argument that the protection of intellectual property is a significant factor in technology transfer has been rejected by some commentators who argued that technology will flow even where it is not protected.⁵²⁷ In any event, modern technology is controlled by large transnational corporations and it is they who stand to benefit from increased protection.⁵²⁸ Some critics point out that the protection of intellectual property, rather than having a neutral or beneficial impact, has an adverse effect on the commercial, political, economic, and technological development of many developing countries.⁵²⁹ The majority of patents granted by developing African countries are foreign patents and have the effect of eliminating competition and implementing restrictive measures that discourage incentive

⁵²⁵ Yambrusic, *supra* note 100 at 9; See generally UNCTAD Secretariat, *supra* note 93.

⁵²⁶ Primo Braga, *supra* note 7 ; E. Penrose, *supra* note 22 at 173.

⁵²⁷ D'Amato & Long, *supra* note 84 at 51; U. Kumar, *supra* note 310 at 339.

⁵²⁸ D' Amato & Long, *ibid* at 51; U. Kumar, *Ibid.* at 321

⁵²⁹ Kumar, *ibid* at 320.

activities. Furthermore, if the patents are not worked locally, it is submitted, no transfer of technology occurs.⁵³⁰

Though advocates of strong international IPRs suggest that developing countries will benefit from increased foreign investment, a 1993 study found that there was no correlation between increased protection for IPRs and foreign direct investment. Some developing countries, such as Nigeria, which provided high levels of protection for IPRs did not attract higher levels of foreign direct investment than did other countries with similar economic characteristics and investment incentives. The developing countries that received the highest levels of foreign direct investment were the same countries that were on the USTR's priority watch list for violation of IPRs.⁵³¹ Rather, foreign direct investment in developing countries is concentrated among a few countries. In 1994 and 1995, China, Mexico, Malaysia, and Brazil accounted for more than half of all foreign direct investment in the developing world.⁵³²

It has also been pointed out that the Netherlands and Switzerland were successful in developing their chemical and electrical industries without the benefit of a patent system. As well, most of the industrialized European countries had low levels of intellectual property protection during the early stages of their industrial development, and there was strong anti-patent sentiment in Europe during the mid to late 19th century.⁵³³ Many developing countries are at a stage of development comparable to the level of development the technologically advanced countries were at during the early stages of industrialization. Arguably, it is unfair to require them to comply with high standards of intellectual property protection. This argument is strengthened by the fact that the

⁵³⁰ U. Kumar, *ibid* at 320. As discussed earlier, various countries, including Canada until the early 1990s, had local working requirements. However, Article 27.1 of TRIPS requires patents to be available without discrimination based on whether the products were imported or locally produced. Canadian local working requirements were eliminated to make Canadian law NAFTA and TRIPS consistent. See *An Act to Implement the NAFTA*, *supra* note 442.

⁵³¹ These were Argentina, Brazil, Korea, China, and Thailand, among others. F. M. Abbott, "WTO TRIPS Agreement and Global Economic Development", in F. M. Abbot & D. J. Gerber eds., *Public Policy and Global Technological Integration* (London: Kluwer Law International, 1997) 3 at 7-10. Similar results have been born out by other studies. See B. Sodipo, *Piracy and Counterfeiting: GATT, TRIPS and Developing Countries* (London: Kluwer Law International, 1997) at 62.

⁵³² World Bank Discussion Paper No. 412, *supra* note 2 at 18.

⁵³³ E. Penrose, *supra* note 22 at 12-17. The conflict over the monopolistic tendencies of the patent system led some to call for its abolishment.

industrialized countries had the economic advantage of industrializing and obtaining new technologies at a time when intellectual property rights were relatively weak both domestically and internationally.⁵³⁴

At present, it may be more beneficial for developing countries not to enforce respect for IPRs than to adhere to stringent standards.⁵³⁵ Developing countries place a high value on the benefit of getting new technologies at the lowest possible price. Making additional royalty payments to industrialized countries would cause problems for many developing countries, especially given that most of them face foreign exchange constraints.⁵³⁶ This is particularly important because foreign exchange is critical for most of these countries in order to further service their heavy foreign debt loads.

Governments in developing countries generally lack financial resources and are therefore reluctant to allocate scarce resources to the protection of IPRs.⁵³⁷ Moreover, imitators or "pirates" of intellectual property have almost no production costs since they save the expense of researching and developing a product and because they only copy successful products, thereby avoiding the risk of market failure and the accompanying financial loss. These cost saving factors and the avoidance of royalties enable imitators to provide the product at a lower cost and satisfy local demand better than the foreign innovator who created the product.⁵³⁸

Despite these concerns, developing countries may increasingly see the utility of intellectual property, or similar property rights, in protecting their own interests. Copyright may be used to protect literary and musical works of traditional peoples in developing countries. Utility models may also be useful in protecting some valuable knowledge from these communities.⁵³⁹ The

⁵³⁴ U. Kumar, *supra* note 310 at 320-323; "The Right to Good Ideas," *The Economist*, 359:8227 (23 June 2001) 1

⁵³⁵ D'Amato & Long at 62; Penrose suggested that developing countries should be left out of the international patent system all together because they have nothing to gain from granting patents to foreigners, *supra* note 22 at 233.

⁵³⁶ D'Amato & Long, *supra* note 84 at 51.

⁵³⁷ *Ibid.* at 62.

⁵³⁸ *Ibid.*

⁵³⁹ D. A. Possey & G. Duttfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: IDRC, 1996) at 81-84.

market value of traditional knowledge from developing countries may increase as advances in biotechnology expand the range of life forms that have commercial value. The market value of plant-based medicines sold in industrialized countries was estimated to be over \$40 billion in 1985. Though most of these medicines were first used by traditional healers, the source communities for this knowledge rarely receive any compensation.⁵⁴⁰ Knowledge of traditional communities is also important for agricultural advances in areas such as plant-based pesticides and the creation of new crop varieties. In the health care and cosmetic industries there is also a move towards “natural” products, and the knowledge about many of these products is derived from traditional or indigenous communities.⁵⁴¹ The majority of the seven thousand natural compounds used in modern medicine have been used by traditional healers for centuries. As well, it is estimated that one quarter of prescription drugs sold in the United States contain active ingredients derived from indigenous knowledge of plants.⁵⁴²

Information originating within traditional communities may inadvertently be passed on to foreigners and be used for academic or scientific research. Since industry researchers often use academic literature, valuable traditional knowledge can and has been used in the R&D of commercial enterprises.⁵⁴³ Companies involved in biotechnological R&D are

not noted for their ethics and concern for, or experience with, indigenous peoples or local communities. They are noted for capitalizing on opportunity. Therefore, there are good reasons why indigenous and traditional peoples should be worried about the commoditization of their cultural, intellectual, and scientific property – not to mention their plants, animals, seeds, and even their own genetic material.⁵⁴⁴

⁵⁴⁰ D. A. Possey & G. Duttfield, *supra* note 539 at 34.

⁵⁴¹ *Ibid.* Of course, everyone is “indigenous” to somewhere since everyone has a place of origin. Though there is no precise definition of indigenous, since colonization the term has been commonly used to refer either to the peoples indigenous to the Americas or to the traditional ethnic groups originating from various non-European countries. See M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2001) at 61. Since the term “indigenous” could refer to the majority of the developing world, the protection of the traditional knowledge of indigenous communities is a relevant issue for all developing countries.

⁵⁴² M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge*, (Saskatoon: Purich, 2001) at 125

⁵⁴³ Possey & Duttfield, *supra* note 539 at 35

⁵⁴⁴ *Ibid.* at 52. For an in depth discussion of the issues surrounding indigenous peoples and IPRs, see generally Possey & Duttfield, *supra* note 539.

Southern countries have expressed concern over the fact that, in their view, traditional knowledge is used and genetic resources are accessed without compensation.⁵⁴⁵ The ease with which these resources have been accessed is probably due in part to the Southern concept of communal property, including communal knowledge. Arguably, this has been used to the detriment of the developing world and to the benefit of many companies based in the developed world, particularly in areas such as pharmaceutical and agricultural research. Because intellectual property theories protect only "new" knowledge, it does not protect the knowledge of traditional healers. Thus, biotechnology companies have been able to obtain patents for synthesized versions of naturally occurring molecules in commonly used plants.⁵⁴⁶ Taking these factors into consideration, can one reasonably expect developing countries to truly accept and fully implement strong protection for intellectual property? It could be that many countries may not yet have reached a stage of economic development where they would seriously consider strong intellectual property protection or be able to rationalize strong intellectual property regimes as suitable to their needs. Many European nations, for example, had relatively weak patent protection during the early stages of their industrial development.⁵⁴⁷

Though cultural, medicinal and agricultural knowledge is valuable for innovation in the area of biotechnology, little economic value has been attached to it. Whereas the finding of a university, corporation, or affiliated research group may be the subject of a patent, the cultural knowledge of indigenous groups from developing countries may not. This holds true even where the information is known only to the secret healers of the group. The knowledge is considered public information which belongs to the common.⁵⁴⁸ This presents an interesting dilemma for developing nations. If one takes a traditional Western approach toward intellectual property

⁵⁴⁵ World Bank Discussion Paper No. 412, *supra* note 2 at 39. Since traditional knowledge has been receiving increasing attention in a variety of areas, from agriculture to trade and economic development, WIPO began in 1998 to consider the intellectual property aspects of protection for traditional knowledge. See WIPO, online: <<http://www.wipo.org/traditionalknowledge/introduction>> (accessed 11:29 a.m. 10/06/01). The 1997 grant of a U.S. patent on Basmati rice derived from basmati rice germplasm from Pakistan caused a great deal of controversy. See J. Watal, "Perspectives from Developing Countries: India" in Lele, Lesser & Horstkotte-Wesseler, *supra* note X, 52 at 59.

⁵⁴⁶ M. Battiste & J.Y. Henderson, *supra* note 342 at 128. American companies have been able to obtain patents on synthetic derivatives of an active substance from the seeds of neem trees. This substance has been used by people in rural India as a pesticide for generations.

⁵⁴⁷ U. Kumar, *supra* note 310 at 321-322.

rather than the developing world stance that know-how is the common heritage of humankind, developing nations should be compensated for such knowledge. In order to obtain remuneration from the pharmaceutical industry from the use of traditional knowledge, developing nations would need to argue for their IPRs in the knowledge of their indigenous peoples and in their rainforests and other natural resources.

However, IPRs may not be the appropriate method of protection for a number of reasons. Where traditional knowledge is commonly held it falls into the public domain and cannot be protected by the intellectual property system as it is currently constructed. Even if the information is not widely held, it may be information belonging to the community which cannot be used by one individual for commercial gain. Nonetheless, when multinational companies make use of indigenous knowledge in the development of agricultural or chemical pharmaceuticals, these communities may want to make a case for just compensation.⁵⁴⁹ Recently, developing countries have been negotiating to ensure that they receive compensation from companies that make use genetic resources located in their territories to create products that are subsequently protected by IPRs and commercialized. The tendency of some companies may be to resist such developments. However, as Professor Ziff notes, "ownership usually entails duties as well as rights".⁵⁵⁰ Methods for protecting the rights of "indigenous" communities, many of whom are located in developing countries, though beyond the scope of this paper, is worthy of further investigation.⁵⁵¹

⁵⁴⁸ D' Amato & Long, *supra* note 84 at 63.

⁵⁴⁹ See for example, the *Convention on Biological Diversity* or the proposed *International Undertaking on Plant Genetic Resources*.

⁵⁵⁰ Ziff, *supra* note 9 at 3.

⁵⁵¹ Though there is no precise definition of indigenous, since colonization the term has been commonly used to refer either to the peoples indigenous to the Americas or to the traditional ethnic groups originating from various non-European countries. See Battiste & Henderson, *supra* note 342 at 61. Since the term "indigenous" could refer to the majority of the developing world, the protection of the traditional knowledge of indigenous communities is a relevant issue for all developing countries.

REGULATION OF IPRS WITHIN THE TRADE CONTEXT - IMPACT ON DEVELOPING NATIONS

It is debatable whether the GATT framework is beneficial for developing countries. On the one hand, developing nations have the advantage of working within a formal organized system rather than attempting to negotiate individually with powerful nations such as the United States. Though TRIPS reduces domestic control over national intellectual property regimes, it offers the advantage of formal dispute settlement rather than a unilateral retaliatory trade action by the U.S.⁵⁵²

On the other hand, the GATT framework forces developing countries to protect intellectual property even though they may not see stronger IPRs as being in their interest. Within the GATT framework, developing nations are obligated to comply with the TRIPS Agreement, and they can be taken before WTO panels if they refuse to do so. Within the trade context, it becomes more attractive for developing countries to strengthen IPRs in order to avoid trade losses in other areas. The nations that sought stronger international IPRs were aware of this, and this was part of the reason the GATT framework was chosen. Access to the markets of industrialized world was used as leverage to pressure the developing world to agree to protect intellectual property.⁵⁵³ However, many of the trade benefits developing countries anticipated have yet to materialize.⁵⁵⁴

However, as mentioned earlier, there are new areas where intellectual property issues are arising for the developing world. For example, the heightened interest in the economic potential of the rainforest in some developing countries raises issues of the intellectual property rights of the

⁵⁵²It has been suggested that since TRIPS is the result of a U.S. led movement for stronger intellectual property protection, it will be difficult for the U.S. to complain about the inadequacy of intellectual property protection in any nation which is complying with TRIPS. It should therefore be more difficult for the U.S. to threaten other states or take retaliatory trade action through the use of Special 301. See McDorman, *supra* note 90 at 124-125 for further discussion.

⁵⁵³ See C.L.N. Amorim, "The WTO From the Perspective of a Developing Country" (2000) 24 Fordham Int'l L.J. 95. It has been pointed out that developing countries are not only being required to meet industrialized world standards for intellectual property but are also being pressured to ensure that their laws are as effective as the laws of the industrialized countries. See A. Endeshaw, "A Critical Assessment of the U.S.-China Conflict on Intellectual Property" (1996) Alb. L.J. Sci & Tech. 295 at 305.

⁵⁵⁴ *Ibid.* at 96; "The Right to Good Ideas", *supra* note 534.

countries where the rainforest is located. The pharmaceutical industry has been the predominant source of increased interest in developing country rainforest and medicinal plant and crop variety research.⁵⁵⁵ Traditional knowledge of native healers and non-European ethnic groups has been an integral aspect of drug development. Approximately three-quarters of the chemical compounds that are derived from plants and which are currently in use were discovered through research on medicinal plant uses by traditional or indigenous peoples. Likewise, the international seed industry depends on genetic materials that originate from crop varieties which are selected and improved by developing country farmers.⁵⁵⁶ Perhaps through the use of the WTO framework, developing countries will be better able to ensure that their social and economic interests in these areas are secured.

Importance of Domestic Control

Under TRIPS, developing countries will be required to implement levels of protection for intellectual property that existed in the industrializing countries at the time they were industrializing.⁵⁵⁷ Protecting intellectual property at the time of industrialization may have been both appropriate and effective for these countries. However, the least developed countries have not yet began to industrialize significantly, if at all, and it is questionable whether strong intellectual property rights will help their economic development at this stage. It is questionable particularly since innovation occurs incrementally through improvements on pre-existing creations.⁵⁵⁸ A country needs to be able to access existing technologies so that it can imitate and then improve upon them. It is counterproductive for a nation to protect IPRs if such rights render the cost of accessing these technologies prohibitive. In the area of agriculture IPRs have a significant impact on developing countries. Many households are dependent on agriculture for

⁵⁵⁵ D'Amato & Long, *supra* note 84 at 63

⁵⁵⁶ *Ibid.*

⁵⁵⁷ M.P. Ryan, *supra* note 121 at 8.

⁵⁵⁸ *Ibid.* at 9. For detailed analysis see G. Grossman & E. Helpman, *Innovation and Growth in the Global Economy* (Cambridge: MIT Press, 1991); Zvi Griliches ed. *R&D, Patents, and Productivity* (Chicago: University of Chicago Press, 1984)

their income. Access to new technologies is essential in order for them to be competitive and to maintain their livelihoods.⁵⁵⁹

A strong technological base is essential for industrial development.⁵⁶⁰ Industrial development is linked to the economic development and prosperity of the people in a particular country. Hence, one could argue that technology is a critical element of economic development. Developing countries have an interest in strengthening their technological bases in order to create economic stability and encourage industrialization.⁵⁶¹ Since the 1979 United Nations Conference on Science and Technology for Development, there has been agreement that science and technology should aim at improving the well being of mankind. The benefits, it is argued, should be shared equitably. The view of the developing world has been that they should have access to the achievements of modern science and technology, and that the transfer of technology should be promoted so that developing countries can create indigenous technologies. In contrast to the position taken by some developing countries that all nations should be entitled to access the new technology as the universal heritage of mankind, the developed world has taken the position that technology should be respected as private property.⁵⁶²

Developing countries have the option of developing new technologies indigenously or acquiring foreign technologies through various mechanisms. Often, when developing countries develop technology locally, the technology is simple and conventional.⁵⁶³ This is largely due to the fact that they lack the resources to invest in R&D and the scientific expertise,⁵⁶⁴ particularly since many educated developing country nationals live and work in multinational companies based in the developed world. It is often seen as more beneficial for many developing countries to acquire new technology rather than to invest in developing alternative technologies.⁵⁶⁵

⁵⁵⁹ W. Lesser et al., "Intellectual Property Rights, Agriculture and the World Bank" in U. Lele, W. Lesser & G. Horstkotte-Wesseler eds., *Intellectual Property Rights in Agriculture: The World Bank's Role in Assisting Borrower and Member Countries* (Washington: The World Bank, 2000) 1 at 1

⁵⁶⁰ D. Subhapholsiri, "Intellectual Property in Economic Development" in P.S. Sangal and K. Ponnuswami eds., *Intellectual Property Law*, (Dehli: UDH Publishers and Distributors, 1994) 61 at 61

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.* at 62

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

However, when technology is transferred to developing countries, it may or may not create scientific and economic development. The technology must be appropriate to local needs and conditions.⁵⁶⁶ For example, there should be a scientific and technological base in the recipient country that is capable of working with the new technology. If the recipient country does not have the capacity to absorb the technology, it will be completely dependent on the supplier of the technology for technical assistance and operations. Thus, the recipient country will be unlikely to develop expertise with respect to that particular technology. Consequently, the recipient country is unlikely to develop the ability to modify the technology to suit local conditions or otherwise improve upon it.⁵⁶⁷ For these reasons, among others, intellectual property policies that are appropriate for industrialized countries may not be suitable in the developing country context.

CAN TRIPS WORK FOR BOTH TECHNOLOGICALLY ADVANCED COUNTRIES AND DEVELOPING COUNTRIES?

The TRIPS Agreement recognizes the need to balance intellectual property rights with other legitimate interests. It also acknowledges that developing countries face challenges distinct from those faced by industrialized countries. As a result, the TRIPS Agreement contains special provisions relating to developing and least developed country Members. The aspects of TRIPS and of the WTO Agreement that provide some latitude for developing countries will be the focus of this section of the paper.

Provisions on Technology Transfer

With respect to the transfer of technology, Articles 66(2) and Article 67 of TRIPS encourage North-South cooperation on technology transfer. Articles 7 and 8 of TRIPS also refer to technological development and technology transfer. Technology transfer requires the participation of private enterprises that have the expertise in much of the relevant technology and may have intellectual property rights in that technology. TRIPS applies to Member states but does not impose obligations on private enterprises with respect to technology transfer. This

⁵⁶⁶ *Ibid.*

limitation may be addressed to some extent by Article 66.2 of TRIPS which requires Member states to promote and encourage the transfer of technology to least developed country Members by providing incentives to private enterprises and to institutions in their territories.

Article 67 requires Members states to provide technical cooperation on mutually agreed terms and conditions to developing and least developed country Members. Such cooperation must include assistance in developing legal regimes for the protection of intellectual property rights, including the creation or improvement of the necessary domestic offices and agencies and the training of personnel.⁵⁶⁸ Though TRIPS provides that the industrialized countries should cooperate with the developing countries on these matters, it remains to be seen how seriously this obligation will be taken. Though a number of laudable goals have been incorporated into clauses of international agreements in past years and numerous United Nations declarations have been made regarding development, little progress appears to have been made.

Articles 7 and 8 of TRIPS also encourage the transfer of technology. The objectives of TRIPS, set out in Article 7 of the Agreement provide:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

While Article 7 includes technology transfer as one of the objective of TRIPS, Article 8, which sets out the principles of the Agreement, allows Member states to take measures to prevent practices which adversely affect the international transfer of technology. Article 8.2 states:

Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ TRIPS, *supra* note 4, Article 67.

Of course, any measures taken pursuant to Article 8.2 must be "consistent with the provisions" of the Agreement. This language could be interpreted in a manner that would severely limit the options available under this section.

Provisions Relating to a Balancing of Interests

Article 1.1 of the Agreement states that Members are free to determine the appropriate method of implementing the TRIPS provisions within their own legal system. As well, the principles of TRIPS established in Article 8 recognize the need to balance the interests of the holders of intellectual property rights with other equally legitimate societal interests. Article 8.1 provides:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Article 8 appears to allow Member the possibility to factor in other relevant considerations as they amend their laws to create TRIPS consistent IP regimes. However, the success of Article 8 in the *EU-Canada Pharmaceuticals* case was negligible. The tension between the protection of IPRs and the important public policy goal of providing low cost medicines to Canadians was a critical aspect of this case. Though Canada raised Articles 7 and 8.1 in defence of its position, the Panel did not even address Canadian arguments with respect to these provisions of the Agreement. Moreover, the language of Article 8.1 contains the same limitation found in other exempting provisions of TRIPS, which requires that the measures taken be consistent with the provisions of the Agreement. This leaves it unclear as to whether an exception really exists and the extent to which Member states can deviate from the precise requirements of the Agreement. The WTO cases thus far would seem to suggest that there is little room for deviation from the WTO standards.

The *WTO Agreement* provides authority for the least developed countries to implement TRIPS only to the extent that it is suitable in light of their needs. Article XI.2 of the *WTO Agreement* states:

The least-developed countries, recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent

with their individual development, financial and trade needs or their administrative and institutional capabilities.

The countries classified as least developed can therefore argue, even after the end of the transitional period, and to the extent that they continue to be classified as least developed countries by the United Nations, for an application of TRIPS that allows them to take into consideration other legitimate interests. However, the other developing countries will not be able to make use of this provision.

The Delayed Implementation Period

"In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need to create a viable technological base", Article 66 of TRIPS exempts the least developed country Members from their obligations under TRIPS with exception of Articles 3, 4, and 5 (obligations regarding national treatment and most favoured nation treatment) for a period of 10 years from the date of entry into force of the Agreement. Since TRIPS entered into force on January 1, 1995, the least developed countries have until 2005 to implement the Agreement.

Given the state of affairs in some developing countries, particularly those in the African region, many of which are politically and economically unstable, the time delay currently provided under TRIPS is not sufficient. Assuming obligations of this nature and the ability to create intellectual property regimes as required by TRIPS presupposes political stability, economic stability and the capability to implement and enforce the legal regimes necessary. Not only do many of these countries lack the institutional infrastructure, including the expertise necessary to implement their TRIPS obligations, they are also struggling to provide all their citizens with basic health (including access to clean drinking water and basic medicines) and education while servicing heavy foreign debt.⁵⁶⁹ Politically, many nations are either still in the process of democratization, are under military governments that do not have legitimacy in the country or are engaged in protracted civil wars. Naturally, the focus in many of these countries is on

⁵⁶⁹ Approximately \$200 billion dollars is owed by 41 countries, mostly in Africa, to the International Monetary Fund and other Western financial institutions. These countries have a total of 600 million people, half of whom live on

meeting some of their basic needs before they can begin to consider the protection and enforcement of intellectual property rights.⁵⁷⁰

Extensions of time for these countries to implement TRIPS shall be accorded by the Council for TRIPS "upon duly motivated request by a least developed country Member."⁵⁷¹ If the exceptions to the TRIPS obligations are interpreted in a narrow manner that accords Member states little room to deviate from the TRIPS standards, it is important, in this writer's view, to give all the least developed country Members sufficient time to stabilize before they have to implement TRIPS. This is preferable to requiring countries to individually request extensions of time. Detailed academic studies would need to be undertaken to determine the amount of time that would be adequate in the circumstances. However, it can safely be said that taking into consideration the state of many of these countries today (2001) they will not be in a position to create TRIPS standard intellectual property regimes in the next 4 years. In order to allow these countries to focus their limited resources on matters of critical importance to their development (i.e. political stability) rather than focusing on whether they can make their legal systems TRIPS compliant by 2005, this reality should be acknowledged and accounted for now. Though these countries may be able to rely on Article XI.3 of the *WTO Agreement* to make a case for more flexibility, the position is debatable and therefore does not provide these countries with sufficient certainty on the question of the application of TRIPS.

Waiver of Obligations and Possibilities for Amendment

Article IX of the *WTO Agreement*, to which TRIPS is an annex, sets out how decisions are to be made within the WTO framework. Article IX.3 could allow developing and least developed country Members to obtain a waiver of an obligation "in exceptional circumstances." This can only occur by consensus of the Members cast at the Ministerial Conference if it is an exception with respect to an obligation which cannot be met at the end of a grace period provided in

less than \$1 per day. See the International Monetary Fund Web site, online: <<http://www.imf.org/external/np/exr/ib2000/092300.htm>> (date accessed: 15 August 2001)

⁵⁷⁰ "The Right to Good Ideas", *supra* note 534.

⁵⁷¹ TRIPS, *supra* note 4, Article 66.1.

TRIPS.⁵⁷² Otherwise, a decision of three-quarters of the Members in favour of the waiver will suffice.⁵⁷³ A waiver granted for a period of more than one year shall be reviewed annually.⁵⁷⁴

Another available alternative is to amend the TRIPS Agreement to allow more flexibility for Member states. Article X of the WTO Agreement allows for amendments to the WTO Agreement and the annexes, including TRIPS. Under Article X.3 amendments to TRIPS that would "alter the rights and obligations of the Members, shall take effect for Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it". It is also possible to make amendments which would effectively be binding on all Member states by a vote of three quarters of the Members at the Ministerial Conference unless an exception is granted to a particular state by the Ministerial Conference.⁵⁷⁵

Is TRIPS Truly Beneficial for Global Markets? - Implications for the South.

Leaders in Canadian business in the 1990's advocated a balance between the development of minimum international standards and the right of sovereign nations to determine their own national standards.⁵⁷⁶ This is as critical for the developing world as it is for industrialized nations like Canada, if not more so.

Approximately 100 of the WTO's more than 130 members are developing countries. These countries are expected to play an increasingly important role in the WTO because of their

⁵⁷² The Ministerial Conference, which must meet at least once every two years, is composed of representatives from all Member states. See Articles IV.1 of the *WTO Agreement*.

⁵⁷³ See Articles IX.1-IX.5 (including footnote 4) of the *WTO Agreement*, *supra* note 5. The request for a waiver must first be submitted to the Council for TRIPS for consideration. The Council will then make a recommendation to the Ministerial Conference.

⁵⁷⁴ *WTO Agreement*, *supra* note 5, Article IX.4.

⁵⁷⁵ The second part of Article X.3 states "The Ministerial Conference may decide by a three-fourths majority that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference."

⁵⁷⁶ R. A. Ferchat, "Global Rivalry in Innovation and High Technology" in Murray G. Smith ed., *Global Rivalry and Intellectual Property: Developing Canadian Strategies*. (Toronto: The Institute for Research on Public Policy, 1991) 21 at 23-27.

numbers and because they are becoming more important in the global economy. As a result, the various WTO agreements attempt to take the interests of these countries into account in a number of ways.⁵⁷⁷ This is reflected in some of the provisions of the TRIPS Agreement. However, it remains to be seen how the WTO panels will interpret and apply TRIPS in disputes involving developing countries once the transitional periods are over. If the *India* cases⁵⁷⁸ are any indication, developing countries may not be accorded the kind of flexibility they may have anticipated when they signed the TRIPS Agreement.

Advocates for stronger international IPRs correctly argue that no nation has a monopoly on creativity. It has been pointed out that developing countries have the option to create their own indigenous R&D rather than taking the "short cut" approach to obtaining technology and other intellectual goods from the industrialized world. Instead of acquiring technology from elsewhere, developing countries could focus on the domestic production of intellectual property. This "short cut" method is criticized as tying the future competitiveness of developing countries to their ability to acquire new innovations rather than generating them.⁵⁷⁹

While this critique may have some validity, it ignores the historical treatment of IPRs in many other countries. One need only consider the experiences of some of the newly industrialized Asian countries that focused on obtaining technology from the more industrialized nations, mastering the art of imitation and finally becoming innovators. The American and Japanese experiences demonstrate that relying on technology transfer can form an important part of a development strategy. Their experiences also illustrate that a recipient country need not be indefinitely dependent on the transferor for its technological innovation.

Preventing New Industry

An analysis of international intellectual property policy issues from a "power-weighting" perspective examines how increased technological and economic integration tend to increase the economic power of certain holders of IPRs. Technological networks have expanded and there is

⁵⁷⁷ World Trade Organization, online: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm> (date accessed: 17 March 2001)

⁵⁷⁸ *Supra* note 208.

increased global technological interdependence. These changes increase the economic power of those who control access to technological networks. The interaction of economic integration, technological integration and global harmonization of intellectual property laws could make it easier for economically powerful companies to interfere with the ability of other companies to compete. Though these processes interacting together tend to reinforce one another, it does not necessarily result in decreased competition.⁵⁸⁰ However, it is apparent that there is potential for exclusion of newcomers or latecomers to the market. Existing industries in developed country markets which are economically and technologically strong, and therefore powerful, may prevent infant industries in developing countries from becoming true competitors.

The issue of technology sharing is not simply a North-South problem. There is potential for the industries in developed countries to become highly stratified wherein only the enterprises that can afford large scale R&D and global advertising expenses will survive. Such companies will have significant advantages not only over small Mexican companies, for example, but also over small enterprises throughout the industrialized world.⁵⁸¹ When patents are overly protective, it can become difficult for researchers to improve upon the technology without infringing the rights of the patent owner. Many patents over biotechnological innovations are very broad. This means that the owners of these patents, primarily companies based in the industrial world, own the rights over important genes, plant varieties, and essential research techniques such that others may not find it possible to enter this industry.⁵⁸²

"Bio-Piracy"

As mentioned previously, some developing countries have become cognizant of their biodiversity as a potential source of wealth. However, as industrialized countries insist that the developing world should protect their intellectual property rights, they simultaneously support virtually free access to the biological resources of these developing countries for multinational

⁵⁷⁹ Yambrusic, *supra* note 100 at 9-10.

⁵⁸⁰ D. Gerber, "Intellectual Property Rights, Economic Power and Global Technological Integration", in F. M. Abbott & D. J. Gerber eds., *Public Policy and Global Technological Integration* eds. (London: Kluwer Law International, 1997) 127 at 130-131.

⁵⁸¹ F. M. Abbott, *supra* note 531 at 49.

⁵⁸² See World Bank Discussion Paper No. 412, *supra* note 2.

corporations [hereinafter "MNCs"]. Once they have accessed these resources, these MNCs use the knowledge and physical resources derived from the South to develop and patent agricultural and chemical products which they then sell throughout the world for profit.⁵⁸³ This includes selling the product to the country from which the source information or product originated and insisting that all IPRs be enforced. The irony of this process may lead one to conclude that the protection of IPRs as the system is currently devised deserves further evaluation and critique.

Social Issues

Increased protection of IPRs raises public health and safety concerns for both the developing and developed countries. Since many scientific medical and agricultural innovations fall within the definition of intellectual property, developing countries in particular have a public health and safety interest in ensuring unlimited access to intellectual goods.⁵⁸⁴ As the *Canada Pharmaceuticals*⁵⁸⁵ case reveals, Member states may find these policy considerations inadequately protected in the GATT context. Since the average citizen of a developing nation may earn only a few dollars per day, many developing countries have an interest in providing low cost pharmaceutical drugs to their citizens. Of course, the question of access to medicines is relevant not only for those in developing countries ravaged by diseases such as malaria or HIV, but also for the poor in industrialized countries and the average Canadian citizen who worries about the increasing cost of drugs such as anti-depressants or even new cancer treatments.⁵⁸⁶

At the July 2000 XIII International Conference on AIDS, the discussion focused on issues such as poverty and the prohibitive cost of acquiring medications that control the HIV virus. The high cost of such medications is linked to the IPRs held by the pharmaceutical companies that produce the drugs.⁵⁸⁷ However, IPRs are not the only problem in countries where poverty is prevalent. Those that suffer from AIDS need clean water and sufficient food before they can

⁵⁸³ Possey & Duttfield, *supra* note 539 at 94

⁵⁸⁴ D'Amato & Long, *supra* note 84 at 61

⁵⁸⁵ *Canada Pharmaceuticals* case, Report of the Panel, *supra* note 315.

⁵⁸⁶ The cost of pharmaceutical drugs is of concern for Canadians as well as citizens of developing countries. See A. Duffy, "Drug Delays Waste Millions: Study Condemns Slow Approval of Generic Drugs," *The Ottawa Citizen* (1 May 2001) A1

⁵⁸⁷ DiManno, *supra* note 157 at B 01.

worry about obtaining drugs.⁵⁸⁸ Africa and Asia, excluding Japan, accounted for less than 5% of global pharmaceutical sales in 2000.⁵⁸⁹ If the average income in developing countries were to increase, the market for the pharmaceutical products would expand. It is therefore more advantageous for MNCs, whether pharmaceutical, computer or other companies, to support policies which will enable the developing world to industrialize.

It was also mentioned at the conference that pharmaceutical companies based in industrialized countries had focused their research efforts on vaccines for the strains of HIV that are prevalent in North America and Europe, the two largest markets for pharmaceutical drugs.⁵⁹⁰ This is indicative of the need for Southern countries to create domestic industries and conduct research relevant to their own circumstances.

Aiming to reduce or control the levels of potentially fatal diseases such as malaria, tuberculosis and AIDS, the South African government drafted laws in 1997 that would enable it to either develop its own pharmaceutical drugs cheaply or to import from foreign sources that provided the drug more cheaply than the patent holder. Some of the measures for achieving these goals included granting compulsory licenses or allowing parallel imports.⁵⁹¹ The difference in the price between a patented brand name drug and a generic version of the drug can be significant. For example, a generic version of Fluconazole can cost as little as 30 cents per day while the brand name Diflucan could cost as much as \$17 per day.⁵⁹² In response to the actions of the government of South Africa, 39 pharmaceutical manufacturers launched a lawsuit against the South African government, claiming that the government's actions violated South Africa's constitutional protection of their patent rights.⁵⁹³ Due to political pressure, the drug companies dropped their lawsuit in June 2001.⁵⁹⁴

⁵⁸⁸ "A War over Drugs and Patents," *The Economist*, 358: 8212 (10 March 2001) 43 at 43. Though South African President Thabo Mbeki was heavily criticized for mentioning causes of AIDS in Africa other than the HIV virus, it has been recognized by some writers that poverty and malnutrition do factor into the AIDS crisis. See Di Manno, *supra* note 157 at B 01.

⁵⁸⁹ "A war over drugs and patents," *ibid* at 43.

⁵⁹⁰ DiManno, *supra* note 157 at B 01

⁵⁹¹ "A war over drugs and patents," *supra* note 588 at 43.

⁵⁹² J. Brown "Putting Profits Before Pity", *The Hamilton Spectator* (14 July 2000) C 03.

⁵⁹³ "A war over drugs and patents," *supra* note 588 at 43

⁵⁹⁴ S. Ward, *The Financial Times*, London Ed. (11 June 2001) at 13

South Africa is not the only country to take measures to provide cheaper drugs to its citizens. Compulsory licensing is an option that can be used by developing countries that face a health care crisis. Prior to TRIPS, the country with the most experience in compulsory licensing was Canada.⁵⁹⁵ Some of the developing countries may find this an appealing alternative in light of the financial and health crises many of them face. Compulsory licensing can result in lower drug costs because it enables generic drug makers to apply for and obtain licenses to make the patented drug. The global resistance to high priced patented drugs is evidenced by a number of events. For example, Brazil recently threatened to grant licenses to local manufacturers for AIDS drugs patented by Merck and Hoffman-La Roche. In response, Merck agreed to reduce the price of two AIDS drugs in Brazil. In Thailand, AIDS patients and activists have begun planing a legal challenge to the validity of a patent on an AIDS drug by Bristol Myers Squibb.⁵⁹⁶

Market Strategies

Protection of IPRs in pharmaceutical products provides a good example of the challenge posed by requiring developing countries to comply with TRIPS intellectual property standards. If citizens of a nation cannot, on average, afford to buy the pharmaceutical drugs that the IPR holder is selling, they simply will not buy them. Likewise, if those individuals cannot afford to pay royalties for the use of films, books, computer programs or any other such item, they will either find ways to obtain cheaper copies or they will have to do without. Hence, it may be more reasonable to allow developing countries, like India for example, to make and provide cheaper generic drugs in these markets. The large multinational companies may not be supplying the markets in these countries. Thus, abstaining from the enforcement of their intellectual property rights in these circumstances should not pose a serious problem for the MNCs in the short term. Preventing India from providing cheaper generic drugs does not create a good market for MNCs, it simply prevents India from developing its own industry.

⁵⁹⁵ A. Pollack, *The New York Times (On the Web)* (20 April 2001), online: <http://www.nytimes.com/2001/04/20/world> (date accessed: 19 June 2001)

⁵⁹⁶ *Ibid.*

Moreover, it may be preferable to abstain from enforcing IPRs than to adopt measures such as differential pricing for pharmaceutical drugs in poor countries. Companies may wish to avoid substantial differences in drug pricing because such differential treatment is often not well received by those who have to pay the higher price. The idea is simply not palatable. If TRIPS is enforced strictly and some MNCs find themselves in the position of providing HIV drugs to South Africans for pennies per day while Canadians, including the poor, have to pay several dollars for the same drugs, it becomes difficult for the company to justify this to the Canadian consumer. As a marketing strategy, it may be more attractive to allow developing countries to make their own generic version of the drug (unless the MNC wants to license the technology to the developing country at minimal cost). It is less likely that Canadian consumers will take issue with India selling an "imitation" or generic version of a patented drug to South Africans for a low price than to know that they, as Canadians, pay ten times more in Canada for the same name brand product than they would in South Africa. The same argument is also applicable to other areas of technology.

As well, as the standard of living is raised in developing countries consumers will be able to purchase more products at higher prices. This means that there is a potential market of hundreds of millions of people who could become future consumers. Since access to technology is a critical aspect of technological and economic development, developing countries will have a better chance of developing if they have free or low cost access to new technologies. A number of industrialized and industrializing nations, including the United States, had weak protection for intellectual property rights at the time they were developing. They often borrowed technology from other nations at little or no cost until they were able to sustain domestic industries and create their own intellectual goods. Allowing developing countries to do the same should be viewed not as a favour to developing countries or simply a matter of fairness but as an investment in the creation of future consumer markets.

Monitoring and Enforcement

Despite their initial reluctance to treat intellectual creations as commodities, developing countries eventually signed the TRIPS Agreement. It has been suggested that this can be taken as an indication that they have accepted the characterization of intellectual products as

commodities.⁵⁹⁷ However, a closer analysis of the situation reveals that the developing world has probably not changed its attitude toward intellectual property. Rather, developing countries have altered their formal position in response to pressure from the world's most powerful nations.⁵⁹⁸ Southern countries agreed to the TRIPS Agreement not because they concluded that protection of IPRs was beneficial for them at this stage of their development but because they feared trade sanctions and other negative repercussions. They were able to obtain concessions in other areas, such as agriculture, and they capitulated in part because of the pressure arising from American actions against Thailand, Taiwan, India, Brazil and other developing countries.⁵⁹⁹ Developing countries may choose to resist TRIPS by continuing past practices, making slow changes to the intellectual property laws, and enforcing protection for foreign enterprises reluctantly and inefficiently.⁶⁰⁰ It is difficult to ascertain the extent to which such practices are currently occurring.

Developing Countries Not an Economic Threat

At this point in time, many developing countries are not sufficiently industrialized to pose a significant economic threat to the technologically advanced countries. Nor are their domestic industries significant competition for companies based in the industrialized world. Developing countries do not account for any substantial portion of world trade and their economic positions are such that they are effectively excluded from participating in the international economic arena in a meaningful way. Thus, in this writer's view, it is not essential to require these countries, particularly the least developed countries, to participate in the international move towards the standardization of intellectual property. It will be more advantageous to allow them to reach a level of industrialization where IP protection matters for them. At that stage, global protection for IPRs will also be more relevant for the industrialized world because their industries will have legitimate concerns about competing (or perhaps working together) with competitors that have achieved similar levels of technological development. When the developing countries achieve this level of competitiveness, it will be appropriate to require them to operate at the same

⁵⁹⁷ D' Amato, *supra* note 84 at 47.

⁵⁹⁸ For further discussion see S. K. Sell, *supra* note 439.

⁵⁹⁹ F. M. Abbott & D. J. Gerber "Comments and Discussion on Chapters 1-4" in F. M. Abbot & D.J. Gerber, *Public Policy and Global Technological Integration* eds. (London: Kluwer Law International, 1997) 1

⁶⁰⁰ F. M. Abbott, *supra* note 531 at 52

standard as the rest the industrialized and industrializing world because it would be unfair for equally capable competitors to have the advantage of weak IP laws.

Exceptions to Intellectual Property Rights

As well, one must not forget that intellectual property rights are not absolute. Even within the context of the legal regimes of industrialized countries, there are exceptions to the protection of IPRs. For example, in Canada, there are various user exemptions for copyright. In patent law there are research exemptions and circumstances in which licenses for the use of a patented invention may be granted without the consent of the patent holder. Likewise, TRIPS contains certain exceptions to the protection of IPRs. Exceptions to IPRs are necessary to account for other interests, such as those of the user of the product or of the public. There are various legitimate interests that are important enough to warrant exceptions to IPRs. Thus, the balance that is implicit in IP protection should not be removed from the WTO TRIPS context.

Democracy and the WTO

The interests of society at large must be served, along with those of the holder of the IPR. An unyielding approach to intellectual property protection under TRIPS may have the tendency to undermine democracy. Citizens may resist such developments by protesting, as has already been done at recent WTO meetings. Alternatively, they may choose other more subtle methods of pressuring their governments, or they may choose to ignore IPRs altogether (i.e., they could ignore copyright in musical or literary works on the Internet). Recent events suggest that ultimately, if the concerns of the citizens of WTO Member states are not taken into consideration, TRIPS, and the WTO itself may be undermined.⁶⁰¹

⁶⁰¹ If the TRIPS requirements are not seen as legitimate, compliance will be low. See generally P. M. Gerhart, "Reflections: Beyond Compliance Theory--TRIPS as a Substantive Issue" (2000) 32 Case W. Res. J. Int'l L. 357.

CONCLUSION

The TRIPS Agreement requires all WTO Member states to provide certain minimum levels of protection for intellectual property rights. Chapters I and II of this paper provided the context within which the TRIPS arose. Chapter one presented the views both for and against stronger intellectual property rights. These ranged from arguments in favour of IPRs, which posit that IPRs promote innovation, to the views of critics who point out that IPRs are inherently anti-competitive and therefore potentially dangerous if over-protected. As well, the difference in cultural attitudes towards the protection of intellectual creations was discussed.

The second chapter of the paper explained how intellectual property became part of the international trade agenda. The paper briefly discussed how trade theory evolved from mercantilism to the promotion of free trade. It also explained the link between trade liberalization and stronger global protection of IPRs. The particular importance of stronger IPRs for the U.S. was noted, as was the American use of trade-based measures to pressure various countries to strengthen their intellectual property regimes. This chapter also set out the main provisions of the TRIPS Agreement.

It is evident from the discussion of the cases in the third chapter of this paper that the TRIPS Agreement has had a significant impact on Member states. There have been a number of complaints initiated as a result of TRIPS, many of which were settled once the defending party agreed to modify its laws. In the cases which proceeded to become formal disputes, most of the Panels interpreted the TRIPS obligations broadly while giving the exceptions under TRIPS a strict and narrow interpretation. In the *India* cases, the Panel engaged in a detailed examination of Indian law and preferred its own interpretation of Indian law to India's interpretation of its own law. In the *Patent Term* case, the Panel held that effective substantial compliance with TRIPS was not enough and in the *Canada Pharmaceuticals* case, the Panel failed to meaningfully consider a balancing of interests under the TRIPS regime. Yet TRIPS requires that the protection of IPRs be conducive to other legitimate interests, such as the promotion of social and economic welfare under Article 7 of the Agreement.

In the final chapter of this paper, the author argued that different levels of protection for IPRs are appropriate at different stages of development. Developing world views on intellectual property were considered, as was the relevance of strong protection of IPRs for developing countries. This paper argued that it is neither necessary nor beneficial for developing countries to implement industrialized country standards of intellectual property protection. Unfortunately, the WTO decisions reviewed in this paper suggest that WTO panels are inclined to apply TRIPS in a rigid manner. However, the author attempted to illustrate that TRIPS allows some flexibility in the application of TRIPS to developing countries.

While attending a meeting of the Group of 8 in Genoa, Italy, Canadian Prime Minister Jean Chretien commented that he does not view debt relief for poor countries as charity but rather as an investment. As the Prime Minister pointed out, once these countries and their citizens increase their wealth, they will increase their consumption and become markets for Canadian products.⁶⁰² Obviously, it would be beneficial for Canada, and for other industrialized countries, to have additional markets to which they could export their goods. This argument can be made with respect to intellectual property and global economic development as well. Just as reduction of debt is not merely charity but an investment in future consumers, allowing nations a standard of intellectual property protection appropriate to their level of economic development and domestic needs is not charity but an investment in the creation of stable economies and strong consumer markets.

In conclusion, the obligations under TRIPS should not be interpreted broadly while the exceptions are given a strict and narrow interpretation. The WTO cases reveal that TRIPS has removed a significant level of domestic control from Member states. While this may be a difficult adjustment for many states, TRIPS could create additional difficulties for developing countries. It is true that participation in the international arena requires all states to compromise and thereby to relinquish some of their independence. However, if developing countries have to apply TRIPS standards now, or even in the next decade, it will be difficult, if not impossible for them to acquire the new technologies that are essential to their industrial development. Without

⁶⁰² "Global News", *Global Television Ottawa*, 21 June 2001, 6:05 p.m.

an adequate level of domestic control over their intellectual property regimes, developing countries cannot create intellectual property laws suitable to their social and economic needs.

Therefore, with respect to the protection of intellectual property rights, it is this writer's position that it is not necessary at this point in time for the entire world to operate from a single paradigm. As this author has demonstrated in this paper, the protection of IPRs appears to be appropriate for different nations at different stages of their economic and technological development. There is a lack of empirical evidence to demonstrate that the protection of IPRs will stimulate creativity or economic growth in developing countries.⁶⁰³ As a result, this author suggests that the TRIPS Agreement be revised to allow the least developed countries more time before they are required to implement the Agreement. Some developing countries have already had to implement TRIPS. However, in light of Articles 7 and 8 of the TRIPS Agreement and the need to balance competing interests, the TRIPS Agreement should not be applied to these countries in a rigid manner. This balanced approach is a reasonable one, regardless of whether the states in question are developing or technologically advanced countries.

⁶⁰³ There is a weak correlation between increased patent protection and innovative activity in developing countries. See J. Lerner, *supra* note 306 at 31. In fact, domestic patenting may actually fall when protection enhancing changes are made. J. Lerner, "The Patent Protection Dilemma" (IC Distinguished Speakers in Economics Program) Industry Canada, 6 April 2001 [unpublished].

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