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Trade and Innovation: Unilateralism v. Multilateralism¹

John Gero*
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I. INTRODUCTION

In the realm of international trade, the United States has long been committed to the principles of multilateralism and non-discrimination in its pursuit of a more liberal international trading system. This commitment, however, sprang a few leaks in the 1970s, and began to really flounder in the 1980s. A perception was created that the main causes of the U.S. trade deficit were foreign industrial policies and trade barriers. From those who believed that U.S. commitment to multilateral principles had left the U.S. market more open than that of its trading partners, there were calls for unilateral action to "level the playing field."

Starting with the Trade Act of 1974,² as a response to the calls for action, successive U.S. Administrations and Congresses crafted a series of new trade weapons. Whether "ordinary," "special," or "super," these measures were unilateral in nature and bore their original legislative number: section 301.

Described in the past by a United States Trade Representative (USTR) as a favorite "crowbar" to pry open foreign markets and, somewhat more ominously, as the "H Bomb of Trade Policy,"³ these provisions have become the trade weapon dearest to Congress, and the ones most reviled by foreign countries. From an American perspective, the purpose of this trade instrument was to create a credible threat of retaliation to convince U.S. trading partners to enter into, and to comply with, trade liberalizing agreements with the United States, as well as to provide a private access remedy to Americans who felt the negative effects of alleged foreign trade barriers.⁴

Not surprisingly, American use of these measures has attracted a barrage of negative international reaction, and the legislation which

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² Trade Act of 1974, Pub. L. No. 93-618, 19 U.S.C. § 2101-2487 (1974).

³ Judith H. Bello, *Section 301: The United States' Response to Latin American Trade Barriers Involving Intellectual Property*, 21 INTER-AM. L. REV. 495, 495 (1989-90).

⁴ *Id.* at 497.

gave birth to these provisions has been described thus:

[T]here is no greater symbol of the perverse nonsense present in Congressional discussions in the past two years than in . . . Super 301 . . . [by which] we will force other countries to the negotiating table on the basis of unilaterally defined unfair trade practices. They must agree to change those practices within a three year period or face retaliation on [the] part of the United States. We are defining what constitutes an unfair trade practice, the time for its elimination, and the retaliation if our demands are not met.⁵

Of particular distaste to the international community was the self-appointed authority of the United States to unilaterally retaliate in response to foreign trade practices, which it deemed to be "unfair," regardless of whether they violate any international agreements. The United States' resort to such tools has been termed "aggressive unilateralism."⁶ Of course, the double entendre of the term "aggressive unilateralism" refers both to the unilateral decision of the United States regarding what is "unfair," and the subsequent unilateral demand for trade concessions to rectify the "cheating."⁷

Perhaps the most interesting area for debate between unilateralist and multilateralist trade policy advocates has been in the area of innovation, more particularly, intellectual property protection. During the past decade, international negotiations have featured both approaches.

II. THE INTELLECTUAL PROPERTY DILEMMA

During the late 1970s, as the technological revolution made it easier to reproduce a variety of proprietary products, countries began to focus more directly on intellectual property protection. Although international disciplines in this area had been around for a century, discussions on intellectual property protection had been more theological than economic. Attempts to ameliorate the situation in the 1970s continued to be centered on changing existing international intellectual property conventions. However, due to the lack of success of negotiations in those fora, and the absence of a workable dispute settlement mechanism in the existing agreements, by the end of that decade, countries started to link trade and intellectual property. The United States, the European Community, and Japan even attempted to include an agreement on trade in counterfeit goods in the Tokyo Round negotiations of the General Agreement on Tariffs and Trade (GATT), but were not

⁵ Claude E. Barfield, *Services, Intellectual Property and the Major Issues of the Uruguay Round*, 19 GA. J. INT'L & COMP. L. 307, 311 (1989).

⁶ See AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADE SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

⁷ THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 19 (1994).

successful.

The early 1980s saw renewed efforts within the Organization for Economic Cooperation and Development (the OECD) to delineate the issues involved in trade in high-technology products. This effort helped to clarify some of the issues. By the mid-1980s, the protection of intellectual property rights had increasingly become a focus of discussions on barriers to international trade, particularly in the United States, where exports of products containing intellectual property had reached significant levels. Problems with respect to inadequate or unenforced intellectual property regimes were reflected in losses to U.S. industry. These losses were real, but difficult to quantify. The U.S. International Trade Commission estimated that in 1986, intellectual property piracy of U.S. commodities resulted in sales losses to U.S. companies of forty-three to sixty-one billion dollars.⁸ This became a widely quoted figure despite the recognized methodological problems of the study.

Although there was a general consensus among developed states that protection of international intellectual property rights should be a primary concern of policy makers in order to encourage innovation and maintain competitiveness in global markets, there continued to be significant philosophical differences with developing countries with respect to the fundamental nature of intellectual property rights. The latter more frequently viewed the issue in terms of economic policy questions, rather than as a fundamental right equivalent to those accorded physical property. For these developing nations, the rights granted by extensive intellectual property laws created monopolies on advanced technology which resulted in high prices and limitations on the applications of the technology. From their perspective, limited protection of intellectual property rights rendered the knowledge available to all at a minimum cost.

In all countries, national decisions with respect to the proper level of intellectual property rights involve a delicate balance between society's interest in promoting innovation, in gaining access to technology, and in protecting the rights of creators and inventors, on the one hand, and the overall social benefits to be derived from the rapid spread of new ideas, technology, and products, on the other. Given the difficulty of achieving such a balance within a particular country, it is not surprising that the problem is greatly amplified in the context of international negotiations. Generally speaking, there is a continuum of national policy regimes which reflect a nation's level of economic development, and their advantage in innovative and artistic products. Therefore, a difference of positions based on the economic interests of countries which import intellectual property and those which export it

⁸ Judith H. Bello & Alan F. Holmer, *Special 301: Its Requirements, Implementation, and Significance*, 13 *FORDHAM INT'L L.J.* 259, 260 (1989-90).

is inevitable.

Moreover, it has not escaped the notice of some developing countries that the intellectual property protection proposed by many of the OECD countries differs significantly from that pursued earlier by the same countries.⁹ For example, in the early days of steam engine technology, Britain had intellectual property-type provisions which forbade the export of engines, parts, and skilled personnel, yet the United States imported all three regardless of the prohibition. As noted by one commentator: "The decision was made in the U.S. that at that stage of economic development, the best policy for the U.S. was lax enforcement of foreign intellectual property."¹⁰

III. THE UNILATERAL APPROACH

A. *Special 301*

Although ordinary section 301 could be used in intellectual property cases, for example the Brazilian pharmaceutical case of 1987, it was felt that a more focussed instrument was needed. Special 301 was born in the Omnibus Trade and Competitiveness Act of 1988¹¹ (1988 Trade Act). The stated objective of Special 301 was to "seek enactment and effective enforcement by foreign countries of laws which recognize and adequately protect intellectual property."¹² Rather than awaiting the results of the Uruguay Round of multilateral trade negotiations (MTN), Special 301 was designed to use the threat of unilateral U.S. trade retaliation to "persuade" trading partners to reform intellectual property practices which the United States found deficient.¹³ Special 301 was, and continues to be, based on the assumption that the United States could use threats and negotiation to obtain meaningful changes in the intellectual property regimes of its trading partners.¹⁴

Under its terms, within thirty days of the publication of the National Trade Estimate Report, an annual report in which the USTR must, *inter alia*, identify significant foreign trade barriers and distortions, Special 301 requires the USTR to identify the foreign countries which "deny adequate and effective protection of intellectual property rights,"¹⁵ or "deny fair and equitable market access to United States

⁹ Peter Gakunu, *Intellectual Property: Perspective of the Developing World*, 19 GA. J. INT'L & COMP. L. 358, 361 (1989).

¹⁰ Robert P. Merges, *Battle of Lateralisms: Intellectual Property and Trade*, 8 B. U. INT'L L. J. 239, 245 (1990).

¹¹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified in sections throughout 19 U.S.C.).

¹² 19 U.S.C. § 2901 (10) (1994).

¹³ Bello & Holmer, *supra* note 8, at 259.

¹⁴ Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L. 284, 287-90 (1989).

¹⁵ 19 U.S.C. § 2242 (a)(1)(A) (1974).

persons who rely upon intellectual property protection.”¹⁶ The USTR (in consultation with other appropriate government officials) must also designate as “priority foreign countries” those countries (i) whose acts, practices or policies are the most onerous or egregious and have the greatest adverse economic impact on the U.S.,¹⁷ and (ii) which are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to adequately and effectively protect intellectual property rights.¹⁸

The USTR may add or remove countries from the priority foreign country list at any time.¹⁹ Within thirty days of the “priority foreign country” designations, Special 301 requires the USTR to initiate investigations into those countries’ acts, practices, or policies.²⁰ However, the USTR is not required to initiate an investigation if it would be detrimental to American economic interests.²¹ At the same time as the initiation of the investigation, the USTR must request consultations on the issues involved with the foreign country.²² The investigations, and any bilateral solutions sought with the target country, must be completed within six months, although three additional months are available if the issues are complex or if substantial progress with the country is being made.²³ Finally, the USTR is authorized, but not required, to unilaterally retaliate by imposing certain measures including suspension of concessions under a trade agreement, duty increases, or import restrictions on target countries which do not cease the offending acts, practices, or policies.²⁴ Note that the USTR has substantial discretion with respect to a number of the steps in this process.

Amendments have been made to Special 301 as a consequence of multilateral agreements entered into by the U.S. Section 513 of the U.S. North American Free Trade Agreement (NAFTA) Implementation Act²⁵ amended Special 301, adding an additional ground for the USTR to potentially identify a priority foreign country. Pursuant to the Uruguay Round Agreements Act (URAA),²⁶ the Special 301 timetable was amended in order to bring it into conformity with U.S. obligations under the World Trade Organization (WTO). Specifically, the Special 301 time limits were amended to provide for longer time peri-

¹⁶ 19 U.S.C. § 2242 (a)(1)(B) (1974).

¹⁷ 19 U.S.C. § 2242 (b)(1)(A) & (B) (1974).

¹⁸ 19 U.S.C. § 2242 (b)(1)(C) (1974).

¹⁹ 19 U.S.C. § 2242 (c)(1)(A) & (B) (1974).

²⁰ 19 U.S.C. § 2412 (b)(2)(A) (1974).

²¹ 19 U.S.C. § 2412 (b)(2)(B) (1974).

²² 19 U.S.C. § 2413(a)(1) (1974).

²³ 19 U.S.C. § 2414 (a)(3)(A) & (B) (1974).

²⁴ 19 U.S.C. § 2411(c) (1974).

²⁵ North American Free Trade Agreement Implementation Act, Pub. L. No. 103-82, 107 Stat. 2057 (1993).

²⁶ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, § 314 (1994).

ods to complete investigations and determinations, but with respect to matters involving the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) only, since the United States is required to seek resolution of disputes covered by WTO provisions through the WTO dispute settlement mechanism prior to taking action under section 301.²⁷

B. Some Case Studies

1. Brazil

In 1987, the United States initiated a section 301 action in response to complaints that Brazil's failure to provide patent protection to pharmaceutical products and processes encouraged piracy, and was costing the U.S. pharmaceutical industry millions of dollars every year in lost sales. The move was part of a broader effort by the United States to crack down on countries which had weak protection for intellectual property rights. Brazil was investigated at the petition of the American Pharmaceutical Manufacturers Association.²⁸

Brazil initially refused to negotiate with the United States under the shadow of a section 301 threat of retaliation. The United States responded in October of 1988 by imposing one hundred percent tariffs against certain Brazilian imports worth thirty-nine million dollars.²⁹ Brazil complained to the GATT, charging that the U.S. retaliation violated its international obligations under Article II.³⁰ Although the U.S. retaliation was clearly illegal under GATT, and was widely condemned by GATT members, the United States repeatedly blocked the establishment of a panel to hear Brazil's complaint.

In May of 1989, the USTR designated Brazil a Super 301 priority foreign country for its quantitative import restrictions, but, again, Brazil denounced the U.S. decision and refused to negotiate. In June of 1990, the United States removed the sanctions, and Brazil withdrew its GATT complaint. These moves came after the election in March of 1990 of a new, more reform-minded president, who agreed to introduce intellectual property rights legislation.

There remained strong opposition to patent protection in Brazil from powerful legislators and the domestic pharmaceutical industry, however, and Brazil failed to enact patent protection legislation acceptable to the United States. The USTR declared Brazil a priority foreign country in April of 1993, a Special 301 investigation was launched a month later, and the deadline was extended in November of 1993. Af-

²⁷ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, §§ 314(d) & 341(a) (1994).

²⁸ BAYARD & ELLIOTT, *supra* note 7, at 187.

²⁹ *Id.*

³⁰ Bello, *supra* note 3, at 502-36.

ter further negotiations, the USTR withdrew its threat of retaliation days before the deadline in February of 1994, upon a promise by Brazil to enact patent protection legislation by June 1994.³¹ The new legislation has, to date, still not been passed, and the United States intended to re-examine the issue during the April 1995 Special 301 review.³²

The case against Brazil has now been pending for eight years, with no end immediately in sight. It has been noted that: "This pattern of repeated U.S. threats and unfulfilled foreign promises over long periods is quite common in intellectual property negotiations. . . . IPR [intellectual property rights] disputes are especially difficult to resolve because they often involve a sharp conflict of interests between the United States and the target country."³³ Intellectual property disputes continue for lengthy periods since it takes a long time to deal effectively with deeply rooted structural or regulatory differences among countries.

The Brazil pharmaceutical case also underlines the limitations which section 301 has in dealing with practices which the United States finds objectionable where the practices have strong political support in the target country. Perhaps its clearest lesson, though, is that even with highly credible threats of unilateral retaliation, "it is exceedingly time-consuming and difficult to achieve effective intellectual property rights protection in developing countries in which powerful groups oppose it."³⁴ The contribution which the threats of retaliation made toward resolving the dispute with Brazil were modest at best, in that they elicited two promises, but no results.

2. China

China, seen by the United States as one of the worst copyright offenders, was thought by some to have acknowledged U.S. demands for intellectual property protection after being placed on the Special 301 priority watch list in 1989 and 1990, then named as a priority foreign country in 1991. Touted as an early success of Special 301, China agreed to, and did, enact copyright laws to protect computer software, and amend its patent law.³⁵ However, despite claims of success on the part of the United States, it has become painfully evident to American industry and negotiators that China has made changes to its intellectual property regime in form, but not in substance.

³¹ BAYARD & ELLIOTT, *supra* note 7, at 187.

³² UNITED STATES TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT (Mar., 1995).

³³ BAYARD & ELLIOTT, *supra* note 7, at 188.

³⁴ *Id.* at 200.

³⁵ Brian Mark Berliner, *Making Intellectual Property Pirates Walk the Plank: Using Special 301 to Protect the United States' Rights*, 12 LOY. L.A. INT'L & COMP. L.J. 725, 739 (1990). See also Siao-Lin Zhou, *U.S.-China Trade Dispute and China's Intellectual Property Rights Protection*, 24 INT'L L. AND POL. 1115 (1992).

According to U.S. government estimates, in 1993, Chinese piracy cost American firms almost one billion dollars and tens of thousands of jobs. The piracy continues to affect a number of U.S. industries, including manufacturers of compact discs, laser discs, and computer software. In the past, whenever the United States has criticised Chinese piracy and threatened sanctions, Beijing has made a series of well-publicised raids, proclaimed itself reformed, and pledged to protect intellectual property rights. As soon as the United States relented in its demands, the piracy continued at its previous pace.³⁶

In this case, even the United States has admitted that China's laws protecting intellectual property rights are adequate, but that the key difficulty is in the enforcement of those laws.³⁷ It is too early to determine how significantly and how soon the new bilateral agreement which the United States and China have struck will affect Chinese enforcement practices.

This case underlines the second significant problem that intellectual property protection creates. Even if a country is convinced to have adequate intellectual property protection, through the introduction of new legislation, such protection will only be as effective as the enforcement policies and systems that accompany such new laws.

C. *The Impact of Special 301*

A recent study by the Institute for International Economics in Washington, D.C., analysed seventy-two section 301 cases taken by the United States from 1975 to 1992. The study classified each case according to its outcome, and those cases ultimately viewed as successes are those which at least partially achieved U.S. negotiating objectives.³⁸ Interestingly, according to the study, for all of the section 301 cases (i.e. not only Special 301 cases), U.S. negotiating objectives were achieved at least partially in thirty-five of the seventy-two cases. However, the overall financial gains for the United States from those successful partial market openings likely only total around four to five billion dollars,³⁹ or about one percent of total annual U.S. exports.

Some believe that Special 301 has been successful. However, developments since the early stages of the legislation have proven the weapon to be less than completely satisfactory from an American perspective. Although a number of countries targeted by the United States via section 301 have passed legislation protecting intellectual property rights, the key issue of enforcement has remained a disappointment,

³⁶ Gregory Mastel & Gregory Stanko, *It's Time to Clamp Down on China's Trade Piracy*, WASH. POST, Dec. 28, 1994, at A23.

³⁷ *U.S. Set to Hit China with Sanctions*, GLOBE & MAIL, Feb. 4, 1995, at B5.

³⁸ BAYARD & ELLIOTT, *supra* note 7, at 59-64.

³⁹ *Id.* at 68.

and has wrung most of the sweetness from early U.S. victories.

What the case studies demonstrate is that the intellectual property realm does not provide fertile ground for unilateralism, since the issues tend to be highly politicized and usually lack any sort of sympathetic domestic constituency in the target country. Changes in this area often require extensive systemic reforms which are difficult to achieve in a short time period. It is, therefore, not surprising to note that none of the intellectual property cases has been satisfactorily resolved within the six to nine month deadline for Special 301 cases. The considerable time required to convince target countries, even under the threat of retaliation, to improve their intellectual property rights protection belies the difficulty which is inherent in the sharp conflict of economic interests.⁴⁰ Finally, and most importantly, without multilateral dispute settlement mechanisms and the tools of enforcement, the U.S. experience has shown that it is an incredibly long, if not impossible, process to convince target countries to enforce their intellectual property laws.

There can be little quarrel with a country which chooses, through bilateral negotiations, to regulate access to its market on its own terms, provided that, in doing so, it remains within the parameters of international law. What creates a problem, however, is if an instrument of trade policy like Special 301 is used by a country as a means of applying its own unilateral code upon another country in a manner that is inconsistent with its international obligations.

It would, however, be unfair not to underline the one truly positive effect which Special 301 has had in the international intellectual property realm. Without a doubt, U.S. unilateral actions pushed the issue of intellectual property rights to the fore of the international negotiating agenda and sufficiently aggravated countries throughout the world to bring them to the multilateral negotiating table. Further, various "offenders" around the world have seen that it is only through the multilateral mechanism that the U.S. fascination with unilateral efforts could be curbed. Similarly, this "aggressive unilateralism" has also led to a much needed reform of the GATT dispute settlement system.

Interestingly, the early perceived "successes" of U.S. unilateralism may have also made it more difficult for the United States to find a multilateral solution, since it was virtually impossible for U.S. negotiators to achieve, in multilateral negotiations, the early unilateral gains achieved by Special 301. Furthermore, the multilateral approach meant that certain U.S. laws and practices would also have to be altered and thus create domestic American costs, which were not necessitated by unilateralism.

⁴⁰ *Id.* at 200-01.

IV. THE MULTILATERAL APPROACH

While U.S. unilateralism was being pursued, negotiations were also taking place under the GATT, involving over one hundred countries, and in the context of the NAFTA, among Canada, Mexico, and the United States. The former led to the creation of the WTO and the TRIPS agreement, while the latter created NAFTA, including a comprehensive chapter on intellectual property rights.

A. World Trade Organization

One of the main distinguishing features of the Uruguay Round was its movement into new policy areas involving domestic policy formulation and implementation. One of these new policy areas was, of course, the protection of intellectual property rights.

Given the reluctance of the developing countries to have this item included on the agenda, it is not surprising that the first two years of the negotiations were spent debating the mandate of the negotiating group. In the following twenty months, however, between April, 1989, and December, 1991, when the so-called "Dunkel text" appeared, the Uruguay Round negotiations developed a comprehensive multilateral intellectual property agreement. Although the Round took two more years to complete, the final TRIPS agreement reflected the results reached in the "Dunkel text."

The Uruguay Round demonstrated that it is possible to create significant multilateral disciplines in this area. The TRIPS agreement establishes general principles governing intellectual property, such as transparency, national treatment for the rights involved, and most-favoured nation treatment. Interestingly, the latter concept had never been a feature of previous international intellectual property agreements, but was included as a means of circumscribing a previous U.S. bilateral agreement which created better treatment for U.S. rights holders than for the nationals of that country.

Utilising existing international intellectual property agreements, such as the Paris and Berne Conventions,⁴¹ the TRIPS agreement also features a wide-ranging set of globally accepted minimum standards for intellectual property. Surprisingly, the standards in the areas of copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information created more debate and compromise among developed country regimes than between north and south. Although critical attention has been focused on the transition period for develop-

⁴¹ Paris Convention for the Protection of Industrial Property, as last revised, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6295, 828 U.N.T.S. 305. Berne Union for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.

ing country implementation of these provisions, particularly in the patent field, the overall level of intellectual property standards included in the agreement is likely to exceed the most optimistic expectations of those who fought to include this subject on the MTN agenda in Punta del Este.

The portion of the agreement dealing with enforcement provides, for the first time, binding international obligations for the effective enforcement of intellectual property both internally and at the border. In doing so, these provisions have managed to bridge the differences between civil and common law legal systems. The importance of this innovative section of the TRIPS agreement cannot be overstated. It will make domestic legal procedures subject to international dispute settlement, not in the context of establishing an appeals procedure for the domestic courts in individual cases, but in ensuring the effective operation of each WTO member's domestic system in enforcing intellectual property rights.

Perhaps the most important aspect of the TRIPS agreement is the fact that it is part of the WTO dispute settlement system. The WTO Dispute Settlement Understanding (DSU) constitutes an enormous improvement over the old GATT procedures and should lead to effective and expeditious settlement of disputes between its members. Of particular importance to the TRIPS agreement is the fact that the DSU will permit "cross-retaliation." As a result, if an offending party does not correct its violations, other WTO members will have the right to retaliate, not only in the context of intellectual property, which would have been virtually impossible to implement, but also through counter-measures affecting trade in goods and services.

The TRIPS agreement is but a snapshot of the period in which it was negotiated. As such, it is capable of prescribing rights and obligations only in areas where sufficient international consensus existed. Intellectual property protection, however, is a constantly changing universe. As a result, the TRIPS agreement left to future negotiators a number of areas where even most domestic legal regimes remain to be clarified. The TRIPS agreement failed to create new rules in the areas of exhaustion of rights; the patentability of plants and animals; the protection of products already in the pipeline when a new patent law is introduced; the need for neighboring rights to, or moral rights in, copyright; the distinction between an idea and the expression of that idea in computer programs; or whether *sui generis* protection for plant breeders' rights or industrial designs is required.

B. NAFTA

Although NAFTA was formally agreed upon and implemented prior to the TRIPS agreement, Chapter 17 of NAFTA was in fact negotiated after the completion of the "Dunkel text." Since all three

NAFTA participants had only recently completed the arduous WTO negotiations, it is not surprising that Chapter 17 so closely resembles the TRIPS text, both in form and in substance. The NAFTA text also resembles the "Dunkel text" in order to ensure uniformity of interpretation and consistent obligations.

NAFTA demonstrates that multilateral disciplines can continue to be improved in each successive agreement, as its intellectual property protection eclipses the TRIPS agreement in a number of significant areas. For example, NAFTA creates national treatment obligations, not only for existing rights, but for any new rights that may be developed in the future. Through the International Convention for the Protection of New Varieties of Plants, NAFTA ensures specific disciplines in plant breeders' rights protection. In addition, it contains previously unavailable protection for encrypted program-carrying satellite signals, and introduces patent protection for products that were in the pipeline when relevant changes to the patent regime were implemented. Furthermore, although there is some leeway for Mexican implementation in such areas as plant breeders' rights and border enforcement measures, most NAFTA disciplines must be implemented immediately, a significant change from the TRIPS provisions which provide developing countries a transition period for implementation of five to ten years.

NAFTA does create fewer obligations than the TRIPS agreement in a few areas, such as in the protection of geographical indications of origin for wines and spirits, and in neighbouring rights, such as performers' rights. These lacunae in the protection regime may be a result of the significant internal debate which these intellectual property rights cause in the United States. Nevertheless, since all three NAFTA partners are also WTO members, there is no real reduction in the level of intellectual property protection as among them.

C. *Success of NAFTA and TRIPS*

The TRIPS agreement has been declared an out and out "victory for U.S. industry,"⁴² since it significantly advanced the global protection of intellectual property across the board. The agreement has been hailed as a "major breakthrough" both for its substance and for the wide measure of international acceptance which it has enjoyed.⁴³ Since NAFTA is so similar, and, in fact, more thorough in certain respects, one must assume it would also receive glowing accolades from these sources.

In 1989, a U.S. "wish list" of benefits which intellectual property owners sought in what would become the TRIPS agreement included

⁴² See Philippe Bennett, *TRIPs — a Victory for US Industry*, 62 PAT. WORLD 31 (1994).

⁴³ See John Worthy, *Intellectual Property Protection After GATT*, 5 E. INTELL. PROP. REV. 195 (1994).

the following:

- (i) adoption of the Berne Convention as the copyright norm, with the addition of protection for computer software and databases and sound recordings;
- (ii) adoption of a patent law minimum above the requirements of the Paris Convention to include the patenting of virtually all subject matter, including pharmaceutical products, chemicals, pesticides and plants, and providing for a patent term of twenty years from filing;
- (iii) adoption of adequate trademark protection;
- (iv) adoption of adequate trade secret protection;
- (v) adoption of a draft WIPO⁴⁴ treaty on semiconductor chips as the minimum standard for protection; and
- (vi) agreement on the minimum undertaking necessary to secure adequate and effective enforcement of border and internal intellectual property laws.⁴⁵

A quick glance at the minimum substantive requirements of the TRIPS agreement and NAFTA indicates that virtually all of these goals have been accomplished and surpassed. The multilateral agreements will also significantly reduce the losses from the counterfeiting and piracy of intellectual property rights.

As one commentator has noted:

The TRIPS Agreement is a welcome development for companies involved in international trading activities, particularly Western companies active in developing countries. It will allow them to have greater confidence that the intellectual property rights which they rely on in the developed world to protect their commercial investment will also be acknowledged in less developed countries. It also means that they will have to consider whether separate steps are required to take advantage of the new forms of protection which will be offered in those countries. Equally importantly, they can look forward to a more uniform and reliable method of enforcing intellectual property rights in developing countries. At a time when many developing countries offer the benefits of low overhead costs and high industrial growth rates, those countries will become even more attractive commercial prospects.⁴⁶

Although NAFTA boasts better intellectual property protection than the TRIPS agreement, it must be conceded that the benefits of the TRIPS agreement will outstrip those of NAFTA due to the number of members in the WTO. Nevertheless as the NAFTA membership

⁴⁴ The World Intellectual Property Organisation (WIPO) is a specialized agency of the United Nations which has administered the main intellectual property unions, such as the Berne and Paris Conventions, since WIPO's creation in 1967. For a comparison of TRIPS and WIPO, see Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADE. OFF. SOC'Y 121 (Feb. 1994).

⁴⁵ Kastenmeier & Beier, *supra* note 14, at 293-95.

⁴⁶ Worthy, *supra* note 43, at 198.

grows in the western hemisphere, it will provide higher levels of protection in an area of rapidly growing trade.

V. SECTION 301 VS. NAFTA AND THE WTO

A. Section 301

By passing its NAFTA and WTO implementing legislation, the U.S. Administration has made it abundantly clear that it plans to continue to use section 301 in the future both to address areas outside of the realm of the new WTO codes, and to press for what it conceives to be improvements to the TRIPS agreement, even where target countries are in compliance with the WTO provisions.⁴⁷ Further, the Statement of Administrative Action assures the American public that nothing in the DSU will make future Administrations more reluctant to resort to section 301 sanctions, even though it could result in WTO-sanctioned counter-retaliation.

The URAA Statement of Administrative Action also makes clear that the United States is not bound by the Uruguay Round Agreements to refrain from using section 301 with respect to matters not covered by the agreements, or with regard to countries which are not members of the WTO. In terms of current developments, the U.S. Administration has already proceeded in this fashion, for example, with respect to China.

More troubling, however, is the fact that both the NAFTA and WTO implementing legislation indicate that the United States has retained its right to use section 301, suggesting that the United States may do so in a given situation even though such action could be contrary to its NAFTA or GATT obligations.⁴⁸ The strongest proponents of aggressive unilateralism in the 1980s were the pharmaceutical, audiovisual, software, and chemical companies who were seeking more extensive patent and copyright protection. In spite of the WTO agreement, many of these companies feel that the new rules are inadequate.

It is true that the DSU does not require the United States to eliminate section 301. It will, therefore continue to be the private sector's "insurance policy" to ensure that the U.S. Administration aggressively deals with foreign governments who are perceived to be trading unfairly. Without a doubt, the proponents of section 301 will continue to press the U.S. Administration to use unilateral retaliation in certain cases. However, the United States will have to weigh very carefully any future section 301 retaliation, to ensure that its goal is not surpassed by

⁴⁷ Uruguay Round Agreements Act, STATEMENT OF ADMINISTRATIVE ACTION, *Annual Report on Intellectual Property Protection*, at 362, and *Enforcement of U.S. Rights*, at 364-66.

⁴⁸ *North American Free Trade Agreement Implementation Act*, Pub. L. No. 103-82, § 102 107 Stat. 2057 (1993), and *Uruguay Round Agreement Act*, Pub. L. No. 103-465, § 102(a) 108 Stat. 4809 (1994).

the cost of retaliation. Importantly, use of section 301 retaliation is no longer “free” for the United States.

It has been argued that section 301 has been “internationalised” by the DSU in that it provides much improved international enforcement against “unfair traders.”⁴⁹ However, the DSU also reduces the credibility of the threat of section 301 unilateral retaliation, since such retaliation is likely to violate the WTO provisions,⁵⁰ and WTO violations are likely to be dealt with relatively swiftly and efficiently under the DSU. Further, unlike the past, the United States will no longer be able to unilaterally block panel reports adverse to itself, and, upon adoption of an adverse report, the United States would be subject to the DSU-mandated reasonable period for compliance, the ongoing monitoring, and, potentially, WTO-sanctioned retaliation. Thus, the DSU seriously erodes the credibility of unilateral retaliation by the United States under section 301.

Some have sounded a note of caution which should ring loudly in light of the Clinton Administration’s professed intention to continue to use all forms of section 301. In an article written prior to the conclusion of the Uruguay Round, it was noted that “if a generally satisfactory [GATT] agreement is achieved but Special 301 is nonetheless retained and implemented in a manner inconsistent with the agreement, the international community’s response will be swift and harsh.”⁵¹

Others have the following advice for U.S. trade policy makers:

Although the new rules negotiated in the Uruguay Round are far from perfect, further progress could be severely undermined if the Clinton administration misreads the lessons of the past. Aggressive unilateralism should continue to be a last resort, and it should continue to be clearly linked to further strengthening of the multilateral regime. Otherwise, America’s trading partners will view it simply as a bully that has forsaken global leadership to pursue narrow sectoral interests at the expense of global welfare — and its own. Ultimately, whether these reform efforts pay off in the long run will depend on whether the United States ultimately embraces — for itself, as well as for others -- the reforms for which it fought so hard.⁵²

B. NAFTA and The WTO

There are means other than unilateralism to achieve further improvements to the global protection of intellectual property. NAFTA is,

⁴⁹ Judith H. Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT’L L. 795, 799 (1992).

⁵⁰ The violations are likely to be of most-favored-nation treatment, or the prohibition of any increase of duties beyond the levels agreed to, or the general prohibition against quotas. *Id.*

⁵¹ Bello & Holmer, *supra* note 8, at 275.

⁵² BAYARD & ELLIOTT, *supra* note 7, at 77.

of course, one of the most attractive regional trading blocks in this hemisphere, especially given the size of the U.S. market. Chile is clearly the candidate most likely to be the next country to accede to NAFTA, but a number of other Latin American countries are interested in either becoming parties to NAFTA or in other forms of economic integration. The strong interest in NAFTA shown by other countries will give the NAFTA partners a considerable amount of leverage to obtain the intellectual property rights protection which they consider adequate as part of the price of membership into the trading area.

In addition, the U.S. Administration has shown interest in recruiting countries of the Caribbean Basin Initiative to grant them NAFTA-equivalent tariff and import quota treatment on certain products. In order to receive these additional concessions, these countries could be asked to forego the transition periods provided in the WTO, although it would appear that the U.S. Congress may be willing to provide these benefits at no cost.

With respect to non-WTO members, it should be possible to seek to condition accession to the WTO upon immediate implementation of the TRIPS agreement in order to prevent reliance upon the transition periods. This approach has been pursued with respect to China, and may be followed with respect to other countries such as Russia.

In this manner, both NAFTA and the TRIPS agreement with their ground-breaking intellectual property protection standards should become the benchmarks for international regimes. The enticement of the economic benefits which await a potential party to NAFTA and the WTO will provide a powerful incentive for such countries to improve their intellectual property rights protection. Further, each of these agreements provide for strong and relatively rapid enforcement and dispute settlement mechanisms, thus avoiding the enforcement problems which are so prevalent in the U.S.-negotiated bilateral intellectual property agreements.

VI. CONCLUSION

There is no disputing the fact that section 301 has had an enormous impact on stopping the counterfeiting and pirating of U.S. products, but it has likely not been the impact envisioned either by Congress or by American industry. The great success of section 301 was not in its unilateralism, but rather in bringing the world to the multilateral bargaining table during the Uruguay Round, both under the threat of U.S. retaliation and as a means to contain the excesses of American aggressive unilateralism. It was at the multilateral bargaining table that the true gains were made with regard to intellectual property rights, in establishing universal minimum standards of protection, in providing the all-important effective enforcement provisions and

in creating an effective multilateral dispute settlement mechanism which was so lacking previously, even in the U.S. bilateral agreements.

On the bilateral front, despite early indications of success, when a number of countries who were the target of investigations actually agreed to enact intellectual property protection, the success ultimately rang hollow. It became apparent that such protection had form, but no substance, and that the bilateral agreements which the United States had negotiated with those countries contained no means to force cooperation. It became evident that even those smaller countries which were highly dependent on the United States market learned quickly that all that was necessary to convince the United States to relent in its unilateral demands was to agree to pass legislation, then to drag its legislative heels doing so, and ultimately to enforce it ineffectively. This seemed to be a particularly useful prescription for success where a country's domestic constituency was not in favour of such protection.

The unilateral use of mechanisms such as Special 301 will continue to be problematic. The mechanism will still be difficult to use with respect to some countries with whom the U.S. Administration may have wider interests than intellectual property protection. In other cases, a trading partner may have either not enough trade or an overall trade deficit with the United States so as to make it impervious to retaliatory threats. Special 301 has also lost some of its shock value, and there is no longer a fear of being branded an "unfair trader" by the United States.

Furthermore, even in cases where concessions are obtained after unilateral threats, the United States' ability to ensure that those concessions are implemented may prove to be ineffective. In such cases, unilateral threats will have to follow, thus placing a continuous strain on U.S. bilateral relations. In the long-term context of the United States' geopolitical relationships, it remains to be seen how long such continued "aggressive unilateralism" can be sustained without damaging overall U.S. global interests.

While the Uruguay Round was ongoing, U.S. negotiators could argue that the weaknesses in the international trading system left no alternative for the United States but to turn to unilateralism. However, now that most of the reforms to the system demanded by the United States have been accepted in the WTO, including a new TRIPS agreement and a strengthened DSU, these claims will no longer be credible.

The effectiveness of the WTO will be severely undermined if the disputed issues are covered by the WTO and the United States does not comply with the WTO dispute settlement procedures. This could happen if, for example, the United States issued a section 301 determination before the WTO mechanism has run its course; if it retaliated after losing a case; if it used threats and pressure to convince members to drop complaints against the United States or to meet its demands; or

if it did not comply with a ruling after it had lost a case.

NAFTA and the TRIPS agreement represent great leaps forward in the adequate and effective protection of intellectual property. Both agreements represent huge economic gains for member countries. The challenge facing the American industry and Administration is to use these agreements to increase their exports, and to resist the urge to resort to unilateralism in disputes involving intellectual property regimes. The damage which could be done to the multilateral system by future American use of section 301 in the face of the TRIPS agreement and the DSU, could cause huge losses in return for relatively insignificant gains.

As noted above, the total trade gains made through market openings as a result of all section 301 actions have been estimated at around four to five billion dollars, or about one percent of total annual U.S. exports. This must be compared to the potential increase in U.S. exports of eight to ten percent which is expected to be gained as a result of the Uruguay Round.⁵³ If one endangers the other, which is the most beneficial?

Finally, and most importantly, the reforms adopted in the Uruguay Round have:

[P]rofoundly changed the political and economic calculus of aggressive unilateralism. U.S. failure to adjust to these changes could reduce the efficacy of future retaliatory threats, hence increasing the probability that retaliation will be imposed, and could also risk the loss of gains achieved in the Uruguay Round. In other words, now that the U.S. marshal has brought law and order to Dodge City, it is important that the United States act as a law-abiding member of the community of nations instead of continuing to dispense 'frontier justice' acting unilaterally in trade disputes as judge, jury and executioner.⁵⁴

⁵³ *Id.* at 334.

⁵⁴ *Id.* at 330.