The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven

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INTRODUCTION

Intellectual property rights (IPRs) have been protected in international conventions since the nineteenth century. See ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 11 (1990).

1. Intellectual property has been defined as information with a commercial value. Intellectual property rights, in turn, have been referred to as the public willingness to bestow the status of property on ideas, inventions and creative expressions. See ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 11 (1990).

2. See, e.g., Paris Convention for Protection of Industrial Property, March 20, 1883, last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Stockholm, July 14, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]. See discussion infra Part I.A. Intellectual property rights (IPRs) are even much older than these international conventions. Patents were used as early as the fourteenth century by English monarchs to protect the knowledge gained from foreign craftsmen who had been imported in order to advance domestic technology. See GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY at v (Mitchel B. Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS].
While we commonly think of intellectual property (IP) in terms of modern high-tech ingenuity, the recognition of IPRs is, in fact, quite old. What is new is the recently positioned legal prominence of IP in international economic relations. In 1994, the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) significantly altered the global IP paradigm through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). For over a century, the Paris Convention of 1883 and the Berne Convention of 1886, the major pre-TRIPs international IP agreements, were perceived to adequately protect IP among member nations. Then something changed. In the late twentieth century, Western developed nations recognized the increasing volume and importance of IP in international trade. TRIPs emerged in response to this shift in the economic importance of IP, repositioning the relevance and legal status of IP in the context of trade. Prior to TRIPs, IPRs were afforded isolated and essentially voluntary international legal protection under the Paris and Berne Conventions. TRIPs changes all this. By placing IP within the rubric of international trade agreements, nations now may protect IP through trade sanctions against...
The Paris and Berne Conventions had no effective means to ensure compliance, whereas GATT's centrality to modern economic life requires nations to comply with its provisions—now including IP—or risk economic isolation.

This recent marriage of IP and trade has profound and hotly contested global implications. Critics of TRIPs, including many developing countries, have argued that stronger international protection of intellectual property will benefit only those countries which produce the greatest amounts of IP—namely Western developed nations. Others maintain that developing countries will ultimately profit from increased IP protection due to incentives it will create for domestic creativity and foreign investment. This Comment argues that early evidence indicates TRIPs is indeed successfully stimulating increased global IP protection. Developing countries are at the forefront of this revolution and wisely elected to include TRIPs in the GATT regime. The inextricable link between trade and IP today necessitated a change in the global treatment of IPRs. TRIPs provides a new and vital structure that can both protect IP in the international order and, in part, stimulate development in poorer nations.

Part I of this Comment looks at reasons for the dissatisfaction with the Paris and Berne Conventions and the perceived need for TRIPs. Disparate results in two international trademark disputes will illustrate a modern breakdown in the Paris-Berne model. Part II discusses provisions in TRIPs that establish its dual role as a code of rules and a forum for negotiation. Consultations and negotiations facilitated by the World Trade Organization, as well as statutory reforms and resulting case law from nations around the world, forecast that TRIPs is more than a “paper tiger” and, as such, is likely to succeed in increasing global implementation and enforcement of IPRs.

Part III considers whether developing countries stand to benefit from protecting foreign, largely Western, IP. Critics of international IP protection argue that Western

5. See discussion infra Part III.B.
6. See discussion infra Part IV.
7. See discussion infra Part II.A.
8. See infra text accompanying notes 16-60.
9. See infra text accompanying notes 61-167.
10. See infra text accompanying notes 168-217.
“owners” of IP do not have a natural, human right to the knowledge they create, but rather have co-opted the language of natural rights as a proxy to justify their desire for greater economic gain from increased IP protection. The economic dichotomy between developing and developed countries creates a conflict of rights with respect to IP between sovereign development on the one hand and global protection of local property interests on the other. TRIPs clearly pushes in favor of the latter.

While it is much too early to gauge conclusively the effects of TRIPs on developing nations, Part IV suggests that initial evidence indicates that substantial long-term benefits will accrue to both the developed and the developing world.\textsuperscript{11} This Comment maintains that behind the language of natural rights both Western industrialized countries and developing nations have agreed to increased IP protection because of two dispositive concerns: first, the growing understanding of what each stands to gain from IP protection; and, second, the particular historical juncture at which this debate is occurring. Knowledge, particularly technical knowledge, assumes a prominent role in modern economic life.\textsuperscript{12} The incredible rate of technological progress combined with the increasing transparency of national borders makes protection of knowledge in the form of IPRs particularly important today.\textsuperscript{13}

The increasing link between trade and intellectual property\textsuperscript{14} has led many developing countries to recognize that survival in a GATT-based world economy requires, in part, recognition and protection of IP. Developing countries have bargained for a graduated implementation of TRIPs and will benefit from the protection afforded by the processes of TRIPs’ dispute resolution system. In isolation

\textsuperscript{11} See infra text accompanying notes 218-40.
\textsuperscript{12} Just twenty years ago both academics and business people looking at international economic development focused their attention on foreign direct investment. While this is still important, and in many ways is related to protection of IP, the role of knowledge itself—particularly technical knowledge—is prominent in economic life today. Countries with weak intellectual property systems clearly receive less technological knowledge. See John A. Armstrong, Trends in Global Science and Technology and What they Mean for Intellectual Property Systems, in GLOBAL DIMENSIONS, supra note 2, at 193, 205.
\textsuperscript{13} See generally GLOBAL DIMENSIONS, supra note 2.
\textsuperscript{14} "At some level nearly all legitimately traded goods and services operate under patent, copyright, or trademark protection." Braga, supra note 3, at 397 (quoting K.E. Maskus).
IPRs may appear as abstract manifestations of a raw individualism—the exclusive ownership of ideas. Viewed in the context of global interconnectedness as an incentive to create, invest and trade, protection of IPRs is a prudent development-enhancing strategy.

I. THE PRE-TRIPS SYSTEM

The history of IPRs is often overlooked when evaluating their role and seeming ubiquity in modern world trade. Today's widespread attention thrust on piracy of computer software and entertainment media obscures the fact that IPRs were well established in international conventions over a century ago. The law of intellectual property is not a creature of the information age, despite its popular association with modern, high-tech industry. Indeed the Paris and Berne Conventions emerged at a time when international agreements were being formed regarding diverse concerns ranging from posts and telegraphs to weights and measures to trade and customs. The breadth of historical international concern regarding IPRs is illustrated by the range of countries which ratified the Paris Convention by 1884: Belgium, Brazil, France, Ecuador, Guatemala, Italy, the Netherlands, Portugal, Salvador, Serbia, Spain, Switzerland, Tunisia and the United Kingdom. The United States acceded to the convention three

15. One foundational document to the theory that intellectual property rights are "natural rights" is the patent law adopted by the French constitutional assembly at the time of the French revolution. Its preamble stated that "every novel idea whose realization or development can become useful to society belongs primarily to him who conceived it, and there would be a violation of the rights of man in their very essence if an industrial invention were not regarded as the property of its creator." See Michael Blakeney, Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement 151 (1996). The United States Constitution is "thought to enshrine this natural right." Id.

16. See generally Paris and Berne Conventions, supra note 2.


18. Ricketson, supra note 17, at 875.
years later.\textsuperscript{19} Prior to this international union, only limited bilateral treaties existed to protect foreign IP.\textsuperscript{20}

A. Provisions of the Paris and Berne Conventions

The Paris Convention protects industrial property, including patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and protects against unfair competition.\textsuperscript{21} The keystone of the Paris Convention is the "national treatment" principle. National treatment prohibits a country from providing less favorable treatment to foreigners than to its own citizens with respect to IP laws.\textsuperscript{22} Article 2(1) provides:

Nationalists of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for in this Convention.\textsuperscript{23}

For example, a French citizen with a patent registered in the United States must receive the same treatment as U.S. citizens with respect to the U.S. patent laws. This is different from a system of "reciprocal treatment" which affords protection only to the degree that one's citizens are protected in another nation.\textsuperscript{24} For example, under a reciprocal treatment system an Argentinean citizen would only receive patent protection in the United States to the degree that U.S. citizens receive protection in Argentina.

The second important principle of the Paris Convention is the "right of priority" established in Article 4. The right of priority rule provides that any person who has duly filed an

\begin{itemize}
\item \textsuperscript{19} Id.
\item \textsuperscript{21} Paris Convention, supra note 2, art. 1(2). For a succinct overview of each of these types of IP, see Braga, supra note 3.
\item \textsuperscript{22} Paris Convention, supra note 2, art. 2(1).
\item \textsuperscript{23} Id.
\end{itemize}
application for a patent, a utility model, an industrial design or a trademark in any member country, shall be given a grace period in which to file in other countries. For example, say Mr. Wisdo applies on October 1 to register a trademark in Hungary and applies on October 15 to register the same trademark in Costa Rica. Meanwhile, Ms. Locario applies to register the same trademark on October 8 in Costa Rica. Mr. Wisdo, although he filed later than Ms. Locario in Costa Rica, will be given a right of priority because of his prior application in another member country.

Third, the Paris Convention promulgates certain minimum standards of IP protection that member countries must incorporate into national legislation. The main objective behind establishing uniform principles and minimum guarantees is to eviscerate discrimination and assure foreigners of equal treatment under the law in protection of IPRs.

The Berne Convention provides broad copyright protection to "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." Like the Paris Convention, the Berne Convention provides for minimum standards such as granting copyright protection for the life of the author plus fifty years. The Berne Convention also adopts the central principle of national treatment. Today, both conventions are administered by the World Intellectual Property Organization (WIPO), a specialized agency of the United States.

25. Paris Convention, supra note 2, arts. 4A(1), 4C(1). The right of priority rule extends for twelve months for patent and utility models and six months for industrial designs and trademarks. During this time, any individual who has filed in one member country can file in any other without fear of appropriation of their IP. Id.

26. It is important to note that the right of priority does not mean that an application filed in one member state is filed in all member states. Rather, it means "that a date has been established throughout the membership should any 'first-to-file' disputes arise." Michael P. Ryan, The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking, 19 U. PA. INT'L ECON. L. 535, 545 (1998).

27. Paris Convention, supra note 2, arts. 4-11.


29. Berne Convention, supra note 2, art. 2(1).

30. See, e.g., id. art. 7(1) (granting copyright protection for the life of the author plus fifty years).

31. Id. art. 5(1).
Nations.  

B. Problems with the Paris and Berne Conventions

Despite the longevity and historical importance of these WIPO Conventions, the end of the twentieth century has wrought what has been called the "crisis in the Paris-Berne regime." Numerous criticisms have been levied against the effectiveness of the Paris and Berne Conventions today. When these conventions were written at the end of the nineteenth century and even in their twentieth century revisions, concerns regarding global connectedness and harmonization of IP were not magnified, as they are today, under the microscope of GATT and unprecedented increases in trade. The present reality of a "global village" creates problems that the WIPO Conventions are not equipped to address. For example, the national treatment principle affords protection only to the degree that a member country protects its own citizens. Thus, inadequate IP laws in a member country will not protect foreigners, particularly when developing nations may desire weak IP laws. Therefore, national treatment does not benefit foreigners in states which fail to provide IP protection to their own citizens.

This disharmony in IP laws among member nations creates other problems, vividly illustrated through the following two trademark battles. In 1925, Article 6bis was amended to the Paris Convention, requiring all member nations to protect well-known trademarks belonging to citizens of other Convention member countries. Yet member


34. See Freeman, supra note 20, at 75.

35. See id. at 74. Sometimes governments of developing nations condone—explicitly or implicitly—unauthorized use of IP. One argument they put forward is that knowledge is part of the public domain. More commonly they argue that industries in developing economies cannot afford to pay royalties to the foreign "owners" of IP. Therefore these industries utilize unauthorized IP in order to survive the competition from the more advanced and economically strong industries in industrialized nations. See GLOBAL DIMENSIONS, supra note 2, at vi.

countries may each have their own standard for determining whether a trademark is well-known, as demonstrated by the much publicized South African case of McDonald’s Corp. v. Joburgers Drive-Inn Restaurant (Pty), Ltd. Prior to the decision in McDonald’s, the South African courts had not protected the owners of foreign trademarks unless they had “goodwill” in South Africa. In McDonald’s, the American fast food giant had registered its marks in South Africa but had not used them due to concerns of the potential negative effect, stemming from criticisms of apartheid, on its businesses elsewhere. Joburgers, a South African fried chicken fast food chain, began using McDonald’s marks and applied to register them in its name. McDonald’s filed suit for trademark infringement.

Despite McDonald’s absence of goodwill in South Africa, the Supreme Court of South Africa, Appellate Division, examined whether McDonald’s marks were well-known in South Africa. It evaluated whether a mark must be well-known to all sectors of the population and what degree of awareness is required to properly describe a mark as well-known. The court ultimately found that, to be well-known,

39. See McDonald’s, 1997 (1) SA 1 (A) at 19. Goodwill refers to the public’s favorable image, established through patronage, of a business’ goods and services.
41. See Naresh, supra note 36, at 565.
42. Id.
44. McDonald’s, 1997 (1) SA 1 (A) at 20.
a mark must be known to a "general level of knowledge" to a "substantial number of persons." Surprisingly, the court looked to a market survey to measure the recognition of McDonald's marks among the South African people. Not only was the survey found to be instructive, but it was dispositive in establishing McDonald's marks as well-known.

McDonald's good fortune counterpoises Reebok's unfavorable treatment in Peru which, like South Africa, is a party to the Paris Convention. Reebok's battle to reclaim its trademark in Peru through cancellation of a pirated registration lasted over ten years. Peru's trademark laws seemingly lacked protection for well-known foreign marks, or its standards were so vague as to preclude application to Reebok. Generally, the right to protection of a well-known mark has existed only on paper. Most parties to the Paris Convention have not protected foreign marks until they have been used locally, regardless of their international fame.

In March 1996, a new Peruvian trademark office invalidated the registration of the REEBOK trademark by a Peruvian company, Fabricas Unidas de Calzado S.A., and held that Reebok International was its rightful owner. The Trademark Office declared that Peruvian consumers recognize the REEBOK mark; that Reebok International, Ltd. engaged in considerable advertising and promotion in Peru; that Fabricas Unidas de Calzado had acted in bad faith;

45. Id. at 23.
46. Id. at 21.
47. Id. at 21.
48. Id. at 21.
49. Id. at 27.
50. Note that the parties to the Paris Convention compose the Paris Union. See Ryan, supra note 26, at 545; Hans Peter Kunz-Hallstein, The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property, 22 Vand. J. Transnat'l L. 265, 269 (1989) (discussing that the parties to the Paris Convention constitute a union but that the agreement does not explain what is meant by the term "union").
51. See Jos6 Barreda, The Reebok Case in Peru: Ten Years and Counting, TRADEMARK WORLD, May 1996, at 22; see also Slotkin, supra note 37, at 677.
52. See Naresh, supra note 36, at 564.
and that in accordance with the Pan American Convention of Washington 1929, of which the U.S. and Peru are members, Reebok International, Ltd. merited full protection of its trade name. Nevertheless, Fabricas Unidas de Calzado was able to obtain a court order to suspend the trademark office's decision and the case was returned to the courts once again. After more than a decade in the judicial system, the dispute was finally settled as a consequence of a private agreement reached between Reebok International, Ltd., and the local entity who had registration in its name.

54. See Barreda, The Reebok Case in Peru, supra note 51, at 29-30.

In short, the Tribunal has broad and unchecked authority to suspend Trademark Office and Copyright Office decisions. And the Tribunal has recently used this authority in a way that may have significantly harmed parties' willingness to comply with Trademark Office and Copyright Office decisions. The Tribunal has made it clear that its main concern is not to punish infringers. Its general policy is that "[a]ttracting the pirate towards the legal market is more beneficial for the rights owner and for society than excluding him entirely... the informal market creates a demand which, intelligently handled, reinforces the development possibilities of the formal market."


Critics are attacking, among other things, the Tribunal's decisions to suspend injunctions against infringers, to decrease fines awarded against infringers, and to take such actions without giving any oral argument to the IP rights owners. On close inspection, however, it is apparent that the Tribunal has acted in accord with Peruvian law, its decisions are no threat to IP rights, and IP rights owners bear at least some of the blame for the Tribunal's decisions against them.

Id.

56. E-mail from Jose Barreda, member of the Peruvian law firm Barreda Moller and counsel to Reebok International, Ltd. in Peru, to author (transmitted Dec. 5, 1997 12:49:33 EST) (on file with the Buffalo Law Review). Mr. Barreda has also published various articles on the Reebok case and trademark law in Peru. See Barreda, The Reebok Case in Peru, supra note 51; Jose Barreda, Trademark Related Aspects of the New Industrial Property Law in Peru, TRADEMARK WORLD, June/July 1996, at 32. Reebok International, Ltd., has had similar problems elsewhere in the world. One example was in Thailand where the Supreme Court upheld two lower court rulings which awarded Reebok International, Ltd., ownership of the name REEBOK in Thailand. The
The stark distinction between South Africa's and Peru's application of the well-known mark requirement of Article 6bis of the Paris Convention highlights the problems of the Paris-Berne regime: lack of harmonization, disparate national treatment, and deficient enforcement and dispute resolution provisions. The Paris-Berne model, despite its noble intentions and centennial endurance, has balkanized the international regime of intellectual property. Indeed, one bleak assessment noted that "there was a clear disparity between the grandeur of the centenary celebrations of 1983 and the relative meager achievements of the Paris Convention." Similarly, one historian of the Berne Convention remarked on the naiveté of its centenary celebration and the inability of the Convention to respond to technological change and global interconnectedness:

"... the impact of the new technologies of digitisation and compression were only vaguely appreciated, the term "information superhighway" had not come into vogue, and the problems of computer programs and electronic databases appeared as minor, if irritating, issues that did not really threaten the seamless web of international copyright law and policy. How different all these issues now appear...!"

The TRIPs Agreement, while not a panacea for the Paris-Berne afflictions, attempts to reglobalize international IPRs and so overcome the Paris-Berne shortcomings by linking trade to IP protection.

II. TRIPs: A NEW PARADIGM

TRIPs has been described as a "revolution" in IP protection. For the first time IPRs are being protected under the rubric of international trade agreements. TRIPs court found that a Thai corporation which had legally registered the name REEBOK in Thailand did so to deceive customers that it was still acting as Reebok's authorized distributor. See Reebok International Entitled to 'Reebok' Name in Thailand, 9 WORLD INTELL. PROP. REP. 134 (1995).

57. See Geller, supra note 33, at 103.
58. Ricketson, supra note 17, at 881.
59. Id. at 879.
60. See id.; Geller, supra note 33, at 103.
62. The relationship between a uniform global IP system and the develop-
is a “conceptual leap” that removes IPRs from the isolated treatment afforded by the comparatively insular WIPO Conventions. In order to benefit from the trade provisions in GATT, nations must implement IP laws in accordance with the TRIPs Agreement. Although membership in the WIPO Conventions is widespread, some of the countries with the least protection of IPRs and greatest incidences of IP piracy are not members. By incorporating IP protection into GATT, it is believed that more nations will have an incentive to provide IP protection in order to benefit from the other trade provisions of GATT. While this Comment

ment of a prosperous global economy has not been studied extensively. In part this is due to the fact that knowledge-based goods and services, in particular technical knowledge, have only recently become an integral part of international trade. See supra notes 12-14 and accompanying text. Other reasons for the neglect in study have been put forward. First, Adam Smith’s prescription to look at capital labor and resources to determine why some countries are richer than others fails to account for innovation and knowledge. Second, the Bretton Woods institutions established after World War II, in particular the World Bank and the International Monetary Fund, have operated on the belief that bringing more money to poor countries will help them develop. Third, the subject is difficult to study. It is hard to estimate how many inventions would have been created if there had been IP protection in a given country. See Robert M. Sherwood, Why a Uniform Intellectual Property System Makes Sense for the World, in GLOBAL DIMENSIONS, supra note 2, at 68, 71.

63. See Ricketson, supra note 17, at 882-83 (describing the compelling pre-science of U.S. Trade Representative Emory Simon, speaking at an IP conference at the Max Planck Institute in 1988, in challenging traditionalist and isolationist treatment of IP; and the surprising speed at which practitioners, government officials, academics and industry representatives abandoned traditionalist views of IP and wholeheartedly adopted the new approach of linking IPRs to the trade regime).

64. For example Singapore and Taiwan are not signatories to either the Paris or the Berne Conventions. See Frank Emmert, Intellectual Property in the Uruguay Round--Negotiating Strategies of the Western Industrialized Countries, 11 MICH. J. INT’L L. 1317, 1339 (1990).

will not address specific provisions in the TRIPs Agreement regarding the various forms of IP, the Agreement generally contains three categories of obligations: (i) it incorporates the major provisions of the WIPO Conventions; (ii) it supplements those Conventions with substantial additional protection; and (iii) it provides enforcement and dispute resolution procedures for all member countries. The World Trade Organization (WTO) is seen as a more viable institution than WIPO for enacting these changes because of GATT’s dual functions as a code of rules and a forum for negotiation.


66. TRIPs addresses copyright and neighboring rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout designs and trade secrets. For a general overview of the substantive advances in each of these areas provided for in TRIPs, see Ricketson, supra note 17, at 896-90, and An Overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights <http://www.wto.org/wto/intellec/intell2.htm> (Mar. 10, 1999) (on file with the Buffalo Law Review). For a detailed analysis of TRIPs' provisions in these areas, see BLAKENEY, supra note 15, at 45-107.


68. TRIPs obliges member states to comply with the following substantive provisions: Paris Convention, supra note 2, arts. 1-12, 19; Berne Convention, supra note 2, arts. 1-21 and the Appendix relating to developing countries.

69. See Braga, supra note 3, at 389-93 (discussing the minimum standards established in TRIPs for copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, trade secrets and control of unfair competition.)

70. The WTO is an international economic organization charged with responsibility for all trade in goods and services among Member states. It is the legal successor of GATT, assuming GATT’s constitution from 1947 and all its amendments. Its purpose is to provide an institutional framework and an administrative body to oversee GATT 1994, TRIPs, and GATS (General Agreement on Trade in Services). It provides a forum for international trade negotiations and dispute settlement between Member states. See WTO Agreement, supra note 65. See generally Gabrielle Marceau, Transitions from GATT to WTO: A Most Pragmatic Operation, J. WORLD TRADE, Aug. 1995, at 147; Jeffrey J. Schott, The Future Role of the WTO, in WORLD TRADE AFTER THE URUGUAY ROUND 52, 63 (Harald Sander & András Inotai eds., 1996).

71. See Emmert, supra note 64, at 1344 (interpreting S. GOLT, THE GATT NEGOTIATIONS 1986-90: ORIGINS, ISSUES AND PROSPECTS 2 (1988)). Although TRIPs functions under the auspices of the WTO and despite the above criticisms levied against the WIPO conventions, both administrative bodies attempt to work cooperatively. That both the Berne and Paris Conventions are incorporated into TRIPs indicates their continued relevance; however, the WTO regime adds further substantive protections and provides a dispute resolution
A. Code of Rules

Although it is much too early to meaningfully evaluate the success of the TRIPs Agreement, particularly in light of the transition periods for developing countries to implement legislation and practices consistent with the Agreement,\(^2\) there are initial indications of its effectiveness. One author describes the immediate impact of the TRIPs Agreement as "an explosion of legislation bringing national statutes into line with TRIPs norms.\(^3\)

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72. Part VI of TRIPs is entitled "Transitional Arrangements." Articles 65 and 66 of Part VI provide that when a country joins the WTO, it has one year to implement the provisions in TRIPs. Developing countries have four additional years to implement TRIPs and least-developed countries are not required to implement TRIPs for ten years. See TRIPs, supra note 3, arts. 65-66. Although there is a tendency to assume that only developing countries need to reform their IP laws in order to comply with TRIPs (hence the transitional arrangements), in fact most developed countries also need to make changes to their laws. One study discusses noncompliance by the United States, Japan, and Member States of the European Union. See John E. Giust, Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working?, 8 IND. INT'L & COMP. L. REV. 69, 80-91 (1997) (noting that "the U.S. is by no means in perfect compliance").

While cataloging the advances made in each area of IP covered in TRIPs is well beyond the scope of this Comment, this section presents a global sampling of widespread increases in international protection of trademarks in order to suggest that developing countries are recognizing the importance of protecting IPRs in order to maintain healthy trade relations with the developed world. The *McDonald's* case discussed above demonstrates one noteworthy foreign decision granting recognition to famous marks. Increasingly, other nations have taken a similar course. For instance, India passed a new Trade and Merchandise Marks Act in 1994 which has had a tremendous impact.

Historically the common law rule in India recognized a trademark owner's goodwill in a mark only through actual sales of branded goods in India; transnational reputation did not protect a mark in *India*. After the much publicized


On June 27, 1993 Turkey enacted an entirely new set of IP laws. These laws are dramatically different from what existed before. . . . Turkey has adopted a fully integrated and coherent body of IP legislation. These laws are fully harmonized . . . with the international conventions to which Turkey belongs, including the Paris Convention [and] TRIPs.

*Id.* The proliferation of statutory changes throughout the world can be seen through a quick perusal of any recent issue of the *World Intellectual Property Report*, the pages of which are filled with country updates of significant IP legislation. Particularly helpful is an annual survey that provides an "at-a-glance" understanding of the volume of changes in IP laws throughout the world. See *Developments in Intellectual Property Rights*, 12 *World Intell. Prop. Rep.* 206 (1998). Beyond national legislative response to TRIPs, regional intellectual property associations have also proliferated in response to TRIPs. See *Blakeney, supra* note 15, at v.


76. *Id.*
decision in *N.R. Dongre v. Whirlpool Corp.*,\(^77\) it is now binding authority in India that well-known foreign marks are entitled to protection.\(^78\)

Whirlpool, a United States corporation, made and sold washing machines internationally, having registered the trademark WHIRLPOOL in more than sixty-five countries.\(^79\) Whirlpool Corp. had registered its trademark in India between 1937 and 1977, but did not renew its registration after 1977 due to import restrictions imposed by the Indian government.\(^80\) Defendant N.R. Dongre operated two companies that manufactured washing machines in India, and in 1986 successfully registered the trademark WHIRLPOOL in India.\(^81\) The court found that plaintiff Whirlpool Corp., despite no registration in India and no direct sales to the public in India, was entitled to the benefit of the marks' transborder reputation known to potential Indian customers through extensive advertisements in foreign magazines circulating in India.\(^82\) Finding that the advertisements were equivalent to use, the court issued an injunction against N.R. Dongre.\(^83\) In August 1997, the Delhi High Court reinforced its decision in *Whirlpool* to protect foreign brand names, remarking: "We must readily support decisions which seek to promote commercial morality and discourage unethical trade practices."\(^84\)

In another example, the Mexican Institute of Industrial Property (IMPI)\(^85\) interpreted Mexico's Industrial Property


\(^78\) The Appellate Division decision in *N.R. Dongre* was affirmed by the Supreme Court of India. See *N.R. Dongre v. Whirlpool Corp.*, 1996 J.T.S.C. 555, 558; see also Mehta & Abhyankar, *supra* note 75.

\(^79\) Id.

\(^80\) Id.

\(^81\) Id.

\(^82\) Id.

\(^83\) Id.

\(^84\) Id. (restraining an Indian company from using the internationally renowned Swiss trademarks SYNTHES and AO/ASIF); see *HC Bars Indian Co. from Using Foreign Firm's Trademark*, *ECON. TIMES*, Aug. 15, 1997, at 1 (discussing the decision regarding the SYNTHES and AO/ASIF trademarks).

\(^85\) The Mexican Institute of Industrial Property (IMPI) was established, under the 1994 amendments to Mexico's Industrial Property Law of 1991, as an autonomous agency with enforcement powers. Attorneys in Mexico point to these changes as evidence of the harmonization of Mexican IP law with international standards. See *IMPI Nullifies Three Trademarks in Dispute Over Use of "Boss" Mark*, 9 *WORLD INTELL. PROP. REP.* 231 (1995) (hereinafter *IMPI Nullifies*).
Law of 1991\textsuperscript{66} to cancel three registrations of the mark BOSS, based on the well-known status of the same mark of German clothes maker Hugo Boss.\textsuperscript{87} A local producer who had registered and subsequently licensed the BOSS mark to other Mexicans was found to infringe on the well-known mark.\textsuperscript{88} After the decisions in favor of Hugo Boss, the Director General of IMPI announced that “the message is very simple—that pirate goods using known trademarks will not be legal in Mexico.”\textsuperscript{99} Interestingly, the bolstering of IPRs in Mexico not only extends rights but also poses corresponding risks and responsibilities to foreign entities. For example, Mexican law now requires any company manufacturing branded goods in Mexico to have the legal right to use the relevant trademark in Mexico, regardless of whether the manufactured products are made only for sale outside of Mexico and no products are ever sold in Mexico.\textsuperscript{90} Notably this aspect of Mexican trademark law contrasts with U.S. trademark law, yet stems from legislation created to strengthen Mexican IP law in accordance with NAFTA and TRIPs.\textsuperscript{91}

Chile reformed its trademark laws through Industrial

\textsuperscript{86.} Note that Mexican IP laws were significantly amended in 1994, after TRIPs, to provide for changes in trademark, patent, unfair competition and administrative procedure laws. In the area of trademark law, the amendments address well-known marks; cancellation for non-use of a trademark; the use of business, corporate or partnership names on products and services; and the scope of the right to exclusive use of a registered trademark. \textit{See Jamie Delagado, Congress Passes Industrial Property Amendments; Mexico Will Join PCT, 8 WORLD INTELL. PROP. REP. 268 (1994).}

\textsuperscript{87.} IMPI Nullifies, supra note 85, at 231.

\textsuperscript{88.} Id.

\textsuperscript{89.} Id.

\textsuperscript{90.} Randall K. Broberg & Craig I. Celniker, \textit{Manufacturers Face Infringement Risks in Mexico}, NAt'L L.J., May 18, 1998, at C18 (“The law makes it clear ... that even goods designed only for immediate and direct export can infringe Mexican trademarks.”). Note that Mexican and U.S. trade representatives recently entered into an agreement to combat intellectual property violations in Mexico. \textit{See Anti-Piracy Measures to be Implemented By June 30 Under Mexico-U.S. Agreement, 12 WORLD INTELL. PROP. REP. 228, 229 (1998) (“There seems to be a sincere willingness on the part of Mexico to take action on IPR violations.”).}

\textsuperscript{91.} See Broberg and Celniker, supra note 90, at C18. In the United States, the Lanham Act requires that allegedly infringing marks be “used in commerce.” Under Mexican law, “merely using a mark Mexico in connection with manufacturing operations without marketing or selling the products in Mexico, and marketing or selling the products without manufacturing them in Mexico both constitute use.” This type of “commerce” would likely not be protected under the Lanham Act. \textit{Id.}
Property Law Nr. 19.039, Articles 20(g) and 26. The statute was found to protect Sea World in opposing registration of a mark using Sea World's well-known whale design. While this decision is encouraging, problems still remain due to the fact that the use of a mark is not required in Chile to file a trademark registration application. Therefore, "pirates" can still register well-known marks in their own names absent pre-existing registration by the foreign owner of the well-known mark. In contrast Brazil, which in the 1970s and 1980s "was a haven for trademark pirates who aggressively registered well-known brands and profited handsomely," now refuses to register well-known marks such as WALGREENS to unauthorized persons and has canceled registrations for marks such as SOTHEBEYS.

In Jamaica, Kmart Corp. sued a Jamaican corporation, Kay Mart Limited, for trademark infringement and unfair competition. Kmart argued that the Jamaican company, by using the name "Kay Mart" and the "K" logo, was passing off its goods and services as originating with and sponsored by Kmart Corp. The defendant, which incorporated eleven years after Kmart had first registered its marks in Jamaica, argued that because Kmart was not doing business in Jamaica it had no legal rights there. The Jamaican Supreme Court found for Kmart on the grounds that worldwide reputation and goodwill may be achieved without physical presence in Jamaica via global communications technology, international travel, the Internet and other similar mechanisms.

In Denmark, the Maritime and Commercial Court (a special court for trademark matters) decided in a judgment dated April 30, 1998, that use of the mark AMW on wheels, steering wheels and body works was confusingly similar to the world-famous mark BMW. The court concluded that

94. See id.
96. Id.
97. Id.
98. Id.
99. See Mads Marstrand-Jorgensen, Court, in Denying 'AMW' Mark, Extends Protection to World-Famous Trademarks, 12 WORLD INTELL. PROP. REP.
extraordinarily well-known marks such as BMW must be given “an extended protection against other trade marks, the use of which would imply an improper exploitation of the distinctiveness of the trade mark or its reputation.”

In a final example of global bolstering of trademark law, Vietnam substantially updated, or rather transformed, its IP laws when it passed its Civil Code in 1996—an “all encompassing” piece of legislation addressing the rights and obligations of Vietnamese citizens and businesses, over ten percent of which is devoted to IP and technology transfer. One commentator remarked that while the “international community still considers Vietnam as one of the ‘bad boys’ with regard to counterfeiting,” this reputation is no longer deserved. Although trademark rights are now guaranteed in Vietnam under Article 785 of the Code, there is a “dearth of regulations and procedures regarding enforcement in the event of infringement.” Nonetheless protection of IPRs clearly has dramatically improved and continues to improve so that even during this initial transitional stage IPRs are being enforced with “the right approach and through established relationships with IP agents and Vietnamese authorities.” The new code’s tremendous attention to IPRs suggests the Vietnamese government’s commitment to international IP standards. That Vietnam is an observer government to the WTO further substantiates that TRIPs likely induced many of its recent and substantial changes. With regard to the issue of well-known marks, WIPO’s standing committee on trademarks is considering a proposal for a memorandum of understanding that outlines provisions that clarify and go beyond the requirements set forth in the TRIPs Agreement.

100. Id. (quoting from an unpublished opinion).
102. Id.
103. Id.
104. Id.
105. All observer countries have applied to join the WTO (except for the Holy See and, for the time being, Ethiopia, Cape Verde and Bhutan). See The Organization Members <http://www.wto.org/wto/about/organsm6.htm> (Mar. 10, 1999) (on file with the Buffalo Law Review).
The above global sampling of recent legislation and judicial decisions regarding trademark protection is an important early indicator that, as a code of rules, TRIPs is more than just a list of norms— that is, nations are implementing, recognizing, and enforcing its normative prescriptions, albeit to varying degrees.

It is one thing to align laws to TRIPs standards, [and] another to effect a change of response from the judges, the law enforcement agents, and to induce an atmosphere conducive to an effective administration of intellectual property rights. 107

Of course not all WTO member countries have made changes to protect well-known and famous marks or have updated their trademark or other IP laws. Each year the Office of the U.S. Trade Representative (USTR) publishes a list of countries that fail to adequately protect U.S. IPRs. The most recent list names fifteen trading partners on the Priority Watch List: Argentina, Bulgaria, the Dominican Republic, Ecuador, Egypt, the European Union, Greece, India, Indonesia, Israel, Italy, Kuwait, Macao, Russia and Turkey. 108 Nonetheless, the USTR noted that “[i]ntellectual

107. SODIPO, supra note 2, at 84. Yet some commentators suggest TRIPs doesn’t go far enough, calling for a truly “supranational code.” One view is that TRIPs is not a systematic code, but a piecemeal incorporation of and supplement to the Paris-Berne regime and thus “leaves patchwork law lagging behind an increasingly networked marketplace.” Paul Edward Geller, From Patchwork to Network: Strategies for International Intellectual Property in Flux, 31 VAND. J. TRANSNAT’L L. 553, 558-59 (1998). China is an example of a nation attempting to buttress IP enforcement through a new “rule of law” directive. However, while China has relatively complete IP laws, including new trademark counterfeiting provisions, enforcement of the laws is still a problem. See Doris Estelle Long, China’s IP Reforms Show Little Success: IP Enforcement Remains Problematic, But Clever Owners Can Beat the Odds, IP WORLDWIDE, Nov./Dec. 1999, at 3, available in <http://www.ipww.com/nov98/p03_china.html> (Feb. 6, 1999) (on file with the Buffalo Law Review).

108. See Results of U.S. Trade Representative’s 1998 Review of ‘Special 301’ Provisions of Trade Act of 1974 Regarding Intellectual Property Protection, Released May 1, 1998, 12 WORLD INTELL. PROP. REP. 195 (1998) (hereinafter 1998 Review of ‘Special 301’). The priority watch list includes countries that “have the most onerous and egregious acts, policies and practices which have the greatest adverse impact (actual or potential) on the relevant U.S. products” and “are not engaged in good faith negotiations or making significant progress in negotiations to address these problems.” Id. The report also placed thirty-two trading partners on a Watch List. See id. at 199-204. For an instructive discussion of country specific IP barriers to foreign trade, see Excerpts from U.S. Trade Representative’s ’1998 National Trade Estimate Report on Foreign Trade Barriers,’ 12 WORLD INTELL. PROP. REP. 158 (1998).
property protection has been improving in part as a result of the implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. Even in East Asia, where the Western media have focused much attention on piracy and counterfeiting activity, there is increasing implementation of IP protective legislation.

B. Forum for Negotiation

1. **GATT Article XXIII.** The dispute resolution mechanism provided for in TRIPs offers additional evidence of the likely effectiveness of the Agreement. Article XXIII is the dispute settlement provision of GATT. It is expressly incorporated by each of the WTO agreements including TRIPs. GATT Article XXIII provides that a complainant


111. TRIPs, supra note 3, art. 64. Examples of other WTO agreements incorporating GATT Article XXIII include, but are not limited to, Trade-Related Investment Measures (TRIMS), Trade in Services (GATS) and the Agreement on Agriculture. For the WTO dispute settlement provisions, see Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [WTO], Annex 2, 33 I.L.M. 1226 [hereinafter DSU]. DSU Article 3.1 provides: “Members
must demonstrate that a benefit accruing to it under the Agreement is being nullified or impaired; or that the attainment of any objective of the Agreement is being impeded as a result of the failure of another contracting party to carry out its obligations under the Agreement. In recent years the practice of the GATT Council has been to establish a panel, generally consisting of three mutually agreed-upon experts, if one contracting party claims another has acted inconsistently with its obligations under GATT. The panel issues a report and recommendation, generally adopted by the Council, after hearing the parties’ arguments and considering their briefs. Typically the panel recommends the termination of any GATT violation, and does not recommend any broader punitive relief. GATT Article XXIII does allow for sanctions in the form of suspension of concessions if a violation is not remedied, although this only occurred once, over forty years ago.

2. WTO Dispute Settlement Understanding (DSU). Article III of the WTO Agreement outlines the various purposes of the WTO. It provides that one of its principle functions is the administration of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU provides a comprehensive forum and process for dispute resolution, giving greater detail to the general structure of GATT Article XXIII. First, the parties affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.”

112. See JACKSON, supra note 65, at 348-71 (discussing the scope of Article XXIII, including panel reports concerned with nullification and impairment as well as remedies available to successful complainants).
113. See id. at 327.
114. See id.
115. See id. at 366.
116. See id. at 343-44. In 1955 the Netherlands was allowed to suspend concessions made to the United States due to U.S. quotas on Dutch agricultural products, however the Netherlands never utilized the authorization. Id.
117. See WTO Agreement, supra note 65.
118. Id. art. III(3).
119. For discussion of how the WTO process makes fundamental changes to the GATT system, see JACKSON, supra note 65, at 341-46. In general the WTO modified the GATT dispute settlement procedures to reflect developments in international arbitration. See Frederick S. Ringo, The Trade-Related Aspects of Intellectual Property Rights Agreement in the GATT and Legal Implications for Sub-Saharan Africa, J. WORLD TRADE, Dec. 1994, at 120, 136; see also Palitha
must attempt to resolve their differences through consultations.\textsuperscript{120} Second, the parties may request conciliation and mediation services if consultations fail.\textsuperscript{121} Third, a panel may be established to hear the dispute, panel members are selected and the panel’s responsibilities are established.\textsuperscript{122} Fourth, the panel hears the dispute and issues a report to a Dispute Settlement Body (DSB).\textsuperscript{123} Fifth, the recommendation of the panel report is adopted unless unanimously rejected by the DSB.\textsuperscript{124} Sixth, any party to a dispute may appeal a panel decision to the Appellate Body.\textsuperscript{125} Seventh, the implementation of adopted panel or appellate reports is monitored.\textsuperscript{126} Lastly, the DSB may authorize sanctions in the form of withdrawal of concessions if an adopted panel recommendation is not implemented.\textsuperscript{127}

With regard to concerns of developing countries, the DSU contains special requirements for providing legal expertise to developing country Members involved in dispute settlement proceedings.\textsuperscript{128} Most importantly, developing countries will benefit from having retaliatory measures of developed countries subject to WTO review. Industrialized nations may not unilaterally punish poorer countries for alleged IP violations under TRIPs. With this type of monitored system, smaller countries will be less hesitant to challenge larger countries on whom their trade depends, and powerful countries will be more restrained from bullying tactics. Indeed, throughout negotiations in the Uruguay Round, developing countries emphasized system strengthening as their overriding objective, stressing the need for an enforceable, non-discriminatory multilateral trading system.\textsuperscript{129} Such a system protects developing

\begin{footnotesize}

\textsuperscript{121} Id. art. 5.

\textsuperscript{122} Id. arts. 6-8.

\textsuperscript{123} Id. arts. 9-15.

\textsuperscript{124} Id. arts. 16, 20.

\textsuperscript{125} Id. arts. 17-19.

\textsuperscript{126} Id. art. 21.

\textsuperscript{127} Id. art. 22.

\textsuperscript{128} Id. art. 27(2).

\end{footnotesize}
countries from bilateral pressure and preserves an openness needed to reap the benefits of long-term trade cooperation and expansion.\textsuperscript{130}

Studies of the GATT dispute system indicate noteworthy success.\textsuperscript{131} First, according to one study only about forty percent of disputes result in panel decisions, indicating that most controversies are amicably settled informally.\textsuperscript{132} This demonstrates the strength of GATT's primary role as a code of rules.\textsuperscript{133} Second, complaining parties report having received full satisfaction in sixty percent of the cases and partial satisfaction in twenty-nine percent of the cases—indicating an overall success rate of almost ninety percent.\textsuperscript{134} Finally, the system has been much utilized, demonstrating the confidence of Member countries. For example, one study noted that in comparison to the International Court of Justice (ICJ), the number of cases taken up by the GATT system totaled over four hundred while the ICJ had heard fewer than one hundred cases since its origin in 1945.\textsuperscript{135}

Tying IPRs to the trade provisions of GATT under the auspices of the WTO will promote continued resort to the Agreement's dispute resolution procedures. That the Paris and Berne Conventions are removed from the trade context undermines the ability of a complainant to compel an infringing nation to settle the dispute. The Paris and Berne Conventions are essentially a set of guiding principles that member countries may or may not adopt.\textsuperscript{136} TRIPs, in large

\textsuperscript{130} See id. at 322.
\textsuperscript{131} See generally ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW (1993).
\textsuperscript{132} See id. at 375-83; see also JACKSON, supra note 65, at 339.
\textsuperscript{133} See supra note 71 and accompanying text.
\textsuperscript{134} See HUDEC, supra note 131, at 285-87; JACKSON, supra note 65, at 339.
\textsuperscript{135} See id. Notably, the ICJ is the dispute resolution body of both the Paris and Berne Conventions. See Paris Convention, supra note 2, art. 28; Berne Convention, supra note 2, art. 33.
\textsuperscript{136} See Mary M. Squyres, New Treaties Add Protections for Well-Known Marks, IP WORLDWIDE, May/June 1997, at 30, available in <http://www.ipww.com/may97/p30treaties.html> (Mar. 10, 1999) (on file with the Buffalo Law Review). The pre-TRIPs era of IP protection has been described as a "relatively loose international IPR system... in existence for more than one hundred and fifty years." Ringo, supra note 119, at 122. The Paris and Berne Conventions sought primarily to ensure the principle of national treatment. TRIPs, by contrast, addresses the strength, form and duration of IPRs throughout the world and provides a mechanism for review and enforcement of its detailed standards. See THE URUGUAY ROUND AND THE DEVELOPING
part a response to the enforcement problems of the WIPO conventions, has more authority because it is a self-executing treaty. For the first time, an international IP agreement provides an enforcement mechanism which can be utilized regardless of legislation or lack thereof in member countries.

3. Evidence of Success. Although not yet utilized enough in TRIPs-related disputes to offer any settled conclusions, the initial evidence suggests the force and value of the dispute resolution system. In one widely reported case, the United States filed a request to consult with the Government of Pakistan pursuant to Article 4 of the DSU and Article 64 of TRIPs. The U.S. alleged that Pakistan had failed to meet its obligation under TRIPs to either grant

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ECONOMIES at xvi (Will Martin & L. Alan Winters eds., 1995). TRIPs "goes beyond the comity approach of most IPR conventions." Braga, supra note 3, at 388.

137. Congress gave authority to the United States Trade Representative to take unilateral action and publish a list of countries that fail to protect U.S IPRs in direct response to the inadequacy of enforcement of IPRs under international law. Prior to TRIPs, attempts by industrialized countries to tighten enforcement mechanisms in international IP conventions such as the Paris Convention proved unsuccessful. See Ringo, supra note 119, at 122. Indeed some suggest that the pre-TRIPs IP regime was insufficient to enforce IPRs and stop unauthorized use of IP because it never intended to be able to do so. See id. at 126. In contrast, under TRIPs the enforcement procedure requires the domestic laws of Member nations to provide for causes of action against infringement of IPRs. See id. at 135.

138. See Squyres, supra note 136. Self-executing treaties have direct effect in domestic law. Treaties that are not self-executing must be effectuated through an "act of transformation"—that is, a government action, such as a statute, to incorporate the treaty into domestic law. See John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 AM. J. INTL. L. 310 (1992).

139. See Squyres, supra note 136. Members of the TRIPs Agreement are required to provide remedies to prevent infringement and create deterrents to infringement. Holders of IPRs must have access to civil and administrative procedures and criminal procedures must be available for certain willful activities. These private enforcement requirements are separate from the dispute resolution procedures available to Member states. See Braga, supra note 3, at 394. Of course Member states must bring their laws into compliance with TRIPs or they will be taken through the dispute resolution process. Indeed the United States Congress, in order to bring its laws into compliance with TRIPs, passed the Uruguay Round Agreements Act (URAA) which amended, along with other laws, the copyright, trademark and patent laws of the United States. See generally Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).
patent protection for pharmaceutical and agricultural chemical products or to establish systems for filing applications for patents on such inventions. After consultation, the two governments issued a notification of a mutually-agreed solution, providing:

[The Governments of the United States and Pakistan agree that Pakistan was obligated under Article 70.8 of the TRIPs Agreement to establish a system for the filing of patent applications on such inventions by 1 January 1995. The two governments also agree that Pakistan is also obligated under Article 70.9 of the TRIPs Agreement to establish a system to grant exclusive marketing rights to such patent applicants if they meet certain criteria. To fulfill these obligations, Pakistan President Farooq Ahmad Khan Leghari issued on 4 February 1997 Ordinance No. XXVI of 1997.]

Arguably Pakistan would not have responded so favorably and so quickly absent the dispute settlement provisions of the WTO Agreement. Only after the United States' request for a WTO panel investigation did Pakistan suggest further consultations which ultimately lead to the amicable settlement. Other similar consultations have frequently been resolved by mutually-agreed solutions. One notable example


141. See U.S.-Pakistan Solution, supra note 140.


143. For a discussion of the mechanics and function of WTO consultations, see generally Gary N. Horlick, The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View, 32 Int'l Law. 685 (1998). Horlick suggests that one of the main functions of the consultation phase of dispute resolution is to encourage parties to settle cases. See id. at 691. The Office of the United States Trade Representative remarked on the success of the WTO consultations:

The new dispute settlement rules often make it possible for us to enforce WTO agreements without ever having to reach a panel decision. The fact that the WTO can and will authorize us to retaliate pays off in earlier settlements.... We have already used the WTO procedures to obtain favorable settlements in some important cases.

Report on Trade Expansion Priorities Pursuant to Executive Order 12901
concerned consultations between Japan and the United States. Japan agreed to promulgate amendments to the Japanese Copyright Law to comply with the TRIPs obligation to grant protection to artistic performances that have been "performed in a WTO Member and existing sound recordings first fixed in a WTO Member or fixed by a national of a WTO Member for a term of at least fifty years from the end of the calendar year in which the performance took place or the sound recording was fixed." Likewise, the United States requested consultations with Portugal concerning TRIPs' requirements on the terms of existing patents. Portugal agreed with the United States Trade Representative's interpretation of Article 33 of TRIPs and announced it would change its patent law to provide a twenty year term of protection to patents in force on January 1, 1996 and to those patents granted from applications pending on January 1, 1996. Most recently, Sweden and the United States have notified the DSU of a mutually-agreed solution to the United States' concern that Sweden failed to meet its obligation under TRIPs "to make available provisional measures inaudita altera parte in civil proceedings involving intellectual property rights." The Parliament of Sweden passed legislation on November 25, 1998 that came into effect January 1, 1999 that amended Sweden's Copyright Act, Trademarks Act, Patents Act, Design Protection Act, Trade Names Act, Act on Protection of Semiconductor Products and Plant Breeders Act to allow a court to order a search for evidence of infringement if there is reason to believe that an individual has or soon will infringe intellectual property rights.

Of course, when consultations do not resolve a conflict, a complaining state may request a panel examination pur-

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148. See id.
suant to Article 6 of the DSU.\textsuperscript{149} Panel decisions may be appealed pursuant to Article 17 of the DSU. India was the first country to utilize this procedure and the result is the clearest and strongest measure of the effectiveness and likely ramifications of TRIPs' dispute resolution process. India appealed from a panel decision in favor of the United States which held that India failed to comply with a TRIPs requirement to either grant patent protection for pharmaceutical and agricultural chemical products or to establish systems for filing applications for patents on such inventions.\textsuperscript{150} WTO Member States are obliged to grant patent protection as of January 1, 1996 to "any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."\textsuperscript{151} Developing countries are granted until January 1, 2005 to meet this obligation.\textsuperscript{152} By virtue of this transition period India does not presently provide product patents on drugs, pharmaceuticals and agricultural chemicals; it does, however, grant process patents which enable Indian pharmaceutical companies to manufacture low cost new products for the international market.\textsuperscript{153}

The benefit of the transition period exacts a quid pro quo from the developing country. During the transition period a developing country must establish a "mailbox"
system for filing of patent applications. These applications will be reviewed once the transition period ends and patent protection is possible. Additionally, the developing country must grant exclusive marketing rights for a product in the “mailbox” during the interim period. India made two failed attempts to implement legislation to bring its laws into compliance with the mailbox and marketing provisions. The United States then brought its complaint before the WTO. The WTO panel concluded that India did not “adequately achieve the object and purpose of Article 70(8) and protect legitimate expectations contained therein for inventors of pharmaceutical and agricultural chemical products.” On appeal the WTO appellate body upheld the dispute panel’s ruling.

This decision is important not so much for its interpretation of the “mailbox” rule, but because it was the first intellectual property case to go through the entire WTO dispute resolution process. As such it demonstrates “the willingness of the WTO to take swift action to enforce TRIPs.” While on the one hand the dispute highlights the fact that some developing countries may be slow in enacting TRIPs requirements, on the other hand India’s experience should likely induce compliance by other countries. Indeed U.S. Trade Representative Charles Barshefsky described the decision as “an important precedent.” Interestingly, after continued sparring with the United States over how long India should take to implement an appropriate “mailbox” system, India recently began to consider grant-

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154. See TRIPs, supra note 3, art. 70(8). Moreover, the patent applicant may use the original filing date to the “mailbox” system for purposes of establishing novelty in the patent prosecution. Id.
155. Id. art. 70(9).
157. See India Panel Report, supra note 150, at *55.
159. See Macdonald-Brown & Ferera, supra note 156, at 69. For a succinct chronology of the major events in the resolution of this dispute, see id. at 70 (detailing how the entire process, from a request for consultations to the publishing of the Appellate Body Report, took only 17 months).
161. See U.S., India Spar Again on Protection of U.S. Farm-Chemical, Drug Patents, 12 WORLD INTELL. PROP. REP. 115 (1998); India Agrees to 15-Month
ing product patents immediately—further demonstrating the strength of TRIPs and the weight of the dispute resolution process. In accordance with the requirements of the DSU, India has provided status reports to the WTO regarding the implementation of the Appellate Body Report. The Government of India first reported that it was "exploring various options... and [that] a series of inter-departmental and inter-Ministerial consultations have been initiated in this regard." The government then announced in another status report that the "Patents (Amendment) Ordinance was promulgated on 8 January 1999 to amend the Patents Act to comply with the obligations as contained in Article 70.8 and 70.9 of the TRIPs Agreement." However, the United States has expressed concern that the Ordinance fails to meet the TRIPs standards and therefore the "United States seeks to discuss [its] concerns regarding the Ordinance with Indian officials at their earliest convenience."

The above examples of consultations and the India panel decision, all in the infancy of TRIPs, suggest "the dispute resolution procedures are far more effective than those available previously under GATT." That there are


162. See India Considers Immediate Approval for Pharmaceutical, Chemical Patents, supra note 153, at 297 ("[T]he government has begun to consider the Trade Ministry's view favoring the upgrade of the existing patent law to cover such patents immediately instead of waiting until 2005, which is when developing countries must provide patent protection under WTO rules."). In some ways this possibility is not so unlikely given India's recent decision to accede simultaneously to the Paris Convention and the Patent Cooperation Treaty (PCT) in order to benefit the country's technological and economic development. See WIPO Announces Accessions to Paris Convention, PCT, 12 WORLD INTELL. PROP. REP. 325, 326 (1998); India Set to Sign Paris Convention, Nat'l L.J., Aug. 24, 1998, at A11 (describing India's decision to join the Paris Convention as a "very major change in attitude").


166. See Macdonald-Brown & Ferera, supra note 156, at 73. The World
now over one hundred cases (far more than originally anticipated) going through the system\textsuperscript{167} indicates global confidence in the WTO process and resolve to promulgate TRIPs norms.

III. FEARS OF WESTERN ECONOMIC AND MORAL IMPERIALISM

Indira Gandhi, speaking at the World Health Assembly in May 1982, proclaimed: "[t]he idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death."\textsuperscript{168} While Western, industrialized countries employ the value-laden language of "piracy" and "counterfeiting" to describe lax protection of IP in the developing world,\textsuperscript{169} lesser developed and newly industrialized countries find a moral foundation for weak IP protection in Gandhi's words. From the developing countries' point of view, weak protection of IP can serve to protect life itself by ensuring a supply of essential goods, particularly in the fields of education and medicine, for both sustenance and development.\textsuperscript{170} A survey of the literature about what is variably termed the "North-South debate"\textsuperscript{171} reveals two distinct

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\textsuperscript{167} See Macdonald-Brown & Ferera, supra note 156, at 73.

\textsuperscript{168} See Chakravarthi Raghavan, Recolonization: GATT, the Uruguay Round & the Third World 121 (1990) (suggesting that use of these terms, especially by the media, has co-opted the debate by painting the developing countries' position and activities as immoral and criminal). Moreover, it has been noted that these are words with no recognized technical meaning in the law of intellectual property. SODIVO, supra note 2, at 123.

\textsuperscript{169} See Emmert, supra note 64, at 1383 (discussing the concerns in developing countries of farmers who require access to cheap seed fertilizers and agro-chemicals; ill people who need affordable medicines; and students who require cheap educational supplies and materials).

\textsuperscript{170} See generally Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature (Wolfgang E. Siebeck et al. eds., World Bank Discussion Papers 1990); Stanley M. Besen & Leo J.
lexicons—one of politics and economics\textsuperscript{172} and another of sociology and cultural anthropology,\textsuperscript{173} with developed nations employing the former and developing countries the latter. Legal conclusions emerge from both regarding the appropriate force of IP protection in international discourse and commerce.

A. The Conflict of Rights

A common criticism levied against the TRIPs Agreement maintains that it violates the sovereign right of nations to development,\textsuperscript{174} however, Western industrialized countries contend that intellectual property rights are natural, human rights and are so recognized in the Universal Declaration of Human Rights (UDHR).\textsuperscript{175} TRIPs


\textsuperscript{174} The right to development under international law was first put forward by Kéba M'Baye in 1972 and was adopted by the United Nations' General Assembly in 1986 in the Declaration on the Right to Development, although it has undergone serious attack as hopelessly utopian. See Richard Warren Perry, Rethinking the Right to Development: After the Critique of Development, After the Critique of Rights, 18 L. & Pol'y 227, 227-28 (1996). This issue of Law & Policy is a special issue on the right to development. Professor Makau Wa Mutua's editorial introduction describes the special issue as “hop[ing] to jump start ostensibly stalled conversations on the right to development.” Makau Wa Mutua, Editor's Introduction, 18 L. & Pol'y 195 (1996). Blakeney adds that “as with human rights, the concept of private natural property rights exists in uneasy tension with countervailing public rights such as the 'universal right to share in scientific advancement' and the so called 'right to development.'” Blakeney, supra note 15, at 151.

\textsuperscript{175} The preamble to the first European patent statute, the Inventors Act of Venice of 1474, proclaimed the philosophical foundation in natural law for granting IPRs:

\begin{quote}
We have amongst us men of great genius, apt to invent and discover ingenious devices . . . now if provision were made for the works and devices discovered by such persons, so that others who may see them could not build them and take the inventor's honour away, more men would then apply their genius, would discover, and would build devices of great utility and benefit to our commonwealth.
\end{quote}

See Blakeney, supra note 15, at 149-50. But see Gana, supra note 17, at 344 n.5 (explaining the provision in Article 27 of the UDHR protecting the right to the
accentuates the tension between these discordant "regimes of rights." While those opposed to TRIPs see international protection of IP and the sovereign right to development in direct conflict, TRIPs adherents view these rights as complimentary—that in order to develop, nations must recognize and employ IP protection. Removed from the language of rights, the conflict can be recast in terms of the "public-good" nature of knowledge: the tension between the social desirability of widespread dissemination of available know-how and the arguable need for society to reward creators of new information. It is as much an economic debate about public interests versus monopoly interests as it is about defining human rights norms. Yet whether based on the language of rights or utility, the solution that TRIPs offers resolves the conflict squarely in favor of developed nations. TRIPs teaches that while the right to IP protection may not be more "right"

moral and material interests resulting from any scientific, literary or artistic production). Gana maintains "there is nothing about intellectual property protection that makes it a universal ideal, and the human rights framework should not endorse a system that perpetuates the subordination of values and ideals of societies in developing countries to the economic interests of countries in the Western Hemisphere." Id. at 317.


[T]echnological advances in key sectors have become the sine qua non for all countries if they are to unleash the creativity and entrepreneur-ship essential to their success in achieving further economic and social progress. And for technology-poor nations, development and transfer of know-how particularly suited to their needs depends on the nature of incentives and protection they are ready to offer both foreign and local owners of intellectual property.

Id.


179. See Raghavan, supra note 169, at 132.

180. See Bernard Hoekman, Services and Intellectual Property Rights, in THE NEW GATT: IMPLICATIONS FOR THE UNITED STATES 84, 110 (Susan M. Collins & Barry P. Bosworth eds., 1994) ("The TRIPs agreement may not be perfect from the perspective of U.S. industry . . . [b]ut . . . [i]t is fair to say that developing countries agreed to much more than even an optimist might have hoped for in 1986.").
than the right to sovereign development, it certainly is more powerful.

B. The Developing Countries' Argument

1. Rights Analysis. Critics of TRIPs argue that protection of IP cannot be justified as a human right, not because it is per se wrong, but because it is not a universal norm.\(^1\) It emerges from a Western liberal ideology of individual dignity.\(^2\) Yet for many non-industrial societies, the values of liberty and autonomy of self and property are inconsistent with, if not anathema to, their experience.\(^3\) As one critic explains:

Most Third World societies are organized around a social unit which extends certainly beyond the individual and, in most cases, beyond the nuclear family. The forms and very definition of ownership are thus crafted in a way opposite to property conceptions of western legal and economic structures central to the development of private and public law.\(^4\)

According to this view, unique political, social and economic realities that create national and individual identities different from Western tradition must ultimately be accounted for in determining a developmental scheme.\(^5\) For example, compliance with copyright law may be virtually meaningless to individuals from societies in which oral, rather than written, histories and stories predominate.\(^6\) In Confucian China it was believed that copying another's creations was a laudable form of reverence.\(^7\)

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1. See Gana, supra note 17, at 326.
2. See id. at 323.
3. See id. at 339.
5. See Gana, supra note 17, at 339.
6. See id. at 340.
Such a "collectivist mentality" is dissonant to the Western property paradigm. Indeed "what is perceived as a wrong by U.S. cultural and legal standards... might not be a wrong under the cultural and legal standards of other nations." One study described as an "ethnographic view of intellectual property" suggests that the concept of IP is unamenable to indigenous peoples who practice collective ownership. A Guyanese native, for example, who believes the greenheart nut is a gift from the gods and that its properties are therefore self-evident to all, cannot conceive of limiting use of the nut for purposes of controlling ovulation to the "inventor" of this process.

One of the early objections of many developing countries to the TRIPs Agreement concerned the interface between international IPRs and environmental protection. In India, the controversy centered on the U.S. chemical company W.R. Grace's patent on a process for extracting chemicals from the famed neem tree which is widely used by indigenous peoples for making traditional medicines, antiseptic toothbrushes, natural insecticides, contraceptives and even soap. Critics are concerned that TRIPs will take control of agricultural products, like neem seeds, away from local communities and give it to large, often foreign, corporations.

Some suggest that rather than warranting the veneration of a human right, international IP protection in fact violates the human rights of people whose norms, traditions and history do not reflect those of Europe and the United States. The fact that the developed West fails to recognize or ignores this difference suggests it may underestimate the facility of local institutions, traditional ideas, and social

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191. Id. at 57-58.
193. See id.
194. See Gana, supra note 17, at 340-41.
values to adopt a new paradigm of IPRs. One critic maintains that "the presumption that U.S. law is morally and intellectually superior to the law of other countries smacks of ignorance and arrogance."196

Ultimately, from the perspective of developing nations, a legitimate human rights analysis of IP protection would reflect and incorporate cultural sensitivities. Moreover, it would account for the more pressing concerns of many developing countries: huge national debts, high unemployment, natural disasters, civil wars, political instability, malnutrition and illiteracy. The book How To Read Donald Duck, written by Chilean Marxists, illustrates this point well. Disney used its copyright and trademark rights in Donald Duck to attempt to limit circulation of the book which was critical of U.S. imperial interests in Latin America. But the question of whether the Chilean government should focus its limited resources on protecting Disney's property interests is not easily answered.

One might well question the wisdom of countries beleaguered by the challenges and social costs of malnutrition, child prostitution, sex tourism, AIDS, foreign debt, and structural adjustment policies putting scarce resources into tracking down those who would appropriate Looney Tunes characters or deploy the icons of American popular culture to satirize U.S. power and its capitalist presence.

Further undermining the West's depiction of IP as a human right is its own history of selective protection. For example, early copyright laws in the United States limited protection to domestic authors and allowed copying of works published in foreign countries. It is commonly suggested that the condoned piracy of foreign-published books "indirectly fostered the growth of the American publishing

196. Kraver & Purcell, supra note 189, at 115.
197. See Gana, supra note 17, at 335.
198. See id.
201. See Gana, supra note 17, at 327.
industry.” Indeed the first federal copyright law in the United States provided that it should not be construed “to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places within the jurisdiction of the United States.” Astonishingly, the United States did not accede to the Berne Convention until 1988—and then motivated less by a desire to offer protection to foreign works than a desire to garner greater protection abroad for works of U.S. origin. Therefore, developing countries commonly argue that industrialized nations now want to deny them the same advantages the West once used in order to develop. Even if IPRs merit human rights status as the West urges (despite examples of the West violating its own norms), some developing countries argue that the right to development is nonetheless a compelling interest which trumps the property rights accorded inventive activity.

2. Utility Analysis. Developing countries also suggest a number of economic arguments against international protection of IP which, although removed from the discourse of rights, are still related to notions of sovereignty and development. For example, the monopoly privilege granted to owners of IP, in particular foreign owners, can have devastating economic effects on developing nations due to the owner’s power to determine whether, and the terms on which, a protected work will be available in a given market. This power is particularly important in crucial and sensitive areas such as agriculture, medicine and education.

Additionally, the evidence of the successful industrialization of countries in East Asia, particularly the “four little

202. SODIPO, supra note 2, at 16.
203. Id. at 15-16 n.44.
204. See id. at 16. And still there is some question as to whether the United States fully complies with Berne’s “moral rights” provisions in Article 6bis. See Giust, supra note 72, at 87.
205. In addition to the example of U.S. copyright laws, some industrial countries—including Germany (1968), Japan (1976), Switzerland (1977), Sweden (1978), Italy (1978) and Spain (1992)—only relatively recently provided for patent protection for pharmaceuticals and chemicals after developing their own domestic industries. Ringo, supra note 119, at 123 n.14.
206. See Gana, supra note 17, at 326.
207. See id.
dragons” (Taiwan, Hong Kong, South Korea and Singapore), reveals that recognition of IPRs is not essential to development, despite the rhetoric of developed nations. The experiences of these four countries demonstrate that economic and political reform rather than legal protection of IP may transform underdeveloped nations. Indeed, even the development of the Western economies has arguably had more to do with economic and political reform than protection of IP, although in the West recognition of IPRs has certainly been a part of industrialization.

Common economic concerns of developing nations relate to costs associated with administration and enforcement of IPRs, costs of increased royalty payments for use of foreign-owned IP, costs of displacement of pirates, and costs of increased need for research and development. Undoubtedly, TRIPs will produce a rent transfer from developing to
developed nations in the short-term. Whether the long-term potential benefits—new inventions, higher levels of research and development, greater transfer of technology and foreign direct investment—outweigh the costs remains to be seen. While there may be an aggregate benefit to the world, we don’t know if or how far that benefit will extend to developing countries. We do know that IP protection will have different economic implications depending on the preparedness of different nations. If for no other reason, developing countries might consider protecting IPRs simply because, so far, lack of protection has generally failed to aid widespread development.

Fink, The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict, 72 CHI.-KENT L. REV. 439, 442 (1996) ("If the country... has some production capabilities... but limited innovative capacity... higher standards of protection are likely to have negative welfare impact, as local producers are displaced, prices rise, and a rent transfer from local consumers and producers to foreign title-holders ensues."); Frederick Abbott, The WTO TRIPs Agreement and Global Economic Development, 72 CHI.-KENT L. REV. 385, 386 (1996) ("[I]f the IPRs to be protected were preponderantly held by OECD country enterprises, then the recognition of IP ownership rights would logically lead to a transfer of wealth from the developing to industrialized economies, at least over the short-term."). From the perspective of developed countries, piracy results in significant lost sales and revenues. See, e.g., Clinton Orders U.S. Agencies to Crackdown on Software Piracy, 12 WORLD INTELL. PROP. REP. 365 (1998) ("Gore estimated that software piracy in the United States and abroad in 1997 accounted for $11 billion in lost sales to software publishers. ... Illegal copying of software by organization, businesses, and government offices around the world is the single biggest source of lost sales for software companies.").

213. See Braga & Fink, supra note 212, at 461. See generally Braga, supra note 3, at 399-405 (discussing the economics of IPRs).

214. See Braga & Fink, The Economic Justification, supra note 212, at 446.

215. In calculating the costs and benefits of IP protection, it is imperative to include lost opportunities in the equation. Free riding on someone else’s technical knowledge seems a quick way to make money and develop. However, a system that allows free riding by not respecting IPRs must consider the lost opportunities that adhere to piracy. First, much technology cannot be appropriated—it is simply too difficult. Second, a free-rider strategy results in lost opportunities to train local technicians and researchers, to attract venture capital, and to promote universities dedicated to laboratory and market research. Sherwood, supra note 62, at 75.

216. One assessment printed in the World Bank Discussion Papers estimates that overall benefits from the Uruguay Round (that is benefits including, but not limited to, TRIPs) are likely to generate gains of between $55 and $90 billion to developing countries and $100 to $200 billion dollars to the world as a whole. See THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES at xvii (Will Martin & L. Alan Winters eds., 1995).

217. See Braga & Fink, The Economic Justification, supra note 212, at 443.
TRIPS AGREEMENT

IV. TRIPS: A DEVELOPMENT ENHANCING STRATEGY

Despite the moral and economic objections of many critics of TRIPs, developing nations nonetheless signed the Agreement and were right to do so. Ironically, the compelling argument denouncing IP as a human right suffers from its own truth. There is no inherent ownership right to IP. There certainly is not any universal experience to point to a natural rights basis for IPRs. They are statutory rights—or rather ‘privileges’—granted through state intervention in the marketplace. Yet demonstrating the weakness of characterizing IP as a human right likewise diminishes the force of the right to development argument. By electing to participate in GATT and specifically in TRIPs, developing nations make a conscious economic choice. While myriad political concerns may influence that choice, the decision to comply with TRIPs is not based on the West's imposition of the human rights paradigm. The language of the human rights discourse in the context of IP is but a proxy for economic policy, even if sincere in its intentions. By successfully removing natural rights from the argument, developing nations simultaneously relinquish the claim that their right to development is frustrated by Western prescriptions of natural rights. For the sake of clarity, if not honesty, developed countries would do well to simply abandon their high moral tone and address issues of IP as matters of

218. See Global Dimensions, supra note 2, at v (stating that “the word ‘right’ may not be particularly well chosen”).


220. See Raghavan, supra note 169, at 116.

221. In particular, many developing countries recognized, especially those which attained independence from colonial powers, that international trade was an important instrument to achieve economic growth. See Emmanuel Opoku Awuku, How Do the Results of the Uruguay Round Affect the North-South Trade?, J. World Trade, Apr. 1994, at 75. In suggesting why developing countries may have elected to participate in TRIPs, one commentator offered the following remark:

While it may take a true believer to embrace a natural property rights justification for the significant benefits offered under patent TRIPs to patent owners in developed countries, nevertheless there may be other justifications, in particular economic ones, that would lead the world community, including developing countries and LDCs, to submit to such a regime under GATT.

Oddi, supra note 219, at 440.
domestic and international economic policy.222

Indeed, outside the ballyhooed rhetoric of politicians and industry lobbyists, IP protection is generally recognized as an economic, not a moral, issue.223 The fact that an ever-increasing percentage of international trade involves IP corroborates this observation.224 The WTO is thus the appropriate forum to address the international impacts of IP.225 At another time IP may have more properly been left to bilateral arrangements; however, today's truly global economy and the paramount importance of technology and information point to the strong link between trade and IP.226 Even concerns about ideological imperialism and insen-

222. See CHIN & GROSSMAN, supra note 178, at 23.
223. See INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 18 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (describing a comprehensive study of IP protection in Argentina, Brazil, India, Mexico, the Republic of Korea, Singapore and Taiwan that found all of the nations viewed IP as an economic issue). In the debate over the foundation for the grant of intellectual property rights, the "natural rights justification of intellectual property protection is very much subordinate to various economic arguments." BLAKENEY, supra note 15, at 151.
225. Some commentators have pointed to the fact that GATT's scant attention to IPRs, prior to TRIPs, signals the insignificance of IP on trade flows in the 1940's during the beginnings of GATT. While it was recognized that a need existed to accommodate protection of IP in foreign nations, the Paris and Berne Conventions and their many revisions seemed more appropriate than GATT. See Braga, supra note 3, at 382.
226. GATT is an international system which fosters competition through reducing barriers to trade. Property rights are an indispensable element of such a system. The fact that intellectual property is increasingly an important part of trade indicates the appropriateness of its inclusion in GATT. Nations which elect participation in GATT thus implicitly recognize the property value of knowledge-based goods. Therefore, inclusion of IPRs in GATT is consistent with the underlying philosophy of free trade. See generally Fritz Franzmeyer, The Consequences of the Uruguay Round for the OECD Countries, in WORLD TRADE AFTER THE URUGUAY ROUND 52, 63 (Harald Sander & András Inotai eds., 1996). One of the negotiation objectives of the TRIPs Agreement during the Uruguay Round specifically identifies the relationship between trade and IP:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Braga, supra note 3, at 385 (quoting and discussing the 1985 Ministerial Declaration of Punta del Este).
sitivity to cultural differences are less than compelling today given the global movement towards market economies and free trade. This shift is consistent with inclusion of IP in trade negotiations. The fact that most nations have actively selected this course makes it difficult to point a finger at the West for stamping out indigenous beliefs or alternate notions of property. Local governments are complicit. They have accepted the market paradigm, for better or for worse, of which IP is an increasingly important component. Indeed, one author who contends that "the culture and heritage of developing countries [are] on a collision course with the global consumer culture of the more powerful developed countries," nonetheless urges that

227. For example while I was living in Belize between 1990-1995, indigenous Maya Indians became embroiled in a battle with the Government of Belize over ownership rights to ancestral lands. The Belize government had granted logging concessions to foreign entities on Mayan ancestral land and planned to pave a road providing greater access to the area. Right or wrong, these were decisions of a local government to increase productivity and access to resources so as to stimulate economic growth and development. They were not decisions of the United States or the European Community to culturally imperialize the Maya. The same can be said of the decision of local governments to provide protection of intellectual property. For a discussion of the Maya land claim, see generally Abid Aslam, Rights: Belizean Mayans Press Land Claims Despite IDB Loan, INTER PRESS SERV., Jan. 8, 1998, available in 1998 WL 5985272; Timothy M. Ito & Margaret Loftus, Cutting and Dealing Asian Loggers Target the World's Remaining Rain Forests, U.S. NEWS & WORLD REP., Mar. 10, 1997, at 39; Mary Jo McConahay, Letter From Belize: Loggers and Activists in Rainforest Crunch, NEWSDAY, Feb. 16, 1997, at G4; Mary Jo McConahay, Rainforest Logging Disrupts Deep Cultural Rhythms in Tiny Belize, NAT'L CATH. REP., Dec. 27, 1996, at 10; Yvette Collymore, Environmental-Belize: Maya Try to Fend off Malaysian Timber Barons, INTER PRESS SERV., Dec. 6, 1996, available in 1996 WL 14476882; Oliver Tickell, British-Funded Road Will Destroy Forest: Commercial Development Threatens Mayan Lands, GUARDIAN, Dec. 2, 1996, at 11; Abid Aslam, Environmental-Belize: Indigenous People Question Highway Project, INTER PRESS SERV., Nov. 7, 1996, available in 1996 WL 13588991; Randy Lee Loftis, Protecting Their Roots: Mayan Villagers Fight to Save Belize Forests From Logging, DALLAS MORNING NEWS, Sept. 15, 1996, at 1A. For a contrary position arguing that TRIPs promotes imperialism, see Oddi, supra note 219, at 470 (concluding that TRIPs "may not amount to 'gun boat' diplomacy, but it does smack of economic imperialism against uppity 'pirate' states who deign to compete by 'imitation,' which, if not 'the very lifeblood of a competitive economy,' is at least an aspect of economic completion") (citations omitted). See also Marci A. Hamilton, The TRIPs Agreement: Imperialistic, Outdated and Overprotective, 29 VAND. J. TRANSNAT'L L. 613 (1996). Professor Hamilton boldly argues: "If TRIPs is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history... [TRIPs] imposes presuppositions about human value, effort and reward." Id. at 614-16.
an IP regime can and should be used as a "cultural shield" to protect native and indigenous culture. Sound development strategies must therefore recognize local and foreign IPRs. In this context IP concerns cannot and should not escape the auspices of the WTO, as the fortunes of the developing countries and the world trading system are closely intertwined.

Developing countries ultimately accepted the TRIPs Agreement in a bargained-for exchange which included concessions on agricultural export subsidies by the European Community, increased market access for tropical products, generous transitional arrangements, and protection against unilateral measures primarily by the United States and other powerful, Western industrialized nations. Certainly the dispute resolution procedures of the WTO make developing countries less vulnerable to bilateral confrontation with the United States and the European Community. Moreover, developing nations also realized that IP protection is increasingly important in order to attract multinational capital and investment. For certain large developing countries, such as India and Brazil, it is likely that they recognized IP protection was in their own best interests in benefiting local inventors. Some analysts have found that in newly industrializing economies, recognition of IPRs correlates with the level of economic development. That is, once a country reaches a certain "development threshold," then protection of IPRs will

228. See Doris Estelle Long, The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective, 23 N.C. J. INT'L L. & COMP. REG. 229, 279-80 (1998) ("[D]eveloping countries can craft a protection regime that would provide protection for such critical cultural elements as folklore, ritual, costumes, and folk medicines."); see also Christine Haight Farley, Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?, 30 CONN. L. REV. 1, 54-57 (1997) (concluding that the existing intellectual property regime is well-suited to protect groups who want to participate in and control the marketing of their goods, but is deficient for those who wish to preclude use of their imagery).


231. See Bronckers, supra note 61, at 1275; see also supra notes 128-30 and accompanying text.

generate economic activity sufficient for the political structure to favor innovation over imitation.\textsuperscript{233}

The result of increased global IP protection is a balance of gains and concessions. While the effect of protecting foreign IP will likely increase the short-term cost of knowledge-intensive goods to developing countries as importers, this loss is set against concessions on important exports, such as textiles and agriculture, from developing nations.\textsuperscript{234} Additionally developing countries will benefit from the advantages of a multilateral agreement over the likely stricter consequences of unilateral accords.\textsuperscript{235} At a minimum, for developing countries inclusion of IP protection into GATT was a lesser evil than assured pressure and likely sanctions from developed-world trading partners.\textsuperscript{236}

\begin{itemize}
\item \textsuperscript{233} See generally Christopher Stevens, The Consequences of the Uruguay Round for Developing Countries, in World Trade After the Uruguay Round 71, 73 (Harald Sander & András Inotai eds., 1996); India Amends Patent Law to Give Effect to TRIPs, 9 World Intell. Prop. Rep. 42 (1995); Otto B. Licks, Court, Attorney General Uphold Self-Execution of TRIPs Accord, 11 World Intell. Prop. Rep. 299 (1997). External pressure from developed nations to recognize IPRs is often intensified towards newly industrializing countries. Examples of areas commonly referred to as newly industrializing economies include Brazil, Hong Kong, Malaysia, Mexico, Singapore, the Republic of Korea and Taiwan. See Carlos Alberto Primo Braga, The Newly Industrializing Economies, in Global Dimensions, supra note 2, at 169, 172. But note that India and Brazil were initially among the most vocal nations to oppose inclusion of IPRs in GATT rather than WIPO. See Braga, supra note 3, at 384. Indian Industry Minister Sikander Bakht remarked on India’s protection of IPRs:

It is our firm belief that with this step India would integrate itself with the world community in respect to intellectual property and provide the necessary opening to its scientists and inventors. This would also help to boost our exports and build up the necessary documentation of scientific information. . . . We would now like the scientific and research community to make use of this opportunity to seek global protection for their inventions.


\item \textsuperscript{234} See Stevens, supra note 233, at 73.
\item \textsuperscript{235} See id.
\item \textsuperscript{236} See Bhagwati, supra note 232, at 113. In 1988 the Trade Act of 1974 was amended to require the United States Trade Representative (USTR) to identify “priority foreign countries” which deny “adequate and effective” intellectual property rights and which are “not making significant progress” to eliminate the problem. See 19 U.S.C. 2242 (1994). The USTR has the power to retaliate against “unfair” trade practices. If the USTR determines that “an act,
Ultimately, recognition and protection of IPRs is important not simply because Madonna or Nike or Microsoft has a "right" to stop international piracy and copying of their intellectual property. More importantly, there are compelling arguments that IP protection will indeed benefit the developing world in the long-run—particularly in creating incentives for domestic and foreign researchers and entrepreneurs to invest resources in innovative technologies and solutions to problems indigenous to their countries.237

Policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies to the United States under, any trade agreement, or is unjustifiable and burdens or restricts United States commerce, or he or she is authorized to "suspend, withdraw, or prevent the application of, benefits of trade agreement concessions" with the infringing foreign country or to "impose duties or other import restrictions on the goods" or services of the foreign country. Id. § 2411. This provision is known as "Special 301." The year prior to the amendment of TRIPs into GATT, the U.S. Congress discussed the importance of retaliation against IP infringement. See Special 301 and the Fight Against Trade Piracy: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance, 103d Cong. 103-56 (1993). The dispute provisions in the TRIPs Agreement provide an additional buffer of protection for developing countries against such unilateral retaliation. For an overview of the most recent finding of the USTR pursuant to Special 301, see Results of U.S. Trade Representative's 1998 Review of 'Special 301' Provisions of Trade Act of 1974 Regarding Intellectual Property Protection, Released May 1, 1998, 12 WORLD INTELL. PROP. REP. 195 (1998). See also Jackson, supra note 65, at 815-43 (providing an overview of Section 301); Blakeney, supra note 15, at 4-6 (explaining U.S. trade legislation as relates to intellectual property and noting the questionable legality of Special 301 within GATT).

237. See Price, supra note 177. Some surveys indicate patent applications, for example, soared in developing countries that adopted or reformed IP laws to meet international standards. After the June 1991 reform of patent laws in Mexico, large numbers of Mexican nationals filed patent applications. Similarly in Columbia, copyright protection was extended to include computer software in 1989. Numerous Colombian nationals then produced and registered application software packages. Contrast this with the technical team for the national coffee growers cooperative in Columbia which is unwilling to pursue research because of the lack of protection for biotechnology. In a study by the Brazilian government, many corporations indicated that lack of IP protection reduced their willingness to conduct research and development. The government found that most of those favoring weak protection in Brazil are not involved in research fields. See Sherwood, supra note 62, at 72, 77, 83; see also Robert M. Sherwood, The TRIPs Agreement: Implications for Developing Countries, 37 IDEA: J. L. & TECH. 491, 525-27 (1997) (discussing factors affecting the trend in patent applications in Brazil, Chile, Egypt, Mexico and South Korea during the period from 1983 to 1993); Blakeney, supra note 15, at 153-54 (providing a general discussion of the numerous studies that have been conducted in developed nations to determine the extent to which the rate of development and commercialization of inventions would decline absent IP protection).
The impact of IP on diverse fields ranging from scientific research to creative authorship to commercial development highlights its pervasive importance to industrial progress. Furthermore, protection of IP in developing nations will reduce the "brain drain" of talented individuals who leave poor countries in order to make a better living elsewhere. Recognition of IPRs will make it possible for these professionals to profit from their creativity and inventiveness in their home country.

We must disabuse ourselves of the image that all technology comes from developed countries. Incremental innovation rather than media-hyped technological "breakthroughs" can be of immense value to a developing nation. Developing nations recognized this potential in signing on

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238. See Price, supra note 177. Scientists and engineers in developing nations commonly look to their former colonial parent for their technical education—which often inculcates skills that are inapt for the developing countries needs. Thus these professionals seek work in developed countries that can utilize their skills, and whatever technical assistance may flow down to the developing nation is outweighed by the exodus of indigenous talent and intellectual skill. See Blakeney, supra note 15, at 166.

239. See Sherwood, supra note 62, at 72.

Local researchers in developing countries can contribute to adaptation and improvement of the local technological base. Inglorious, incremental work can have a cumulative impact. It is useful to get away from thinking predominantly of headline-grabbing technology. In the developing countries, it is a loss when the humble farm worker who might have designed a better plow is not stimulated to do so. Id. at 83. Some authors argue that recognition of IPRs by developing countries would allow developing countries to legally protect their endowment of natural resources from unlawful exploitation. Nevertheless, critics of this position maintain that providing for patenting of seeds and plants, for example, might benefit multinational corporations more than unprepared industries in developing countries, thereby preventing their use by local inhabitants and inflating prices for drugs which originally come from the developing world. See Awuku, supra note 221, at 84-85.

Notably international agencies are participating in relating strategies for technological transformation to developing countries. Common recommendations from agencies such as UNCTAD and WIPO include: developing national technology policies and national technology centers; providing incentives for technological development through tax policies, direct financial assistance and the establishment of national research institutes; encouraging greater technological "collective self-reliance" and "collective self-sufficiency" among developing countries; and exercising greater control over transnational corporations located in developing countries to adapt their research to address the technological needs and priorities of their host countries. See Blakeney, supra note 15, at 171-77. One such IP training center was recently opened in Malaysia. See IP Training Centre Launched in Malaysia, 12 World Intell. Prop. Rep. 184 (1998).
to TRIPs. IP protection is not a singular prescription for development, but it is one important aspect to a development plan.\(^{240}\) Although the origins of IPRs may hearken back to a brute egoist carving out exclusive proprietorship of ideas, utilized appropriately they can and often have transcended their raw foundation to advance economic development.

**CONCLUSION**

The TRIPs Agreement reglobalizes IPRs by tying intellectual property to trade via the WTO. This revolutionary linkage has altered the legal balkanization of IP over the last one hundred years.\(^{241}\) IPRs are now visible and enforceable in the international arena. They have assumed a prominent role in trade negotiations. Nations that hope to benefit from GATT's trade regime must respect international IPRs. While some fear that TRIPs will further divide the rich from the poor, developing countries were wise to recognize the long-term potential of IP to stimulate domestic creativity and attract foreign investment, thereby aiding national economic development. Previous efforts to achieve a worldwide system to recognize and protect IP were hampered by limited participation of developing countries and lack of enforcement provisions. TRIPs radically alters this picture by holding all WTO member nations to a core of established IP norms.\(^{242}\) Although the long-term effects of TRIPs cannot be conclusively gauged for years, initial evidence indicates that nations around the world are responding to its provisions. This important and overdue

\(^{240}\) As Blakeney notes, "Although it is undeniable that technological growth may be a catalyst for economic development, it is not the sole determinant of that growth." **Blakeney, supra** note 15, at 160. Blakeney provides a critical overview of what he titles "the rhetoric of development" as it relates to technology transfer. **Id.** at 157-66. Yet despite clear costs and challenges to developing countries, "seen over the longer term the positive effects of technology transfer can be identified. Industrialisation has been occurring in developing countries, sometimes at spectacular rates. One effect of this has been that developing countries are enjoying an increasing share of world trade." **Id.** at 162.

\(^{241}\) See generally **Braga, supra** note 3, at 381 ("TRIPs is the most comprehensive international agreement on intellectual property rights... ").

marriage of trade and IPRs\textsuperscript{243} is beginning and will continue to raise competitive conditions that will benefit both developed and developing countries through increased innovation and investment.

\textsuperscript{243} See Sherwood, The TRIPs Agreement, supra note 237, at 493 ("[T]he issue of intellectual property protection has been 'married' to international trade.")).