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In Defense of TRIPs: It Only Seems Imperialistic

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NOTE: IN DEFENSE OF TRIPs:
IT ONLY *SEEMS* IMPERIALISTIC

ANTHONY R. NOSS[†]

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I. INTRODUCTION

334–324 B.C.

Alexander . . . looked upon himself as the carrier of Greek civilisation. . . . Around 200 B.C. a man could speak Greek from the Gates of Hercules to the Ganges. . . . The science, philosophy and, above all, the art of the Greeks was thus coming to bear on the old civilisations of the East. Coins, vases, architectural and sculptural remains and, . . . literary influences, bear witness to this cultural invasion. . . .¹

Late 1980s–Early 1990s

[S]enior members of three distinct corporate cultures had agreed to the globalization of . . . “fundamental principles” of intellectual property. . . . Implicit . . . was . . . a morality of investment in information Piracy would have to be eliminated, infringement . . . criminalized . . . severe limits [placed] on public interest exceptions . . . [and agreement] to become the subjects of meaningful enforcement procedures if [countries] did not comply . . .²

Like Alexander’s empire, TRIPs³ has undoubtedly spread Western principles across the globe.⁴ Does this necessarily mean, however, that TRIPs has perpetuated a “new empire”—that it is “imperialistic”?⁵ The “new empire” would be as intangible as Alexander’s was short lived.⁶ It would subsist not by maintaining armies and grabbing land, but by imposing a system of norms and values upon other cultures in order to gain and advance protection for the empire’s major asset—intellectual property. Over millennia, the West developed

¹ BERTRAND RUSSELL, WISDOM OF THE WEST 102–03 (Paul Foulkes ed.) (1959) (discussing Alexander the Great’s empire within a greater discussion of the Hellenistic world).

² PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 123 (2002) (noting the three cultures as the U.S., the EC, and Japan).

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 269, 33 I.L.M. 1197 (1994) [hereinafter TRIPs], available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

⁴ See generally DRAHOS, *supra* note 2, at 108–49.

⁵ Perhaps the “Emperor” of the “new empire” might actually be more like a “Lord” in a feudal sense such as Drahos and Braithwaite explain with their concept of “information feudalism,” the “emergent property right” of which is defined as “[i]nfogopolies, biogopolies over abstract objects.” See DRAHOS, *supra* note 2, at 199.

⁶ See RUSSELL, *supra* note 1, at 103 (discussing the ephemeral nature of Alexander’s empire after his death).

distinct conceptions of philosophy, science, literature, art, music, and economics.⁷ These conceptions⁸ led to value-laden constructions of protection for intellectual property.⁹ At the same time, world cultures developed distinct paradigms and came to view intellectual property in different ways.¹⁰ Today, however, a global economy and a shrinking world demand solutions for consistent protection of intellectual property on an international scale. One major effort to satisfy this need is TRIPs.

TRIPs is often lauded as a wonder treaty—a marvel that provides, for the first time ever, an enforcement mechanism with “teeth.”¹¹ To say that TRIPs has been well accepted by many would be an understatement.¹² Nonetheless, TRIPs has critics.¹³ They seem to assert that TRIPs is merely a form of Western Imperialism—a vehicle for spreading the West’s cultural ideals and economic interests at the expense of less-industrialized, non-Western nations.¹⁴

⁷ See generally RUSSELL, *supra* note 1 (providing a concise survey of “Western thought”).

⁸ One of the most relevant constructs is the West’s concept of “property.” See DONALD G. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT* 25–52 (2004) (outlining various philosophic interpretations of “property” and explaining that the concept of “exclusivity” applies most aptly to intellectual property).

⁹ *Id.*; U.S. CONST. art. I, § 8, cl. 8.

¹⁰ See, e.g., Geoffrey T. Willard, *An Examination of China’s Emerging Intellectual Property Regime: Historical Underpinnings, The Current System and Prospects for the Future*, 6 *IND. INT’L & COMP. L. REV.* 411, 411–28 (1996) (discussing Chinese intellectual property concepts over time). China recognized some forms of intellectual property nearly 3,000 years ago during the Zhou Dynasty. *Id.* at 413. As the communists took power, intellectual property was grounded “[o]n the notion that individual accomplishments belonged to all of society.” *Id.* at 417.

¹¹ Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States “Trips” over Special 301*, 7 *MINN. J. GLOBAL TRADE* 179, 187–88 (1998) (discussing how TRIPs provides a mechanism which provides actual consequences). See TRIPs, *supra* note 3, art. 64.

¹² See, e.g., DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY & ANALYSIS* 3 (3rd ed. 2008) (opining that along with the 1968 Stockholm Conference that created WIPO, TRIPs “[i]s undoubtedly the most significant milestone in the development of [intellectual property] in the twentieth century”).

¹³ See, e.g., CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT & POLICY OPTIONS* 3 (2000) (“Developing countries reluctantly negotiated increased standards of protection for IPRs in GATT, and finally acquiesced in making important concessions in terms of reforms of their intellectual property legislation, without obtaining any compensating concession from industrialized countries.”).

¹⁴ See BANKOLE SODIPO, *PIRACY AND COUNTERFEITING: GATT, TRIPS & DEVELOPING COUNTRIES* 276 (1997) (explaining that because of the manner of introduction and administration, “the system is viewed [by developing countries] mainly as a vehicle for protecting foreign interests”).

This article asserts that TRIPs is far more than a tool for the perpetuation of a “new empire.” It asserts that TRIPs is not imperialistic for three reasons.¹⁵ First, the spirit of the Dispute Settlement Mechanism (“DSM”) provisions in the developing countries’ draft agreement text subsists in subsequent drafts, the Dispute Settlement Understanding (“DSU”),¹⁶ and in the disposition of a majority of TRIPs disputes.¹⁷ Second, TRIPs stifles Special 301-type unilateralism.¹⁸ Third, strong empirical evidence shows that TRIPs’ third-party DSM participation is diverse, extensive, and has increased over time.¹⁹

II. “WESTERN IMPERIALISM” DEFINED

For purposes of this article, “Western” does not necessarily mean Western in a purely geographic sense, because Japan also advocated inclusion of intellectual property rights in the Uruguay Round of GATT.²⁰ As such, to some extent the label “Western” is a collective term for three industrialized political bodies situated in both the West and the Far East. This construct comes with a caveat, however, because Japan’s stance was at times quite divergent from the stance of the United States and the European Communities (“EC”) during TRIPs’ formation.²¹ Moreover, during TRIPs negotiations, the public-private relationship in Japan appears to have resulted in the Japanese business community playing a far less forceful role than that of its American and European counterparts.²² Indeed, some view Japan’s role as rather passive.²³ Accordingly, the term “Western,” as used in this article, primarily means the United States, the EC, and to a lesser extent, Japan.

¹⁵ See *infra* Part II. This article focuses solely on TRIPs’ dispute settlement mechanism (“DSM”). Although some may interpret other aspects of TRIPs as “imperialistic,” TRIPs is not imperialistic overall because the DSM is a central aspect.

¹⁶ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

¹⁷ See *infra* Part III.A.

¹⁸ See *infra* Part III.B.

¹⁹ See *infra* Part IV.

²⁰ See M.B. RAO & MANJULA GURO, UNDERSTANDING TRIPs: MANAGING KNOWLEDGE IN DEVELOPING COUNTRIES 13 (2003). GATT refers to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

²¹ See Mitsuo Matsushita, *A Japanese Perspective on Intellectual Property Rights & the GATT*, 1992 COLUM. BUS. L. REV. 81 (1992) (discussing Japan’s divergent views on a number of issues).

²² See DRAHOS, *supra* note 2, at 117 (“[T]he relentless search for consensus meant that Japanese businesses and the Ministry of International Trade and Industry (MITI) never operated too far apart from each other, making it difficult for Japanese business to take the kind of agenda-setting role that US business played.”).

²³ See DRAHOS, *supra* note 2, at 118 (“[T]he Japanese simply sat back, watching and waiting for others to take the lead.”).

“Imperialistic,” as used in this article, means imperialistic in the broad sense of the term.²⁴ Therefore, the reader should interpret “imperialistic” as “the extension or imposition of power, authority, or influence” of a nation or group over another nation or group.²⁵

III. TRIPs IS NOT IMPERIALISTIC, BECAUSE ITS DSM REFLECTS THE SPIRIT OF THE DEVELOPING COUNTRIES’ DRAFT AGREEMENT TEXT, AND REPRESENTS A SHIFT AWAY FROM UNILATERALISM

TRIPs’ DSM is not imperialistic. First, its design and application reflect the spirit of the developing countries’ draft agreement text, and second, it is a Western-driven shift away from Special 301-type unilateralism.²⁶ Although the intricacies of Special 301 are beyond this article’s scope, a brief discussion may be helpful for the sections below.²⁷ Special 301 requires that the United States Trade Representative (“USTR”) identify “priority foreign countries” (“PFCs”)—those countries that “deny adequate and effective [intellectual property] protection” or “deny fair and equitable market access” to United States companies that rely on such protection.²⁸ If, after a period of investigation and publication,²⁹ the most “egregious” PFCs do not enter into good faith negotiations or “make significant progress in bilateral or multilateral negotiations,” then the PFC may face unilateral retaliation through the processes available through “regular” section 301.³⁰

A. *TRIPs’ Dispute Mechanism Facilitates Developing Countries’ Goals*

TRIPs is not imperialistic, because its DSM’s design and application reflect the spirit of developing countries’ draft agreement text despite the near wholesale incorporation of the West’s draft agreement text into the final version of TRIPs.

²⁴ “Imperialistic” is defined as “the policy, practice, or advocacy of extending the power and dominion of a nation especially by direct territorial acquisitions or by gaining indirect control over the political or economic life of other areas; *broadly*: the extension or imposition of power, authority, or influence.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 623 (11th ed. 2003).

²⁵ *Id.*

²⁶ Trade Act of 1974, § 182, Pub. L. No. 93-618, 88 Stat. 1978, 1999, § 141 (1974) (*amended by Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1179, § 1303 (codified as amended at 19 U.S.C. § 2242 (2006))*). *See generally infra* Part III.

²⁷ For a more detailed discussion of Special 301, see Lina M. Montén, Comment, *The Inconsistency Between Section 301 & TRIPs: Counterproductive with Respect to the Future of International Protection of Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 387 (2005).

²⁸ 19 U.S.C. § 2242(a) (2006).

²⁹ For example, the USTR’s “2009 Special 301 Report” was recently published. Office of the United States Trade Representative, *2009 Special 301 Report*, (Apr. 30, 2009), available at [http://www.ustr.gov/sites/default/files/Full Version of the 2009 SPECIAL 301 REPORT.pdf](http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf).

³⁰ *See* 19 U.S.C. § 2242(b)-(e); Montén, *supra* note 27, at 400–03.

A DSM derived from divergent viewpoints, while primarily facially incorporative of one viewpoint's text, is not imperialistic if the design and application of that mechanism reflect the spirit of other parties' viewpoints. As such, one must look beyond the text of TRIPs as it stands today when determining whether it is imperialistic. To determine whether the "spirit" of the developing countries' draft agreement text subsisted past the negotiating table, one must compare the early versions of the developing countries' draft with those from the West, trace it through subsequent working drafts and the final version of TRIPs, and then examine whether this "spirit" survives through TRIPs' body of complaints to date.

TRIPs' formation is somewhat shrouded in mystery.³¹ Indeed, one account holds that TRIPs was essentially formed by a group of only fifty people.³² Thankfully, however, early draft agreement texts from various viewpoints are available to analyze.³³ During TRIPs negotiations, the West and the developing countries had disparate views over the prospective shape of TRIPs' DSM. On one hand, the West wanted to incorporate GATT's dispute settlement process into TRIPs.³⁴ On the other hand, developing countries sought mutually satisfactory solutions as opposed to an adversarial process.³⁵ For example, part of the EC's text states the following:

Contracting parties agree that . . . they shall, in relation to each other, abide by the dispute settlement rules and procedures of [GATT], and the recommendations, rulings and decisions of the CONTRACTING PARTIES, and not have recourse in relation to

³¹ See DRAHOS, *supra* note 2, at 10.

³² See *Id.* "During the course of an interview in 1994 with a senior US trade negotiator he remarked to us that 'probably less than 50 people were responsible for TRIPs.'" *Id.*

³³ For an especially detailed analysis of various TRIPs documents, see GERVAIS, *supra* note 12.

³⁴ MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPs AGREEMENT 140 (1996) (citing *Communication from the European Community, Draft Agreement on Trade-Related Aspects of Intellectual Property*, GATT Doc. No. MTN.GNG/NG11/W/68 (March 29, 1990) [hereinafter *EC Draft Agreement (W/68)*]). Documents from India, Australia, the Nordic Countries, and Switzerland preceded Document W/68; however, W/68 "could be considered the spark which ignited the work towards the TRIPs agreement." GERVAIS, *supra* note 12, at 16–17 n.61. Japan and Switzerland also tabled proposals in mid-May 1990. GERVAIS, *supra* note 12, at 17 nn. 63–64.

³⁵ GERVAIS, *supra* note 12, at 17 (citing *Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay*, GATT Doc. No. MTN.GNG/NG11/71 (May 14, 1990) [hereinafter *Developing Countries' Draft Agreement (W/71)*]).

other contracting parties to unilaterally decided economic measures of any kind.³⁶

After the EC released Document W/68, the United States soon followed with a nearly identical text.³⁷ The United States added nothing to the EC's dispute resolution language.³⁸ Part of the developing countries' proposal stated the following:

Article 19: Consultations. (1) Where a dispute arises concerning the interpretation or implementation of any provisions of this Agreement, a Party may bring the matter to the attention of another Party and request the latter to enter into consultations with it. (2) The Party so requested shall provide promptly an adequate opportunity for the requested consultations. (3) Parties engaged in consultations shall attempt to reach, within a reasonable period of time, a mutually satisfactory solution to the dispute.

Article 20: Other Means of Settlement. If a mutually satisfactory solution is not reached within a reasonable period of time through the consultations referred to in Article 19, Parties to the dispute may agree to resort to other means designed to lead to an amicable settlement of their dispute, such as good offices, conciliation, mediation and arbitration.

Article 21: Non-recourse to Unilateral Measures. Parties shall refrain, in relation to each other, from threatening or having recourse to unilaterally decided measures of any kind aimed at ensuring the enforcement of intellectual property rights.³⁹

Therefore, very early on, and just two years after the adoption of Special 301,⁴⁰ the United States, the EC, and the developing countries agreed on the rejection of unilateral retaliation as part of TRIPs' DSM.⁴¹ With the then-rising

³⁶ *EC Draft Agreement (W/68)*, *supra* note 34, at pt. 5, art. 8 available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (type "mtn.gng/ng11/w/68" into search field under "full text search criteria" and then preview result in HTML mode).

³⁷ See GERVAIS *supra* note 12, at 17 ("The similarity between the two documents suggested that transatlantic consultations had preceded the tabling of both documents.").

³⁸ *Communication from the United States, Draft Agreement on Trade-Related Aspects of Intellectual Property*, GATT Doc. No. MTN.GNG/NG11/W/70 (May 11, 1990) (stating that the U.S. believes the EC's provisions "provide in general an acceptable basis for negotiation"), at Part IV, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (type "mtn.gng/ng11/w/70" into search field under "full text search criteria" and then preview result in HTML mode).

³⁹ *Developing Countries' Draft Agreement (W/71)*, *supra* note 35, at ch. IX, arts. 19–21.

⁴⁰ See *supra* note 26 (citing the 1988 amendment to the Trade Act of 1974).

⁴¹ See *supra* notes 36, 38–39 and accompanying text.

threat of Special 301, the developing countries' avoidance of unilateralism in TRIPs was undoubtedly of paramount concern.⁴² TRIPs' anti-imperialistic effect is evident through a strong connection between the state of TRIPs' formation and the United States' deployment of Special 301. For example, in 1989 and 1990, the USTR labeled no countries "Priority Foreign Countries," but when TRIPs negotiations stalled in 1991, it quickly designated China, India, and Thailand as such.⁴³

Shortly after the various drafts were submitted, the Council of Representatives Chairman provided a report to the group.⁴⁴ Although its structure was most similar to the EC's and United States' drafts, "by and large it was eventually accepted as the basis for further discussions."⁴⁵ The Chairman's report clearly presented two approaches: (1) the West's all-encompassing agreement approach; and (2) the developing countries' demarcated approach.⁴⁶ Thus, disagreement still existed.⁴⁷ Nonetheless, the voice of the developing countries was still present.⁴⁸

Eventually, the West's single-agreement approach was adopted, as can be seen in Article 64 of TRIPs.⁴⁹ Article 64 incorporates the DSU and GATT 1994.⁵⁰ As discussed above, the developing countries wanted the mechanism to involve consultations that led to "mutually satisfactory solution[s]" in a reasonable time.⁵¹ Moreover, the developing countries felt that parties should fall back on use of "good offices, conciliation, mediation and arbitration" and should

⁴² In 1989, the USTR placed twenty-five countries on its "watch list." See Pechman, *supra* note 11, at 197.

⁴³ See Pechman, *supra* note 11, at 197.

⁴⁴ GERVAIS, *supra* note 12, at 18–19; *Chairman's report to the Group of Negotiation of Goods*, GATT Doc. No. MTN.GNG/NG11/W/76 (July 27, 1990), available at http://docsonline.wto.org/gen_search.asp?searchmode=imple (type "mtn.gng/ng11/w/76" into search field under "full text search criteria" and then preview result in HTML mode) [hereafter *Chairman's Report (W/76)*].

⁴⁵ See GERVAIS, *supra* note 12, at 20.

⁴⁶ See *id.* at 19–20 (noting that the developing countries sought to have pirated and counterfeited goods under a GATT model, and a separate non-GATT agreement regarding intellectual property rights more generally).

⁴⁷ See GERVAIS *supra* note 12, at 23 ("[t]here were three possible avenues: a completely separate dispute settlement mechanism for TRIPs; a system under the (future) WTO umbrella but without the possibility of cross-retaliation; or, as a last option, full incorporation into the WTO mechanism.").

⁴⁸ See *Chairman's Report (W/76)*, *supra* note 44, Part IV.

⁴⁹ See TRIPs, *supra* note 3, art. 64.

⁵⁰ GERVAIS *supra* note 12, at 508; TRIPs, *supra* note 3, art. 64 (incorporating GATT 1947, *supra* note 20, art. XXII and XXIII (as amended by GATT 1994)); DSU, *supra* note 16.

⁵¹ *Developing Countries' Draft Agreement (W/71)*, *supra* note 35, art. 19.

always refrain from unilateral recourse.⁵² A close look at the DSU reveals that the spirit of the developing countries' draft agreement text was not totally lost despite the adoption of the West's single-agreement approach.

First, DSU Article 3 states that “[a] *solution mutually acceptable* to the parties to a dispute and consistent with the covered agreements *is clearly to be preferred.*”⁵³ Second, DSU Article 5 states that “[g]ood offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time.”⁵⁴ Moreover, Article 5 provides that parties may continue with these options during the panel process.⁵⁵ In addition, the Director-General may even offer such options.⁵⁶ Lastly, DSU Article 23, titled “Strengthening of the Multilateral System,” calls for Members to “abide by[] the rules and procedures of the [DSU],” and, in particular, refers to Article 22.⁵⁷ Article 22 lays the groundwork for the suspension of concessions or other obligations.⁵⁸ It provides a clear preference for same-sector sanctions, and only allows a Member to request cross-sector sanctions when a number of factors are met.⁵⁹

Lastly, TRIPs is not imperialistic, because the *application* of its DSM reflects the spirit of the developing countries' draft agreement text. As discussed above, the developing countries primarily sought “mutually satisfactory solution[s].”⁶⁰ Therefore, to the extent that TRIPs' DSM has yielded mutually satisfactory solutions, it reflects the spirit of the developing countries' goal. To the extent it reflects the developing countries' goal, TRIPs is not imperialistic.

Thirteen of the twenty-five TRIPs disputes between 1996 and 2009, or 52%, ended with a Mutually Agreed Solution.⁶¹ Notably, of the thirteen disputes with Mutually Agreed Solutions, the United States was the complainant twelve times, or over 92% of the time.⁶² Thus, of the fifteen TRIPs disputes in which the United States was the complainant, 80% of the disputes ended in a Mutually Agreed Solution.⁶³ Based on the foregoing, TRIPs is not imperialistic, because an analysis of TRIPs' DSM-related drafting history, DSU provisions, and application

⁵² *Id.*

⁵³ DSU, *supra* note 16, art. 3, para. 7 (emphasis added).

⁵⁴ DSU, *supra* note 16, art. 5, para. 3.

⁵⁵ DSU, *supra* note 16, art. 5, para. 5.

⁵⁶ DSU, *supra* note 16, art. 5, para. 6.

⁵⁷ DSU, *supra* note 16, art. 23.

⁵⁸ DSU, *supra* note 16, art. 22.

⁵⁹ *Id.*

⁶⁰ *Developing Countries' Draft Agreement (W/71)*, *supra* note 35, art. 19.

⁶¹ See TRIPs DISPUTES, *infra* APPENDIX; TABLE 1, *infra* note 64.

⁶² See TABLE 1, *infra* note 64.

⁶³ See TRIPs DISPUTES, *infra* APPENDIX; see also TABLE 1, *infra* note 64.

of the mechanism, illustrates that the spirit of the developing countries' draft agreement text subsists even through present-day application.

TABLE 1

TRIPs Disputes Resolved With a Mutually Agreed Solution⁶⁴

Dispute	Year	Complainant	Respondent
DS37	1996	U.S.	Portugal
DS28	1997	U.S.	Japan
DS36	1997	U.S.	Pakistan
DS42	1997	EC	Japan
DS86	1998	U.S.	Sweden
DS125	2001	U.S.	Greece
DS124	2001	U.S.	EC
DS83	2001	U.S.	Denmark
DS199	2001	U.S.	Brazil
DS196	2002	U.S.	Argentina
DS171	2002	U.S.	Argentina
DS115	2002	U.S.	EC
DS82	2002	U.S.	Ireland

B. TRIPs Stifles Special 301-type Unilateralism

TRIPs is not imperialistic, because it stifles the United States' ability to utilize Special 301, and thus empowers WTO-Member developing countries to challenge the United States and others without the looming threat of unilateral Special 301 retaliation.⁶⁵ An international agreement advocated by the West which decreases the West's capabilities for unilateral retaliation is not imperialistic. Such an agreement is not imperialistic because the reduction or elimination of unilateral political tools necessarily results in lessened opportunity for concentrated "extension or imposition of power, authority, or influence."⁶⁶

⁶⁴ For the data underlying TABLE 1, see TRIPs DISPUTES, *infra* APPENDIX and accompanying notes.

⁶⁵ See generally Pechman, *supra* note 11, at 199–208 (noting the theoretical legal conflict between Special 301 and TRIPs). This article attempts to highlight this conflict and, from it, infers that TRIPs is not imperialistic.

⁶⁶ See *supra* note 24.

In some ways, TRIPs might be viewed as a calculated risk on the United States' part. Indeed, it appears that the United States thought that the likelihood of high WTO accession rates and eventual TRIPs compliance would outweigh anything lost by TRIPs' potential stifling of the United States' ability to legally utilize Special 301.⁶⁷ One commentator provides a clear description, explained briefly below, of the interplay between Special 301 and TRIPs—a framework that one might interpret as strong evidence that TRIPs is not imperialistic.⁶⁸

First, Special 301's use against a WTO-Member nation for an alleged TRIPs violation would likely violate TRIPs, because TRIPs requires Members to invoke the DSM and not self-determine whether a violation has occurred.⁶⁹ Second, TRIPs' design arguably prevents the United States from using Special 301 to impose so-called TRIPs-plus standards on WTO Members, because TRIPs does not allow the United States to block panel formation or reports—something the United States had done under the previous GATT dispute model.⁷⁰ Third, it is implicit that Special 301 cross-sector retaliation violates TRIPs, because TRIPs strongly suggests that retaliation must be in the same sector as the violation.⁷¹ Lastly, if the United States cannot compel TRIPs compliance through the DSM—because it allows compensation in lieu of compliance⁷²—then the United States would have to resort to using Special 301.⁷³ However, this would likely result in a TRIPs complaint against the United States.⁷⁴

The commentator's analysis provides fertile ground for this article's arguments.⁷⁵ Because TRIPs' DSM was shaped by the West, it represents a self-induced reduction of the West's ability to unilaterally influence the shape of WTO-Member nations' intellectual property regimes—at least in terms of compliance. Furthermore, because TRIPs' DSM was shaped by the developing countries, it is a stakeholder-based, multilateral exercise of influence in response to, and in anticipation of, Special 301-type unilateral measures.⁷⁶ Thus, TRIPs is

⁶⁷ See Pechman, *supra* note 11, at 199–210.

⁶⁸ *See id.*

⁶⁹ *See id.* at 202–03.

⁷⁰ *See id.* at 197–98. For example, in 1987 the United States blocked Brazil's attempt to form a GATT dispute settlement panel in response to the United States' imposition of “100% tariffs on \$39 million worth of Brazilian exports including paper products, drugs, and electronics” as a cross-sector Special 301 response to Brazil's protection, or lack thereof, of pharmaceutical patents. *Id.*

⁷¹ See Pechman, *supra* note 11, at 203–04.

⁷² See DSU, *supra* note 16, art. 22, para. 1.

⁷³ See Pechman, *supra* note 11, at 204–08.

⁷⁴ *See id.*

⁷⁵ See *supra* notes 69–74 and accompanying text.

⁷⁶ Special 301 may have even been a driving force behind developing countries' TRIPs negotiations. See Pechman, *supra* note 11, at 199 (quoting THOMAS O. BAYARD & KIMBERLY

not imperialistic, because both options illustrate that TRIPs' DSM was not the result of an "extension or imposition of power, authority, or influence" by the West.⁷⁷ The United States' decision may generally be a wise investment for long-term and widespread increases in intellectual property protection.⁷⁸ If and when this occurs, TRIPs may bring two important benefits for the West: (1) it may externalize the resources previously exhausted by efforts like Special 301;⁷⁹ and (2) it may enhance America's image abroad and improve international trade relations generally due to the absence of cross-sector sanctions for intellectual property violations.⁸⁰ The presence of these potential benefits for the West does not make TRIPs imperialistic, however, because the attainment of these benefits would benefit the world at large. Lastly, Special 301 has not gone away entirely.⁸¹ As such, the West has not let go of all unilateral options—at least not those outside of TRIPs' realm.⁸²

These TRIPs-era remnants of Special 301-type programs, however, do not signal defeat for this article. Indeed, this article only asserts that TRIPs is not imperialistic—its arguments do not necessarily combat allegations that the West is imperialistic in other intellectual property contexts. Of course, because TRIPs does not abolish what some may interpret as imperialistic actions outside of TRIPs' realm, TRIPs might be viewed, in some respects, as a form of complicit or passive imperialism. This argument fails, however, because imperialism requires active and deliberate steps—the "*extension or imposition of power, authority, or influence.*"⁸³ Therefore, TRIPs is not imperialistic.

ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 207 (1994)) (stating that it appears plausible that the U.S.'s unilateralism "encouraged developing countries to negotiate on [intellectual property during TRIPs negotiations] as a way of establishing rules to restrain U.S. unilateralism").

⁷⁷ See *supra* note 24.

⁷⁸ See Pechman, *supra* note 11, at 204–05.

⁷⁹ See *id.* at 204 ("[T]he United States wants to externalize its strong intellectual property protection by supporting a multilateral agreement that provides sufficient minimum standards of protection and adequate enforcement mechanisms.").

⁸⁰ See Pechman, *supra* note 11, at 204 ("The retaliation limitations built into the DSU, coupled with the obligation of Members to utilize the DSU to deal with disputes arising under the WTO Agreements, imply that retaliation under Special 301 beyond the scope of the DSU violates the WTO Agreements.").

⁸¹ Indeed, it was not repealed after TRIPs was established. Montén, *supra* note 27, at 403 (citation omitted). Moreover, it apparently remains available for (1) influencing conformance as countries accede and construct standards; and (2) retaliating against GATT non-Members. See Pechman, *supra* note 11, at 199.

⁸² See Pechman, *supra* note 11, at 199.

⁸³ See *supra* note 24.

IV. TRIPs IS NOT IMPERIALISTIC, BECAUSE THIRD-PARTY
PARTICIPATION IN THE DISPUTE SETTLEMENT PROCESS IS DIVERSE,
EXTENSIVE, AND HAS INCREASED OVER TIME

The design and application of TRIPs' DSM is non-imperialistic, because strong empirical evidence supports that international third-party participation in such disputes is diverse, extensive, and has increased over the past thirteen years. An international dispute settlement process should allow multilateral participation and should provide all relevant global stakeholders a forum in which to cast their relevant opinions. Indeed, unless this need is satisfied, the agreement's terms would clearly be imperialistic in nature. Mere design, however, is only the beginning. If application of the agreement's process fails to include diverse voices, and if the international community eschews the process because it feels ignored, then the agreement is clearly imperialistic. Diverse participation means inclusion of parties with varied geographical locations, cultures, political structures, and economic power. Extensive participation simply means that the process includes a relatively high percentage of relevant stakeholders. In sum, the existence of diverse and widespread international participation in the process, and an increase of such participation over time, would be strong evidence of the treaty's non-imperialistic design and application, and thus its success.

TRIPs is not imperialistic, because third-party participation in its DSM is diverse and extensive. At first glance, however, TRIPs' DSM is a tool and a forum for the United States' and the EC's imposition of Western principles on other nations.⁸⁴ Indeed, through a quick review of the complainant and respondent party names for each TRIPs dispute,⁸⁵ one might infer that TRIPs is merely a venue for carrying out the West's goals under the veil of TRIPs' multilateral structure. In fact, either the United States or the EC was the complainant in nineteen of twenty-five, or 75%, of all TRIPs complaints.⁸⁶ Of those nineteen complaints, the United States was the complainant thirteen times.⁸⁷ Moreover, there is not a single case in which the United States or the EC was not either the complainant or respondent.⁸⁸ Looking only at the complainant and respondent in each dispute, however, is not wholly illustrative. Rather, one must dig deeper before labeling the system's application as "imperialistic."

A closer look at TRIPs' twenty-five complaints reveals that, when viewed as a whole, the body of disputes is only imperialistic on the surface. First, in addition

⁸⁴ A link and full citation for all TRIPs disputes, including those listed in TABLE 1, is found in the TRIPs DISPUTES, *infra* APPENDIX.

⁸⁵ See TRIPs DISPUTES, *infra* APPENDIX.

⁸⁶ See TRIPs DISPUTES, *infra* APPENDIX.

⁸⁷ See TRIPs DISPUTES, *infra* APPENDIX.

⁸⁸ See TRIPs DISPUTES, *infra* APPENDIX.

to naming the complainant and respondent in any given dispute, the WTO also names any countries that reserved third party rights.⁸⁹ The table included at Appendix 1 contains a list of third party participation, if any, in each dispute.⁹⁰ As Appendix 1 shows, a third party joined a complaint in ten of twenty-five, or 40%, of all TRIPs disputes.⁹¹ Within the ten complaints with third-party participation, a total of forty-nine countries participated.⁹² In particular, twenty-three countries participated as individual entities, and twenty-seven countries participated under the auspices of the EC.⁹³ Notably, Poland participated as an individual entity prior to joining the European Union in 2004, and also under the auspices of the EC in 2009.⁹⁴ Poland is not counted twice, however, and the total number of participating countries is forty-nine.⁹⁵ Remarkably, these forty-nine countries are from six distinct global regions:

⁸⁹ This information is available only by looking at each dispute individually. See any note accompanying TRIPs DISPUTES, *infra* APPENDIX for an example.

⁹⁰ See TRIPs DISPUTES, *infra* APPENDIX.

⁹¹ See TRIPs DISPUTES, *infra* APPENDIX.

⁹² See TRIPs DISPUTES, *infra* APPENDIX.

⁹³ See TRIPs DISPUTES, *infra* APPENDIX. For various legal reasons, the European Union (EU) is known as the “European Communities” (EC) in WTO proceedings. See World Trade Organization, *The European Communities and the WTO*, http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited Oct. 15, 2009) [hereinafter *EC & the WTO*]. All twenty-seven EU member states are individually WTO Members. *Id.* EU member nations are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *Id.* New EU members in 2004 were Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, and Slovenia. *Id.* New EU members in 2007 were Bulgaria and Romania. *Id.* Notably, Switzerland and Poland are independently listed in TABLE 1 because Switzerland is not an EU/EC member, and Poland was not an EU member in 2000 when it joined as a third party in a TRIPs dispute. *Id.* See also TRIPs DISPUTES, *infra* APPENDIX; TABLE 1, *supra* note 64.

⁹⁴ See *EC & the WTO*, *supra* note 93.

⁹⁵ See TRIPs DISPUTES, *infra* APPENDIX.

TABLE 2
Third Parties to a TRIPs Dispute by Geographic Area⁹⁶

<i>North America</i>	<i>Central & South America</i>	<i>Australia</i>	<i>Asia</i>	<i>Europe</i>	<i>Middle East</i>
Canada	Argentina	Australia	China	EC ⁹⁷	Israel
Cuba	Brazil	New Zealand	Chinese Taipei	Poland	
Dominican Republic	Colombia		India	Switzerland	
Mexico	Guatemala		Japan		
United States	Honduras		Korea		
	Nicaragua		Thailand		
			Turkey		

Therefore, although the group contains no African nations, it is nonetheless incredibly diverse.⁹⁸ Indeed, a brief glance at Table 2 shows diversity in geographic location, culture, political structure, religion, and economic strength.⁹⁹ Moreover, over 32% of all WTO-Member nations have participated as a third party in a TRIPs dispute, as forty-nine of the 153 WTO-Member nations have reserved third-party rights individually or under the auspices of the EC.¹⁰⁰ Lastly, in addition to the above-mentioned diversity and extensiveness of third-party participation in TRIPs' dispute settlement process, TRIPs has become more "universal," and thus less imperialistic over time. As Table 3 illustrates, the number of "joins," or instances in which a distinct third party joined a distinct TRIPs dispute as a third party in a given year, has steadily increased over the past thirteen years. Thus, TRIPs is not imperialistic because strong empirical evidence

⁹⁶ For the data underlying TABLE 2, see TRIPs DISPUTES, *infra* APPENDIX and accompanying notes.

⁹⁷ For a list of EC members, see *EC & the WTO*, *supra* note 93.

⁹⁸ For a list of the third-party countries, see TRIPs DISPUTES, *infra* APPENDIX and TABLE 2, *supra* note 96.

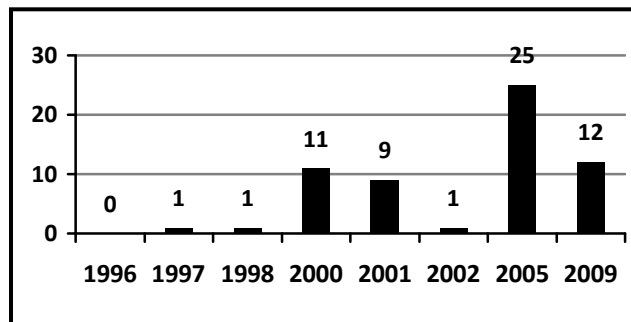
⁹⁹ See U.S. Cent. Intelligence Agency, *The World Fact Book*, <https://www.cia.gov/library/publications/the-world-factbook/index.html> (last visited Oct. 15, 2009). For example, compare Cuba, <https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html>, (last visited Oct. 15, 2009) with the United States, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Oct. 15, 2009).

¹⁰⁰ See TRIPs DISPUTES, *infra* APPENDIX (identifying the countries that have participated as a third party in a TRIPs dispute); WTO, *Member List*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 15, 2009) (identifying all WTO Members); *EC & the WTO*, *supra* note 93 (identifying all EC countries).

supports that third-party DSM participation is diverse, extensive, and has increased over time.

TABLE 3

Number of Times Distinct Third Parties Joined a Distinct TRIPs Dispute per Year¹⁰¹



V. CONCLUSION

Based on the foregoing, TRIPs is not imperialistic for three reasons. First, despite the nearly wholesale incorporation of the West's DSM-related draft agreement provisions into Article 64 of TRIPs, it is evident that TRIPs' drafting history, the resultant DSU, and the application of the DSU reflect the spirit of the developing countries' draft agreement text.¹⁰² Second, TRIPs' DSM stifles what some might consider unilateral and imperialistic measures: Special 301.¹⁰³ Finally, strong empirical evidence supports that TRIPs' third-party DSM participation is diverse, extensive, and has increased over time.¹⁰⁴

¹⁰¹ If a party joined two distinct disputes in one year, it counts as two "joins." The EC counts as one party. For data underlying TABLE 3, see TRIPs DISPUTES, *infra* APPENDIX and accompanying notes.

¹⁰² See *supra* Part III.A.

¹⁰³ See *supra* Part III.B.

¹⁰⁴ See *supra* Part IV.

APPENDIX

TABLE OF ALL TRIPs DISPUTES

1996–2009

Dispute	Date	Third Parties	Complainant	Respondent	Area of Law
DS37 ¹⁰⁵	1996	None	U.S.	Portugal	Patent
DS28 ¹⁰⁶	1997	None	U.S.	Japan	Copyright
DS36 ¹⁰⁷	1997	None	U.S.	Pakistan	Patent
DS42 ¹⁰⁸	1997	None	EC	Japan	Copyright
DS50 ¹⁰⁹	1997	U.S.	India	EC	Patent
DS79 ¹¹⁰	1998	U.S.	EC	India	Patent
DS153 ¹¹¹	1998	None	Canada	EC	Patent
DS86 ¹¹²	1998	None	U.S.	Sweden	Enforcement

¹⁰⁵ Notification of Mutually Agreed Solution, *Portugal—Patent Protection under the Industrial Property Act*, WT/DS37 (Oct. 8, 1996), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds37_e.htm.

¹⁰⁶ Notification of Mutually Agreed Solution, *Japan—Measures Concerning Sound Recordings*, WT/DS28 (Feb. 5, 1997), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds28_e.htm.

¹⁰⁷ Notification of Mutually Agreed Solution, *Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36 (March 7, 1997), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds36_e.htm.

¹⁰⁸ Notification of Mutually Agreed Solution, *Japan—Measures Concerning Sound Recordings Complainant*, WT/DS42 (Nov. 17, 1997), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds42_e.htm.

¹⁰⁹ Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50 (Dec. 19, 1997), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm.

¹¹⁰ Report of the Panel, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79 (Aug. 24, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds79_e.htm.

¹¹¹ Request for Consultations by Canada, *European Communities—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS153 (Dec. 2, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds153_e.htm.

Dispute	Date	Third Parties	Complainant	Respondent	Area of Law
DS186 ¹¹³	2000	None	EC	U.S.	Tariff
DS114 ¹¹⁴	2000	Australia; Brazil; Colombia; Cuba; India; Israel; Japan; Poland; Switzerland; Thailand; U.S.	EC	Canada	Patent
DS160 ¹¹⁵	2001	Australia; Brazil; Canada; Japan; Switzerland	EC	U.S.	Copyright
DS224 ¹¹⁶	2001	None	Brazil	U.S.	Patent
DS170 ¹¹⁷	2001	None	U.S.	Canada	Patent
DS125 ¹¹⁸	2001	None	U.S.	Greece	Enforcement
DS124 ¹¹⁹	2001	None	U.S.	EC	Enforcement

¹¹² Notification of Mutually Agreed Solution, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/2 (Dec. 11, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds86_e.htm.

¹¹³ Request for Consultations by the European Communities and their member States, *United States—Section 337 of the Tariff Act of 1930 and Amendments thereto*, WT/DS186/1 (Jan. 12, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds186_e.htm.

¹¹⁴ Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/13 (Aug. 18, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm.

¹¹⁵ Recourse to Arbitration under Article 25 of the DSU, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/ARB25/1 (Nov. 9, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.

¹¹⁶ Request for Consultations by Brazil, *United States—US Patents Code*, WT/DS224/1 (Feb. 7, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds224_e.htm.

¹¹⁷ Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *Canada—Term of Patent Protection*, WT/DS170/10 (Feb. 28, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds170_e.htm.

¹¹⁸ Notification of Mutually Agreed Solution, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/2 (March 26, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds125_e.htm.

Dispute	Date	Third Parties	Complainant	Respondent	Area of Law
DS83 ¹²⁰	2001	None	U.S.	Denmark	Enforcement
DS199 ¹²¹	2001	Dominican Republic; Honduras; India; Japan	U.S.	Brazil	Patent
DS196 ¹²²	2002	None	U.S.	Argentina	Patent
DS171 ¹²³	2002	None	U.S.	Argentina	Patent
DS115 ¹²⁴	2002	None	U.S.	EC	Copyright
DS82 ¹²⁵	2002	U.S.	U.S.	Ireland	Copyright
DS176 ¹²⁶	2002	Japan; Nicaragua	EC	U.S.	TM

¹¹⁹ Notification of Mutually Agreed Solution, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/2 (March 26, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds124_e.htm.

¹²⁰ Notification of Mutually Agreed Solution, *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/2 (June 13, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds83_e.htm.

¹²¹ Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4 (July 19, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm.

¹²² Notification of Mutually Agreed Solution, *Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS196/4 (June 20, 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds196_e.htm.

¹²³ Notification of Mutually Agreed Solution, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171/3 (June 20, 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds171_e.htm.

¹²⁴ Notification of Mutually Agreed Solution, *European Communities—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS115/3 (Sept. 13, 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds115_e.htm.

¹²⁵ Notification of Mutually Agreed Solution, *Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS82/3 (Sept. 13, 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds82_e.htm.

¹²⁶ Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds176_e.htm.

Dispute	Date	Third Parties	Complainant	Respondent	Area of Law
DS290 ¹²⁷	2005	Argentina; Australia; Brazil; Canada; China; Chinese Taipei; Colombia; Guatemala; India; Mexico; New Zealand; Turkey; U.S.	Australia	EC	TM and GIS
DS174 ¹²⁸	2005	Argentina; Australia; Brazil; Canada; China; Chinese Taipei; Colombia; Guatemala; India; Mexico; New Zealand; Turkey	U.S.	EC	TM and GIS
DS362 ¹²⁹	2009	Argentina; Australia; Brazil; Canada; EC; India; Japan; Korea; Mexico; Chinese Taipei; Thailand; Turkey	U.S.	China	Enforcement

¹²⁷ Report of the Panel, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R (March 15, 2005), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm.

¹²⁸ Report of the Panel, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (March 15, 2005), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm.

¹²⁹ Report of the Panel, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009), available at http://www.wto.int/english/tratop_e/dispu_e/362r_e.pdf.