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Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries

Y. Kurt Chang

On April 30, 1993, the United States Trade Representative (USTR) placed Taiwan on the "priority watch list" of countries that failed to protect United States intellectual property rights.¹ Although countries on the priority watch list are not as egregious in violating United States intellectual property rights as those identified as "priority foreign countries," Taiwan was targeted for an immediate action plan, requiring it to take specific actions before July 31, 1993, or else risk being the subject of a trade sanction.² Under the intense pressure from the United States, the ruling party of Taiwan rammed through the legislature the first law governing the island's booming cable-television industry on July 16, 1993.³

The authority of the USTR to target trading partners of the United States for their unsatisfactory protection of United States intellectual property rights comes from the Special 301 provision of the Omnibus Trade and Competitiveness Act of 1988.⁴ The Special 301 provision is designed to use the threat of unilateral retaliation by the United States to pressure its trade partners to reform their currently deficient intellectual property practices. The idea is the carrot and the stick, where the carrot is the right to export to the United States as a most favored nation, and the stick is the trade sanction.

To understand the pros and cons of using Special 301, a case study seems better than general discussion based only on general legal and

¹ USTR Fact Sheet on Special 301, Apr. 30, 1993, *reprinted in* 10 Int'l Trade Rep. (BNA) 761 (May 5, 1993).

² *Id.*

³ *Taiwan Optimistic on New TV Law, But Foreign Ownership Ban Concerns U.S.*, Int'l Bus. & Fin. Daily (BNA) (July 29, 1993).

⁴ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified in scattered sections of 19 U.S.C.).

political principles which can be too vague and abstract. Looking at a real case helps to flesh out the arguments and facilitates more reasonable evaluation of the effectiveness of Special 301. In a paper published in 1989-90,⁵ the Administration's implementation of Special 301 was appraised as a "ten strike," and the application of Special 301 was called "artful." It will be interesting to see whether four years later those praises are still pertinent, at least in the case under study.

Taiwan is an interesting case for many reasons. Even before the passage of Special 301 Taiwan has been under the close scrutiny of the United States for its deficient protection of United States intellectual property rights. Ranked the fourteenth largest exporter in the world, Taiwan is not a member of United Nations, not a signatory to the General Agreement on Tariffs and Trade (GATT),⁶ and not diplomatically recognized by most developed countries. As a rapidly developing country, Taiwan has many social, political and economic problems. Some of those problems are unique to Taiwan, but many of them are common to all developing countries. This paper will trace and analyze the interaction between the United States and Taiwan in the process of resolving disputes on intellectual property protection, and will discuss the implications of Taiwan's experience, which can be useful for understanding conflicts over intellectual property protection in other countries.

Part I of this paper discusses the statutory requirements of Special 301, and the reason why such a law was enacted. Part I also consists of a review of the general conflicts between developed and developing countries over the protection of intellectual property rights. Part II begins with a short review of Taiwan's economic and political developments, then gives a review of how the United States has applied Special 301 on Taiwan, and a closer look at certain changes Taiwan has made in response to the Special 301 threat. Part III contains a discussion of the problems of Special 301's application, and a discussion of protecting intellectual property rights through the GATT.

As the case study of Taiwan will make clear, the real problem of a statute like Special 301 lies in its unilateral nature. This paper suggests that the United States should stop its aggressive use of the threat of unilateral trade retaliation under Special 301 as the main means to

⁵ Judith H. Bello & Alan F. Holmer, "*Special 301*": *Its Requirements, Implementation and Significance*, 13 *FORDHAM INT'L L.J.* 259 (1989-90).

⁶ The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

enforce United States intellectual property rights in other countries. Instead, the United States should use multilateral means such as that provided by the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement in the GATT for the protection of United States intellectual property rights in foreign countries.⁷

I. SPECIAL 301 AND PROTECTION OF INTELLECTUAL PROPERTY
RIGHTS IN FOREIGN COUNTRIES

A. What is Special 301?

Special 301, as certain provisions in the Omnibus Trade and Competitiveness Act of 1988 (Trade Act of 1988) are called, is aimed at protecting United States intellectual property rights in foreign countries. The Trade Act of 1988 expressly finds that the "international protection of intellectual property rights is vital to the international competitiveness of United States persons that rely on protection of intellectual property rights."⁸ It further stresses that United States businesses that rely on intellectual property rights must be ensured fair and equitable market access in foreign countries in order to protect the economic interests of the United States.⁹

The purpose of Special 301 is to provide for the development of an overall strategy to ensure that intellectual rights and market access for those who rely on such rights will be adequately and effectively protected. Under Special 301, within 30 days after the issuance of the National Trade Estimate (NTE) Report, the USTR has to identify those foreign countries that deny "adequate and effective protection of intellectual property rights,"¹⁰ or deny "fair and equitable market access to United States persons who rely upon intellectual property rights protection."¹¹ The USTR is further required to name as "priority foreign countries" those countries whose acts, practices or policies are the most onerous or egregious, and have the greatest adverse economic impact on the United States,¹² and that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights.¹³

⁷ See *infra* notes 83-89 and accompanying text.

⁸ Omnibus Trade and Competitiveness Act of 1988 § 1303(a)(1)(A).

⁹ *Id.* § 1303(a)(1)(B).

¹⁰ 19 U.S.C. § 2242(a)(1)(A) (1988).

¹¹ 19 U.S.C. § 2242(a)(1)(B).

¹² 19 U.S.C. § 2242(b)(1)(A).

¹³ 19 U.S.C. § 2242(b)(1)(B).

Within thirty days after the USTR identifies "priority foreign countries," the USTR must initiate investigations into the acts, practices, or polices of those "priority countries."¹⁴ The USTR has only six months (with possible three months extension) to complete the investigation and to seek to negotiate bilateral solutions.¹⁵ If the acts, practices and polices continue after the investigation period, the USTR is authorized, but not required, to retaliate in the form of economic sanction.¹⁶ The USTR also has the discretion not to initiate a Special 301 investigation if such investigation would be detrimental to United States economic interests.¹⁷

Retaliation ranges from withdrawal of trade concession to increasing duties or import restrictions.¹⁸ Trade sanction under Special 301 has powerful and disruptive effects because it can be directed against any industry in the infringing country, regardless of whether that industry is involved in the piracy of American intellectual properties.¹⁹

B. How the USTR Implements Special 301

There is currently a three-tier priority system for the implementation of Special 301 requirements.²⁰ Countries may be identified as "priority foreign countries" pursuant to Special 301, or be put on the "priority watch list" or the "watch list". A country on the "priority watch list" is given one hundred fifty days to pursue accelerated actions plans, and its progress over the one hundred fifty-day period is reviewed to determine whether it should be identified as a priority country.²¹

Since 1988, many countries have been listed in this three-tier system.²² Although most of those countries are developing countries, developed countries such as Japan and Germany have been targeted. In 1993, Brazil, India, and Thailand were identified as "priority foreign

¹⁴ 19 U.S.C. § 2412(b)(2)(A).

¹⁵ 19 U.S.C. § 2414(a)(3)(A)-(B).

¹⁶ 19 U.S.C. § 2416(b).

¹⁷ 19 U.S.C. § 2411(a)(2)(B)(iv).

¹⁸ 19 U.S.C. § 2411(c)(1).

¹⁹ 19 U.S.C. § 2411(c)(3).

²⁰ USTR Fact Sheet on Special 301, May 25, 1989, *reprinted in* 6 Int'l Trade Rep. (BNA) 715 (May 31, 1989).

²¹ *Id.*

²² See USTR Fact Sheet on Special 301, *supra* note 1.

countries." Ten countries were placed on the "priority watch list,"²³ among which Taiwan and Hungary were required to complete "immediate action plans" by July 31, 1993. Seventeen countries were placed on the "watch list."²⁴

Under the threat of unilateral trade sanction, many countries targeted by Special 301 enacted new intellectual property laws or upgraded their enforcement of intellectual property laws. The Clinton Administration, however, does not seem satisfied with the rate improvements were made in those countries, and intends to use Special 301 more aggressively. The Fact Sheet on April 31, 1993,²⁵ proclaimed that "the Administration is committed to giving a fresh direction to the Special 301 review process to ensure that its objectives are clear and that other countries know what we expect. . . . The Clinton Administration is determined to ensure that foreign countries provide high levels of protection and that it solves particular problems *to the satisfaction of the [United States] intellectual property community*" (emphasis added). The Fact Sheet also stated that the Clinton Administration will not let countries take up permanent residence on any of the Special 301 lists. To this end, "immediate action plans" and "out-of-cycle" reviews are used, which marks a departure from prior Special 301 enforcement. Ambassador Kantor, the USTR, will instruct an interagency team of government experts to initiate "immediate action plans" that will include *deadlines* and *benchmarks* for evaluating a country's performance.²⁶ The Fact Sheet also indicated the strong influence of private industrial organizations on the policy and actions of the USTR in the implementation of Special 301.²⁷

²³ *Supra* note 1. The ten countries on the 1993 priority watch list are Taiwan, Hungary, Argentina, Egypt, Korea, Poland, Turkey, Australia, the European Community, and Saudi Arabia.

²⁴ *Supra* note 1. The countries on the 1993 watch list are Cyprus, Italy, Pakistan, Spain, Venezuela, Chile, China, Colombia, Ecuador, El Salvador, Greece, Guatemala, Indonesia, Japan, Peru, Philippines, and United Arab Emirates.

²⁵ *Supra* note 1.

²⁶ *Supra* note 1.

²⁷ *Supra* note 1. "The measures announced today result from close consultations with affected industry groups and Congressional leaders, and demonstrate the Administration's commitment to utilize all available venues to pursue resolution of the intellectual property issues. In issuing the announcement, Ambassador Kantor is expressing the Administration's resolve to take uniformly strong actions under the Special 301 provisions of the Trade Act. The interagency group that advises the USTR on implementation of Special 301 obtains information from the private sector, American embassies abroad, the United States' trading partners, and the NTE report." *Id.*

C. Why Does the United States Use Special 301?

1. *Why has intellectual property protection become an important trade issue?*

As one of the most advanced countries in the world, the structure of United States industry is shifting away from manufacturing and toward high technology and service. Intellectual property, which covers patents, trademarks, copyrights, and new technologies such as computer software and semiconductor masks, has become a major component of international trade and United States competitiveness. Whether one considers movies, music, computer software, or chemical processes, the United States continues to be among the world's largest producer of new and valuable intellectual properties.

This competitive advantage of the United States, however, has been undermined by intellectual property piracy in foreign countries. Due to the intangibility and public good nature of intellectual properties, protection of intellectual property rights in foreign countries poses especially difficult problems. Books, audio-video tapes, computer software can be copied at low cost; patents, trademarks and know-how can be misappropriated easily. American exporters heavily reliant upon intellectual property, such as computer, entertainment, and pharmaceutical industries, have been frustrated by both legitimate competition and proliferating piracy.

The trade deficit and budget deficit make the United States more concerned about the loss of profit due to violation of intellectual property rights in foreign countries.²⁸ Intellectual property piracy not only contributes to the trade deficit, but also translates into lost jobs in the United States.²⁹ Much of the piracy can be traced to several nations with which the United States has significant trade deficits, such as Japan, Korea and Taiwan.³⁰ Linking the piracy problem to the deficits that exist with these highly visible trading partners has provided

²⁸ The overall merchandise trade deficit of the United States in 1993 was 115.77 billion dollars. *Years Trade Deficit Widened: December's shrank*, N.Y. TIMES, Feb. 8, 1994, at D4.

²⁹ A 1988 report estimated that foreign counterfeiters had cost the between 43 and 61 billion dollars a year. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Trade and Industry*, USITC Pub. 2065, Inv. No. 332-TA-245, at Appendix H (Feb. 1988).

³⁰ Taiwan's trade surplus with the United States in 1992 was 9.4 billion dollars, a decline from a peak of 19 billion dollars in 1987. See *U.S. Set To Take Tough Measures Over Trade*, SOUTH CHINA MORNING POST, Feb. 22, 1993, available in Nexis, World Library, ALLWLD File. Both Taiwan and Korea are on the 1993 priority watch list, and Japan is on the watch list. See *supra* notes 24-25.

Washington with a politically appealing way to address the trade imbalances.³¹

Another concern about intellectual property piracy in other countries is its negative effect on the incentive of United States industries to produce intellectual property. The denial of international intellectual property rights is not only harmful to the economic interests of the United States, it undermines the creativity, invention, and investment that are essential to economic and technological growth.³² The United States has recognized that foreign governments' tolerance of piracy in their countries of foreign intellectual property rights may constitute a non-tariff barrier with trade distortion effects. Since many developing countries which tolerate considerable intellectual property piracy also depend heavily on the United States market for exports, the United States created a trade policy in the mid-1980's that conditions continued market access on improved intellectual property rights enforcement regimes. In 1986, a United States White Paper set out a multifaceted approach to implement this policy.³³ The paper called for the United States to (1) work through multilateral forums to promote world-wide intellectual property rights protection, (2) pursue vigorous programs of bilateral consultations to obtain "adequate and effective" protection for all forms of intellectual property rights, and (3) work to ensure that United States domestic law provides a higher standard of protection.³⁴

Following the directions identified in the White Paper, the United States enacted Special 301 in 1988. At the same time, the United States insisted on the incorporation of intellectual property issues into the agenda of the Uruguay Round of GATT negotiations.³⁵ Because the Uruguay Round had not reached conclusion until very recently, Special 301 has been the main measure for the United States to attack intellectual property piracy in foreign countries. From the United States perspective, there are distinct advantages to using bilateral negotiations. Bilateral negotiations can target practices of a particular country offensive to United States interests and do so in an expeditious manner. For instance, the USTR can tell a country directly what

³¹ William P. Alford, Forum: Taiwan and the GATT: Panel Three: *Intellectual Property, Trade and Taiwan: a GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 99 (1992).

³² USTR Fact Sheet on Special 301, *supra* note 21.

³³ The White Paper was called "Administration Statement on the Protection for U.S. Intellectual Property Rights Abroad." See Summary of the Phase II Recommendations of the Task Force on Intellectual Property to the Advisory Committee for Trade Negotiations (Mar. 1986).

³⁴ *Id.*

³⁵ See *supra* notes 81-82 and accompanying text.

the United States wants it to do in the form of an “immediate action plan.” In an immediate action plan, the United States sets out not only the deadline, but also the benchmarks for evaluating the progress of that country.³⁶

2. International Treaties on Intellectual Property Rights

There are good reasons why the United States in 1988 chose to enact Special 301, which resorts to bilateral negotiations, instead of using then existing multilateral treaties for intellectual property protection.

There are three major intellectual property rights treaties governed by two United Nations institutions: The World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). WIPO administers the Paris Convention for the Protection of Industrial Property of 1883, as amended, and the Berne Convention for the protection of Literary and Artistic Work of 1886, as amended. UNESCO oversees the Universal Copyright Convention of 1952 (UCC). The Paris Convention governs patents, trademarks and other industrial properties, while the Berne Convention and UCC deal with copyrights. The United States withdrew from UNESCO in 1984 and joined the Berne Convention in 1989.³⁷

From the United States perspective, the Conventions have significant drawbacks. They fail to provide adequate substantive norms covering important subject matters.³⁸ Besides traditional exclusion of certain areas of intellectual property, incorporation of important new technologies has also lagged due to the blocking by developing countries. The conventions also fail to provide flexible dispute resolution mechanisms to resolve disputes when member states do not meet their treaty obligations.³⁹ The WIPO is unable to develop effective enforcement mechanisms due to the fact that developing countries constitute an overwhelming majority.⁴⁰

³⁶ See *supra* note 27 and accompanying text.

³⁷ See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 293 n.95 (1991).

³⁸ *Id.* at 293.

³⁹ *Id.*

⁴⁰ *Id.* at 294; USTR Fact Sheet on Special 301, *supra* note 21.

D. Conflicts Between Developed Countries and Developing Countries Over Intellectual Property Protection

Although Special 301 may be used on any of the trading partners of the United States, Special 301 has been mainly applied to developing countries, such as Thailand, Brazil, and Taiwan.⁴¹ Looking at the records of Special 301 negotiations between those developing countries and the United States, the question that naturally arises is why it is so difficult to make those developing nations strengthen their intellectual property protection. The difficulty stems from the fact that developing countries hold very different views of intellectual property rights protection from those of developed nations.

The United States and other developed countries, as well as many business associations, have rigorously touted to developing nations the benefits of adopting Western standards for protecting intellectual property. The benefits are the fostering of local intellectual property production and the increased willingness of foreign intellectual property owners to transfer technology to the developing country. To the ears of the developing countries, however, those arguments have a hollow, self-serving ring to them, especially when the developing countries have to pay the bill for protecting the rights of foreigners at the expense of the indigenous population. Although the benefits of strong intellectual property protection may be apparent in the long run, to many, the benefits of weak protection appear to outweigh the costs. Without access to information the immediate economic development may be jeopardized.

As consumers of intellectual property, certain developing countries see little to gain from vigorously protecting intellectual property. A study by the United Nations showed that developed countries held 95 percent of the patents issued by developing countries, of which 90 percent were never utilized in the host states.⁴² The developing countries charge that the Western-created intellectual property rights regime serves only to levy an unjust royalty on their technology development. The developing countries tend to argue that stringent intellectual property protection will make it more costly to obtain the technologies necessary for their developments. The developing countries are also concerned that establishing high standards of protection for intellectual property rights would allow the business enterprises of

⁴¹ See USTR Fact Sheet on Special 301, *supra* note 1.

⁴² U.N. CONFERENCE ON TRADE AND DEVELOPMENT, THE ROLE OF THE PATENT SYSTEM IN THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES at 38-40, U.N. Doc. TD/B/AC, U.N. Sales No. E.75.II.D.6 (1975).

advanced countries to monopolize technology and to exploit unfairly the enterprises of less advanced countries.

Some of those concerns of developing countries are valid. It is wrong, however, for a developing country to refuse to improve its grossly inadequate intellectual property protection just for the sake of stealing the fruit of research and development by intellectual property owners in advanced countries. Foreign intellectual property owners have the right to be compensated for the use of their work. Furthermore, the developing country itself will be victimized in two ways. First, local intellectual property owners will also suffer from the piracy. By condoning piracy, the developing country destroys the incentive for indigenous creation of intellectual property. Second, absent adequate intellectual property protection, companies from developed countries will be reluctant to transfer technology to the developing country. The free-riding attitude therefore condemns a developing country to perpetual second-class status.

On the other hand, it is arguably wrong for an advanced country to force its intellectual property rights regime on less developed countries to maximize its profits. Different countries exist in different stages of economic and technological development. Intellectual property standards developed by an advanced country might not fit the needs of a developing country. For example, a developing country that wants to develop its manufacturing industry may decide to limit the term of a patent grant to ten years instead of the United States standard of seventeen years. Another consideration is the administrative cost of maintaining a system of strong intellectual property protection. A developing country is unlikely to be enthusiastic about keeping an expensive intellectual property system just to benefit foreign owners.

Unfortunately, developing countries and developed countries are often not willing to see the problem from the other's angle. The result is that developed countries see an intellectual property system not up to their standards as little more than piracy, while developing nations see restrictions on the use of intellectual property as little more than an effort by the rich to charge them for knowledge, and so to keep them impoverished.

II. TAIWAN AND ITS INTELLECTUAL PROPERTY PROTECTION
UNDER SPECIAL 301

A. The political and economic aspects of Taiwan

As a nation of twenty-one million people on an island the size of Lake Michigan, Taiwan rose from relative poverty to become the world's fourteenth largest trading nation. The development of Taiwan is a history of industrial transformation. Before 1949, rice and sugar were its main exports. After political separation from mainland China in 1949, a structural shift from an agricultural economy to an industrial one was phased in. At the initial stage, labor-intensive industries were encouraged. Light industries, such as textiles, shoes, and toys were gradually developed. Later, capital-intensive industries, such as electronics and machinery, were developed. Most recently, a computer industry is rapidly growing. The wealth of Taiwan comes from exporting. Taiwan is over-populated and resource poor. Its small-scale island economy needs foreign technology, capital and markets. After forty years of integration into global capitalism, the foreign trade share of Taiwan's gross national product has increased from twenty-three percent in 1952 to ninety-two percent in 1988.⁴³

As Taiwan became a newly industrialized country (NIC), it found that it could no longer rely on labor-intensive industries to maintain its prosperity. Taiwan has been forced to hand over low-value added manufactures to the second-tier Asian NICs, and needs to switch to higher value-added industries. To systematically upgrade its economic structure, Taiwan is undertaking a hefty "Six Year National Development Plan, 1991-1996," which requires three hundred and three billion dollars in funding.

Taiwan's trade is heavily concentrated on the United States and Japan. In 1988, 26.2 percent of Taiwan's imports were from the United States, which account for 3.8 percent of United States exports; 38.7 percent of its exports were to the United States, which account for 5.6 percent of United States imports.⁴⁴ Most of Taiwan's trade surplus has been earned from the United States, constituting about 90 percent of its foreign currency reserves. The interdependency between the United States and Taiwan is overwhelmingly asymmetric in favor of the United States, even if diplomacy and politics are not con-

⁴³ Chih-Cheng Li, *The Production of Intellectual Property Rights as a Strategic Component of the Republic of China's Policy* (1991) (unpublished Ph.D. dissertation, University of Kansas).

⁴⁴ *Id.* at 35.

sidered. This trade dependence makes Taiwan extremely susceptible to the threat of trade sanctions from the United States.

In spite of its strength in international trade, Taiwan is politically isolated. In 1971 Taiwan lost its "China seat" in the United Nations to mainland China. Most developed nations, including the United States, do not recognize Taiwan.⁴⁵ Diplomatic isolation has forced Taiwan to undertake a so-called "substantive diplomacy" to circumvent the diplomatic siege. It is generally believed that accelerating market openness to foreigners was the best defense for Taiwan's security, and maintaining good economic and trade relations with its trade partners was the best diplomatic strategy. Trade thus has become the center of Taiwan's substantive foreign relations.

Lying ahead in the 1990's are two challenges for Taiwan: trade tension relief with the United States and economic upgrading. The protection of intellectual property rights is a strategic component of Taiwan's new economic policy.⁴⁶

B. How Special 301 has been used on Taiwan

The United States started bilateral negotiations with Taiwan on intellectual property protection problems in 1983. Because Taiwan is not recognized by the United States, all United States-Taiwan negotiations are held through unofficial agencies. The American Institute in Taiwan represents the United States, and the Coordination Council for North American Affairs represents Taiwan. Also due to the lack of a formal diplomatic relationship, the agreements reached through negotiations have to be enacted into law to take effect.

Before 1983, the intellectual property laws in Taiwan were criticized for their limited scope of recognition and protection of intellectual property rights, inadequate deterrence for infringements, and protectionist provisions. Foreign entities were denied national treatment, and unrecognized foreign entities often were denied protection of their intellectual property rights as well as standing to seek redress.

Since 1983, partly due to the external pressure from the United States, Taiwan began a series of significant reforms to its intellectual property laws. Step by step, Taiwan has modified its intellectual property laws to approach the standards of developed countries. For instance, the 1986 Patent Law Amendment extended protection to both

⁴⁵ Taiwan has applied agricultural diplomacy to aid a lot of less developed nations since the 1960s. By 1990, Taiwan claimed to have diplomatic relationships with twenty-seven small states.

Id.
⁴⁶ *Id.*

products and processes of chemicals and pharmaceuticals, and the recent 1989 amendment recognized the patentability of micro-organisms.⁴⁷ The 1985 Amendment of Copyright law expanded protection to all kinds of literal, scientific, and artistic works, including computer software and soundtracks. Unrecognized foreign entities now are allowed to bring actions against infringers of their intellectual property rights, based on treaty or factual reciprocity.⁴⁸

Since the enactment of Special 301 in 1988, Taiwan has been continuously under the threat of a Special 301 retaliation. In 1989 Taiwan was listed on the "priority watch list."⁴⁹ Taiwan agreed to expeditiously resolve copyright problems concerning motion pictures, and concluded with the United States an agreement on the protection and enforcement of rights in audio-visual works.

In 1992 Taiwan was named a priority foreign country.⁵⁰ A Memorandum of Understanding related to intellectual property rights protection was signed between the United States and Taiwan on June 5, 1992,⁵¹ which called for Taiwan's legislature to approve a cable television law, as well as revisions to the copyright, patent, and trademark laws. In 1992 Taiwan passed a new copyright law and promulgated regulations for implementing the new law. Taiwan also passed a Fair Trade Law that provides some protection for trade secrets.

In April 1993 Taiwan's legislature approved a Bilateral Copyright Agreement and amended Taiwan's copyright law to prohibit parallel importation.⁵² Taiwan also passed an amendment raising the rate of conversion of intellectual property rights violation jail terms to fines.⁵³

On April 30, 1993, Taiwan was again listed on the "priority watch list."⁵⁴ This time the United States required Taiwan to implement an

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ USTR Fact Sheet on Special 301, *supra* note 21.

⁵⁰ See U.S., *Taiwan Reach Key Agreement on Patent, Trademarks, Copyrights*, reprinted in 9 Int'l Trade Rep. (BNA) 1001 (June 10, 1992).

⁵¹ *Memorandum of Understanding Between The Coordination Council For North American Affairs and The American Institute in Taiwan*, June 5, 1992 (on file with author).

⁵² USTR Fact Sheet on Special 301, Apr. 30, 1993, reprinted in 10 Int'l Trade Rep. (BNA) 761 (May 5, 1993). See also *infra*, notes 59-61, 66-67 and accompanying text.

⁵³ *Id.*

⁵⁴ *Id.* "[The U.S.] admitted that Taiwan had taken positive steps in its protection of copyrights by approving a bilateral copyright agreement and amending its law to ban unauthorized parallel imports of copyrighted works. Taiwan has also committed to implement specific improvements by July 1 in its export licensing system for computer software and compact discs. Nonetheless, significant problems remain and the U.S. has presented Taiwan with an "immediate action plan" to address problems in the level of protection for intellectual property rights and market access for U.S. audiovisual products. We continue to have serious intellectual enforce-

“immediate action plan” before July 31, 1993. Taiwan responded by passing the Cable Television Law on July 16, 1993.⁵⁵ The Taiwanese government also announced that it would institute a new program to improve intellectual property rights protection beginning July 1, 1993.⁵⁶ The program, known as the “Comprehensive Action Plan for Protection of Intellectual Property Rights,” has a stated purpose of setting a standard for Taiwan to upgrade its industry, establish itself as a modern nation, and to conclusively eliminate friction with its trading partners over intellectual property. The plan lists key points of action, measures to put those points into practice, as well as a schedule for completion of legislation on intellectual property laws. Perhaps the most important part of the plan calls for the establishment of a central agency for the coordination of intellectual property rights protection, which oversees the registration, administration, and enforcement of matters concerning intellectual property rights.

With these efforts, Taiwan hoped the United States would remove it from the “priority watch list.”⁵⁷ The strategy of the United States, however, has been to keep Taiwan under continuous pressure and threat of Special 301 trade sanctions until Taiwan provides intellectual property protection to the satisfaction of the United States. After Taiwan passed the Cable Television Law, the United States declared its satisfaction with Taiwan’s effort to improve enforcement, but refused to remove Taiwan from the “priority watch list.”⁵⁸

C. A Closer Look at Certain Issues

In order to get a flavor of the conflicts between Taiwan and the United States over intellectual property protection, three issues that have been controversial are given a closer look below. These exam-

ment problems in Taiwan and Taiwan needs to enact legislation to legitimize cable TV systems, control copyright piracy by cable TV stations on Taiwan and eliminate piracy of video games.”
Id.

⁵⁵ *Taiwan Optimistic on New Cable TV Law, But Foreign Ownership Ban Concerns U.S.*, Int’l Bus. and Fin. Daily (BNA) (July 29, 1993), available in NEXIS, World Library, ALLNWS File.

⁵⁶ *Taiwan Announces Program to Improve Its Intellectual Property Rights Regime*, 10 Int’l Trade Rep. (BNA) 1082 (June 30, 1993).

⁵⁷ Several ministers of Taiwanese government said they would resign if the United States should ignore Taiwan’s efforts in protecting intellectual property rights and apply Special 301 sanctions on Taiwan. *Taiwan Official Threatens to Resign if U.S. Launches Trade Retaliation*, BBC April 28, 1993, available in NEXIS, World Library, ALLWLD File.

⁵⁸ *Taiwan; Intellectual Property: Taiwan Reacts to U.S. Decision to Keep “Priority Watch,”* BBC, Aug. 7, 1993, available in NEXIS, World Library, ALLWLD File.

ples suggest that the United States trade policy with the threat of Special 301 has been particularly heavy-handed towards Taiwan.

1. *Cable TV Law*

Since 1989 the issue of piracy of American films has been on the agenda of United States-Taiwan Special 301 negotiations. The United States was concerned that underground cable networks in Taiwan were showing American films without paying royalties. In the 1992 Memorandum of Understanding, Taiwan agreed to enact the Cable Television Law.⁵⁹ This law was rapidly passed in July 1993 after Taiwan was placed on the "priority watch list" in April 1993. According to the law, Taiwan will be divided up into forty-eight different districts, with each district allowed to have five stations.⁶⁰

The controversy over the law lies in the fact that the cable television network is part of the broadcasting/communication system, and traditionally the regulation of the broadcasting/communication system is strictly an internal affair, i.e., foreign nations have no right to interfere.

2. *Parallel Imports*

Parallel import occurs when someone imports goods covered by intellectual property rights into a region that is the designated territory of a distributor under a license agreement. In April 1993 Taiwan passed a law which bans parallel import of genuine goods.⁶¹ Under the law only the licensee of the copyright has the right to import the works covered, and individuals are allowed to bring only one copy of the copyrighted goods into the country. This stipulation, said United States officials, is aimed at guarding the rights of copyright owners while taking into account the interests of individual consumers. This regulation was put into force on April 26, 1993. The result was chaos at customs counters as agents tried to examine the luggage of incoming passengers with great care.⁶²

The provision restricting parallel imports is a controversial one, especially since it is not included in the Berne Convention which is the international standard for copyright. A ban on parallel imports is tan-

⁵⁹ *Memorandum of Understanding Between The Coordination Council For North American Affairs and The American Institute in Taiwan*, June 5, 1992 (on file with author).

⁶⁰ *Chamber of Commerce in Taipei Urges USTR Not to Use Special 301 Sanctions*, 10 Int'l Trade Rep. (BNA) 1252 (July 28, 1993).

⁶¹ Jack C.C. Li, *Taiwan: IPR Protection-How Far Should It Go?*, BUSINESS TAIWAN, Aug. 2, 1993, available in NEXIS, World Library, ALLWLD File.

⁶² *Id.*

tamount to giving distributors a monopoly in the market. It distorts free market competition to the detriment of consumers. In the European Community, restrictions on parallel imports is frowned upon, and considered to hurt the community. The Taiwanese government initially strongly opposed the adoption of such a provision. Under pressure from the United States, however, this law was passed.⁶³ As a result, imports are becoming more expensive.

3. *Pre-export Inspection System*

On July 1, 1993, the Taiwanese government imposed a new pre-export inspection system,⁶⁴ according to the agreements in the Memorandum of Understanding reached between Taiwan and the United States in 1992 after Taiwan was named a priority foreign country.⁶⁵ The pre-export inspection system covers computer software and related products, cosmetics, automobile parts, and sporting goods bearing foreign trademarks. Exporters of such products have to register with the Board of Foreign Trade and supply licensing documents from the owners of any patents, trademarks or copyrights involved. As of now Taiwan is the only country in the world that imposes such a pre-export inspection system. This pre-export inspection requirement is particularly troublesome for the computer industry, because of the potential high costs and time delay caused by this requirement due to the large numbers of patents, trademarks, and copyrights involved in the products. Besides imposing an additional burden on customs, government agencies, and exporters, the pre-export registration requirement will shave the competitive advantage off the newly developed industry of Taiwan.

III. PROBLEMS WITH SPECIAL 301 AND GATT AS AN ALTERNATIVE

A. Problems with Special 301

The review above of Taiwan's Special 301 experience, although incomplete, indicates that the United States has applied Special 301 in a rather heavy-handed fashion. Taiwan definitely feels that way, given

⁶³ See *infra* notes 67-68.

⁶⁴ Jack C.C. Li, *Taiwan: IPR Protection-How Far Should It Go?*, BUSINESS TAIWAN, Aug. 2, 1993.

⁶⁵ *Memorandum of Understanding Between The Coordination Council For North American Affairs and The American Institute in Taiwan*, June 5, 1992 (on file with author). See also *U.S., Taiwan Reach Key Agreement on Patent, Trademarks, Copyrights*, 9 Int'l Trade Rep. (BNA) 1001 (June 10, 1992).

the United States' insistence in negotiations on the creation of a special police force and courts, the revision of elementary texts, and the provision of treatment for United States nationals preferable to that afforded Taiwanese citizens by their own legal system.⁶⁶

There are several interrelated factors that contributed to this heavy-handedness. The first, and perhaps the most important one, is that the United States simply views an intellectual property system that does not fully protect its intellectual property rights as the equivalent to condoning piracy. The logic seems to be that if a country does not effectively protect United States intellectual property, the intellectual property laws of that country must be changed to meet United States standards. If that alone does not work, then some ad hoc laws, regulations, and enforcement mechanisms must be put into place. There is no consideration given to what intellectual property system that country needs, or to the cost of maintaining a stringent intellectual property system designed primarily to protect United States intellectual property works.

The second factor is that in its eager pursuit of the goal of protecting intellectual property abroad, the USTR has paid scant attention to the possibility that it may be infringing upon the sovereignty of other nations. Under Special 301, the USTR, influenced by private United States interest groups,⁶⁷ judges whether the laws and enforcement of laws in another country are adequate. If they are not, that country will be required to make changes under the threat of trade sanctions. Due to uneven bargaining power, the political reality is that Special 301 gives the USTR power to change laws of other countries.⁶⁸ Serious resentment toward the United States has been gener-

⁶⁶ William P. Alford, Forum: Taiwan and the GATT: Panel Three: *Intellectual Property Trade and Taiwan: A GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 100 (1992).

⁶⁷ See, e.g., *Taiwan attacked in U.S. Senate Hearing on Copyright*, Central News Agency, Apr. 20, 1993, available in NEXIS, World Library, ALLWLD File. Eric Smith, executive director of the International Intellectual Property Alliance, urged the United States government to employ sanctions against Taiwan and Thailand and make them painful if they could not meet the demands by the United States before the deadline. "If not, it is a sorry message we send our trading partners that you can take seven or eight years to solve a problem before the United States will act decisively." See also *U.S. Copy Groups Praised USTR Action Against Taiwan*, Central News Agency, May 1, 1993.

⁶⁸ The passage of Taiwan's Amendment to Copyright Law in April 1993 has caused great controversy in Taiwan. The United States infringed on the legislative rights of Taiwan by drafting a revised bill for the copyright law of Taiwan, then demanding it be enacted into law. *DDP Decided to Play Ball on Controversial Copyright Bills*, China Economics News Service, April 21, 1993, available in NEXIS, World Library, ALLWLD File.

ated,⁶⁹ and words like imperialism and colonist have been used to describe the behavior of the United States.⁷⁰ Although some may argue that what really matters is the availability of pressure and the willingness to use it, it is simply naive for the United States to ignore the full ramifications of its intellectual property policy. Some may argue that the United States is doing only what is needed to protect its own legitimate rights, and that there is no reason for pirating countries to complain. Besides failing to recognize issues concerning intellectual property standards in different countries, this view ignores the extra-territorial nature of a law like Special 301. When a country is forced to do things, such as enacting new intellectual property laws, which its citizens do not want, nationalism will inevitably be aroused. It is said that in Thailand furor over a copyright amendment eventually led to the dissolution of the Thai Parliament in April 1988.⁷¹ Imagine how Americans would feel if the United States were told by another country to fix its intellectual property law in six months.

Another factor is the attempt of the United States to stop piracy of its intellectual property in other countries as soon as possible. In rushing reforms, the United States has failed to consider that it normally takes a long time for a country to develop a strong and healthy intellectual property system, and has not recognized the genuine efforts made by other countries.⁷² Meaningful and enduring legal development in intellectual property protection can only be achieved in a country that has the right combination of social, economic and political conditions to support a strong intellectual property protection system. Some may point to Taiwan as an example of how pressure discretely applied can achieve the desired result of intellectual property protection. Pressure, however, was but one of a number of fac-

⁶⁹ In the event mentioned in the previous note, the ruling Kuomintang (the Nationalist Party) caucus issued a statement before the passage of the revisions to the Copyright Law, stating that "We are telling the United States that what it has asked from us not only violates our interests but also our sovereignty. . . . For this, we are lodging our gravest protest." See *id.*

⁷⁰ See William P. Alford, *Intellectual Property, Trade and Taiwan: a GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 105 (1992), for Professor Alford's recount of his witnessing the audience of a lecture on Intellectual Property he gave in Taiwan express their anger at the United States.

⁷¹ See *Thai Government Falls in Dispute over U.S. Copyrights*, UPI, Apr. 29, 1988, available in NEXIS, World Library, UPI File.

⁷² It is of significance that the American Chamber of Commerce in Taipei, Taiwan withdrew itself from its parent organization in the United States in protest against the United States' use of § 301 trade sanctions as a threat against Taiwan. *American Chamber of Commerce in Taipei's Protest Ignored by U.S.*, Central News Agency, June 11, 1993, available in NEXIS, World Library, ALLWLD File. See also *Chamber of Commerce in Taipei Urges USTR not to Use Special 301 Sanctions*, 10 Int'l Trade Rep. (BNA) 1252 (July 28, 1993).

tors that led to changes in Taiwan's intellectual property law and policy. Pressure would not work but for major economic, political, and social changes already underway in Taiwan.

It may be argued that the pressure from the United States helps to accelerate the development of a strong intellectual property system in a developing country, which in turn helps that country to develop its own technology and industry. The assumption behind this argument seems to be that the developing country either cannot plan for its future economic growth or cannot make changes fast enough. That could be the case in many less developed countries. It is not clear, however, how valid that assumption is in the case of Taiwan. Taiwan is aware of the importance of long term economic growth, and is capable of making long term economic plans. If its economic growth requires improving its intellectual property system, more likely than not Taiwan will do it even without external pressure. This is a point the Taiwanese government stressed when it made recent modifications to its intellectual property system.⁷³

Even if we assume that pressure alone is enough to make a country create a strong intellectual property protection system, once the pressure is lifted the system will also collapse. Therefore, in order to maintain the level of intellectual property protection, the United States can not stop threatening its trade partners with trade retaliation. The question is for how long, and on how many countries at the same time, can the United States maintain the necessary pressure? It seems likely that continued application of such pressure will eventually backfire and prove harmful to the interest of the United States. Furthermore, even if the United States can maintain high pressure on other countries indefinitely, it is also perhaps not in the best interest of the United States to be the sole policing force for worldwide intellectual property protection. These considerations make it clear that Special 301 cannot be relied upon as a long term solution.

Some may also argue that the United States has suffered significant losses as the result of intellectual property piracy.⁷⁴ Strong measures, therefore, should be taken. The validity of estimates of losses,

⁷³ See *Taiwan Government Seizes Illegal Videos, Laser Disks after U.S. Special 301 Action*, 10 Int'l Trade Rep. (BNA) 794 (May 12, 1993).

⁷⁴ The International Intellectual Property Alliance estimates that United States film, publishing, music, software, and other industries that depend on copyrights lose \$12-15 billion annually to piracy of their products outside the United States. *Enforcement of Copyright Protection Still Faulty, Subcommittee Told*, 9 Int'l Trade Rep. (BNA) 1709 (Sept. 30, 1992).

however, has been questioned.⁷⁵ The estimated losses resulting from piracy in foreign countries are usually calculated as the estimated number of pirated copies sold times the United States price. This method, however, neglects the economic reality. If the consumers can only buy copyrighted goods at the United States price which is usually several times higher than the price for a pirated copy, the volume of sales has to shrink quite significantly.

Protecting United States intellectual property rights in foreign countries is of great importance to the United States economy. The United States is fully justified to request its trading partners to improve their intellectual property systems so that United States intellectual property rights can receive better protection. The problem is in the means the United States has resorted to achieve this goal. The root of the problems with Special 301 is in its unilateral nature. The effectiveness of Special 301 is premised on the unequal bargaining power between the negotiating parties. Facing the significant consequence of a trade sanction, a country like Taiwan has no choice but to concede to the requests of the United States. A powerful weapon like Special 301, surely, is not completely without value. Used carefully, it can achieve certain results without causing excessive damage. However, artful use requires awareness of the danger of abuse and the willingness to exercise self-restraint. Not every United States President or USTR is willing to show careful self-restraint, of course. While ex-USTR, Carla Hills, seemed to have taken a more careful approach, at least in the beginning,⁷⁶ the current USTR, Mickey Kantor, expressly favors aggressiveness.⁷⁷ If, as the Clinton Administration has claimed, the United States is going to use Special 301 more aggressively, a heightened level of conflicts between the United States and its trade partners can be expected.

There is, however, one definite positive effect of the aggressive application of Special 301. Now that developing countries have been

⁷⁵ See, e.g., William P. Alford, Forum: Taiwan and the GATT: Panel Three: *Intellectual property, Trade and Taiwan: a GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 99 (1992).

⁷⁶ In 1989 and 1990, the USTR Carla Hills declined to name countries as "priority foreign country." See Hills, *Citing Significant Progress, Declines to Name Countries Under Special 301 Provision*, 7 Int'l Trade Rep. (BNA) 616 (May 2, 1990).

⁷⁷ The USTR Mickey Kantor told the Trade Subcommittee of the House Ways and Means Committee that Special 301 has been a very valuable statute, but ultimately its credibility rests on the United States' willingness to take strong action against those countries which contribute to piracy, and that "we (USTR) are not going to shy away from our responsibility to protecting U.S. intellectual property." *U.S. Vows to Protect Intellectual Property Rights*, Central News Agency, April 22, 1993, available in NEXIS, World Library, ALLWLD File. See also USTR Fact Sheet on Special 301, Apr. 30, 1993, reprinted in 10 Int'l Trade Rep. (BNA) 761 (May 5 1993).

hit hard by Special 301, they may be willing to employ multilateral means to resolve disputes over intellectual property protection.⁷⁸

B. GATT as a Long Term Solution

Because a bilateral measure like Special 301 is not a good long term solution for solving the problem of intellectual property piracy in foreign countries, a multilateral measure is needed. One possibility, as the United States has recognized, is to resolve intellectual property issues through the GATT.⁷⁹

The GATT is the most important international agreement regulating trade among nations, with more than ninety countries, accounting for well over four-fifths of world trade, now subscribing to the agreement.⁸⁰ Because GATT lays down multilaterally agreed-upon rules for the conduct of international trade, resolving disputes through the GATT can potentially lessen the effects of uneven bargaining power. Arbitration under GATT, in lieu of unilateral actions, would provide both formality and the chance to take into account the needs of the developing world. Although no one maintains that the GATT has enjoyed a perfect record in dealing with departures from its basic goals, it remains the only multinational organization with any kind of track record in promoting the goal of free trade.⁸¹

The GATT is perceived to have certain advantages over other multinational remedies in solving the problem of intellectual property piracy. As a principle advantage, the GATT provides not only a forum for negotiations, but also an enforcement mechanism that does not exist in traditional multilateral agreements. Although the dispute settlement mechanism has produced mixed success, there is nothing similar to it under the multilateral conventions.

Being discouraged by the World Intellectual Property Organization's lack of effective enforcement mechanisms and inspired by GATT's recorded merits,⁸² the United States turned to the GATT as a multilateral forum to pursue its trade-based intellectual property rights interests. In order to achieve stronger enforcement of intellec-

⁷⁸ Association of American Publisher Officials held that had the United States threatened its trading partners more with Special 301, they would have come to the TRIPS table with more goodwill. *International Intellectual Property Alliance Targets 22 Countries for 'Special 301' Lists*, 8 Int'l Trade Rep. (BNA) 274 (Feb. 20, 1991).

⁷⁹ See *supra* note 34 and accompanying text.

⁸⁰ Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 298 (1991).

⁸¹ *Id.* at 302.

⁸² See *id.* at 292-94, 299-301.

tual property rights, the United States insisted that the rules governing these rights be incorporated in the GATT. The European Community and Japan basically agreed with this position, and the consensus resulted in the TRIPS negotiation in the Uruguay Round. In November, 1990, the Uruguay Round produced "The Draft Texts on Trade Related Aspects of Intellectual Property Rights" (Draft TRIPS).⁸³

The recent conclusion of the Uruguay Round negotiations has brought many major changes to the GATT.⁸⁴ After seven years of negotiation and two postponements, on December 15, 1993 the Uruguay Round finally came to conclusion and produced the Final Act. This agreement is considered as the "largest, most comprehensive trade agreement in world history."⁸⁵ According to the Final Act, a new World Trade Organization (WTO) will be established as the successor of the GATT.⁸⁶ The WTO will pull together in a single framework the GATT as it now exists, all arrangements concluded under GATT auspices, and all other bodies emanating from the Uruguay Round. The WTO will be run by a General Council, which will act as a dispute settlement body. The existing GATT dispute settlement mechanism will also be strengthened.⁸⁷

The Final Act also includes Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁸⁸ Thus, for the first time, intellectual property agreements are incorporated into the GATT. The Uruguay Round also provides for the establishment of a Council for Trade Related Aspect of Intellectual Property Rights to monitor all of these agreements.⁸⁹ The provisions of Articles XXII and XXIII of the GATT 1994 apply to consultations and dispute settlement under the TRIPS agreement.⁹⁰

The general principles set out in TRIPS are the principles of national treatment and most-favored nation treatment.⁹¹ The TRIPS is

⁸³ Mitsuo Matsushita, *A Japanese Perspective on Intellectual Property Rights and the GATT*, 1992 COLUM. BUS. L. REV. 81, 83 n.6 (1992).

⁸⁴ *Uruguay Round Agreement is Reached; Clinton Notified Congress under Fast Track*, 10 Int'l Trade Rep. (BNA) 2103 (Dec. 15, 1993).

⁸⁵ Opinion of Laura D'Andrea Tyson, Chair of the President's Council of Economic Advisors. *Id.*

⁸⁶ *Agreement Establishing the Multilateral Trade Organization*, Part II of the Final Act of Uruguay Round negotiation.

⁸⁷ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the Final Act of Uruguay Round negotiation.

⁸⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, Annex 1C of the Final Act of Uruguay Round negotiation.

⁸⁹ TRIPS art. 68.

⁹⁰ TRIPS art. 64.

⁹¹ TRIPS arts. 3, 4.

fairly comprehensive in its coverage of intellectual property rights. Besides traditional intellectual property rights of copyright, trademark, and patent, it also contains provisions on computer software and integrated circuits. The intellectual property standards set forth in TRIPS are fairly high. On copyright, it calls on countries to respect the 1971 Berne Convention.⁹² On patents, countries are to comply with the 1967 Paris Convention,⁹³ and the term of patent protection is twenty years.⁹⁴ Member countries are also required to provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.⁹⁵

Although the TRIPS sets high standards of intellectual property rights, it does show consideration for less developed countries by allowing for delay of implementation of those standards. Any developing country member is entitled to delay for five years.⁹⁶ Least-developed country members, depending on their special situations, may delay for ten years.⁹⁷

As the original proponent for the incorporation of TRIPS into the GATT, the United States should give its full support of the TRIPS. The United States, therefore, should stop using Special 301, because any further use of that bilateral measure will seriously undermine the effectiveness of the TRIPS. The United States has to learn to be patient. Even with the incorporation of TRIPS into the GATT, the goal of effectively resolving intellectual property protection issues through the WTO will likely take a long time to achieve. The United States also has to be ready to accept that the outcome of dispute resolution through the WTO may not be as satisfactory as results possible through Special 301 negotiations.⁹⁸ The United States, however, should not be discouraged by those considerations so as to give up pursuing the TRIPS/WTO route and continue aggressive Special 301 applications.⁹⁹

⁹² TRIPS art. 9.

⁹³ TRIPS art. 2.

⁹⁴ TRIPS art. 33.

⁹⁵ TRIPS art. 61.

⁹⁶ TRIPS art. 65.

⁹⁷ TRIPS art. 66.

⁹⁸ See *supra* note 37 and accompanying text discussing the advantages of a bilateral approach.

⁹⁹ Even after the conclusion of the Uruguay Round, the USTR Mickey Kantor made suggestion that the Clinton Administration might revive the Super 301, which expired in 1990, and use it against Japan if current talks do not produce satisfactory results. See *Japan Calls U.S. Trade Threat 'Regrettable'*, L.A. TIMES, Jan. 14, 1994, at D2.

C. Taiwan and GATT

The Republic of China (ROC) was a founding member of the GATT.¹⁰⁰ The ROC government gave notice of withdrawal from GATT in 1950, after it retreated to Taiwan.¹⁰¹ In January of 1990 Taiwan applied for GATT membership. In order to avoid the issue of Taiwan's political status, its application purported to be on behalf of the "customs Territory of Taiwan, Penghu, Kinmen and Matsu."¹⁰² This formulation is consistent with Art. XXXIII of the GATT, which allows applications for membership to be filed by "governments acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of other matters provided for in this agreement."

Accession to GATT is of great importance to Taiwan. Nine-tenths of its trade is done without official ties, of which one-third is with the United States. Except with the United States, Taiwan lacks even a dialogue forum to resolve trade disputes. Being a non-GATT state, Taiwan has no conduit to grieve against other countries who deny it GATT's most favored nation treatment. Accession to the GATT would instrumentally serve its security, for its membership would simultaneously link it to more than a hundred economies. The United States could aid Taiwan's accession to the GATT, and use its influence in the process as a further incentive for Taiwan to cooperate on intellectual property rights and other trade issues.¹⁰³

IV. CONCLUSION

The piracy of intellectual property is a serious problem, not only for the United States, but also for all producers of intellectual properties. Piracy, especially in developing countries, is hard to eliminate. In order to protect its intellectual property rights in foreign countries, the United States has launched a series of Special 301 attacks on those pirating countries. While the United States should not be attacked for wishing to protect its citizens' intellectual property rights, the means it uses to achieve that end is problematic. As a bilateral measure backed by unilateral retaliation, the Special 301 approach has certain drawbacks. It can only be used as a short term solution. There

¹⁰⁰ See Lori F. Samrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 21 (1992).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *U.S. Urges Taiwan to Cut Barriers to Trades as Part of GATT Accession*, 10 Int'l Trade Rep. (BNA) 2019 (Dec. 1, 1993).

is also the possibility of overly aggressive use, as demonstrated in the case of Taiwan.

Strengthening intellectual property rights protection on a global scale is not a simple trade problem. It inevitably involves international politics. The case of Special 301 is just another example showing that a multilateral means is often more desirable than a bilateral means for resolving disputes between nations. At the risk of oversimplification, we can analogize the GATT (or the new WTO) to the village council of a small village. Based upon a set of rules agreed upon by most or all villagers, the village council adjudicates disputes between villagers. This mode of dispute resolution has the potential advantages of formality and equity. Use of bilateral negotiations between nations to resolve disputes is comparable to the resolution of disputes within the village by direct confrontation between villagers. Direct confrontation as a way of dispute resolution has the potential advantage of efficiency, but it always has the problem that the strong will bully the weak. It also runs the risk of developing the dispute into a family feud, especially when the parties have very different views of the issue in dispute. Even though the two ways of dispute resolution may result in exactly the same agreements between the parties, resorting to the village council for a decision definitely adds legitimacy to the outcome.

The Uruguay Round agreement, with the provision to establish the World Trade Organization, may bring about significant changes to the economic and political relationship among countries around the world. The TRIPS covers an important area of the global economic structure. It may take quite a few years before we can tell whether the TRIPS is a successful way to resolve disputes over intellectual property protection. It is clear, however, that the effectiveness of the TRIPS depends on the effectiveness of the WTO. The effectiveness of the WTO depends on whether powerful countries like the United States can refrain from resorting to bilateral means under Special 301.