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# Revisiting the Intellectual Property Dilemma: How Did We Get to a Strong WTO IPR Regime?

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## REVISITING THE INTELLECTUAL PROPERTY DILEMMA: HOW DID WE GET TO A STRONG WTO IPR REGIME?

*Julien Chaisse<sup>†</sup> & Xinjie Luan<sup>‡</sup>*

*The increasingly robust protection of Intellectual Property Rights (“IPRs”) worldwide stems from the ever-increasing importance of IP-intensive industries in international environments. However, IPR protection and enforcement are bound both by national and international IPR-related laws, policies, and practices. Since the development of the United States’ IPR system, there has been a dramatic transformation of IPR-protection modalities, from a soft one based on “monopoly phobia” to a strong one in the absolute sense. The United States has made it its aim to strong-arm the negotiations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) provisions to obtain strong IPR protection. As for many other World Trade Organization (“WTO”) Members, attending the multilateral IPR negotiations and then accepting the negotiating results have seemingly become a strategic choice to circumvent the United States’ unilateral actions against IPR violations. Considering the onerousness of the Doha Round Agenda, it will be significant if future TRIPS reforms will avoid the dilemma caused by focusing obsessively on strong IPR protection and enforcement.*

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## INTRODUCTION

Intellectual properties (“IPs”) or intellectual property rights (“IPRs”) have considerable economic and legal importance in international trade. IP-intensive imports and exports, IP royalties and license fees, IP-related content downloads, and cross-board deliveries demonstrate the significance of IPRs.<sup>1</sup> In retrospect, there are two major policy types of IPR protection and enforcement—i.e., the strong one and the weak one. What should be mentioned is that, to some extent, the so-called “weak” protection of IPRs concerns sometimes “could not” but not “would not”. In other words, weak IP protection is a systemic imperfection of IP protection and enforcement in certain members of the World Trade Organization (“WTO”)—e.g., the Least Developed Countries (“LDCs”) sourcing from their lower levels of economic and social development, rather than an intentional policy alternative.<sup>2</sup>

Without contradiction, legal culture should be an integral part of the whole ethical culture. In the patent context under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”),

1. Trade Policy Review Body, *Trade Policy Review*, WTO Doc. WT/TPR/S/307/Rev.1, at 88 (Mar. 13, 2015) [hereinafter *Trade Policy Review*].

2. *Intellectual Property: Balancing Incentives with Competitive Access*, in 12 GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 129 (World Bank 2002).

established in the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (“GATT”) (namely, the forerunner of the WTO),<sup>3</sup> we can read between the lines that patent protection is one of the outstanding objectives under the TRIPS. Part III, which is entitled “Enforcement of Intellectual Property Rights,” sets forth the general obligations for IPR enforcement. Article 41 thereof reads:

Members shall ensure that enforcement procedures as specified in this Part are available under their law *so as to permit effective action against any act of infringement of intellectual property rights* covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.<sup>4</sup>

Apparently, the “protection” is the core of the cultural ethics of the current international intellectual property system. Of these general obligations that the WTO members must assume, the first and foremost concern is to protect IPRs, whereas boosting transfer of the patent technology and follow-up innovation is not specifically mentioned in Part III of TRIPS.<sup>5</sup> Moreover, “economics is simply too blunt a tool”<sup>6</sup> to discipline the most appropriate scope and boundary of IPR protection, and the blockage being solely based on a financial stake is no better than balancing the pros and cons of all situations as far as IPR benefits are concerned. Innovation and development are no doubt the contemporary common focus of WTO members, but it must be stressed that intellectual monopoly with excessive IP protection would also retard innovation and development.<sup>7</sup> Determining the most suitable levels of IPR protection is a complex and comprehensive issue, rather than a single and simple economic one.<sup>8</sup> In fact, through the discussion

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3. Catherine Field, *Negotiating for the United States*, in THE MAKING OF THE TRIPS AGREEMENT – PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 130 (2015), <http://bit.do/field-negotiating-for-US>. On the ongoing WTO negotiations, see generally Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9 (2013).

4. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 41, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 318 (1994) (emphasis added) [hereinafter TRIPS].

5. TRIPS, *supra* note 4, arts. 41-61.

6. Alfred Yen, *Restoring Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. REV. 517, 539 (1990).

7. Richard A. Spinello, *A Case for Intellectual Property Rights*, 13 J. ETHICS INFO. TECH. 277, 281 (2011) (reviewing MICHELE BOLDRIN & DAVID LEVINE, AGAINST INTELLECTUAL MONOPOLY (2010)).

8. For an interesting discussion of the complexity in finding “legislative balance,” see

in Section II.A about the developing history of the United States' IP regime, both strong and weak IPR protection regimes can be used in combination as a primary governmental guideline and exist in reciprocal dependence.

In this Article, Section I discusses how the United States has gradually corrected the mode of strong IPR protection and led global engagement on hard IPR protection issues, including through its own trade policy tools and multilateral structure—e.g., the negotiation on TRIPS and the Dispute Settlement Mechanism (“DSM”) under the Understanding of Rules and Procedures Governing the Settlement of Disputes (“DSU”). Section II addresses whether a singular choice of a strong or weak IPR protection mode involves a dilemma. The answer thereto would be “No!” had no external pressure been exerted by, for example, the United States. Lastly, Section III concludes with a summary account and discloses that IPR protection is complex and cannot be settled in a single, simple fashion. Certainly, it is instrumental to review international IPR systems in a less arbitrary manner to achieve a significant breakthrough concerning future TRIPS reform, in view of a cautionary tale of repeatedly extended deadlines for acceptance of the Protocol Amending the TRIPS Agreement.

#### I. STRONG IPR PROTECTION: WHO BUT THE UNITED STATES CAN LEAD IT?

It is well known that IPR protection and enforcement have long been considered a central part of the United States' IP-intensive economy and of its imports and exports markets.<sup>9</sup> The action mode of strong IP protection and enforcement in the United States had been applied, on the one hand, through its trade policy tools, especially the Special 301; and, on the other hand, through internationally multilateral regimes, including the DSM of the WTO.<sup>10</sup>

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Bryan Druzin, *Restraining the Hand of Law: A Conceptual Framework to Shrink the Size of Law*, 117 W. VA. L. REV. 59 (2014) (positing a model to help policymakers find the correct balance between regulatory over-invasiveness and insufficient regulation).

9. Trade Policy Review Body, *supra* note 1, at 36.

10. U.S. INTELL. PROP. ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT (June 2013), <http://bit.do/IPEC-2013>.

*A. Strong IP Protection Through Trade Policy Tools*

In fact, treating the IPR protection as the keynote of IP regimes, and therefore fostering IP protection, has existed since the United States' founding in 1776.<sup>11</sup> The U.S. Constitution was written in 1787, ratified in 1788, and has formally operated since 1789.<sup>12</sup> Section 8 of Article I of the U.S. Constitution sets forth in part that “[t]he Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>13</sup> Simply stated, this clause stipulates copyright and patent of authors and inventors shall be protected by the U.S. laws. Pursuant to which, the first patent and copyright acts of the United States were in force as of 1790.<sup>14</sup> It is worth noting that, in 1777, the slogan “To Counterfeit is DEATH” was printed on the Pennsylvania three pence bill, which may represent the world’s shortest anti-counterfeiting declaration.<sup>15</sup> In fact, currency counterfeiting is considered a special kind of piracy.

When viewed as a whole, the gradual fade of weak IP protection stemming from “monopoly phobia”<sup>16</sup> in the United States took place by the end of the 1970s. The phenomenon was contributed to numerous research- and development-intensive technological breakthroughs or IP-based innovations. The IP system had become an integral part of the United States’ innovation policy framework by that time.

After the 1970s, strengthening the protection of IPR has gradually occupied a dominant position in IP-related bilateral and multilateral negotiations, and furthermore, there arose a kind of power or influence culture based on the so-called law of the jungle.<sup>17</sup> Enactment of the Leahy-Smith America Invents Act (“AIA”), as of September 9, 2011, promoted the most significant regulatory and administrative reforms of the last sixty years of U.S. patent protection and enforcement.<sup>18</sup> The U.S. Patent and Trademark Office (“USPTO”) asserted in an apparent,

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11. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

12. *The Day The Constitution Was Ratified*, NAT’L CONST. CTR. (June 21, 2017), <http://bit.do/thedayconstitutionratified> (last visited Nov. 22, 2017).

13. U.S. CONST. art. I, §8, cl. 8.

14. Patent Act of 1790, ch. 7, 1 Stat. 109; Copyright Act of 1790, 1 Stat. 124.

15. John Dunlap, *Three Pence Bill* (photograph), <http://bit.do/threepence> (last visited Nov. 22, 2017).

16. See Beverly W. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967 (1952).

17. The Oxford Living Dictionary defines Law of the Jungle as “the principle that those who are strong and apply ruthless self-interest will be most successful”. See *Law of the Jungle*, OXFORD LIVING DICTIONARY, <http://bit.do/law-of-the-jungle> (last visited Sept. 30, 2017).

18. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

aggressive manner that AIA implementation also provided “a renewed opportunity to harmonize the international patent system.”<sup>19</sup>

Aiming to lead the world in IP protection and policy, the United States’ IPR acts have been continuously developed, and moreover, there is one great characteristic in these developments—namely, that the scope and content of the United States’ IPR protection have been extended into new fields.

It is well known that traditional IP includes patents, trademarks, copyrights, and trade secrets. But now geographical indications, new plant varieties, layout designs of integrated circuits, software copyrights, data pools, trade dress, logos, and so on are all encompassed by IP protection. In the meantime, creative industries—comprising programme, music, electric publishing, audio-visual, gaming software, and other large amounts of application and entertainment software, and thereby international digital trade delivered via the model of transnational digital downloads over the Internet—have been developed rapidly in recent years. The value of royalties and licensing fees which the United States has obtained therefrom increased from \$98 billion in 2009 to \$130 billion in 2013.<sup>20</sup> Moreover, the United States maintained a huge IP-related trade surplus in 2012 and 2013, \$84 billion and \$88 billion, respectively.<sup>21</sup> The United States now has a dominant position in these industries and trades, and yet it clearly and incisively criticizes internet piracy as being “the single most important barrier to digital trade.”<sup>22</sup> The United States considers it to be a serious problem and imposes on itself the central task of strengthening the protection of electrical IPR in accordance with the ever-increasing importance of these new economic and trade patterns.

In the meantime, issues like anti-dilution, anti-counterfeiting, and geographical indications outreaching rights are developed to be independent legislations or to become new topics of international multilateral IPR negotiations organized by the IPR Committee of the WTO. Thus, the persistent, broad terms of reference of the United States’ IP system makes the system *per se* more complex than ever before. In the modern, competitive, and sophisticated economy, a stable and organically-organized IPR system will undoubtedly help consumers reduce search costs and discover the specific products

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19. *Global Impacts of the AIA*, USPTO, <http://bit.do/uspto-global-impacts> (last visited Sept. 27, 2017).

20. Trade Policy Review, *supra* note 1.

21. *Id.* at 89.

22. *Id.* at 90.

which meet their personal preferences or demands. In this respect, it is well recognized that an IP with prestige in the marketplace must be protected against any misuse by others, which would otherwise undermine its distinction and further increase the likelihood of confusion.

Consequently, the anti-dilution significance relating to the famous IPR protection has increased over time. The Federal Dilution Act, which came into effect in 1996, and the Anti-Counterfeiting Trade Agreement (“ACTA”)<sup>23</sup>—signed in October 2011 by eight members including Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States—are two examples developing from a special concern about a specific law or agreement. The ACTA “reportedly does not require any statutory changes to U.S. law”.<sup>24</sup> This further shows that the relatively mature IPR system of the United States plays a leading and exemplary role in the development of international IPR rules, even though the outlook of ACTA is uncertain and has not yet been in force to date.

The strong protection of IPRs, say, putting special emphasis on the inventor’s or the owner’s interest protection from anti-counterfeiting and piracy, has been taken into prior account under the U.S. IPR system. Also, in this circumstance, the IPR system in the developed country members of the WTO has increasingly been treated as a powerful instrument for encouraging innovation and invention.

For instance, in response to growing demands for license content, Spain set up its own patent system for pharmaceuticals in 1992.<sup>25</sup> In contrast, pharmaceuticals were not incorporated into the Canadian patent system until 1993.<sup>26</sup> For the sake of strengthening the United States’ IPR protection as from the 1970s, the wording “IP protection” or “protect IPRs” has gradually lodged itself into the public consciousness at the international level.

It is also well known that legal culture is an indispensable and integrative part of American culture, and a complicated system of laws

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23. ACTA is an international plurilateral agreement combating the infringement of intellectual property rights, counterfeiting, and piracy. It includes provisions on the IPR enforcement, especially on civil, criminal, border, and digital environment enforcement measures. See European Commission Press Release IP/10/1504, Joint Statement on the Anti-Counterfeiting Trade Agreement (ACTA) from All the Negotiating Partners of the Agreement (Nov. 15, 2010).

24. Trade Policy Review, *supra* note 1, at 36.

25. See Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT’L ECON. L. 51 (2012). See also Harvey E. Bale, *Patent Protection For Pharmaceuticals: A Platform For Investment, Markets And Improved Health In The Americas*, <http://bit.do/patentprotectionforpharma> (last visited Nov. 22, 2017).

26. Bale, *supra* note 25.



affects everyday life in the United States.<sup>27</sup> Based on the sheer economic and trading scales, along with the size of U.S. domestic market, the American legal culture carries weight on a global scale (either as deterrence or influence). The well-established IPR regimes of the United States form a forceful basis for its own policy output of strengthening IPR protection. With the start of the Uruguay Round negotiations, it was a highly suitable time for considering the IP protection problem on a multilateral scale.

### *B. Strong IP Protection Through Multilateral Regimes*

Invention, innovation, creativity, and branding—which are reflected by means of international registration and the transfer or authorizations for use of specific IPs—represent a large amount of economic value. This is supported by the fact that international royalties and licensing fees for IP-trade reached approximately \$300 billion in 2014.<sup>28</sup> In view of both the IP economic value and all the participants' varied requests in the course of negotiations on the TRIPS draft, the TRIPS final draft unavoidably covers provisions and disciplines linked to conflicting factors—such as grounds for issuing a compulsory license, improved IPR protection and enforcement, safeguards against unilateral sanctions for infringement of IPRs, market access of IP-based goods, promoting transfer of technology with patent licensing, etc.<sup>29</sup> The international community has also been keenly focused on these issues and, in particular, on IPR protection and compulsory licensing.

Different WTO members targeted three concerns in the TRIPS' preamble:

- i) reducing “distortions and impediments to international trade”;<sup>30</sup>
- ii) promoting “effective and adequate protection of intellectual property rights”;<sup>31</sup> and
- iii) ensuring that “measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”<sup>32</sup>

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27. Many of the U.S. government's own laws affect and restrict its own actions.

28. *TRIPS Agreement: Changing The Face Of IP Trade And Policy-Making*, at 8 (2015), <http://bit.do/changing-face-ip-trade>.

29. DANIEL J. GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 24-25 (2d ed. 2003).

30. TRIPS, *supra* note 4, at pmb1.

31. *Id.*

32. *Id.*

The latter two, which meant strengthening the protection and preventing the abuse of IPRs, have developed simultaneously with the accepted opinion about “compromises with regard to achieving various objectives.”<sup>33</sup> However, there is no indication of which concern is of primary importance. Even the first target alludes to compromise, but keeps silent about it. In other words, the mutually contradictory measures both for protecting and preventing the abuse of IPR help to reduce distortions and impediments to international trade. Therefore, two seemingly simple *de lege* but complex *de facto* issues arise. Firstly, which of the targets between protecting and preventing the abuse of IPR should be paramount since all original participants in the TRIPS negotiations need to benefit from something in the IP package? Secondly, how should a pragmatic balance of these two tenets for protecting or preventing the abuse of IPR be maintained to promote international trade?

As stated above, the United States’ IPR protection and enforcement regimes are among the world’s most systematic and effective, and therefore special international attention has been paid to the United States’ strong protection of IPRs. At present, it is no exaggeration to say that the United States is in the vanguard of international protection and enforcement of IPRs. With its technological leadership, the United States’ IP-intensive industries have, since the 1980s, been the backbone of its national economy, and therefore its IP-intensive industries would be subject to material injury unless strong multilateral mechanisms for IP protection and enforcement are established.

Although compromise, concession, and flexibility are, to a limited extent, relevant in the context of the different international negotiations and consultations, strengthening the protection of IPRs was both the starting point and the ultimate aim during the United States’ participation in the TRIPS negotiations.<sup>34</sup> In the TRIPS negotiations, an essential requirement of the United States was that access to the U.S. market depended on whether the exporting country had provided effective and adequate protection of IPRs.<sup>35</sup> Naturally, this requirement was based on the United States’ own domestic IP-related acts. Here, we take the Special 301 under the Omnibus Trade and Competitiveness Act of 1988 (“the Special 301”) as an example.

The Special 301 Report identifies those countries that “deny adequate and effective protection for intellectual property rights or

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33. Field, *supra* note 3.

34. *Id.*

35. *Id.* at 133-34.

deny fair and equitable market access to U.S. persons who rely on intellectual property protection.”<sup>36</sup> Specifically, it focuses on monitoring trademarks, including geographical indications (“GI”), counterfeiting and copyright piracy; digital, internet, and broadcast piracy; government use of software; and trademark and domain name disputes.<sup>37</sup> The first Special 301 Report concerning the weakness of some trading partners in IP protection was issued on May 25, 1989.<sup>38</sup> More seriously, the guideline of strong IPR protection and enforcement on bilateral and multilateral bases have thereafter been made perfectly clear, the reasons thereof being declared as follows:

As a result of this extensive review, the [United States Trade Representative (“USTR”)] concluded that no foreign country currently meets every standard for adequate and effective intellectual property protection as set forth in the U.S. proposal on intellectual property tabled in the Uruguay Round.

Thus the USTR has determined that *all countries are eligible for potential priority designation* based on the standards of the U.S. Uruguay Round proposal, because all countries “deny adequate and effective protection of intellectual property rights” within the meaning of the statute.<sup>39</sup>

The United States has fired the shot heard all around the world via the Special 301. In 2013 and 2014, a total of 177 trading partners of the United States were reviewed and 76 thereof were placed on the Priority Watch List and the Watch List, according to the USTR’s 25th annual Special 301 Report.<sup>40</sup> Also, there were 37 and 34 countries identified on the Priority Watch List and the Watch List in 2015 and 2016, respectively.<sup>41</sup> It could be argued that, with the aggressive stance taken by the United States in applying the Special 301 and the Special 301 Out-of-Cycle Review of Notorious Markets,<sup>42</sup> no country can escape

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36. 2016 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing, 81 Fed. Reg. 1,277 (Jan. 11, 2016).

37. *Id.*

38. Press Release, United States Trade Representative, USTR Fact Sheet: “Special 301” On Intellectual Property (May 25, 1989), <http://bit.do/USTRfactsheet> (last visited Nov. 22, 2017).

39. *Id.* at 2 (emphasis added).

40. Trade Policy Review, *supra* note 1, at 99.

41. These trading partners in the Priority Watch List in 2016 Special 301 Report include Algeria, Argentina, Chile, China, India, Indonesia, Kuwait, Russia, Thailand, Ukraine and Venezuela. See generally 2016 U.S. TRADE REPRESENTATIVE SPECIAL 301 REP. 3 (Apr. 2016); Kevin E. Noonan, *U.S. Trade Representative Issues 2017 Special 301 Report*, PATENT DOCS (May 4, 2017), <http://bit.do/Patent-Docs-2017special301rep>.

42. Trade Policy Review, *supra* note 1, at 99.

the USTR's discovery of IPR infringement, even though some aspects, for instance trading retaliation mechanism contained in the Special 301, may be inconsistent with WTO obligations, as analyzed in Section III.B, below.<sup>43</sup>

With the Special 301 being such an effective instrument targeted at closing the links between the U.S. domestic market access for goods and effective IPR regimes in exporting countries, the United States stalwartly pursued its goals and requirements for IP protection and enforcement, evaluated its partners' IP protection regimes, and established whether a country's acts, policies, or practices provided adequate and effective IP protection and enforcement.<sup>44</sup> One fact has been clear—namely, that speeding up the multilateral negotiations of enforcement disciplines on protection of IPRs would be of critical importance for restraining the United States from taking unilateral action against its opponents' IP violations. To be brief, TRIPS “is aimed at preventing unilateral actions.”<sup>45</sup> As a matter of fact, with the application of these unilateral actions against, for instance, Singapore, the Republic of Korea, Brazil, and China,<sup>46</sup> all of which were lately involved in the TRIPS negotiations, the United States effectively improved its negotiating position, and it has become widely recognized that access to the U.S. market for IP-intensive goods will be denied if any country lacks restrictive IPR protection and enforcement under its domestic legal regime.

Of the IPR protection in some developing countries, it may be said that these countries are forced by circumstance to take some part in the TRIPS negotiations, and they had to incorporate strong IP protection into their own IPR laws, policies, and practices. Brazil, for instance, encountered the U.S. unilateral trade sanctions on October 20, 1988, under Section 301 of the Trade Act of 1973, after President Reagan appealed for the launch of a new round of IP-covered multilateral trade negotiations in 1986.<sup>47</sup> With the allegation of an IPR infringement, the United States attempted to, on the one hand, coerce Brazil to strengthen its IPR protection legislation and, on the other,

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43. See also Suzanne Zhou, Challenging the Use of the U.S. Special 301 Procedures Against Developing Country Access to Medicines Policies – Indian Pharmaceutical Patents and the WTO 9 (Sept. 1, 2015) (unpublished manuscript), available at <http://bit.do/Zhou-Challengingtheuse>.

44. Field, *supra* note 3, at 133.

45. Carlos M. Correa, *The TRIPS Agreement: How Much Room for Maneuver?*, 2 J. HUM. DEV. 79, 80 (2001).

46. Field, *supra* note 3, at 132.

47. *Id.*

improve its own negotiating position, above all that related to TRIPS.<sup>48</sup> This seeming coincidence fully proved the United States' intention and objective of strengthening the IPR protection by means of entering into a multilateral IPR agreement (later which came to be TRIPS). The Hobbes doctrine<sup>49</sup> of defense by applying the pressure of absolute sovereignty in U.S. foreign policy was again fully manifested.

The current TRIPS agreement covers the major contents provided in a proposal by the United States in October 1988 on requirements for IPR protection and enforcement.<sup>50</sup> This proposal, together with those subsequently set forth by the European Community ("E.C.") (the predecessor of the European Union ("E.U.")), Japan, Switzerland, and Australia, constitutes the core substantial and structural framework.<sup>51</sup> What is more, one fact should not be neglected in that, seeing a lack of a global footprint for its time, the United States has been playing a leading role in the "Quad" (comprising the United States, Canada, the E.C., and Japan) and "the Friends of Intellectual Property Group" (including the "Quad", Switzerland, and so on) in the history of TRIPS negotiations, after all these countries held similar views and intended to develop a shared set of strict multilateral regimes on IPR protection and enforcement.<sup>52</sup> There have been many examples which prove this. For instance, the E.C. concretely proposed the use of trade sanctions for IP-related breaches at the meeting of December 11, 12, and 14, 1989. These proposals read in part that:

[i]t was therefore necessary to provide for the possibility of meaningful sanctions in cases where other measures had proved insufficient to solve a dispute. The Community proposal therefore suggested that, in conformity with Article XXIII of the General Agreement, such sanctions could include the possible suspension by a contracting party of the

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48. *Id.* at 132-33.

49. Thomas Hobbes (1588–1679) is now regarded worldwide as "one of a handful of truly great political philosophers", who advocated with the social contract method that "we ought to submit to the authority of an absolute—undivided and unlimited—sovereign power." For more details, see Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, STAN. ENCYC. PHIL. (Feb. 25, 2014), <http://bit.do/Lloyd-Hobbes>.

50. Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *Note By the Secretariat: Suggestion By the United States For Achieving the Negotiating Objective – Revision*, WTO Doc. MTN.GNG/NG11/W/14/Rev.1 (Oct. 17, 1988).

51. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Joint Communication from the European Communities, Japan, Switzerland, and the United States*, WTO Doc. IP/C/W/485, at ¶ 4 (Nov. 2, 2006).

52. Peter Drahos, *Global Law Reform and Rent-Seeking: The Case of Intellectual Property*, in 3 *COPYRIGHT LAW: COPYRIGHT IN THE 21ST CENTURY* 43, 54 (Benedict Atkinson & Brian Fitzgerald eds., Routledge 2016).

application of any concession or other obligation under the GATT, as determined to be appropriate by the Contracting Parties.<sup>53</sup>

IP compulsory licenses are another example. Such conditions for enforcing compulsory licenses as “public non-commercial use,” “national emergency,” and “circumstances of extreme urgency” were proposed by, *inter alia*, the United States, the E.C., Japan, and Switzerland.<sup>54</sup> In addition, improving the transparency in deciding whether to grant a compulsory license or not was pursued and was a shared objective of these developed countries.<sup>55</sup> Limitations on the use, scope, duration, and so forth were well established as chief disciplines for the implementation of compulsory licenses. This further identified that IPR “protection” is distinctly a core concept that runs through the whole of the TRIPS negotiations.

Inevitably, there are certain exceptions. For example, an important patent protection principle of first-to-file did not enter the TRIPS agreement only because of the requirement of making a basic change of the ongoing principle of first-to-use in the U.S. patent regime.<sup>56</sup> Exceptions from patentable subject are another example. The E.C., Switzerland, and Japan are three developed members proposing common exceptions from patentable subject matter, and the current TRIPS agreement also explicitly lays down these exceptions in Article 27 (entitled “Patentable Subject Matter”), under Section 5 (entitled “Patent”).<sup>57</sup> However, the United States was not included in the group raising the proposal for the common exceptions. Furthermore, because these exceptions had received overwhelming support, the United States placed great emphasis on preventing the abuse of these exceptions through crafting the negotiated TRIPS text, and this was fully contrary to the E.C.’s, Switzerland’s, and Japan’s support for the exceptions.<sup>58</sup> In any case, when it comes to the IPR issue, the United States’ top priority is to strengthen IPR protection.<sup>59</sup>

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53. Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *Note By the Secretariat: Meeting of Negotiating Group 11, 12, and 14 December 1989*, WTO Doc. MTN.GNG/NG11/17 (Jan. 23, 1990).

54. Field, *supra* note 3, at 143.

55. *Id.*

56. Thomas F. Zuber, *Registering and Enforcing a Foreign Trademark in the U.S.*, IP INT’L: CHINA IP, Mar./Apr. 2009, at 101.

57. TRIPS, *supra* note 4.

58. Field, *supra* note 3, at 141.

59. Richard A. Morford, *Intellectual Property Protection: A United States Priority*, 19 GA. J. INT’L & COMP. L. 336 (1989).

At this point, we can answer the question raised at the outset of this Section: under TRIPS, which is more important between the following—IPR protection or preventing the IPR abuse through compulsory licensing? We respond that the former is more important than the latter. Article 1 of TRIPS, entitled “Nature and Scope of Obligations” provides a more positive answer, which reads in part:

Members may, but shall not be obliged to, implement in their law *more extensive protection than is required* by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall *be free to determine the appropriate method of implementing the provisions* of this Agreement within their own legal system and practice.<sup>60</sup>

As a rule, the word “shall,” as opposed to “may,” legally identifies a compulsory obligation.<sup>61</sup> The special alternatives of “may” or “shall” in Article 15 (entitled “Protectable Subject Matter”) and in Article 16 (entitled “Rights Conferred”) of TRIPS have further demonstrated the nature of strong protection under the TRIPS mechanism. In other words, obtaining trademark status is not limited to the precondition of registration in accordance with the “may” provisions. Reading between the lines, we find that “protection” of the trademark is no doubt the sole tenet *per se*, whether using the word “shall” or “may”.

Article 15 reads in part that:

Where signs are not inherently capable of distinguishing the relevant goods or services, Members *may* make registrability depend on distinctiveness acquired through use.

. . .

Members *may* make registrability depend on use. However, actual use of a trademark *shall* not be a condition for filing an application for registration. An application *shall* not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.<sup>62</sup>

And, Article 16 reads in part that:

The owner of a registered trademark *shall* have the exclusive right to prevent all third parties not having the owner’s

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60. TRIPS, *supra* note 4, at art. 1(1).

61. One example of such alternation can be found in Article 1 of TRIPS: “1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. (...)”. *Id.*

62. TRIPS, *supra* note 4, at art. 15 (emphases added).

consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion *shall* be presumed.<sup>63</sup>

It goes without saying that now the IPRs have been much more closely linked *de jure* with “protection” than with “compulsory license.” This result stemmed from the special preference of the United States and other like-minded countries with a determined IP-protection ideal. Originally, antitrust and competition law is the natural enemy of the monopoly of knowledge or the abuse of IPR, but from the United States’ perspective, the lack of transparency, predictability, and well-accepted standards for applying IPR leaves the U.S. IPR holder “vulnerable.”<sup>64</sup>

This kind of increasingly popular “protectionist” view even has a fundamental impact on the ruling of the WTO dispute settlement body (“DSB”). In *India – Patents (U.S.)*, the Appellate Body actually referred to the above-mentioned three objectives in the TRIPS preamble in its interpretation of Article 70.8(a) of TRIPS, as follows:

The Panel’s interpretation here is consistent also with the object and purpose of the *TRIPS Agreement*. The Agreement takes into account, *inter alia*, “the need to promote effective and adequate protection of intellectual property rights.”<sup>65</sup>

“*Inter alia*” is defined as “among other things” or “especially”.<sup>66</sup> One question remains: why did the Appellate Body circumvent the third target, i.e., the prohibition of the abuse of IPRs or the IP compulsory licensing?

Expressed concisely, the “strong protection” of IPRs has developed along the line of stringent IPR protection and enforcement under the United States’ and other like-minded countries’ guidance. There is no doubt that the implementation of the TRIPS agreement implies that the United States successfully pursued its IP protectionist objective on a multilateral basis. Logically, the TRIPS agreement has helped the United States to “align with international norms” with its Leahy-Smith America Invents Act.<sup>67</sup>

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63. TRIPS, *supra* note 4, at art. 16 (emphases added).

64. *Id.*; Field, *supra* note 3, at 154.

65. Appellate Body, *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R, at ¶ 57 (Dec. 19, 1997) (emphasis original).

66. *Inter alia*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

67. Trade Policy Review, *supra* note 1, at 94.



## II. CONFLICTS BETWEEN STRONG AND SOFT IPR PROTECTION MODES

As far as the conflicts between the strong protection of IPR and the weak one are concerned, we will examine the relationship between the IPR protection and enforcement and the multilateral DSM under the GATT 1994. More specifically, the conflicts in the field of IP-related retaliation and cross-retaliation under the DSM reflect such an international reality that the strong protection and enforcement of IPRs is not the only policy choice.

### A. *Conflicts in the Field of IP-Related Retaliation under the WTO/DSM*

Concerning the issue of IP-related retaliation, there is a very controversial story among the United States, India, and New Zealand.

#### 1. The United States

As mentioned above, the United States strongly favor the link between the U.S. domestic market access for IP-intensive products and the IP-protection conditions in exporting countries.<sup>68</sup> Therefore, the United States strongly adheres to the TRIPS provisions under the DSU, including, *inter alia*, the rules and procedures relating to the suspension of concession or other obligations, e.g., retaliation.

#### 2. India

India has stressed that IP disputes can only be negotiated for settlement rather than for implementing trade retaliation. India even tended to take the same route as that mentioned in the polemical book *Against Intellectual Monopoly*,<sup>69</sup> in which Boldrin and Levine pungently criticized contemporary patent and copyright regimes as “an unnecessary evil” and called for systematic reform.<sup>70</sup> Without intending to advance the IPR dispute settlement matters more generally, India inclined to defend exclusive IPR and to encourage free riding, and thereby encourage the contraction of R&D investments, or, say, have “virtually no research conducted by its pharmaceutical industry after a 1970 law.” India also has weak patent protection,<sup>71</sup> even if there is a well-known opinion that new, follow-up products always

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68. See Section I, *supra*.

69. MICHELE BOLDRIN & DAVID LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (Cambridge Univ. Press 2008).

70. Spinello, *supra* note 7, at 279.

71. *Id.* at 281.

mean significant improvements in quality and immense economic benefits.<sup>72</sup>

### 3. New Zealand

Comparatively, at the time, New Zealand just focused on “floating some ideas that could bridge the differences”<sup>73</sup> and proposed that all the IP-related trade retaliations involving non-compliance with DSB recommendations and rulings should solely be endorsed by the TRIPS Committee, a special deliberating body for IP dispute settlement architecture going beyond the current WTO’s DSM.<sup>74</sup> Getting to the bottom of the proposal raised by New Zealand, one may find that it reflected the very protectionist nature for IPRs, namely, “an *ex ante* incentive for maximizing expression and innovation,”<sup>75</sup> or the proper incentives for creating and inventing<sup>76</sup> within the limitation of IPRs itself as well as its derivative rights and within an ascertained period.

Different from the mode of strong IPR protection implemented in the United States, the soft one like New Zealand’s never overlooked the factors that warrant IPR protection based not only on the public interest in a broad sense but also on maintaining the creative and reputational interests of the IPR holders.<sup>77</sup> The latter interests are also the core pragmatic rewards of the creator’s labor. Actually, in such a global IP-intensive competitive environment, free riding is not sustainable whether *de lege* or *de facto*. Those WTO Members who place emphasis on the soft IP protection (like India) face a common issue—namely, that their IP strategy should be “upgraded” in the future because the moral foundation of strong IPR protection has been pursued by the United States, the E.U., and others who have numerous IP-intensive industries, such that “[e]veryone has the right to the

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72. For discussion of India’s approach to pharmaceutical patents, see Samira Guennif & Julien Chaisse, *Present Stakes Around Patent Political Economy: Legal and Economic Lessons from the Pharmaceutical Patent Rights in India*, 2 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 65 (2007); David K. Tomar, *A Look into the WTO Pharmaceutical Patent Dispute Between the United States and India*, 17 *WIS. INT’L L.J.* 579 (1999).

73. Adrian Macey, *Dispute Settlement in TRIPS: A Two-Edged Sword*, in *THE MAKING OF THE TRIPS AGREEMENT – PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 351, 354 (2015).

74. Macey, *supra* note 73, at 355.

75. Spinello, *supra*, note 7, at 279.

76. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031 (2005).

77. Ministry of Business, Innovation, & Employment, *Copyright and the Creative Sector, New Zealand Government – Study of the Role of Copyright and Registered Designs in the Creative Sector in New Zealand* 4 (Dec. 2016), <http://bit.do/CopyrightCreativeSector>.

protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>78</sup>

*B. Conflicts in the Field of the IP-related Cross-Retaliation under the DSM*

Cross-retaliation under the DSM is a much more threatening weapon. In contrast, cross-retaliation under the DSU is limited to three sectors—namely, goods, services, and IPs, in accordance with Article 22(3) of DSU.<sup>79</sup> Trading retaliation measures based on these three sectors are mutually equivalent and reciprocal. For instance, once cross-retaliation is authorized by the DSB against the U.S. trading restrictions on certain imports, the compulsory licensing of some U.S. patents could also be legally chosen as one of the effective means of retaliation. In other words, the retaliation instrument of IPR limitations could be applied against market access limitations, e.g., an anti-dumping, countervailing, or safeguarding measure. In fact, there is a precedent for this although it is subject to the lack of specific, procedural, and substantial rules—which aim to evaluate the equivalence between the market access forbidding measure and IPRs utilized as retaliation tool—and how to withdraw the IP license benefits because of the opponent’s failure to implement market access obligations under the GATT 1994 and the subsequent DSB arbitration award of non-compliance. Retaliation by way of “goods for IPRs” (“goods–IPRs”) could be deemed to be irrational or even somewhat ludicrous, because most of the WTO members have been accustomed to the “IPRs for goods” (“IPRs-goods”) tit-for-tat mode—not the opposite “goods for IPRs” approach under the United States’ continuous crusade to strengthen IPR protection since the 1970s. More importantly, almost all of the developing country members do not have sufficient, effective, and ingenious IPR resources to carry out goods–IPRs retaliation.<sup>80</sup>

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78. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 27 (Dec. 10, 1948).

79. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT’L ECON. L. 153 (2007); see also Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT’L ECON. L. 9 (2013).

80. Danish, *WTO Dispute Resolution and Cross Retaliation Under TRIPS: Is it Sanctioned Piracy of Intellectual Property?*, 3 WESTMINSTER L. REV. (Oct. 2013), <http://bit.do/Danish-WTODispute>.

It is noteworthy that there are seven categories of IPRs under the current TRIPS. They cover patent, copyright, trademark, geographical indication, industrial design, layout design of integrated circuits, and unclosed information.<sup>81</sup> Therefore, the numerous IP sources will unavoidably complicate the issue of choosing the most suitable IPR retaliation. Assessment of the corresponding amount and duration of IP retaliation as well as identification of the level of the nullification or impairment caused by the original IP infringement are no easy tasks.<sup>82</sup> Further, the retaliation sectors under Article 23(3)(g) of the TRIPS agreement are applied to goods-, services-, and trade-related IPRs. However, even the IPRs–IPRs retaliation itself cannot feasibly be operated within the same TRIPS agreement.<sup>83</sup>

### III. STRONG IPR PROTECTION: A TOUGH NUT TO CRACK

Many problems stem from limitations, and the simple *ex parte* limitation is infeasible. This observation may help to explain the fact that the strong protection of IPRs, as discussed above, has not always been a popular, widely-held position in the whole development process of the U.S. IPR regime. Certain IP-related acts, regulations, or practices—such as the Copyright Term Extension Act (“CTEA”), which by its very nature involves strong protection—are also the disputed ones. According to the CTEA, individual copyright holders are granted an extra 20 years and thus a total of 70 years after their death for the protection for their works.<sup>84</sup> This extension does not certainly stimulate creativity by promoting social justice. It safeguards the legal needs of future creators; it has therefore been criticized because “it has contributed to the copyright thicket that complicates an author’s efforts to use old copyrighted sources in a way that goes beyond the parameters of fair use.”<sup>85</sup>

Moreover, although the U.S. government had made a robust defense of IPRs within its borders, it is obvious that the U.S. policy of strengthening IPR protection measures is a tough nut to crack. The issue of “patent trolls” is a clear example of how strong IPR protection has seriously retarded innovation and creativity. What patent trolls do is purchase the patent rights, especially to license them or to initiate patent infringement claims plainly based on a monetization

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81. See TRIPS, *supra* note 4, at arts. 9-39.

82. Macey, *supra* note 73, at 358.

83. DSU, *supra* note 79.

84. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

85. Spinello, *supra* note 7, at 277.

scheme, without the intent to innovate and create, much less improve social welfare considerations.<sup>86</sup> In this respect, the monopoly sourcing from the exorbitant IPR protection is a “cancer” that needs to be abolished without delay.<sup>87</sup> Lao Tzu (*circa* 571–471 B.C.) said: “[i]f we cease to set store by products that are [tough] to get, there will be no more thieves. If the people never see such things as excite desire, their hearts will remain placid and undisturbed.”<sup>88</sup> It seems therefore that the soft protection of IPR is also a reasonable alternative.<sup>89</sup>

The soft IPR protection herein, which places more emphasis on the protection of the consumers’ or the public’s interests, may be called the balanced development approach of the international IPR system,<sup>90</sup> which is in full compliance with the provisions in the TRIPS agreement. For instance, Section 8 of TRIPS, entitled “Control of Anti-Competitive Practices in Contractual Licences,” takes note of the fact or the possibility that IP licensing practices or conditions restrain competition and thereby produce adverse effects on trade and impede the transfer and dissemination of technology. Article 40(2) of TRIPS further stipulates that:

[a]s provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of

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86. Ian Appel, Joan Farre-Mensa, & Elena Simintzi, *Patent Trolls and Small-Business Employment*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Feb. 28, 2017), <http://bit.do/Appel-PatentTrolls>.

87. Spinello, *supra* note 7, at 278.

88. LAO TZU, TAO TE CHING (Arthur Waley trans., Foreign Language Teaching & Res. Press, 1998).

89. Indeed, under certain circumstances a “soft” regulatory approach may exert substantial force. For a fascinating exploration of “soft” regulation with specific reference to international soft law instruments, see Bryan H. Druzin, *Why Does Soft Law Have Any Power Anyway?*, 7 ASIAN J. INT’L L. 361 (2017) (arguing that network effects can infuse soft law with significant adoption and compliance pull). *See also* Bryan Druzin, *Using Social Norms as a Substitute for Law*, 78 ALB. L. REV. 67 (2016) (examining the possibility of policymakers strategically using prevailing norms to reinforce or replace legislation); Bryan Druzin, *Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law*, 28 BYU J. PUB. L. 373 (2014) (arguing that policymakers can harness the energy of customary ordering to trigger legal order); Bryan H. Druzin, *Towards a Theory of Spontaneous Legal Standardization*, 8 J. INT’L DISP. SETTLEMENT 403 (2016) (positing a theory of bottom-up, decentralized legal ordering).

90. Anne Ardagh, *Intellectual Property Protection and the WTO TRIPS Agreement: Finding a Global Balance as Part of the Doha Round*, in ENGAGEMENT & CHANGE: EXPLORING MANAGEMENT, ECONOMIC AND FINANCE IMPLICATIONS OF A GLOBALIZING ENVIRONMENT 139 (2007).

the Member.<sup>91</sup>

As a *de facto* multilateral guideline on the establishment, implementation, and development of international IP regimes, this provision also specially considers the elimination of the IP barriers of different countries. The “Zhong’yong Zhi Dao”<sup>92</sup> (i.e., “a middle course”) approach in IPR protection is extremely necessary. The viewpoint herein is firmly supported by an argument that “although stronger IPR protection directly increases the incentive to innovate, it also discourages innovation in the long run by suppressing the process of ‘learning by doing.’ . . . This implies that both very strong and very weak IPR policies decrease innovation, so a moderate approach is preferable.”<sup>93</sup>

Furthermore, more challenges arise in overturning the decisions that reflect the WTO members’ broad interests. As is widely known, the WTO commonly makes its decisions by consensus.<sup>94</sup> TRIPS has placed the developing country members in something of a dilemma. Cross-retaliation with potential threat of IPRs–goods mode under the TRIPS is one thing and the United States’ possible bilateral sanction but for the TRIPS agreement is another.<sup>95</sup> Thus, under this proposed “middle course” approach, we can speculate that the TRIPS agreement reached back then would face hurdles at attaining consensus. After all, the developing country members have given greater consideration and effect than ever before to the issues of IPR protection and enforcement.<sup>96</sup>

So far, the acts, policies, and incentives that foster IPR access will become an integral part of the innovation regimes. IPR protection and enforcement might then be crafted so as to reduce barriers while maximizing the positive effects of IPR protection and while minimizing its potentially negative effects. However, strengthening the IPR protection and enforcement has been regarded as a top-level objective of the United States throughout the TRIPS negotiations and especially since the TRIPS agreement came into force. This

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91. TRIPS, *supra* note 4, at art. 40(2).

92. YU-LAN FUNG, A SHORT HISTORY OF CHINESE PHILOSOPHY 172-74 (Derk Bodde ed., The Free Press 1997) (1948).

93. Yuichi Furukawa, *Intellectual Property Protection and Innovation: an Inverted-U Relationship*, 109 ECONS. LETTERS 99 (2010).

94. Marrakesh Agreement Establishing the World Trade Organization art. 9, Apr. 15, 1994, 1867 U.N.T.S. 154, 159-60.

95. Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

96. SHAYERAH ILIAS AKHTAR & IAN F. FERGUSSON, CONG. RESEARCH SERV., RL34292, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE (2014).

observation is further confirmed by the United States' overall strategic goals, including the U.S. Department of Commerce strategic goals for 2014–2018<sup>97</sup> and the strategic plan of the U.S. Patent and Trademark Office.<sup>98</sup> The former focuses on accelerating the growth of innovation-intensive economic sectors and promoting enhanced IP protection abroad while the latter sets out three goals: “optimize patent quality and timeliness, optimize trademark quality and timeliness, and provide domestic and global leadership to improve IP policy protection and enforcement.”<sup>99</sup>

In the future, the United States might eventually bring about its own dilemma when emerging economies, such as China, Brazil, and India—which all frequently appear on the Priority Watch List or the Watch List of annual U.S. Special 301 Reports—become powerful, innovating countries, and these countries mirror their IPR regimes with the United States’.

#### CONCLUSION

The implementation of a strong IP protection mode or a soft one is simply a policy choice. The strong IP protection mode reflects, in a specific manner, national strategies focusing on developing global competition and meeting central demands of creativity and innovation in certain special economic and social developmental phases in the United States. In contrast, juxtapose that mode with the Office of USTR official website headline of “America First Trade Policy”:

The Office of the United States Trade Representative is committed to ensuring that American workers are given a fair shot at competing across the globe. USTR is working to reshape the landscape of trade policy to work for all Americans. On a level playing field, Americans can compete fairly and win. This new America First trade policy will make it more desirable for companies to stay here, create jobs here, pay taxes here, and rebuild our economy. Our workers and the communities that support them will thrive again, as companies compete to set up manufacturing in the U.S., to hire our young people and give them hope and a real shot at prosperity again.<sup>100</sup>

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97. U.S. DEP’T OF COM., AMERICA IS OPEN FOR BUSINESS: STRATEGIC PLAN | FISCAL YEARS 2014–2018, VERSION 1.1 (2014), <http://bit.do/AmericaOpenBusinessF14-18>.

98. U.S. PAT. & TRADEMARK OFFICE, U.S. DEP’T OF COMM., 2014–2018 STRATEGIC PLAN, <http://bit.do/USPTOStrategicPlanF14-18> (last visited Nov. 22, 2017).

99. Trade Policy Review, *supra* note 1, at 93.

100. OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://bit.do/USTR-AmericaFirst> (last visited Jan. 24, 2017).

In the field of IPR protection, the corresponding position was declared in an USTR press release dated December 12, 2016, which reads:

Trademarks, copyright, patents, and trade secrets play a crucial role in America’s global competitiveness. IP-intensive industries directly account for 27.9 million high-paying jobs and indirectly support 17.6 million more. As the Joint Strategic Plan makes clear, the U.S. will continue to pursue high global standards in protection and enforcement of intellectual property rights.<sup>101</sup>

It is apparent that strong IPR protection and enforcement have become Hobson’s choice and must be promoted. In particular, the Trade Facilitation and Trade Enforcement Act of 2015 has been in force since February 24, 2016, and it lists IPR as one of “[t]he priority trade issue” and directs that the Office of the USTR shall now include one presidentially-appointed “Chief Innovation and Intellectual Property Negotiator,” who:

shall . . . conduct trade negotiations and . . . enforce trade agreements with respect to United States intellectual property and . . . take appropriate actions to address acts, policies, and practices of foreign governments that have a significant adverse impact on the value of United States innovation.<sup>102</sup>

In view that this law is designed for promoting a new “America First trade policy” and helps to “compete fairly and win”<sup>103</sup> for the U.S. IP-intensive industries, it will be undoubtedly carried out by the Trump Administration. The strong IPR protection in the United States will open a new chapter.

However, tracing back to the founding of the United States, one can find yet another case. Thomas Jefferson, the principal author of the Declaration of Independence, said in 1813 that:

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement

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101. Press Release, Office of the U.S. Trade Representative, U.S. Trade Representative Welcomes Strategic Plan to Enhance Intellectual Property Protections (2016), <http://bit.do/USTRpressrelease> (emphasis added).

102. Trade Facilitation and Trade Enforcement Act of 2015, § 609, Pub. L. No. 114–125, 130 Stat. 125, 190 (2016) (to be codified at 19 U.S.C. § 2171(c)(6)).

103. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 100.



or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. *Society may give an exclusive right to the profits arising from them*, as an encouragement to men to pursue ideas which may produce utility, *but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.*<sup>104</sup>

Attention should be paid to the use of “may” but not “shall” in the last sentence. With the emergence and development of the American innovation economy, great changes in principle have taken place in its IPR laws, policies, and practices.

In a metaphorical sense, thought is the head of the times. Indeed, where there is a will, there is a way. TRIPS is by any means a very mixed bag filled with an enormous amount of multilateral provisions for strong IPR protection and enforcement stemming from the United States. The deterrent for offenders of IPR compulsory licensing is far less than that of the U.S.’s four swords<sup>105</sup>—the Generalized System of Preference (GSP), Section 301, Special 301, and 337 Investigations—while the spirit linking market access with the conditions of IPR protection and enforcement embodied by the four protecting instruments has been fully incorporated into the TRIPS agreement. Therefore, IPR protection continues to be the strongest point under the current international IPR system.

The formation of the strong protectionist characteristics of the ongoing international IPR regime is rooted in, on the one hand, international pressure from the United States, the E.U., and on the other, developed WTO members, which now have made a robust defense of strengthening IPR protection and enforcement. On the other hand, the internal incentive to pursue technical innovation is supported by invention patents and creative expression in some WTO members. Of course, protecting intellectual property is also a morally-driven notion during the socioeconomic development of different WTO members. Exclusive rights accorded to the owners of IPR are important instruments for guaranteeing the returns on their creative activities. The U.S. preferential objective of IP protection and enforcement reflects the desire for tough disciplinary measures to address IP infringement but, in no case, to encourage the flexibility in setting out the level of protection or compulsory licensing for IPRs.

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104. Letter from Thomas Jefferson to Isaac McPherson in 6 THE PAPERS OF THOMAS JEFFERSON: 11 MARCH TO 27 NOVEMBER 1813 379 (J. Jefferson Looney ed., Princeton Univ. Press 2009), available at <http://bit.do/Jefferson-McPhersonLetter> (emphasis added).

105. See The Year in Trade 2011: Operation of the Trade Agreements Program, 63rd Report, USITC Pub. 4336 (July 2012).

What should be mentioned is that Canada is a member of both the “Quad” advocating strong IPR protection and “the Friends of Intellectual Property Group” in the process of TRIPS negotiation, as mentioned above in Section II.B. This indicates that Canada has been playing the same central role as the United States in facilitating the IPR multilateral protection. Unfortunately, the Office of the USTR always designates Canada as a Priority Foreign Country (“PFC”), and has continuously placed Canada on the Priority Watch List (2009–2012) or the Watch List (2002–2008, 2013–2016) in the Special 301 Report since 2002.<sup>106</sup> This is an astonishing fact, considering that the Special 301 Report is “the result of an extensive multi-stakeholder process”<sup>107</sup> “following extensive research and analysis”<sup>108</sup> and only a country having “the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant U.S. products”<sup>109</sup> can be named as a PFC and qualified as a trading partner taking a position on the Priority Watch List or the Watch List. It therefore seems that the U.S.’s strong IPR protection system is harsh enough. As far as most less-advanced country members of the WTO are concerned, their own IPR protection and enforcement regime still has a long way to go to be in consonance with the U.S. requirement of providing “high levels of protection.”

Bob Dylan, an American singer-songwriter who was awarded the 2016 Nobel Prize in Literature,<sup>110</sup> wrote a thought-provoking song entitled “Blowing in the Wind.” The first two lines of its lyrics read as follows: “How many roads must a man walk down before you call him a man? How many seas must a white dove sail before she sleeps in the sand?”

If these two questions were asked in the IPR-related context, the answer would be: when the leading country has been finally successful in catching up with its destined target in view of current global unbalanced innovation infrastructure and economic development. Anyway, it is rational to conclude that “a country’s IPR regime likely coevolves with its economy” and that “countries try to alter their IPR regime in response to changing needs.”<sup>111</sup> Whether the IPR regime is

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106. See generally 2002-2013 U.S. TRADE REPRESENTATIVE SPECIAL 301 REPS. (2002-2013).

107. 2016 U.S. TRADE REPRESENTATIVE SPECIAL 301 REP. 1 (Apr. 2016).

108. *Id.* at 3.

109. *Id.* at 1.

110. Laura Smith-Spark, *Bob Dylan wins 2016 Nobel Prize for Literature*, CNN (October 13, 2016), <http://bit.do/CNN-Bob-Dylan>.

111. Hiroyuki Odagiri et al., *Introduction to INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP AN INTERNATIONAL COMPARATIVE STUDY* 12 (Hiroyuki

perfect or not does not depend on the purpose and objective expressed with such ambiguous wordings as “adequate and effective,” “fair and equitable,” or “having adverse effects on trade or competition,” but on its acceptable degree in practice. Seeing the laborious progress of the Doha Round Agenda over a long period of time,<sup>112</sup> it will be of exemplary significance if the current TRIPS reforms will escape the dilemma which focuses on strong IPR protection and enforcement.

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Odagiri et al. eds., 2010).

112. Frank Altemöller, *A Future for Multilateralism? New Regionalism, Counter-Multilateralism and Perspectives for the World Trade System after the Bali Ministerial Conference*, 10 GLOBAL TRADE & CUSTOMS J. 42 (2015).