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PUBLIC WELFARE AND THE ROLE OF THE WTO: RECONSIDERING THE TRIPS AGREEMENT

Ruth L. Okediji*

> Of course, when it comes to deciding on the correct interpretation of the covered agreements, a panel will be aided by the arguments of the parties, but not bound by them; its decisions on such matters must be in accord with the rules of treaty interpretation applicable to the WTO.
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> *WTO Report of the Appellate Body on U.S. Complaint Concerning India's Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997).*

> Cooperative international relations. . . internationalize and partially transcend nationality.
>
> *MARTIN SHAW, A THEORY OF THE GLOBAL STATE, GLOBALITY AS AN UNFINISHED REVOLUTION 28 (2000).*

INTRODUCTION

Almost a decade after coming into effect, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement")[1] remains a controversial but forceful

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* William L. Prosser Professor of Law, University of Minnesota Law School. This Article is part of an ongoing multidisciplinary research project examining the development of international intellectual property law in the post-Uruguay Round era. Some of the arguments were presented during the Panel "TRIPs, Patents and Politics" at the *Emory International Law Review* NEXUS Symposium: An Interdisciplinary Forum on the Impact of International Patent Trade Agreements In the Global Fight Against HIV and AIDS in April 2003. Thanks to Indronil Chakarbarty, Graeme Dinwoodie, Paul Goldstein, Dan Farber, Keith Maskus, Tade Okediji, Joel Trachtman, and participants at Faculty Workshops at Georgetown Law Center, Boston University School of Law, and Notre Dame Law School for comments on the monograph from which this Article was developed.

[1] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol.

legacy of the Uruguay Round Trade Agreements. At its momentous conclusion in 1994, the TRIPS Agreement was both over and underestimated. Pessimists who questioned the enforceability of the substantive provisions and its long-term efficacy in addressing infringement in global markets must concede that the celebrated Dispute Settlement Understanding (DSU)[2] has, in fact, been an important mechanism in transforming national intellectual property legislation worldwide. The minimum requirements of the TRIPS Agreement are now reflected in the legislation of most member countries and several important disputes have been determined.[3] This "formal" compliance with the TRIPS Agreement, however, pales in comparison to the "soft" compliance mechanisms that exist through the work of the TRIPS Council[4] and in the preliminary, but mandatory, steps of the DSU process.[5]

31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

[2] *See* Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[3] *See infra* Part III; *see also* Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC. 585, 636-48 (2001) [hereinafter Okediji, *TRIPS Dispute Settlement*] (providing a comprehensive chart of WTO TRIPS disputes from 1995-2002).

[4] *See* TRIPS Agreement art. 68 (establishing the Council on TRIPS and defining its responsibilities to include monitoring the operation of TRIPS "and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters related to trade-related aspects of intellectual property rights"); Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 411 (1996) (emphasizing that the Council and World Trade Organization (WTO) Secretariat are "whenever possible, to resolve differences between countries without a need for formal recourse to dispute settlement"). *See generally* Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000) (arguing for the efficacy of soft compliance and a strong role for the TRIPS Council).

[5] *See* Okediji, *TRIPS Dispute Settlement*, *supra* note 3, at 616-25 (summarizing the stages of the dispute settlement process). *See generally* Ruth L. Okediji, *Rules of Power in an Age of Law: Process Opportunism and TRIPS Dispute Settlement*, *in* HANDBOOK OF INTERNATIONAL TRADE LAW (Kwan Choi & James Hartigan eds.) (forthcoming 2003/2004) [hereinafter Okediji, *Rules of Power in an Age of Law*] (arguing that emphasis in the DSU on diplomatic solutions to disputes can yield

Optimists who anticipated that the TRIPS Agreement would significantly limit global piracy or otherwise lead to a healthy respect and appreciation for the utility of intellectual property laws as agents of economic growth and development[6] must now confront the complex and highly controversial problem of access to essential medicines which has raised important and persistent questions about the appropriate scope of patent protection under the TRIPS Agreement and corresponding welfare losses in developing and least developed countries.[7] The HIV/AIDS epidemic thrust the TRIPS Agreement into the epicenter of a global and very public debate about the merits of intellectual property protection. However, issues about the cost of access to goods protected by proprietary systems, or the ability of developing countries to invoke limitations on the scope of exclusive rights, reflect enduring problems of the international intellectual property system.[8]

Despite the orthodoxy that the Uruguay Round Agreements reflect a package deal arduously negotiated through linkage strategies, it is still pertinent to consider the nature and source of the welfare bargain reflected in the TRIPS Agreement. This question is particularly important because the dispute settlement process arguably should have been the forum for resolving the pernicious

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greater levels of compliance than required by TRIPS especially for developing countries).

[6] *See generally* Eric H. Smith, *Worldwide Copyright Protection Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 559 (1996).

[7] Expansive patent protection has also generated some negative welfare effects for developed countries, particularly in the United States. There are increasing calls for the reform of the U.S. patent system for institutional and policy reasons. *See generally* Symposium, *Patent System Reform*, 17 BERKELEY TECH. L.J. 623 (2002); Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 LAW & CONTEMP. PROBS. 289 (2003); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035 (2003).

[8] *See* Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 736-59 (1996) (reviewing the history of developing country participation in the international intellectual property system and the implications of TRIPS provisions on development concerns).

debates about the interpretation of TRIPS Article 31, the legitimacy of parallel importation, and other arguments raised by developing countries in attempts to delimit the reach of expansive proprietary interests. The choice by developed and developing countries to seek compromise outside of the dispute settlement mechanism of the WTO has important implications for the development of a public welfare jurisprudence predicated upon the explicit language of the TRIPS Agreement.

This Article analyzes the role of the TRIPS dispute settlement process in integrating public welfare components into the development and application of international intellectual property norms. Despite explicit provisions regarding development concerns and the aspirations of developing and least developed countries, it is unlikely that unilateral determinations of a national welfare calculus will play a significant role in interpreting the TRIPS Agreement. Indeed, outcomes of TRIPS disputes suggest that exposure of a domestic public policy to the DSU process can have the perverse result of calcifying the pervasive ideology of maximalist property rights on a global scale, thus limiting policy spaces within which countries may advance specific visions of welfare in national intellectual property laws. Thus, the choice to utilize diplomacy instead of the dispute settlement process in addressing the public health crises arguably was a superior strategic move.[9] Nevertheless, the failure of the dispute process to explicitly articulate welfare considerations in the interpretation of TRIPS provisions suggests that within the specific context of international intellectual property law, the constitutional function of the state to regulate intellectual property policy for domestic welfare is vulnerable to subversion by strategic uses of the WTO

[9] Of course, there were self-serving reasons behind the decision of the United States to forgo formal complaints against developing countries who had relied on TRIPS limitations to develop responses to the public health crises. The motives, however, are irrelevant to whether the decision had welfare enhancing benefits.

system of mandatory supranational adjudication for purposes of constraining the policy choices available to a member state.

Part I of this Article seeks to complement the rich literature on the TRIPS negotiations by utilizing insights from game theory.[10] This account of the negotiations through the lens of coalition theory establishes an analytical context within which the entrenched role of private industry actors can be strategically assessed. Part II introduces the two-stage game as a model to evaluate the implications of dispute settlement on sovereign discretion over domestic intellectual property policy. The first stage of the game is the negotiation of TRIPS. This stage was characterized by coordination of developed country standards in order to facilitate a common bargaining position. As with coordination games, developed countries, notwithstanding their own policy differences, recognized that they were each better off with an agreement than with none. This resulted in coalitions between developed countries that made negotiation of a global set of standards a feasible objective.

The stage two game is the enforcement process. Having accomplished the primary goal of binding developing countries to high standards of intellectual property protection, developed countries must now deal with the costs of "winning" the first stage game. These include constraints on sovereign discretion in the area of policy development, and battles over extant policy differences between the member states.[11]

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[10] *See generally* Peter Drahos, *Developing Countries and International Intellectual Property Standard Setting*, 5 J. WORLD INTELL. PROP. L. 765 (2002); SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST (1998). *See also infra* Part I.

[11] While many differences between developed countries were addressed during the Uruguay Round, the broad principles adopted in those cases where no agreement could be accomplished are subject to interpretation by member states. *See generally* J.H. Reichman, *Securing Compliance With the TRIPS Agreement After U.S. v. India,*

Part III of this Article reviews three significant decisions concerning the interpretation of provisions in the TRIPS Agreement. Contested interpretations of TRIPS provisions are the domain of the WTO dispute settlement process; but as the product of private/public coalitions, it is now almost impossible to interpret TRIPS provisions without the influence of the private sector. Consequently, any proposals for the global health crisis, or other access issues in intellectual property, must address the role of industry in the development of national and international intellectual property policy. Dispute resolution in the WTO is unlikely to yield outcomes that disturb the strong presumption of protection for owners in a global marketplace. Even in circumstances where the member state may advance its own national interests as a necessary factor in assessing TRIPS compliance, the primacy of internationally agreed upon standards over domestic interests is a notable feature of international economic agreements. Indeed, within the context of free trade, assertions of domestic welfare objectives often are viewed as pretexts for protectionism. Consequently, it should be the role of the WTO dispute settlement process to evaluate such assertions and to determine when welfare interests should count in the interpretation of intellectual property norms.

The explicit consideration of public welfare in assessing TRIPS compliance is a necessary aspect of resolving competing claims brought in the shadows of ambiguous or politically sensitive treaty provisions. It is an important constitutional function of the state to advance these goals, and of the WTO dispute settlement process to integrate them in interpreting TRIPS provisions. Both these elements are necessary for the development of a global jurisprudence of public welfare that might more readily permit intellectual property rights to coexist with other

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1 J. INT'L ECON. L. 585 (1998) [hereinafter Reichman, *Securing Compliance*].

regimes designed to improve the conditions of human existence worldwide.

I. GAMES, TRIPS, AND THE DEVELOPMENT OF A GLOBAL INTELLECTUAL PROPERTY SYSTEM

A Setting the Stage for Games: Understanding the Stakes

The TRIPS negotiations resulted in an Agreement that in many respects reflected prevailing U.S. law and policy.[12] However, the specter of enforceable dispute resolution fundamentally alters the malleability that is generally associated with such international accords. Many of the intellectual property issues negotiated during the Uruguay Round produced "rules" and "standards"[13] in the TRIPS Agreement. As with national intellectual property laws, the standards contained in the Agreement generally involve limitations on the rights of owners to facilitate access by users or downstream innovators in an effort to promote general welfare. Within the TRIPS Agreement, countries retain the sovereign prerogative to determine the conditions under which such access mechanisms can be utilized and

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[12] The TRIPS Agreement extends patent protection to inventions in all fields of technology, as long as the inventions are "new, involve an inventive step, and are capable of industrial application." TRIPS Agreement art. 27. These correspond to the U.S. Patent Office requirements of novelty, non-obviousness, and utility. 35 U.S.C. §§ 101, 102, 103, 112 (2001). The TRIPS Agreement extends copyright protection to "expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." TRIPS Agreement art. 9. This requirement corresponds to the U.S. Patent Office protection of "original works of authorship." 17 U.S.C. §102 (2001).

[13] In law and economics terminology, a rule specifies precise conduct in advance while a standard establishes general guidance. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 956 (1995). *See also* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 334 (1999) [hereinafter Trachtman, *WTO Dispute Resolution*].

the responsibility to utilize them in a manner consistent with the stated objectives.

It is uncontroversial to assert that member states cannot pursue future domestic policy interests without considering the effects on the TRIPS Agreement "bargain." However, determining what that bargain is when a conflict arises, is the purview of dispute settlement. The "strict constructionism" interpretative approach adopted by WTO panels affectively establishes a "lock-in" position for member states once formal compliance (i.e., changes in legislation) has been affected.[14] Policy changes inconsistent with the strong protectionist ethos reflected by the TRIPS Agreement are easy cases of violation under this interpretive rule, despite the conservative posture of the rule.[15] Put simply, policy changes that might calibrate the domestic balance in a manner deemed necessary for domestic welfare, but that do not enhance owner's rights, could invoke the skepticism of trade partners, and may lead to threats to invoke the dispute settlement process.[16] Thus, it would seem that the only unequivocally TRIPS-consistent policy "moves" for member states are those that could afford greater levels of protection.[17] In the event that a state is unwilling to be locked in, or that domestic interests lead the state to adopt legislation that is considered less protective of owner's rights, the WTO dispute settlement process will

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[14] For the first articulation of the strict constructionist approach to TRIPS disputes, see WTO Report of the Appellate Body on U.S. Complaint Concerning India's Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter *U.S. v. India*]; World Trade Organization Report of the Panel on U.S. Complaint Concerning India's Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R (Sept. 5, 1997) [hereinafter *U.S. v. India* Panel Report].

[15] *See, e.g.*, *U.S. v. India* Panel Report, *supra* note 14. *See generally*, Reichman, *Securing Compliance*, *supra* note 11 (discussing the Appellate Body's strict constructionist approach).

[16] In another work, the author has examined the signaling features of the DSU stages and strategic uses of threats to invoke the DSU process. *See generally* Okediji, *Rules of Power in an Age of Law*, *supra* note 5.

[17] At best, members are locked in at the TRIPS Agreement level of protection, as construed by WTO Panels or the Appellate Body.

become the focal point of strategic dueling as countries vie for interpretations more consistent with their own national positions on the issue at stake.

Prior to the TRIPS Agreement, developed countries already shared substantially similar levels of intellectual property protection. Thus, bald violations of basic intellectual property norms were unlikely to be the principal source of conflict between these countries. Instead, claims of TRIPS violations between developed countries were more likely to require interpretation of the unharmonized policies that reflect each country's underlying philosophy of intellectual property.[18] In the context of the TRIPS Agreement, the strategic windfall of adjudicated harmonization is particularly valuable: as the TRIPS negotiation experience demonstrates, a coordinated platform by developed countries on any number of issues facilitates the extraction of rent on a global scale. The only "cost" for these countries is the political one of limiting sovereign prerogative over domestic policy. Ostensibly, this is a cost that is also shared by developing and least developed countries, thus contributing to the myth of parity between countries in the WTO system.[19]

Insights from game theory, in particular coalition formation theory, facilitate an appreciation for why developed countries, particularly the United States (which historically has been obdurate in yielding its sovereignty to

[18] In some instances, the policy at issue may not be intellectual property, but, instead, a related subject such as environmental law, public health, or national security. These policies may compete in the domestic setting of a particular state, or one state's policy in an area may conflict with that of another state to produce different TRIPS interpretation and, hence, implementation. Just recently, the Appellate Body did as much in a case involving U.S. foreign policy toward Cuba. *See* WTO Report of the Appellate Body on U.S. and EC Complaint Concerning Section 211 of the U.S. Omnibus Appropriations Act of 1998, WT/DS176/AB/R, at para. 360 (Jan. 2, 2002) [hereinafter Havana Club].

[19] *But see generally* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002) (examining how, despite the consensus-based rules of the GATT/WTO, countries may still use power to affect outcomes).

international legal processes), would initiate the creation of an international regime that impinges upon sovereign prerogative to develop domestic policy,[20] particularly in a constitutionally reserved subject like intellectual property. Of course, it is possible that the "lock-in" effect of significant standards of intellectual property protection was a surprise for the United States (suggesting game-theoretic irrationality) or that policy makers anticipated this effect and welcomed it as a means of securing costless acquiescence to industry demands for stronger and stronger intellectual property rights.[21] A game theoretic model provides some insight into why the bargain concluded under the TRIPS Agreement was a significant payoff for developed countries who typically are more concerned about sovereignty.

In the classic prisoner's dilemma payoff matrix, the dominant strategy equilibrium is that which gives each

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[20] Other scholars may not share the author's skepticism of the so-called "residual" state power to develop intellectual property policy. *See generally* Reichman, *Securing Compliance*, *supra* note 11; J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000) [hereinafter Reichman, *TRIPS Agreement Comes of Age*] (arguing for cooperation rather than a conflict approach to TRIPS enforcement and suggesting government to government undertakings as one means to approach resolution of claims of TRIPS violations by developing countries). While the explicit language of TRIPS reflects a disposition to defer to local laws, and TRIPS panels have acknowledged this deference, the very need to construe the substantive provisions of TRIPS suggests less predictability in the outcome of disputes, not more. The power of dispute panels to interpret and construe TRIPS is the basis of the author's doubtfulness about the certainty of state power over the future of intellectual property policy. Invariably, dispute resolution is a form of legislation, as well as the place where legislation derives its meaning and power. Dispute resolution establishes the legitimacy of the statute. As Professor Trachtman puts it, "[d]ispute resolution is . . . a socially immanent governance mechanism to be used to establish a particular type of governance in a particular social setting." Trachtman, *WTO Dispute Resolution, supra* note 13, at 337.

[21] Trachtman, *WTO Dispute Resolution, supra* note 13, at 335 (noting the possible use of international fora as a way to integrate sub rosa); Ruth Okediji, *Toward an International Fair Use Standard*, 39 COLUM. J. TRANSNAT'L L. 75, 86 (2000) [hereinafter Okediji, *Fair Use Standard*] (suggesting that international fora provide a convenient means to transfer political costs of contested copyright policies).

player the best outcome regardless of what the other player chooses.[22] The shared objective of heightened global standards for intellectual property engendered a cooperative game among developed countries during the TRIPS negotiations. In game theory, this pre-commitment to cooperation typically alters the expected outcome of the game in unforeseen ways because standard prisoner's dilemma generally assumes an inability to communicate as the key cause of the choice conundrum. In the case of the TRIPS Agreement, the negotiating process ensured a substantial degree of communication and cooperation between the United States, the European Community (EC) and other developed countries. If there was extensive communication, thus removing a central assumption behind prisoner's dilemma, why might the result—a compromised ability to make independent policy—nonetheless be classified as a "bad" outcome for these countries in welfare terms?

The coordinated game during the TRIPS Agreement negotiations did not include any agents for what can loosely be described as welfare interests. A classic public choice problem was evident: an unorganized, disaggregated public cannot mobilize to influence the state as effectively as intellectual property industries.[23] Yet, deliberative

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[22] AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY 85-87 (1999).

[23] While generally speaking this is still true, NGO's and other consumer welfare groups have recently proven effective at neutralizing the activities of the copyright industries in the agenda for maximalist protection. The 1996 World Intellectual Property Organization (WIPO) copyright treaties remain the leading examples of this strategic effort to balance the legislative scales between users and owners of creative works. For a detailed account of the negotiating process that culminated in the WIPO digital treaties, see generally Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 396 (1997). However, domestic implementation of these treaties arguably undermined the efforts of these public interest groups. *See, e.g.*, Jessica Litman, *Digital Copyright and Information Policy*, *in* 4 GLOBALIZATION OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 299 (Kraig M. Hill et al. eds., 1998) [hereinafter Litman, *Digital Copyright and Information Policy*]. To appreciate the "voice" of the copyright industry alone, consider that, in 1999, motion pictures, sound recordings, music publishing, print publishing, computer software, theater, advertising, radio, television, and cable broadcasting

policymaking enriched by voices representing different perspectives and interests is imperative for balanced regulatory systems.[24] The rent-seeking activities that have engendered most intellectual property legislation in major developed countries dispense with the normative safeguards that are an indispensable part of good governance. Rent-seeking devalues democratic virtue by allowing only some citizens to be heard and not others; it occludes reasoned debate about what constitutes the public interest and how best to accomplish welfare goals for society as a whole. In sum, successful rent-seeking transforms the state into an agent of a particular segment of society instead of a guardian of welfare for all. Consequently, the result of a coordinated strategy, such as the TRIPS Agreement, must be viewed as it has been with healthy skepticism. When these same intellectual property interest groups motivate states to invoke the WTO dispute settlement process,[25] and when that process is inadvertently

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together contributed approximately 4.9% or $457 billion to the U.S. economy. Since 1995, the contribution of these industries to the GDP has increased over 10%. *See* STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2000 REPORT 3-4, 9 (2000). For a recent exhaustive critique of the social, constitutional, and legal ramifications of U.S. implementation of the WIPO digital treaties, see generally Litman, *Digital Copyright and Information Policy*, *supra*. The possibility of "government failure" as described by critics of the Digital Millennium Copyright Act (DMCA) provide ammunition to those who advocate direct applicability of the WTO agreements and private party standing before WTO panels. *See generally* E.U. Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161 (1995); Gail E. Evans, *Intellectual Property as a Trade Issue—The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1994 WORLD COMPETITION L. & ECON. REV. 137 (1994). It also reinforces the argument that the state and the international system should operate in concord to secure domestic welfare. At the very least, the international order should not be deployed against domestic welfare by re-enacting the government failure at the international level.

[24] *See generally* Litman, *Digital Copyright and Information Policy*, *supra* note 23.

[25] *See* Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 456 (noting the open secret that private industries have "the greatest access" to the U.S. Trade Representative (USTR), the chief officer responsible for protecting U.S. trade interests), at 452-53. According to Professor Reichman,

> [I]ntellectual property owners who most dominate the process are pressing maximalist claims and interpretations of TRIPS standards that are

aided by rules designed primarily to constrain state discretion in areas where concessions have been explicitly negotiated (i.e., trade in goods), then the international order is also effectively transformed into an agent of the interest groups. In this context, contrary to modern assumptions in public international law and international relations theory, government failure at the national level is not likely to be rectified, but instead reinforced if the TRIPS Agreement is interpreted and enforced without significant analysis and accommodation of domestic constitutional goals or policy objectives. A vital inquiry, then, is about the nature of the relationship between the "domestic" and the "international" and how the interaction between the spheres should be constructed [26] in view of the

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consistent with their earlier negotiating position, but are often inconsistent with the black letter rules . . . even organized efforts to provide technical cooperation under Article 67 of the TRIPS Agreement have sometimes reportedly degenerated into crude propaganda exercises that give exclusive voice to the views of the high protectionist coalition.

Id.

[26] Of course, one way to address the relationship between the domestic and international domain is to view the latter as an extension of the former, or vice-versa. Clearly, there is reverberation across these two spheres. The question is whether and how to regulate primarily for domestic interests in the context of greater economic interdependence. As the author elaborates later, the tendency under the WTO regime is to esteem the "multilateral trade system" as the principal value of both spheres, and thus to treat enforcement of WTO obligations as an end in itself. This approach is premature given the degree of unresolved conflicts in substantive intellectual property policies of developed countries. Instead, enforcement of TRIPS provisions (or other agreements) should reflect an attempt to help nations make good on their promises to each other in light of their responsibility for domestic concerns and to constituents. The two domains should interact to accomplish specific welfare goals within each discipline under the jurisdiction of the WTO. This is particularly important given the lack of agreement over a global competition policy which can more directly regulate conditions for competition in innovation, and thus promote some welfare interests. Disagreement over fundamental principles and basic tenets of competition policy suggests that this discipline is unlikely to be brought under the aegis of the WTO anytime soon. *See* Hans Ullrich, *TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy, in* ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 153 (John O. Haley & Hiroshi Iyori eds., 1995). Yet, the competitive balances for countries differ significantly and it is possible that domestic competition policy can be used to attenuate the effect of TRIPS. *See generally* Eleanor M. Fox, *Trade, Competition, and Intellectual Property—TRIPS and Its Antitrust Counterparts*, 29 VAND. J.

constitutional imperative regarding intellectual property regulation and the moral function of the state.[27]

TRANSNAT'L L 481 (1996). Globalization has simultaneously strengthened the need to have a harmonized framework for competition policy, as well as the desire of states to maintain domestic control over the direction and use of competition law. Indeed, the TRIPS Agreement explicitly provides for this in Article 8(2) which states that, "[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." TRIPS Agreement art. 8(2). *But see* Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 459 (discouraging incautious use of such powers by developing countries). Unilateral resort to regulatory powers as a means to circumvent TRIPS may have some short-term domestic benefits, but these are likely to be outweighed by long term adverse consequences to innovation, foreign direct investment flows and over all efficiency. *See* J. H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 NYU J. INT'L L. & POL. 11, 52-58 (1996-97) [hereinafter Reichman, *From Free Riders to Fair Followers*]. In sum, there are numerous policy variables that could affect the interpretation/implementation of TRIPS in a country, ranging from foreign relations policy. *See* WTO Appellate Body Report on Requests for Consultation Concerning EC Regimen for the Importation, Sale, and Distribution of Bananas, WT/DS27/AB/R (1997), to environmental policy. *See* WTO Appellate Body Report on Requests for Consultation Concerning U.S. Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (1988) [hereinafter Shrimp Panel Decision], to health policy, innovation policy, and public safety (WTO Panel Report on EC Complaint Concerning Canada's Patent Protection of Pharmaceutical Products, WT/DS114/R (2000) [hereinafter Canada—Patent Protection]. Further, there are different sources of international obligations in these areas and the relationship between treaties is an important, if overlooked, area that may generate the potential to limit the effect of TRIPS in order to advance legitimate domestic policy objectives. While TRIPS reflects an agreement between developed countries over the most basic principles of protection in respective intellectual property categories, this consensus was limited *precisely* because there was an absence of genuinely harmonized policies. In applying even these minimum principles, the lack of policy harmonization is likely to yield different views of what the provisions mean as evidenced by the Canada Pharmaceuticals case. Another point is worth noting: the greater the pressure on the dispute settlement process, the more likely that states will resort to "policy shopping" to avoid the effects of TRIPS on domestic welfare (or in response to domestic political pressures). This is already evident in WTO disputes that implicate other areas such as the environment. *See, e.g.*, Shrimp Panel Decision, *supra*. As Professor Reichman puts it, "hard-nosed confrontational strategies for implementing TRIPS standards risk backfiring by revealing the full extent of residual disagreement, as reflected in conflicting state practices." *See* Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 458.

[27] *See generally* John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2002) (raising concerns about the influence of globalism on

For the immediate purposes of this Article, however, the issue is that the WTO dispute settlement process offers unprecedented strategic opportunities for intellectual property owners to secure economic rents on a global scale through TRIPS enforcement.[28] International law doctrines are easily employed to aid this objective through application of the rules of treaty interpretation.[29] The veil of legitimacy imposed by the international process at best obscures, and at worst marginalizes, the domestic welfare issues that inevitably are implicated in the process of TRIPS dispute settlements. Consequently, this celebrated mechanism of global enforcement has the potential to yield perverse outcomes for domestic policy. In this scenario, the utility of the "interface"[30] approach that seeks to manage the differences between economic and legal systems, or the more rudimentary negotiation of national and international domains through institutional design choices, or interpretive tools, is effectively compromised as the

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American constitutional autonomy and system of popular sovereignty).

[28] Despite the focus in this Article on the possible use of the international process by intellectual property owners, the argument is also applicable to groups advocating on behalf of intellectual property users. It should be noted, however, that current conditions based both on relative domestic influence as well as the idiosyncrasies that characterize the international process make it less likely that user groups will be able to penetrate the WTO system as effectively as the intellectual property industries.

[29] Article 3(2) of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." DSU art. 3(2). The Vienna Convention on the Law of Treaties is considered by the WTO as a primary source of rules of interpretation of international law. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. For discussion on how these rules may yield distorted outcomes in the context of TRIPS disputes, see *infra* Part III.

[30] *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 345-46 (2d ed. 1997) (describing various approaches for dealing with global interdependence). Professor Jackson describes the interface approach as one which recognizes the existence of different (economic) systems and endeavors to create means—for example, through institutions, regimes, or agreements—to ease the tension and conflicts between the different systems. *Id.*

"international" negates or, in effect, replaces the "domestic" through a well-established hierarchy of laws.[31]

If disputes between developed and developing countries will merely reinforce the strong protectionist ethos of the TRIPS Agreement, disputes between developed countries will likely *stretch* the minimum requirements of the TRIPS Agreement through interpretations that are consistent with that ethos. Under these circumstances, both developed and developing countries committed to domestic welfare priorities may have incentives to deviate from the Agreement in attempts to defend felt sovereign prerogatives in the area of intellectual property policy.[32] Of course, demonstrations of "sovereignty" often mask a show of power,[33] to circumvent the discipline imposed by

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[31] In the United States, the hierarchy of laws is as follows: the Constitution supercedes all laws and treaties; treaties and federal statutes are of equal status, subject to the later-in-time-rule. Courts are expected to apply treaties and federal law consistently to the extent possible. Last, there is state legislation. *See generally* Reid v. Covert, 354 U.S. 1, 17-18 (1957); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmts. b-d (1986).

[32] This would happen, of course, assuming that the state is indeed acting as a social welfare planner, i.e., acting in a purely competitive market and/or is motivated by distributive justice concerns in its allocation of public goods. One might argue that the recalcitrance of the United States in implementing the decision of the WTO panel in *United States-Section 110(5) of the Copyright Act* is an example of an explicit demonstration of this predilection. *See* WTO Panel Report on U.S. Request for Consultations Concerning Section of the U.S. Copyright Act, WT/DS160/R (June 15, 2000) [hereinafter 110(5) Panel Report]. However, it may also be the case that this is an example of how domestic intellectual property policy offers a veneer of legitimacy for what is essentially an attempt to circumvent the discipline imposed by international organizations.

[33] *See* Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 313 (2001) (stating that "the commitment of the United States to its treaty obligations has recently been put in question" by persistent breaches of treaty obligations such as the refusal to pay U.N. dues). Professor Vagts also notes the growing tendency by the Executive Branch to rationalize treaty breaches through the U.S. later-in-time rule, with the resulting casual treatment of the binding effect of international legal obligations. *Id.* He concludes, however, that despite many attempts by the United States to modify treaty obligations, the number of instances where treaties have been in fact breached are not really significant when compared to the number of treaties that bind the country. *Id.* at 333.

international organizations.[34] As one school of international relations theory posits, the ability of states to choose when and under what circumstances they will abide by international rules is dependent on power realities.[35]

The failure of a state to fulfill its international obligations by refusing to abide by welfare decreasing interpretations of an international agreement may reflect the state's fulfillment of its internal constitutional mandate to act as a social welfare planner. In the context of multilateral trade, such claims are generally viewed with a measure of skepticism, as they tend to conceal protectionist tendencies, usually in response to domestic interest group pressures. The classic economic conviction about such claims is that they are, in fact, attempts to undermine and not promote domestic welfare.[36] Indeed, a major accomplishment of

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[34] In the context of domestic implementation of international law agreements, Professor Petersmann argues that:

> WTO law—like GATT law—includes many precise, unconditional and justiciable guarantees of freedom, non-discrimination, rule of law, private intellectual property rights and judicial review. Yet, the attempt by governments, even in constitutional democracies like those of the EC states and the USA, to limit the "domestic law effects" of their self-imposed international guarantees of freedom and non-discrimination illustrates that the foreign policy concern over lack of reciprocity and over inequality of domestic enforcement procedures is considered more important than the "general interest" of their citizens in making their WTO market freedoms more effective through the direct applicability and judicial protection of WTO law. This primacy of foreign policy over the individual rights of citizens reflects a power-oriented perception of the government.

Petersmann, *supra* note 23, at 168.

[35] The origins of Realism are traced back to Thucydides, a Greek philosopher. *See generally* THUCYDIDES, THE PELOPONNESIAN WAR (T. E. Wick ed., 1982) (c. 400 B.C.). *See* Robert Keohane, *Theory of World Politics: Structural Realism and Beyond*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 503 (A. Finifter ed., 1983).

[36] As Adam Smith argued in his case against mercantilism:

> Consumption is the sole end and purpose of all production; and the interests of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. . . . But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.
>
> . . . It is altogether for the benefit of the [producer] that the [consumer] is obliged to pay that enhancement of price which this monopoly almost

multilateral free trade under the General Agreement on Tariffs and Trade (GATT)[37] has been to facilitate transparency between nations by exposing "protectionism"—that is, rules, policies or practices that operate to distort the free flow of trade by favoring domestic producers and markets, thus undermining the domestic and global welfare benefits of the free trade ideal.[38]

In the realm of intellectual property, however, the notion of "protectionism" should be understood differently from protectionism in the trade context. The underlying presumption of the TRIPS Agreement is that strong levels of intellectual property protection will enhance domestic and global welfare. Accordingly, rules, practices, or polices that are perceived to weaken intellectual property rights, or that dilute the strength of the property interest granted by intellectual property laws, are viewed with equal or greater disapproval under the TRIPS regime as "protectionist" with all the accompanying negative connotations from the trade context. As a consequence, a utilitarian intellectual property policy like that of the United States (or utilitarian aspects of policies in other countries) is likely to be suspect under this new order, despite the fact that this policy has facilitated the advancement of tremendous creative endeavor. As scholars have strenuously argued, it is precisely the limitations and exceptions to proprietary rights that stimulate competition in innovation and which can foster higher levels of innovative activity.[39] With regard to intellectual property, then, "protectionist" efforts to balance intellectual property rights by imposing constraints on enforcement under certain conditions are welfare-

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always occasions. . . .

ADAM SMITH, THE WEALTH OF NATIONS Vol. I, at 159 (Edwin Cannan ed., Methuen & Co. Ltd. 1920) (1776).

[37] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

[38] SMITH, *supra* note 36, Vol. II at 169-70.

[39] Professor Jerome Reichman, among others, has written extensively about this. *See, e.g.*, Reichman, *From Free Riders to Fair Followers, supra* note 26.

maximizing both because they are beneficial to sustained creativity and, in the public health example, because access to health care contributes directly to development.

Further, when the government asserts its sovereign prerogative to negotiate treaties that reflect the considerable influence of domestic industries, it sets the stage for an outcome that also undermines the welfare ideal of the free trade model.[40] Specifically, in the face of an adverse decision by an international body, the government may choose not to assert its sovereign prerogative in order to preserve a domestic bargain that it has made with interest groups.[41] Of course, complying with the decision of an international tribunal pursuant to a treaty by which a state is bound is a requirement of international law.[42] To the extent that sovereign nations, particularly hegemons, choose compliance, this is also laudable.[43] The perverse

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[40] *See* Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 125-47 (1999).

[41] This may occur, for example, by choosing not to appeal an adverse WTO decision to the Appellate Body as happened in the *United States Section 110(5)* case, see *supra* note 32.

[42] Most notable is the international law canon of pacta sunt servanda codified in Article 26 of the Vienna Convention. It states "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 29, art. 26.

[43] The organizing inquiry of international law is "is international law law?" In other words, how is order imposed on sovereigns? *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979). International relations theories, particularly regime theorists, explain state cooperation in terms of strategies, incentives, and rational choice. Thus, order is not imposed but is desirable or expedient for the achievement of common ends. Despite different methodologies, both disciplines accord varying degrees of recognition to constitutive elements of a broad "penumbral interest" in complying with international obligations. One of these is "reputation" or "goodwill" or "honor." *See* Vagts, *supra* note 33, at 323-29 (discussing the various elements of the penumbral interest). Without these "incentives" to cooperate, states are described as in a "state of nature" where anarchy reigns. As the Supreme Court described it in 1884:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual

result is that the international decision is insulated from domestic and international scrutiny of its domestic welfare-distorting behavior, while simultaneously providing a powerful rationalization of the outcome. The use of the international process to circumvent the rigor of domestic democratic processes, while invoking the honor of treaty observance to avoid (or at least mitigate) domestic political repercussions, and at the same time undermine the precept of state responsibility to its domestic constituents, is an incredible strategic masquerade.

Assertions of sovereign prerogative in the face of international obligations, or reliance on international obligation to excuse domestic government failures, are both equally subversive of the institutions and processes that are designed to facilitate the operation of the rule of law in both the domestic and international arena. It invokes Realist views of states as completely focused on their own power in relation to the power of other states. In the classic Realist view it is power, not law that predominates international relations and determines outcomes in the absence of a central authority.[44] In this view, rules of international behavior and the institutions responsible for developing and enforcing them are but convenient agents for demonstrations of state power.[45] Actions really taken for reasons of power may be rationalized by international law.[46] Similarly, domestic policy may be used to rationalize actions that are inconsistent with international law.[47] A

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war.

Edye v. Robertson, 112 U.S. 580, 598 (1884).

[44] *See* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 104 (1979) (surveying a variety of theories on state behavior). *See generally* Petersmann, *supra* note 23.

[45] *See* Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 190-91 (1982).

[46] *Id.*

[47] For example, national security or defense is often a classic example of a domestic concern that has been considered as "legitimate" cause for deviation from international obligations. *See, e.g.*, TRIPS Agreement art. 73 (security exceptions). Sometimes treaties will provide specific examples of exceptions that may be invoked

classic Realist perspective might suggest that there is no need to rationalize such expressions of state power. Rationalizations of aberrant acts, however, are expedient if a state desires both the gains of cooperative agreements and the benefits of unfettered sovereign discretion. A purportedly justifiable deviation from agreed upon norms might vindicate such breaches of the agreement.[48]

B. Coalition Theory and the Story of the TRIPS Negotiations

There have been limited attempts to develop a theoretical framework to evaluate the negotiation strategies that secured the successful conclusion of the TRIPS Agreement.[49] Rationalizations that depict the TRIPS Agreement as

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by members. More likely, however, treaties tend to provide a number of subjects that may provide grounds for a member to employ unilateral prerogative by explicit reservations of sovereign residual power or by recognition of a certain scope for sovereign initiative. *See, e.g.*, TRIPS Agreement arts. 13, 30, 31 (examples of the former).

[48] *See* HENKIN, *supra* 43, at 13-27 (discussing the nature of "law" from a broad perspective. Professor Henkin observes that states feel compelled to give excuses for derogation and this fact evidences some binding force of the treaty.). At first blush, retreat by the United States from the enforcement arm of TRIPS seems implausible given the priority accorded to intellectual property protection by the United States at the onset of the Uruguay Round. However, the cooperative coalition of state and industry that comprised U.S. leadership in the context of the TRIPS negotiations is unlikely to be sustained in the face of aggressive international adjudication that implicates the divergent views on intellectual property protection among developed countries.

[49] For examples of early efforts at this task, see David A. Lax & James K. Sebenius, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, *in* NEGOTIATION ANALYSIS 153 (H. Peyton Young ed., 1991) (a game theoretic analysis of multilateral negotiations). *See generally* INTERNATIONAL MULTILATERAL NEGOTIATION (I. William Zartman ed., 1994) (a compilation of a series of essays employing different theoretical perspectives to multilateral negotiations. Several of the contributing authors apply insights specifically to the Uruguay Round.). *See also* Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535, 561-66 (1998) (employing linkage-bargain diplomacy to analyze the TRIPS negotiations). In many important respects, linkage-bargaining is a subset of coalition theory. Coalitions develop because complementary self-interests are attainable through linkages of shared goals or possible trade-offs among prospective members of the coalition.

another example of North-South power disparities tell a much too simple story. Indeed, one of the noted triumphs of the Uruguay Round was the unprecedented level of developing country participation in the negotiations.[50] Within the specific context of the TRIPS negotiations, alliances that formed over a variety of subjects crossed the traditional North-South divisions. These alliances also included industry groups whose positions on issues (ultimately of tremendous influence on official government positions) also had to be reconciled with competing intra-industry priorities.[51] Given the tremendous coordination problems typically faced in multi-party negotiations, coalitions constituted the coordinating mechanism that facilitated coherent substantive positions of intellectual property owners. [52]

There are two general classes of coalition formation theories rooted in game theory; power theories and policy theories.[53] Power theories predict what type of coalitions will form by relying on information about the power positions of the actors.[54] Because power theories exclude any policy preference between the actors, they are also called policy blind.[55] However, policy theories use one or more multidimensional scales to factor in the policy positions of the players in order to predict what coalitions

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[50] *See generally* JACKSON, *supra* note 30.

[51] *See generally* DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (1998).

[52] The negotiating history of TRIPS has already been well documented and the following analysis incorporates only a limited review of the relevant moments of that history. *See generally id. See also* Evans, *supra* note 23, at 137; Ryan, *supra* note 49, at 558-67 (providing a condensed version derived primarily from the account in Evans, *supra* note 23).

[53] *See generally* B. Grofman, *The General Irrelevance of Zero Sum Assumption in the Legislative Context, in* COALITIONS AND COLLECTIVE ACTIONS 99 (M.J. Holler ed., 1984); Ad. M. A. van Deemen, *Dominant Players and Minimum Size Coalitions*, 17 EUR. J. POL. RES. 313 (1989); T.A. Caplow, *A Theory of Coalitions in a Triad*, 21 SOC. REV. 489 (1956).

[54] *See generally* Caplow, *supra* note 53. *See also* WILLIAM H. RIKER & PETER C. ORDESHOOK, INTRODUCTION TO POSITIVE POLITICAL THEORY 120-21 (1973).

[55] *See* RIKER & ORDESHOOK, *supra* note 54, at 2.

will emerge.[56] Finally, coalitions are cooperative alliances that can produce regimes.[57] They should not be considered as regimes per se, although in the cooperative process they may exhibit characteristics that are typical of regimes broadly conceived.

Social scientists, particularly political scientists and economists, have studied coalition formation as a form of rational behavior to explain social issues ranging from voting, majority rule, and cabinet formation, to virtually all aspects of representative government.[58] Behavioral assumptions articulated by political scientists posit that political actors must form winning coalitions because "[m]ost things that people want they cannot get by themselves."[59] The TRIPS Agreement is certainly representative of the fact that coalition formation is an indispensable aspect of political interaction in the international sphere.[60] The process of coalition formation at the international level is a reflection of the relationship between domestic politics and international economic policy; coalition formation in the international sphere is

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[56] *See* ABRAM DE SWAAN, COALITION THEORIES & CABINET FORMATIONS 75 (1973).

[57] Regimes are defined as a set of implicit or explicit (or a combination of both) "norms, rules and decisionmaking procedures around which actor's expectations converge." *See* Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982). Regimes may or may not involve formal agreements. *Id.*

[58] In this regard, coalition formation is, in essence, a subset of collective choice theory. Put differently, coalition theory replaces standard models of game theory in situations where two or more players choose to act in coordination, or are compelled to do so in order to accomplish mutually beneficial objectives. Collective choice theory uses economic models to analyze democratic government. Collective choice refers to the fact that in a democracy, people have to come together to decide who will rule. Coalition formation, in this sense, is properly viewed as a part of this theoretical premise.

[59] William H. Riker, *The Place of Political Science in Public Choice*, 57 PUB. CHOICE 247, 249 (1988).

[60] I. William Zartman, *Two's Company and More's a Crowd, The Complexities of Multilateral Negotiation*, *in* INTERNATIONAL MULTILATERAL NEGOTIATION: APPROACHES TO THE MANAGEMENT OF COMPLEXITY 1, 6 (I. William Zartman ed., 1994).

influenced by factors exogenous to the international domain, and simultaneously a part of that domain as well.[61] In short, the dichotomy between national and international affairs is increasingly difficult to sustain. The overlapping domains with respect to just one state actor, becomes unmanageable when multiple actors converge to negotiate a multiplicity of issues as is typically the case in multilateral trade negotiations.[62] Indeed, the characteristic use of coalitions in multilateral settings is one way to manage this complexity,[63] even as it introduces an additional set of issues to the broader negotiation process.[64]

C. Reconsidering the TRIPS Agreement and its Coalitions

It is common knowledge that the United States pioneered the introduction of intellectual property in the Uruguay

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[61] With particular respect to intellectual property, a number of scholars have noted the convergence of national and international law making processes. This is partly a by-product of harmonization efforts as well as a reflection of influence of multinational actors exerting influence on policymakers worldwide. *See generally* Okediji, *TRIPS Dispute Settlement, supra note* 3; Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001) [hereinafter Dinwoodie, *Development and Incorporation*]; Graeme B. Dinwoodie, *The Integration of Domestic and International Intellectual Property Lawmaking*, 24 COLUM.-VLA J.L. & ARTS 307 (2000) [hereinafter Dinwoodie, *Integration*]; Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, *in* REVUE INTERNATIONALE DU DROIT D'AUTEUR 72 (2001) [hereinafter Ginsburg, *Toward Supranational Copyright Law?*].

[62] Zartman, *supra* note 60, at 4-7 (noting that multilateral negotiations are characterized by coalitions).

[63] *Id.* at 8-9 (identifying the major themes of small group analysis and power-coalition analysis as analytical tools).

[64] This is because, as is evident in the discussion of the coalitions formed during the TRIPS negotiations, coalitions form on different bases for different reasons. The cumulative environment that is engendered as this dynamic process of coalition building unfolds in the context of negotiation renders the application of any one theory to explain the how and why of the outcome necessarily incomplete, much less the application of these same theories to evaluate the substantive meaning of the outcome. Subsequent discussion in this Article attempts to sketch the main theoretical insights and apply them in evaluating the TRIPS Agreement outcome as interpreted by the dispute panels.

Round. However, intellectual property had been somewhat directly regulated under the auspices of GATT, the institutional antecedent of the WTO.[65] When the Uruguay Round formally commenced in 1986, the issue of trade in counterfeit goods was a tested basis for the extension of the trade discipline to broader issues of intellectual property protection.[66] Despite conflicting views between developed countries about how precisely to integrate intellectual property in the GATT framework,[67] concerns about the feasibility of such integration,[68] and the steadfast resistance of some developing countries to GATT as a forum for intellectual property negotiations,[69] the political will to extend the trade regime to intellectual property eventually gathered momentum after the initial proposals by the United States and other developed countries were introduced.[70] The proposal to include trade-related aspects

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[65] *See* Gunnar Sjostedt, *Negotiating the Uruguay Round of the General Agreement on Tariffs and Trade*, *in* INTERNATIONAL MULTILATERAL NEGOTIATION: APPROACHES TO THE MANAGEMENT OF COMPLEXITY 44, 69 (I. William Zartman ed., 1994). *See generally* David Hartridge & Arvind Subramanian, *Intellectual Property Rights: Issues in GATT*, 22 VAND. J. INT'L L. 893 (1989).

[66] Evans, *supra* note 23, at 158-59. *See also* Sjostedt, *supra* note 65, at 49-50.

[67] Even the proposals from various developed countries were in conflict and attempts to reconcile the proposals to reach a complete consensus were unsuccessful. GERVAIS, *supra* note 51, at 10.

[68] Developing countries' opposition to GATT has been the subject of much commentary. This opposition was both substantive and institutional; some countries believed that WIPO and not GATT was the appropriate forum to address intellectual property negotiations. Other countries simply opposed the linkage of trade with intellectual property. From the outset, developing countries, notably Brazil and Argentina, opposed the idea of intellectual property in the GATT framework. *See* GERVAIS, *supra* note 51, at 10. India, Mexico, and Thailand were also vocal about their concerns over the proposed merger of the two areas. *See id.* at 13 n.50. Over time, this opposition was overcome, primarily through the bargaining process. In exchange for higher levels of intellectual property protection, developing countries negotiated for greater concessions in textiles and agriculture. *See* Will Martin & L. Alan Winters, *The Uruguay Round: A Milestone for the Developing Countries*, *in* THE URUGUAY ROUND AND DEVELOPING COUNTRIES 1-14 (Will Martin & L. Alan Winters eds., 1996).

[69] The Group of Ten was particularly intransigent. This coalition comprised a cross section of countries from South America, Latin America, Africa, and Asia.

[70] GERVAIS, *supra* note 51, at 13 n.49 (stating that by 1987, it was "already quite clear that a number of participants wanted a very far-reaching agreement" and that

of intellectual property on the Uruguay Round agenda was supported by a coalition of forty countries, consisting primarily of developed countries, and adopted by the Ministerial Conference in Punta del Este.[71]

Prior to the formal commencement of the TRIPS negotiations, members of private industry in the United States, concerned about inadequate foreign protection of patents, championed a trade-based strategy for securing greater protection of intellectual property rights.[72] Trade-based efforts in this regard were already established through the use of Section 301 of the 1974 Trade Act.[73] Indeed, much of the ground work in pressuring developing countries to negotiate the TRIPS Agreement was done through threats or actual exercise of the Section 301 power.[74] However, the case-by-case, country-by-country approach, though effective, was costly to industry, which often provided government with the details of the alleged violations.[75] The process was also time-consuming and involved significant transaction costs, often of a political

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the United States, Switzerland, the European Community, Japan, and the Nordic countries all tabled proposals).

[71] The Punta del Este declaration set the framework for the TRIPS Negotiating Group. The declaration included trade in counterfeit goods and linked the previous GATT regime with the prospects of developing a broader understanding and agreement in the new Round. *See* GATT Ministerial Declaration on the Uruguay Round, Sept. 20 1986, GATT B.I.S.D. (33d Supp.) at 19, 25-26 (1987); Sjostedt, *supra* note 65, at 44-54 (providing an evolutionary narrative of the Uruguay Round, particularly an overview of the events leading up to the ministerial declaration in Punta del Este; describing the various coalitional forms at different stages of the Uruguay Round negotiations).

[72] *See* Ryan, *supra* note 49, at 562.

[73] *See* 19 U.S.C. § 2411 (2001). *See also* Evans, *supra* note 23, at 148-54 (describing pre-TRIPS unilateral responses to alleged intellectual property violations overseas).

[74] Evans, *supra* note 23, at 154-58 (discussing the countries targeted by Section 301).

[75] *See, e.g., U.S. v. India* Panel Report, *supra* note 14 (the seminal TRIPS Agreement case under the WTO system). The USTR was alerted to India's alleged TRIPS violation by the Senior Vice President of the Pharmaceutical Research and Manufacturers of America. His letter to former USTR Charlene Barshefsky is attached as Annex 3 to the Panel Report. *See id.* Annex 3.

nature.[76] International relations scholars have pointed out that without regimes, international law is a system of "self-help" in the sense that sovereign states unilaterally take actions designed to protect their interests. In the context of intellectual property, Section 301 is perhaps a leading example of such self-help. In addition to high transaction costs, self-help is inefficient to the extent that it creates uncertainty and risk, both for the alleged offender and the offended actor. Thus, there is a demand for international regimes to increase levels of cooperation which would be sub-optimal in the absence of such regimes.[77] For intellectual property regulation, certainly the well-documented failures of the pre-TRIPS system reflected the important need for effective protection and enforcement. Consequently, the demand by private industry for institutional innovation at the international level appeared justified and rational.

To overcome longstanding resistance to a new intellectual property treaty, but more precisely to a new intellectual property agreement under the GATT system, the U.S. Trade Representative (USTR) anticipated the need for a coalition of states working in cooperation to accomplish shared, identifiable industry needs and goals.[78] Industry leaders were advised to collaborate with industry representatives in the EC and Japan.[79] The shared interest in higher standards of intellectual property protection facilitated coalition formation between these erstwhile

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[76] Indeed, a continuing source of irritation for U.S. trade partners is the continued existence of Section 301. *See* WTO Panel Report on EC Complaint Concerning Sections 301-310 of the U.S. Trade Act of 1974, WT/DS152/R (Dec. 22, 1999) [hereinafter U.S. Sections 301-310].

[77] Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 332-45 (1982).

[78] Of course, the United States had collaborated with other countries, primarily Japan and the EC, in the pre-Uruguay Round efforts to bring intellectual property within the GATT system. *See* Evans, *supra* note 23, at 158-59 (discussing attempts to secure agreement on an anti-counterfeiting code proposed by the United States, the EC, Canada, and Japan).

[79] *Id.*

competing industries. With their coordinated efforts, these industries facilitated the formation of an intergovernmental winning coalition for the TRIPS negotiations.[80] At the very early stages of the process leading to the Ministerial Declaration at Punta del Este, several developed countries, at the urging of their own private industries, agreed to join the United States in promoting the inclusion of intellectual property in the Round. Each state in the coalition was, in turn, a member of a coalition consisting of its domestic industries. The coalition that ultimately ensured the negotiation of the TRIPS Agreement was a combination of sub-sets of coalitions of private industry and their respective states.[81]

When the United States and the EC formed coalitions with their intellectual property industries,[82] the goal was to

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[80] To constitute a winning coalition, empirical analysis suggests that two criteria must be satisfied. First, winning coalitions contain no more members than are necessary to win and, second, they contain only members that adjoin (not necessarily agree) on a one-dimensional policy scale. *See* ABRAM DE SWAAN & ROBERT M. AXELROD, CONFLICT OF INTEREST: A THEORY OF DIVERGENT GOALS WITH APPLICATIONS TO POLITICS 169-70 (1970). For a brief summary of the development of coalition theories, see AD. M. A. VAN DEEMEN, COALITION FORMATION AND SOCIAL CHOICE 1-6 (1997).

[81] The United States and the EC are emphasized in this Article for a number of reasons. It will aid the ease of the subsequent analysis and, more importantly, the degree of convergence between industry and government objectives was greatest with regard to these two parties.

[82] It is possible to argue that the alliance between state and industry is not necessarily or strictly a coalitional form. For one thing, the two party nature of this state/industry alliance may suggest that it is not susceptible to coalition theories that assume multiparty settings. A coalition can be generally defined as cooperative efforts to accomplish specific goals. Coalitions may be distinguished from other cooperative efforts by their lack of formal structure because they are deliberately constructed and the members are interactive. Yet these characteristics may be found in other kinds of alliances to greater or lesser degree. Perhaps one critical definitional element is that coalitions are formed not necessarily through harmonious identification of objectives, but through trade-offs, linkages, or power. In other words, coalitions are both about actor positions as well as issues. Put differently, coalitions form over substantive positions on issues, as well as over the fact of the issue. For example, in TRIPS negotiations, a coalition formed over the issue of having the Round include intellectual property, and a counter coalition opposed it. In neither of these coalitions was the policy or substance of TRIPS the motivating cause of the coalition formation. Thus, with coalitions, it is possible that

negotiate enforceable rules of intellectual property protection that would bind developing countries. The outcome expected was not one that would bind these states to a program of domestic policy reform,[83] other than what was explicitly negotiated.[84] At its most basic level, the goal of TRIPS was to seek to enforce standards that already existed in other major intellectual property treaties.[85] The grand coalition, comprised of the state-industry coalitions in the United States, the EC, and Japan, were understandably of a cooperative model[86] given the initial modest goal of the TRIPS negotiations. These countries were already committed to the level of protection reflected in the major intellectual property treaties. In this regard, then, the policy differences in their national intellectual property systems were irrelevant to the coalition formation.[87] Consistent with power theories of coalition formation,[88] these trade partners disregarded their respective differences in intellectual property until well into the ambitious expansion of the initial objectives of the

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the external coalition in fact reflects a diverse range of policy positions and members are united through linkages, trade-offs and/or power. A pertinent example is the industry coalition that formed in the United States, despite the fact that the copyright industry and the patent industry had different views about the efficacy of a trade-based agreement. *See* Ryan, *supra* note 49, at 561-62.

[83] The TRIPS negotiating coalition could thus be described as policy blind.

[84] In the end, TRIPS did require some changes in U.S. law. *See, e.g.*, Harold C. Wegner, *TRIPS Boomerang—Obligations for Domestic Reform*, 29 VAND. J. TRANSNAT'L L. 535 *passim* (1996); Okediji, *Fair Use Standard*, *supra* note 21, at 105. *See also* discussion *infra* Part II.

[85] Evans, *supra* note 23, at 137.

[86] From a social choice perspective, coalitions need not necessarily be cooperative. They appear to have the characteristics of a cooperative game when the focus is on what is likely to be obtained through a coalition as opposed to acting alone.

[87] This statement pertains to copyright policy in particular.

[88] Power theories focus on how actors utilize information to overcome conflicts of rational behavior. Some variations of power-based theories of coalition formation identify the presence of a dominant player who controls the formation process and chooses it. This variation on power-based coalition theory is also referred to as an "actor-oriented" approach to coalition formation. *See generally* B. Peleg, *Coalition Formation in Simple Games with Dominant Players*, 10 INT'L J. GAME THEORY 11 (1981).

negotiations.[89] The expansion of the initial proposal for TRIPS eventually drew attention to important differences in the policies of developed countries.

Between 1986 and 1994, when the Round was concluded, the TRIPS negotiations required just as much work in reconciling areas of conflict between developed countries, as in bargaining for developing country assent to the principle of extending GATT to intellectual property. Indeed, a careful analysis of the history of the negotiations suggests that, in terms of its substance, the TRIPS Agreement was primarily a product of concessions between the developed countries.[90] For the developing countries, once the resistance to GATT as a forum was overcome,[91] there were fewer (even though contentious) issues to bargain around and most of these involved patents in pharmaceuticals.[92] In general, the daunting task was that of determining the scope of the proposed agreement and its relationship with existing intellectual property treaties.[93]

On the substantive front, significant progress began in 1990 when both the EC and the United States tabled

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[89] GERVAIS, *supra* note 51, at 15-25.

[90] One might ask why the coalition of developed countries did not dissolve at this point. An answer could be that the shared objective of heightened global protection was still valued greater than the differences between them. A stronger explanation would be based on the role of industry in these negotiations. If states, which are responsible for policy, would have been willing to pull out as policy differences became clear, certainly the industry, in whose primary interests the negotiations were taking place, was not. So, industry groups working in concert across national lines leaned heavily on their respective states that, in turn, made the necessary compromises to stabilize their coalition. Thus strengthened, this coalition could face developing countries and press for conclusion of the Agreement. *See* discussion *supra* note 68.

[91] Evans, *supra* note 23, at 159-216; GERVAIS, *supra* note 51, at 10, 18.

[92] Evans, *supra* note 23, at 163-65; GERVAIS, *supra* note 51, at 25. The continued debate over the scope of TRIPS provisions with regard to pharmaceuticals, especially with the AIDS controversy in South Africa, and, more recently, the Anthrax scare in the United States, provides a glimpse of the uncertain scope of TRIPS language and the different views on the limits of unilateral determinations of what the provisions mean.

[93] *See* GERVAIS, *supra* note 51, at 13-18.

similar draft Agreements, indicating the (coalition) collaboration between these two dominant trade powers.[94] The two proposals provided the framework for the final product, despite the emergence of policy-based differences between developed countries and the continued resistance of some developing countries to the principle and scope of the proposals.[95] While the proposals submitted by respective states generally fell within the categories of "developed" and "developing" countries, the divisions were neither that exact nor predictable. Indeed, over the period of negotiations, the coalition formation between developed countries altered as different issues arose. The same was true for developing countries.[96] Within these descriptive categories, several different coalition configurations emerged with some countries ostensibly acting independently.[97]

In the end, the TRIPS Agreement was concluded by adopting several strategies. The final agreement excluded deal breakers (such as moral rights which the United

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[94] *Id.* at 15.

[95] *See, e.g.*, Evans, *supra* note 23, at 164-65. The author noted that support for minimum standards, as opposed to complete harmonization, meant that countries would have to ratify the Berne Convention for the Protection of Literary Works and the Paris Convention for the Protection of Industrial Property. "Such a radical proposal provoked controversy also among industrialized countries when the proposed international standard differed from the level of protection offered within their domestic legislation." *Id.* For example, with regard to protection terms for neighboring rights, the United States supported a fifty-year term and the EC a twenty-year term. *Id.*

[96] For example, the Andean Group (Bolivia, Columbia, Peru, and Venezuela) and the Group of Ten (Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia) focused on different issues at different stages of the negotiations. The Group of Ten had early on opposed the idea of TRIPS while the Andean Group was involved in making proposals at later stages of negotiations. *See* GERVAIS, *supra* note 51, at 23; Ryan, *supra* note 49, at 562-63.

[97] For example, Japan and Switzerland each submitted different proposals for a draft agreement, and fourteen countries representing different development levels joined together to submit a developing country proposal. These included Argentina, China, Colombia, Cuba, Nigeria, Pakistan, Tanzania, Uruguay, and Zimbabwe. *See* GERVAIS, *supra* note 51, at 16.

States opposed),[98] included compromises (such as the rental right provision which allowed Japan to maintain its length of protection), and dealt creatively with unique issues (such as distinct recognition of wines and spirits under geographical indications to address a rift between the EC and some wine producing countries).[99] Provisions intended to acknowledge developing country concerns about the Agreement as a whole were included, as reflected in the transitional periods for developing and least developed countries[100] and in the stated objectives of the Agreement. At the same time, trade-offs in sectors particularly important to the developing countries had also been negotiated. In this way, the TRIPS Agreement guaranteed a surplus for developed countries greater than what each state could otherwise have obtained on its own, as well as a surplus for developing countries in the form of enhanced trade concessions in the areas of textiles and agriculture. It remains to be seen whether such concessions will really be implemented.

From an economic perspective, the TRIPS Agreement can properly be viewed as a minimum set of standards because it does represent the "core" of the game.[101] That is, no subset of the coalition could have obtained a better result than the negotiations ultimately produced. Thus, in the process of coalition formation, re-formation, and deal making, the TRIPS Agreement produced an outcome that the market may have produced through a bargaining process. With every possible coalition receiving something better than it would have if the deal were blocked completely, all the possible outcomes indicated that an agreement on most issues was better than none at all. Viewed as a core, the

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[98] *See* TRIPS Agreement art. 9.

[99] *See id.* art. 23.

[100] *See id.* art. 24.

[101] In game theory, the core represents the bargaining range of the game. It denotes the set of allocations that cannot be derailed by any coalition; further, better deals cannot be made.

level of protection in the different categories of intellectual property protected by TRIPS may be described as an efficient outcome; that is, every actor maximized its payoff from successfully negotiating TRIPS.

The observation that a coalition of state and industry was formed to "win" the TRIPS negotiation does not fully answer the question why the United States acted in coalition with the intellectual property industry and then later with the EC given each sovereign's distinctive policy interests in some intellectual property subjects and sovereign priorities. In other words, the study of a particular coalition preference is analytically distinct from what the coalition might accomplish.[102]

Coalition preference is a social choice problem, while coalition formation is intrinsically strategic, focusing primarily on the outcomes made possible by the coalition.[103] An actor's coalition preference may determine the outcome of the negotiation,[104] so that in combining both the preference for the outcome and the preference for the coalition (as opposed to unilateral action) there has already been an implicit signal suggesting the social choice made by the actor. For example, in choosing to align with industry and then, in turn, forming alliances with countries who observed equal or higher levels of intellectual property protection, strong intellectual property values were firmly established in the coalitional strategy of developed countries during the TRIPS negotiations. This was obvious in the coalition preference adopted by the EC and the United States during the TRIPS negotiations.

It could be argued that a public/private coalition was necessary since international law recognizes only states as

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[102] VAN DEEMEN, *supra* note 80, at 7.

[103] *Id.*

[104] *See generally id.* (using social choice theory and game theory to describe and explain preferences for coalitions and to predict a set of coalitions that might emerge).

actors. Consequently, government alliances with intellectual property interest groups were inevitable if industry voices were to be heard in an international setting. However, other domestic constituents, notably libraries, scientific and research institutes, and higher education institutions were not represented in the negotiations and did not form a part of the coalition. The coalition preference suggests that the governments' interests in negotiating the TRIPS Agreement were more or less consistent with those of industry. As many others have observed, it was a capture of government and the process by interest groups.

In the initial modest vision for the TRIPS Agreement, it seems logical that the important domestic perspective during the negotiations (and even in the pre-negotiation stage) was the one that had the most direct interest in preventing piracy and establishing a strong global regime for innovators and owners of creative content. As to the single issue of piracy, this harmonious coalition was rational. However, when the TRIPS negotiations graduated to a more ambitious scope, the original coalitional preference remained unchanged. This may have been a reflection of the growing influence of intellectual property interest groups in the domestic front and the absence of any countervailing lobbies to advocate a consumer interest during the TRIPS negotiations. Or, it may reflect Riker's size principle that "in social situations similar to n-person, zero-sum games with side-payments, participants create coalitions just as large as they believe will ensure winning and no larger."[105] In either scenario, from a public choice perspective, the state's decision to form a coalition with industry had immediate implications for domestic welfare.

The view of coalition formation that introduces player preferences as a variable in the coalition formation

[105] RIKER & ORDESHOOK, *supra* note 54, at 33, 47.

process[106] predicts the possible coalition sets as a function of a choice process.[107] While traditional game theory focuses on player preferences in terms of the payoffs, this variation introduces preferences for the coalition itself. Applied to the TRIPS context, the state chose the industry as its partner in the TRIPS negotiations as an indication of its own allocative preferences. This view would be consistent with the domestic rent-seeking activities of intellectual property interest groups, and suggests that the coalition formation between U.S. industries and the government during the TRIPS negotiations reinforced domestic government failure in the international arena.

From a policy perspective, the same analysis is not as apposite to the EC. Intellectual property policy in the EC has historically been more consistent with industry demands for a maximalist interpretation of the rights afforded to intellectual property owners. This is a reflection not so much of strategic behavior, but of the philosophy of intellectual property in the continental tradition. This philosophy emphasizes individualism and the moral integrity of human creativity over utilitarian justifications for proprietary rights in creative goods.[108] Thus, the coalition that formed between the EC and its domestic industry is more consistent with Riker's "harmonious cooperation" which is defined as "a team effort against nature, guided by a Platonic rule of justice. There is a joint product which all participants' desire with equal intensity; they agree about the appropriate means to obtain it."[109] The

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[106] VAN DEEMEN, *supra* note 80, at 1-6.

[107] *See id.* at 1-42.

[108] *But see* Jane C. Ginsburg, *A Tale of Two Copyrights*, 64 TUL. L. REV. 991, 993 (1990) (arguing that the continental tradition has strong utilitarian roots).

[109] Political scientist William Riker identifies a range of cooperative forms. At one end lies the "harmonious" form of cooperation defined above. *See* Riker, *supra* note 59, at 249. At the other end of the continuum lies a cooperative form that is exploitative. It is one "in which goals are only partially shared. In this type of cooperation . . . a winning coalition exercises the authority of the entire group to support outcomes that, while perhaps benefiting the whole body, still benefit especially the members of the winning coalition." *Id.*

different approaches to intellectual property policy between the EC-industry coalition, and the United States-industry coalition, forecast an element of uncooperative behavior that would not fully manifest until the enforcement stage of TRIPS.[110]

The disparities between intellectual property policies of developed countries were strategically obscured during the TRIPS negotiations[111] given the primary (and shared) goal of strengthening rights in the global market. Yet, it is these policies that provide an interpretive context for national courts as they implement the rules of domestic intellectual property laws.[112] Of course, the globalization of the pharmaceutical industry, as with the copyright industry, would have led ultimately to cooperative behavior between developed countries on issues of interpretation of TRIPS patent provisions. The sharp divide between developed and developing countries over the implementation of the Doha mandate on public health reflects the power of an industry that transcends nationality. The pre-TRIPS grid of protection based on justifications for intellectual property rights between the members of the grand coalition might be very simply represented as follows:

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[110] As witnessed by the significance of the disputes between the two sovereigns. *See* Part III.

[111] Increasingly, scholars discount the difference between the *droit d'auteur* system typified by continental French copyright laws and common law systems. *See, e.g.*, PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT, PRINCIPLES, LAW, AND PRACTICE 4 (2001).

[112] *See* W.R. Cornish, *Judicial Legislation*, *in* LAW, SOCIETY AND ECONOMY 359, 373 (Richard Rawlings ed., 1997) (noting, in the British context, the historic importance of preserving the "intervening role of national legislatures"); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 476 (2000) (arguing that national courts should serve as agents for purposes of determining the unharmonized norms of the TRIPS Agreement).

Comparative pre-TRIPS levels of protection where * = profit

European Union	Greatest Scope of Protection	π^*+1
United States	Optimal Scope of Protection	π
Developing Countries	Least Protection	π-1

Serious assessment of the welfare gains and losses in the TRIPS Agreement can only take place in the context of its negotiating history. To the extent that welfare gains are influenced by domestic policy such an assessment must account for how those policy objectives were advanced or compromised. The coalitions engendered by the desire for the successful negotiation of TRIPS might then be presented with the resulting differences of anticipated payoffs as follows:

Grand Coalition	Protection Preference Based on Domestic Policy	TRIPS Payoff	Anticipated Outcome
European Union + Industry	3	$\pi+1^*$	Harmonization Up
European Union Industries	3	$\pi+1$	Harmonization Up
United States + Industry	2	π+ gains from domestic rent-seeking + possible rent in global and domestic market	Harmonization
United States Industries	3	$\pi+1$	Harmonization Up

Coalition models based on exogeneity, i.e., outcome driven. Protection = 1, 2, 3 (1* is an arbitrary number to denote rent. It has no fixed value).

In an exogenous coalitional model, every incremental coalition form increases the possible payoffs of a multilateral agreement. Thus, by combining to form a first-level coalition, disparate intellectual property industries increased the value of their TRIPS payoff. In second-level

coalitional form (i.e., the combination of intellectual property industries and state), the value of the payoff increased with the probability of success. Recall from the review of TRIPS negotiating history above that first- and second-level coalitions were simultaneously formed in the domestic setting of the various states that comprised the coalition at the multilateral level. Thus, it was possible for the members of the coalition, prior to the official commencement of the TRIPS negotiations, to anticipate moves and formulate strategies for the multilateral negotiations.

Many commentators have observed that the TRIPS Agreement as ultimately concluded is one in which "all parties 'won' and 'lost' important issues."[113] However, what was "won" or "lost" in this context is merely a reference to what was politically feasible in a multilateral setting, given the divergent range of issues and perspectives.[114] The negotiations outgrew the original vision for curbing piracy and extended to meet the specific interests of intellectual property owners amid competing, if unacknowledged, policy objectives. The prospect that different policies of intellectual property might yield different interpretations of the TRIPS Agreement lends a description of the negotiations as an n-game with an uncooperative outcome.[115] The different domestic policies of members of the developed country coalition also suggest that the payoff function for each coalition member was premised on

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[113] *See* THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2313 (Terence P. Stewart ed., 1993) [hereinafter GATT URUGUAY ROUND]; GERVAIS, *supra* note 51, at 16-24 (discussing the consultations and negotiations between the several countries and the process of achieving compromise on differences). Dr. Gervais, who was a member of the negotiating group stated, in describing the negotiations at advanced stages, that with regard to important divisions between developed countries and developing countries, informal consultations with individual delegations or small sub-groups were established by the Chair of the TRIPS negotiating group to identify "room to move." *Id.* at 19.

[114] As Dr. Gervais describes it, by the end, "there were no options left." GERVAIS, *supra* note 51, at 24.

[115] This is exemplified by the lack of true harmonization between the countries.

different values. While the concept of a core in game theory typically assumes a cooperative game, the freedom of players to join coalitions, form new ones, or break up existing ones (as in the case of Peru as a member of both the G-10 and the Andean Group), introduced forceful non-cooperative elements to the game. It is for this very reason that the core is another way of maximizing payoffs. The members negotiated the best possible outcome based on their identified payoff function.

Having earlier described the negotiated standards in TRIPS as a core, it should also be said that the core will leave some states with lower payoffs than others. Simply put, an efficient outcome does not secure fairness or equality. Similarly, despite the general benefits of international regimes some states will be worse off.[116] An efficient outcome does not correspond or equate with the goals of distributive justice.[117] It should be no wonder that the serious problems of public health in developing countries is being addressed through the prism of a trade regime, deploying intellectual property rules that are intended to limit sovereign discretion over the range of options available to address public welfare priorities.

Understanding the TRIPS Agreement as the outcome of competitive bargaining is pertinent to the argument that the state, in responding to industry demands and in effect negotiating for the industry, compromised domestic policy objectives—objectives that cannot be accomplished solely by the market. Thus, even as a competitive model, the TRIPS Agreement is flawed not only because as a normative matter it is the product of political will as dictated by

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[116] Keohane, *supra* note 77, at 330, 332 (noting that voluntary decisions to create regimes do not imply equality of situation or outcome).

[117] *Id.* at 336 (discussing market failure as a basis for decisions by states to form regimes; noting, however, that while each actor must be better off within the regime than outside of it—otherwise there would be no demand for the regime—this does not imply that formation of an international regime will yield overall welfare benefits).

private industry,[118] but because only the sellers (content industries) were involved in the coalitions. Public interest objectives, typically represented by user groups such as libraries, educational institutions, research institutes, or non-governmental organizations were noticeably absent during TRIPS negotiations.[119] Thus, the market for negotiating TRIPS was not strictly competitive and the outcome should be scrutinized, particularly in the context of a dispute, both for its claims of efficiency and its welfare effects.

As noted earlier, the proposals of the EC and the United States that formed the basic structure of the final TRIPS Agreement suggested that there was collaboration between the two actors.[120] More specifically, there was collaboration between relevant domestic industries of the two actors.[121] While the TRIPS negotiations ostensibly took place between state actors, the driving force of the negotiations were private actors, specifically intellectual property industries

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[118] As one author states:

> The [TRIPS Agreement] clearly meets or exceeds the initial negotiating mandate articulated in Uruguay in 1986 . . . . Some industries are deeply troubled by the compromise package . . . . Nonetheless, the opportunity to obtain multilateral rules and enforcement mechanisms across so many disparate issues will likely be viewed as one of the major accomplishments [of the Round].

See GATT URUGUAY ROUND, *supra* note 113, at 2313.

[119] Based on the experience of the negotiations on WIPO internet treaties, it seems likely that the TRIPS negotiations would have been infused with domestic policy concerns that may have shaped the philosophy of the Agreement. Indeed, the earliest indication of the importance of public participation in intellectual property matters was the extensive public debate prior to U.S. adherence to the Berne Convention. The counterbalance that libraries, research foundations, and educational institutions provided to the copyright industries was very important in shaping the way in which the United States ratified the Berne Convention. Indeed, from an international perspective, welfare enhancing doctrines such as fair use, and the failure to provide explicitly for the protection of moral rights, all might be attributed to the vigorous efforts of these domestic groups to resist the full force of the continental copyright tradition and its effects on U.S. copyright law.

[120] *See* Ryan, *supra* note 49, at 561-62.

[121] *See* Evans, *supra* note 23, at 165 (commenting that the TRIPS negotiations were characterized by an unprecedented involvement by private industry, which promoted it, debated its contents, and assisted in drafting its provisions).

and their associated lobbies.[122] As mentioned earlier, the collaboration between the office of the USTR and representatives of private industry, led to coalition efforts in the EC.[123] The private industry groups were heavily represented in Geneva[124] and their opinions, as supported or modified by government negotiators, clearly defined the basic contours of the TRIPS Agreement. Industry opinions were important to the government representatives and, in some cases, those opinions became official government positions.[125] The degree to which these groups actually controlled the outcome of the TRIPS negotiations likely varied from country to country. What is clear, however, is that the collaboration between government and industry ensured that industry opinions weighed very significantly in the positions put forth by the negotiators—particularly given the fact that the industry groups worked in concert to ensure that their own positions were reconcilable.[126] To illustrate the significant role of private industry in the negotiations, one account of the negotiating history of the TRIPS Agreement identifies specific industry concerns over what became known as the "Dunkel draft," and juxtaposes

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[122] *Id.* *See also* Ryan, *supra* note 49, at 558-67 (providing a brief but detailed summary of the private/public U.S. alliance responsible for the idea of a trade-related agreement on intellectual property).

[123] *Id.* at 562 (stating that the USTR believed that getting intellectual property on the trade agenda would require European and Japanese support and recommending that the industry representatives "get in touch" with their counterparts in those countries to pressure their governments and EC secretariat leadership to support the idea).

[124] The United States was represented by interest groups such as the Intellectual Property Committee, the International Intellectual Property Alliance, and the Pharmaceutical Research and Manufacturers of America. European business was represented by The Union of Industrial and Employers' Confederation of Europe, while Japanese business was represented by the Japanese Federation of European Organizations. *See id.* at 564-65.

[125] *See* Evans, *supra* note 23, at 165-67 (detailing the extent of industry participation in the negotiations).

[126] In addition to working through government representatives, the industry groups also acted independently. In 1988, they introduced a draft agreement stating the views of industry for a basic GATT framework for intellectual property. *See id.* at 173.

these private industry concerns with India's concerns with the restrictions on compulsory licensing.[127] In short, the industry concerns were considered (and indeed were) synonymous with the government positions.[128]

The ascendant economic rationale of multilateral free trade agreements is the classic game theory axiom that cooperative bargaining yields the best outcome for all parties.[129] The discipline of the international order is a requisite for correcting government failures that stem from domestic rent seeking activities, which typically generate protectionist trade measures. Enforcement of internationally negotiated rules is a critical part of this system. Governments may recognize that compliance with international standards enhance domestic welfare but may be vulnerable to demands by other industries adversely impacted by free trade agreements. The international regime offers the opportunity for strategic allocation of competence and enforcement of the welfare generating rules without the negative political payoff that may result from disaffected industries.[130]

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[127] GERVAIS, *supra* note 51, at 25. The U.S. pharmaceutical industry was concerned about the transitional period contained in the Dunkel draft for patents and wanted immediate protection, while the motion picture industry wanted full national treatment on private copying levies available in Europe for European works. Additionally, the Motion Picture Association of America wanted the term "author" to include corporations. *Id.* The emphasis on the pervasive reach of developed country industries during the TRIPS negotiations is not intended to imply that developing countries were not somewhat captive to their own domestic industries. Indeed, the susceptibility of governments to their respective domestic lobbies is, again, precisely the reason that this Article suggests that the dispute settlement process should evaluate the welfare effects of arguments advocated by governments rather than applying TRIPS provisions mechanically.

[128] *Id.* (noting that the "United States . . . submitted changes to the Dunkel draft reflecting [its] (read 'industry') concerns," adding that representatives of the Motion Picture Association of America "were working full time in Geneva during the last weeks of the Round, at the end of 1993").

[129] *See generally* GATT URUGUAY ROUND, *supra* note 113. Despite the general acceptance of this premise, multilateral trade agreements are difficult to achieve. The Uruguay Round was negotiated over a period of more than seven years.

[130] The political gains of integration should not be underestimated in examining

The TRIPS negotiations best reflect an uncooperative game with a core that subverted the competitive assumptions. This requires the existence of mechanisms to correct imbalances that are attributed to the provisions of the TRIPS Agreement. This can be done in the area of TRIPS enforcement, by deferring to state policy, to the extent that the policy seeks to preserve a balance between owners and users, as well as owners and downstream innovators, in efforts to promote public welfare. A domestic balance that enhances welfare by maximizing both the incentives to create and the opportunities to access innovative goods is just as important for the domestic economy as it is for the global one. In short, all countries should be concerned about the domestic welfare balance in intellectual property policies of other member states given the interdependence of the global economic system. If the TRIPS Agreement is enforced with a maximalist brush, the welfare goals of domestic intellectual property will be subverted, as will the welfare goals intrinsic to the competitive trade model.

II. THE TWO STAGE GAME AND ITS WELFARE IMPLICATIONS

A. Multiple Players and Moves in the TRIPS Bargain

A standard claim by trade economists is that it is possible to enjoy the economic gains of free trade without reciprocal trade agreements. However, the same cannot be said for the political and legal gains offered by international regimes.[131] These include, for example, prying open access

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the utility of a particular international structure. *See* Okediji, *Fair Use Standard*, *supra* note 21, at 85-87 (making a similar point with respect to the implications of TRIPS on the U.S. fair use doctrine).

[131] ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT 36-37 (1997) (outlining the economic, political, and legal functions of trade

to foreign markets, increasing domestic political support for liberal trade, rationalizing various foreign policy objectives,[132] and promoting legal security.[133] Consequently, the design choice of the international organization and the particular mix of rules and standards articulated in the agreement are useful criteria for evaluating what the state intended/negotiated in establishing the dispute settlement regime of a particular legal discipline.[134]

In an integrated market, intellectual property rights owners are united by their joint desire to maximize gains from the exclusive proprietary rights and the resulting market power that intellectual property protection affords.[135] States are expedient agents to assist these citizens in accomplishing this goal in the international setting. However, securing the public policy and welfare objectives for having an intellectual property system is also the responsibility of the state. In the utilitarian American tradition, social welfare is accomplished by a careful calibration of rights and limitations. In the continental tradition with its emphasis on natural rights, the social welfare function[136] is reflected in the policy ideal underlying

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liberalization). Also, it is possible to have a regime without an international agreement. *See* Keohane, *supra* note 77, at 337-39 (distinguishing between the demand for agreements and the demand for regimes).

[132] *See* Keohane, *supra* note 77, at 334. Keohane discusses the concept of "nesting," which is the placing of specific agreements within more comprehensive agreements. *See id.* International regimes help to make governments' expectations consistent with one another. For example, bilateral tariff agreements are not made on an ad hoc basis but are affected by the GATT rules. *Id.*

[133] Regimes based on explicit agreements reduce information costs, thus satisfying one of the tests for international market failure justifying the need for regimes to introduce efficiency to the international system. *Id.* at 337-41.

[134] *See generally* Trachtman, *WTO Dispute Resolution, supra* note 13.

[135] This desire to maximize gains is evident in the alliances that were formed to influence respective governments to initiate the TRIPS negotiation in the first place. *See* Ryan, *supra* note 49, at 561-66.

[136] An Arrowian social welfare function is a rule used to produce social values, but it is not the social value itself. Herein begins the difficulty of copyright harmonization, particularly as considered in the context of international trade law. It is possible that, in the copyright tradition, the aggregate rules constitute a social welfare function because they are designed to produce socially desirable outcomes

the rights. Thus, although the desire for rent may force a coalition between industries in these respective traditions, it is the state that chooses the conditions under which welfare objectives will be maximized.[137] To analyze the competing functions of the state in its capacity as domestic social welfare planner, international negotiator, and enforcer of negotiated rules, it is useful to view the TRIPS negotiations as a two-stage, infinitely repeated game.[138]

In the first stage of negotiating the TRIPS Agreement, developed countries played against developing countries with a pre-commitment to accomplish the stated objective of an enforceable regime of heightened intellectual property protection. This pre-commitment between the EC and the United States, in particular, yielded a dominant strategy based on robust information sharing between developed countries about standards on which they could agree.[139] This first stage had decidedly different objectives than the overall game, which can be called "intellectual property globalization." At this stage, the prisoner's dilemma that is characteristic of international relations was resolved because the same choices yielded the optimal outcome for each developed country even without the information sharing. In game theory terms, the decision to work

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namely, enhanced public welfare by encouraging optimal levels of productivity and optimal levels of access to the work by the public. In the continental tradition, however, the rules *are* best understood as the values. This would be represented in economic terms as a Bergson-Samuelson social welfare function. As employed in Paretian welfare economics, this type of social welfare function is a depiction of choice among social states based on a value judgment. Thus, despite similarities in rights and the influence of economic forces on both traditions, the choice by states to follow a utilitarian path or a natural rights path is a welfare choice and not, merely or only, a reflection of cultural differences.

[137] International agreements are between states. The state is responsible for enforcing TRIPS within its domestic borders.

[138] *See generally* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INT'L ORG. 427 (1988) (describing domestic politics and international relations as a two stage game).

[139] *See* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 345-47, 381-88 (1995) [hereinafter Reichman, *Universal Minimum Standards*].

together for an intellectual property treaty was a dominant strategy for major exporters of intellectual goods.

The first stage, however, is still more complex. Within the group of countries working in cooperation, there were coalitions working to ensure the outcome of the dominant strategy.[140] Recall that coalition formation, an aspect of game theory, has been used primarily to examine political outcomes. Given the nature of the international process where traditionally only state actors are recognized, and the particular features of transnational intellectual property alliances that have the ability to influence foreign policy and serve as powerful domestic lobbies, coalition formation again provides a uniquely adaptable lens to examine the social choices made during the first stage of TRIPS negotiations. Public choice also offers some insight in its continuum of forms of cooperation with extremes at either end.[141] At one end is a game where the players jointly want the same outcome with the same amount of passion or intensity and agree on the best means to obtain the outcome.[142] At the other end is cooperation that flows from goals that are partially shared. In this form of cooperation, a winning coalition "exercises the authority of the entire group to support outcomes that, while perhaps benefiting the whole body, especially still benefit the members of the winning coalition."[143]

The beneficiaries of heightened intellectual property rules are first and foremost intellectual property owners and then, less directly, states. While there may be overlap between the interests of both actors, these shared interests are not entirely congruent.[144] Intellectual property owners generally are concerned only about obtaining maximum

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[140] GERVAIS, *supra* note 51, at 19-25; Evans, *supra* note 23, at 169-75.

[141] *See* Riker, *supra* note 59, at 247, 249.

[142] *See id.* at 249.

[143] *Id.* (referring to cooperative forms as "exploitative" as opposed to "harmonious").

[144] *See supra* notes 78, 80 and accompanying text (discussing shared interests).

gains from enforcement of intellectual property rights. As private actors, they are self-serving with no public obligation or incentive to act any differently.[145] States, on the other hand, must account for a variety of interests, some of which may be in direct competition with the interests of intellectual property owners. As such, a state is an arbiter of conflicting goals, as well as a champion of the interest that succeeds in winning over others.[146] However, in coalition form, the state's ability to function as a neutral arbiter for the domestic market is constrained because the TRIPS Agreement assumes a significantly integrated market. This might be presented as follows:

Actor	Desired returns from the Global Market	Desired returns from the Domestic Market
United States	π+ 1,2. . . .n	π
Industry	π+1,2. . . .n	π+1

The table depicts a divergence of interests at the domestic level, i.e., an endogeneity problem. The difference is represented as $\pi + 1 - \pi = 1$.

The value "1" represents economic rent over and above normal profits, defined as the minimum necessary to keep a producer involved in that line of production. With respect to intellectual property, this would correspond to optimal levels of protection. π is realized at a level of optimal protection of innovative goods that requires a balance of competing interests. Because the state determines those rights through intellectual property policy and legislation, the state controls the value of "1."

[145] Public perception might relax this assumption.

[146] Ryan, *supra* note 49, at 541 (noting that the strategic interaction of states in multilateral negotiations is "really a two-level game in which states bargain with their own domestic groups even as they bargain with each other").

The absence of direct application of the TRIPS Agreement in most countries[147] suggests that the state distinguishes between its political market and its economic market. This distinction is under tremendous pressure with regard to TRIPS enforcement because of the growing tension between the welfare goals of intellectual property policy and the political dominance of domestic intellectual property interest groups. Ideally, in a purely competitive market, the state would want marginal cost to equal marginal revenue and price (mc = mp = p). However, industry would want price to be greater than the profit maximizing criteria (i.e., p > mc = mr). In the domestic market, this divergence is manageable. In the global market, however, there is a confluence of state and industry interest. Consequently, in the enforcement stage of TRIPS, the state must make an allocative decision about whether it will act as a social welfare planner. π will be realized if, and only if, the state implements and a dispute panel interpret TRIPS in a manner that balances the interests of consumers and owners in the domestic market of the allegedly breaching state. Rent, i.e., $\pi + 1$, is also determined by the state or a dispute resolution body. Recourse to a supranational forum is a convenient strategy for a state that aligns with a particular sector, but does so outside of the controls of the domestic socio-political system and yet is obligated to enforce the international outcome within that same system.

A distinguishing characteristic of two stage games is that the players are able to anticipate the moves at the second stage of the game. It is possible that the manipulative use of the dispute settlement process to further harmonize intellectual property norms sub-rosa was precisely what developed countries anticipated in the enforcement stage of the TRIPS Agreement. If this is the case, there would be little incentive to refuse to comply with the decisions of the dispute panels, as compliance would secure the payoffs

[147] In other words, most countries required domestic implementing legislation for TRIPS to have domestic legal force.

calculated at the stage one game negotiations. Recall, however, that the separation of powers in the domestic political market calls for a bargain between the executive and the legislature prior to negotiating an international agreement. Where such a bargain has been made there is, in theory, less possibility that the legislature will balk at the decision of a tribunal that is consistent with the negotiated terms of the treaty.[148] Alternatively, where the dispute resolution yields a decision that is consistent with legislative interests, compliance is also predictable unless other domestic variables disrupt the equilibrium.[149] Thus, where there is some uncertainty about how the domestic political market will react to a legislative move toward deeper harmonization of intellectual property, the international dispute settlement process offers an avenue for both industry and the government to accomplish preferred objectives with the shield of treaty obligation mitigating potential political costs of compliance.

In the Uruguay Round, intellectual property was a clear winner, at least in the sense that other new topics such as investment and services yielded only very modest

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[148] It should also be noted that cooperation between the executive and legislature plays an important role in international affairs. It is important that the Executive be taken seriously in international negotiations otherwise other nations will be less inclined to cooperate with the United States. The balance between executive freedom under the Treaty power and executive constraints under the practice of implementing legislation is a factor to be considered in choosing strategies for international negotiations. *See generally* Putnam, *supra* note 138. As the Supreme Court has expressed:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

[149] One possible disruption could come from the Supreme Court, whose role cannot be precisely accounted for in the equilibrium calculus. The Supreme Court represents a "state of nature" in the game theoretic sense. Its potential effect is uncertain but potentially very disruptive.

agreements.[150] A coalition of intellectual property alliances and state actors engaged in cooperative strategies[151] to motivate negotiations for an agreement that should enhance global welfare[152] and provide unprecedented protection for owners, such as the TRIPS Agreement. But what did it mean to win in this context? To answer this question, a related economic theory, social choice, will be examined.

B. Social Choice, Coalitions, and TRIPS

Social choice theory is a tool both for critique and design.[153] Game theory is a useful predictive tool, but as indicated earlier, it is insufficient to address issues of whether the outcome is just, optimal, or fair. Social choice theory facilitates this particular project. It offers some important normative insights into how to evaluate the outcomes of strategic bargaining. Although the argument is that trade is good for all, countries negotiate only for what is good for themselves. Thus, for example, where a country is interested only in consumer surplus and a domestic firm's profit in the internal market, participation in a multilateral system is sub-optimal for that country. Autarchy is

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[150] *See* Ryan, *supra* note 49, at 567 (making the same point).

[151] *See* Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate Its Development?* 16 B.U. INT'L L.J. 165, 187-90 (1998) (tracing the origin of TRIPS negotiations to the U.S. private sector); Ryan, *supra* note 49, at 557-66 (providing the background of the dominant role of private industry in initiating, guiding, and shaping the TRIPS negotiations).

[152] There has been significant support for the proposition that minimum enforceable standards of intellectual property protection enhances public welfare by securing the gains of comparative advantages in production of knowledge goods, in promoting development goals, encouraging FDI flows, and protecting investments in innovation. *See generally* Reichman, *From Free Riders to Fair Followers*, *supra* note 26; KEITH MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000).

[153] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2 (1963). *See generally* Kenneth J. Arrow, *Current Developments in the Theory of Social Choice*, 44 SOC. RES. 607 (1977).

optimal.[154] Interdependence and the incentive to engage in multilateral bargaining flows from the fact that countries are, in fact, concerned about internalizing a firm's profit from foreign countries. Nonetheless a social welfare function, such as domestic welfare, consisting of an aggregate of internal pressures, such as lobbying patterns, domestic policy, etc., creates an incentive to deviate from the multilateral agreement when participation might otherwise erode domestic welfare benefits. Such deviation need not necessarily be a retreat from treaty membership but might be resolved in other strategic ways, such as government-to-government undertakings,[155] mediation, negotiations, or public-private initiatives.[156]

Backward inductive analysis reveals another set of interesting findings about TRIPS enforcement. Backward induction requires that the stage two game of TRIPS enforcement be solved first to reveal what strategies should be employed at the negotiations. If at the stage two game, the payoff function changes from maximalist to optimal levels of protection, either due to strong pro-consumer, pro-competitive domestic pressure, a change in administration, or other factors, then the rational choice is deviation from the TRIPS dispute decision. If deviation is rational at stage two, then only the payoff function at the stage one game should drive the level of compromise made.

The identified payoff function during the negotiations was that developing countries would join TRIPS. If developing countries did in fact join TRIPS, but for reasons unrelated to intellectual property interests, such as concessions in other areas of trade, it suggests that the deployment of a supranational dispute settlement process as to disputes between *developed* countries is an unnecessary cost in

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[154] Ines Macho-Stadler et al., *Stable Multilateral Trade Agreements*, 65 ECONOMICA 161, 169 (1998).

[155] *See* Reichman, *The TRIPS Agreement Comes of Age*, *supra* note 20, at 463-67.

[156] *Id.* at 467-69. This approach would be equally effective in disputes between developed countries.

terms of sovereign discretion, but not so for industry. Since industries in all developed countries seek rent from both domestic and international markets, the WTO dispute settlement process is exactly what was needed to facilitate rent seeking in the domestic market where the state is either less inclined or faces political hurdles to satisfy industry demands. One can conclude that the industry correctly identified its payoff function when it formed the coalition with the state at the stage one game. To the extent that the governments may now be reluctant to submit to the dictates of a supranational body it suggests on the other hand that the state did not accurately calculate its payoff function or anticipate that the payoff function might change in the stage two game.

The influence of intellectual property lobbies in the EC and United States has proven potent and there is currently no evidence that this situation will change in the foreseeable future. It is also still the case that intellectual property industries generate significant income flows to the domestic economy, thus the motive behind global enforcement remains just as strong today. Consequently, wholesale retreat from the TRIPS Agreement is unlikely given the side-payments that have already occurred and the global payoffs anticipated. More importantly, if developing countries will enforce the TRIPS Agreement because they have received concessions in other trade areas or due to a threat of invoking the DSU process, then there is really no incentive for developed countries to heed demands for a development-oriented TRIPS jurisprudence, in any area, including public health. Indeed, the basic goal of introducing intellectual property in the multilateral trade regime would have been fulfilled.

For developed countries, then, it is possible to obtain the benefits of the TRIPS Agreement with regard to enforcement in developing countries, without complying with dispute settlement decisions that would subvert the welfare objectives of their own domestic intellectual

property policy. There are, however, other costs associated with this strategy, including reputational costs in international circles and the loss of good faith with trading partners. Further, if deviation is a rational choice for a developed country, it suggests that the payoff function in the stage one game did not factor the value of relationships with other countries—but it must do so now in the stage two game. The essential question becomes: is there room to maintain policy driven domestic laws that may be in tension or inconsistent with a panel's interpretation of TRIPS obligations? This question can be answered in the affirmative if the dispute resolution system is viewed as a means to assist states in fulfilling their specific constitutional mandate in the area of intellectual property. It requires that TRIPS dispute panels defer more substantively to the domestic policy arguments of states. In the trade setting, the degree to which a dispute panel is influenced by domestic policy rationale makes the outcome of the dispute suspect to power plays of the type witnessed in the pre-WTO era. Thus, to address this concern, several variables might be considered.

First, deference to policy arguments should be considerable primarily in respect of interpretation of TRIPS standards. In other words, for those rules specified in TRIPS—for example, that patent protection should last for twenty years from date of filing—deference should be minimal and the domestic policy at stake must be compelling to warrant such deference. Second, a dispute panel might employ a balancing test to determine whether a redressable violation has occurred. Such a test would comprise a determination of whether the asserted policy basis for the challenged law is in reality a non-tariff barrier to trade in intellectual property goods. Consistent with GATT jurisprudence, the focus of the inquiry would not be on the specific operation of the practice, rule, or policy, but on the normative and prescriptive rationale. A practical step in the analysis would be whether a less trade distortive

option is available to the state. This step would allow the TRIPS panel to view the policy measure in light of the broad principles in the TRIPS preambular statement, particularly the explicit acknowledgment of the public policy objectives of national systems for the protection of intellectual property.[157]

The second stage of the game, the application and enforcement of TRIPS, clearly raises a different set of concerns. Because the rules and payoffs in this stage pertain to enforcement against each other, as well as against developing countries, it is not yet clear what the dominant strategy will be. At this stage, the coordination game structure that produced the TRIPS Agreement disintegrates and formerly cooperative coalitions may be realigned as competing actors (i.e., state versus industry).[158] Their different interests and goals are more clearly discernible in stage two, as are the differences in TRIPS interpretations between and among states. Part III examines these differences as highlighted in the dispute settlement process.

III. BOUNDARIES OF SOVEREIGN DISCRETION: THE ROLE OF THE DSU

A. *Reflections on TRIPS: Thoughts from International Law and International Relations Theory*

The assimilation of intellectual property into the international trade regime was greeted with considerable approbation in the United States and other developed

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[157] *See* TRIPS Agreement pmbl.

[158] Macho-Stadler et al., *supra* note 154, at 161 (noting that "sometimes cooperative opportunities are not realized because coalition arrangements that are possible in multilateral negotiations undermine the stability of the general agreements").

countries. Indeed, the extensive academic literature on the TRIPS Agreement generally assumes the efficacy and probity of intellectual property as a subject of international economic regulation.[159] The TRIPS Agreement, however, is not the result of a precipitate enlightenment about the correlation of comparative advantage and the increased susceptibility of knowledge goods to appropriation in an integrated global market. Nor was the enthusiasm engendered by the successful negotiation of TRIPS a reflection of an unprecedented appreciation for the utility of a global intellectual property system.[160] The TRIPS Agreement, with its celebrated substantive provisions for intellectual property protection, is preeminent principally because of the enforcement mechanism assured by the DSU administered by the WTO.[161] The DSU replaces the mercurial dispute settlement system[162] of GATT with a new

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[159] For analyses of the integration of trade and intellectual property, see generally GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY (Friedrich-Karl Beier & Gerhard Schricker eds., 1989); J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747 (1989). For early assessment of the importance of multilateral responses to intellectual property protection, see Marshall Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991); Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989). *But see* Gana Okediji, *Copyright and Public Welfare*, *supra* note 40, at 125-72 (arguing against the notion of a "natural" fit for intellectual property in the multilateral trade system).

[160] Efforts to establish an effective international system for copyright and patent protection date back to 1883. *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, chs. 1, 2 & 3 (1987) (describing the origins of the Berne Convention); Heinrich Kronstein & Irene Till, *A Reevaluation of the International Patent Convention*, 12 LAW & CONTEMP. PROBS. 765, 766-76 (1947). For the purposes of this Article, intellectual property globalization is used to denote the progressive development of uniform, standardized intellectual property rights as TRIPS is construed and enforced by a supranational institution. The indices of the globalization of intellectual property vary from the increasing reliance by scholars on provisions of TRIPS to assess the validity of domestic legislative initiatives to a rash of legislative activity in Congress based on developments in other countries.

[161] *See* DSU.

[162] *See generally* Judith H. Bello & Alan F. Holmer, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095 (1994);

order specifically designed to address the deficiencies of the pre-WTO era.[163] The DSU, however, does more than rehabilitate the pre-WTO rules. It is, by most accounts, a "premium package" bargain with highlights that include: the establishment of a Dispute Settlement Body (DSB) to administer the rules and procedures of the DSU;[164] procedures for multiple complainants[165] and third parties having a "substantial interest" in the disputed issue;[166] establishment of a standing Appellate Body;[167] and surveillance of the implementation of the decisions of the dispute panels by member states.[168] The DSU also provides for "expeditious arbitration" by mutual agreement of the parties as an alternative to the multilateral process.[169] In short, dispute settlement under the WTO seems replete with the accouterments of mature legal systems, including the establishment of a legal aid center.[170]

Judith H. Bello & Alan F. Holmer, *Settling Disputes in the GATT: The Past, Present and Future*, 24 INT'L LAW. 519 (1990). For specific treatment of the new WTO dispute treatment in relation to TRIPS disputes, see generally Rochelle Cooper Dreyfuss & Andrea F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

[163] *See generally* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987) (discussing dispute settlement in GATT as more of a process in consensus building rather than dispute settlement). For a leading examination on the GATT dispute settlement process, its roots in diplomacy, and the influence of diplomatic process on dispute resolution, see generally ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1990); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993).

[164] *See* DSU art. 2.

[165] *See id.* art 9.

[166] *See id.* art. 10.

[167] *See id.* art. 17.

[168] *See id.* art. 21.

[169] *See id.* art. 25. This process was invoked, for the first time, in the complaint by the EC against the United States over Section 110(5) of the Copyright Act. *See* 110(5) Panel Report, *supra* note 32. For an analysis of the use of arbitration in the Section 110(5) case, see Okediji, *Rules of Power in an Age of Law*, *supra* note 5.

[170] The Advisory Centre for WTO Law, the first of its kind in the international legal system, is meant to assist developing and least-developed countries in dealing with WTO related disputes "with a view to combating the unequal possibilities of access to international justice as between States." *See* Director-General Mike

A strong, if implicit, presumption underlying the ambitious posture of developed countries, particularly the United States, during TRIPS negotiations was that enforcement of TRIPS obligations primarily would externalize the domestic status quo. Enforcement of intellectual property rules pursuant to the TRIPS Agreement would reinforce domestic interests, not change them, legitimize and invigorate the basic norms that undergird domestic intellectual property policy, and facilitate the extension of these norms to other countries. Indeed, there was substantial basis for this assumption: the TRIPS Agreement was initiated by private industry[171] and, as concluded, required minimal changes to U.S. intellectual property law.[172]

Undoubtedly, however, intellectual property law is unavoidably "international." Scholars increasingly are turning to texts of international treaties to assess the validity of domestic initiatives and scholarly proposals for intellectual property policy.[173] Put more starkly, recent

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Moore, Address at the Official Opening of the Advisory Centre for WTO Law (Oct. 5, 2001) *at* www.wto.org/english/news_e/spmm_e/spmm71_e.htm (last visited Oct. 3, 2003). The Centre opened on October 5, 2001 under the leadership of former GATT and WTO legal advisor Frieder Roessler.

[171] *See* Ryan, *supra* note 49, at 561-66.

[172] *See* Dinwoodie, *Integration*, *supra* note 61, at 307 (noting that significant U.S. influence on intellectual property treaties has resulted in minimal changes to U.S. law). As a matter of fact, several TRIPS provisions were directly influenced by U.S. legislation. *See, e.g.*, TRIPS Agreement art. 27(1) n.5 (explicit reference to American terminology). Evidence of U.S. influence in the choice of words in the TRIPS Agreement is particularly evident in the enforcement provisions. *Compare* TRIPS arts. 44-46 (injunctions, damages and other remedies), *with* 17 U.S.C. §§ 502-505 (injunctions).

[173] This is a gloss on what is a significant debate in international (trade) law, namely, the question of subsidiarity. In other words, what competencies are reserved to a state and which are delegated to an international organization? What are the tools for making this determination? What are the determinants of a legitimate division of competencies? *See generally* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993). *See also* Trachtman, *WTO Dispute Resolution*, *supra* note 13, at 334-35 (1999). The

legislative activity[174] and government proposals evaluating domestic law[175] demonstrate that there is less and less that is "domestic" about domestic intellectual property law.

Despite the current political reality of intellectual property lawmaking, there remain enduring asymmetries between intellectual property law resulting from adjudication in international fora and domestic intellectual property policy.[176] As a normative issue, this result might be expected. The incomplete harmonization of international intellectual property may reflect the

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subsidiarity (or competency) problem and what Professor Trachtman describes as an "interstitial" problem—where within an institution power should be exercised—both entail questions of constitutional legitimacy and the relationship between domestic and international law. *Id.* at 335.

[174] These laws were proposed and passed in the style of the new international era, namely, in response to legislation enactments abroad, most typically in the European Union. *See, e.g.,* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending the copyright term to life plus seventy years in response to the EU Term Directive); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (implementing the WIPO Copyright Treaty). For a detailed account of the international negotiations that led to the WIPO Copyright Treaty, see Samuelson, *supra* note 23.

[175] *See generally* The Library of Congress, U.S. Copyright Office, A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act, (Aug. 2001), *available at* http://www.loc.gov/reports/studies/dmca/dmca_study.html (last visited Oct. 6, 2003). Section 104 of the DMCA directs the Register of Copyrights to examine the effects of the DMCA on the development of electronic commerce and associated technology on the operation of sections 109 and 117 of the Copyright Act. The Report suggests that recognition of a first sale doctrine would place the United States in a different position relative to what international partners are doing. *See generally id.*

[176] This is a gloss on what is a significant debate in international (trade) law, namely, the question of subsidiarity. In other words, what competencies are reserved to a state and which are delegated to an international organization? What are the tools for making this determination? What are the determinants of a legitimate division of competencies? *See generally* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993). *See also* Trachtman, *WTO Dispute Resolution, supra* note 13, at 334-35 (1999). The subsidiarity (or competency) problem and what Professor Trachtman describes as an "interstitial" problem—where within an institution power should be exercised—both entail questions of constitutional legitimacy and the relationship between domestic and international law. *Id.* at 335.

deliberate allocation of powers between the domestic and international systems.[177] Put differently, the domain of WTO adjudication, at least in theory, ought to be distinguishable from domestic policy initiatives, given the divergent responsibilities of governance at national and international levels.[178] Stated positively, the areas of incomplete harmonization reflect points where the legitimacy of undertakings may be questioned within the domestic constitutional structure, or where other political realities (whether based on interest group politics or sectoral divisions) inflate the costs of a bargain.[179] Yet by virtue of its design choice,[180] the WTO, while necessarily

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[177] Or that the cost of harmonization, by way of a legal rule, proved too high. Incomplete harmonization may be reflected through the use of standards to be construed by a dispute settlement body, or by lacunae in the treaty. *See* Trachtman, *WTO Dispute Resolution, supra* note 13, at 334.

[178] The manner in which these responsibilities are constructed depend on what view of the state one subscribes. For a simple description of the influence of political philosophy—Hobbesian, Lockean, and Kantian concepts of government—on domestic implementation of international regulations, see ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 16-26 (1997) [hereinafter PETERSMANN, GATT/WTO DISPUTE SETTLEMENT SYSTEM]. While neither Hobbes nor Locke dealt much with international law, their views on the function of the state is significant for understanding justifications for international law, while also providing useful tools to rationalize the role of the state vis à vis the international legal system.

[179] *See* Dreyfuss & Lowenfeld, *supra* note 162, at 333 (noting that minimum standards suggest an agreement to disagree about the optimal level of protection). *See also* Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 455, 460 (noting U.S. failure to consider the degree to which political circles might be willing to endure countervailing costs of trade concessions given in return for higher levels of intellectual property protection; observing that "governments compromised far more, and obtained far less" in TRIPS than has been admitted).

[180] The creation of the WTO is a significant development in the evolution of international organizations. The WTO is the first international organization with broad jurisdictional authority over a wide variety of subjects ranging from trade in goods to financial services and intellectual property. Expansion of the WTO's portfolio to include subjects such as investment and competition law is still being debated. The mandatory nature of the obligations in the agreements monitored by the WTO and the dispute settlement mechanism that enforces compliance indicate that a significant degree of sovereignty has been ceded to the WTO in those areas that fall within its jurisdictional scope. However, to the extent that the decisions of a dispute panel are not directly and automatically integrated into a member's domestic legal system, one might argue that sovereignty loss is minimal. *See, e.g.*,

sensitive,[181] is not beholden to the political, cultural and legal norms that sustain the (intellectual property) laws of its member states.[182] Indeed, in several instances, dispute

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Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 759-60, 762-63 (1999) (categorizing the WTO as an International Adjudication regime and suggesting that the lack of standing by private parties and the absence of direct effect of adjudicate decisions minimize the cessation of sovereignty to the WTO; arguing that such a regime will likely be more palatable to democracies because it is a rule-oriented regime). *But see* PETERSMANN, GATT/WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 178, at 21. *Id.*

[181] *See* TRIPS Agreement pmbl. (providing, inter alia, that member states recognize "the underlying public policy objectives of national systems for the protection of intellectual property").

[182] This has been true in "pure" trade disputes and is now extended to TRIPS disputes. *See, e.g.*, WTO Panel Report on U.S. Requests Concerning Canada's Certain Measures Concerning Periodicals, WT/DS31/R (March 14, 1997); WTO Appellate Body Report on U.S. and Canadian Appeal Concerning Canada's Certain Measures Concerning Periodicals, WT/DS31/AB/R (June 30, 1997). The Appellate Body held that Canada's attempt to preserve an indigenous periodical industry by utilizing a combination of import prohibitions, favorable postal rates, and tax advantages constituted a violation of GATT Article III. *See generally* Myra Tawfik, *Competing Cultures: Canada and the World Trade Organization—The Lessons from Sports Illustrated, in* THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 298 (1998) (analyzing the WTO decision in terms of its implication for the development of distinct national cultural identities). Professor Tawfik argues that the objectives of the WTO are fundamentally incompatible with "the ability of a sovereign nation to have unfettered discretion to determine by itself the means by which it implements its cultural policies." *Id.* at 283. The international trade system is, however, structured precisely to impose different levels of constraints on policy options of member states. Indeed, this is the only way the system, such as it is, can exist and be effective. *See generally* JACKSON, *supra* note 30. *See also U.S. v. India* Panel Report, *supra* note 14. The Appellate Body held that "administrative instructions" by which India implemented Article 70.8(a) of the TRIPS Agreement were inconsistent with the obligations of that provision notwithstanding the fact that Article 1.1 of the TRIPS Agreement provides that "Members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice." India maintained that the administrative instructions were legally binding under Indian law but neither the Panel nor the Appellate body was persuaded by the argument. The Appellate Body held that WTO dispute bodies can legitimately interpret a member state's laws to see if they meet the obligations of the TRIPS Agreement. *Id.* at 25, paras. 65-67. *See generally* Reichman, *Securing Compliance*, *supra* note 11, at 585-601. Some scholars have urged that the WTO dispute resolution process defer, in some cases, to domestic norms in interpreting the reach of TRIPS obligations. *See, e.g.*, Dreyfuss & Lowenfeld, *supra* note 162, at 301-07. Such deference might, for example, legitimize and strengthen the dispute settlement system by allaying fears about the erosion of

bodies have explicitly declined to accept arguments or interpretations rationalized primarily, or only, by domestic policy interests.[183] The dynamic, yet unpredictable, interaction between international intellectual property laws as construed by the WTO, and the laws of member states, provides the framework within which the development of domestic and international intellectual property policy will unfold.

As stated earlier, it has been useful for scholars in a variety of disciplines to evaluate the international and national fields as distinct markets.[184] However, globalization typically denotes the accelerated integration of these two markets, facilitated by rapid information flows and unprecedented technological developments.[185] The objectives of harmonized laws, intellectual property and otherwise, are prescribed responses to the challenges of an integrated global economy. States are no longer the one-

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sovereignty that were particularly strong at the inception of the WTO regime while also preserving some flexibility for states to tailor their own intellectual property policy consistent with specific economic, cultural and legal contexts and needs.

[183] *See, e.g., U.S. v. India* Panel Report, *supra* note 14; Canada–Patent Protection, *supra* note 26; 110(5) Panel Report, *supra* note 32.

[184] *See, e.g.,* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 1 (2000) (analysis of democracy as competitive). *See generally* Keohane, *supra* note 77. *See also* DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS 4 (2001) (noting the treatment of "politics between borders and politics between polities are two sorts of realms with two sorts of habits").

[185] MARTIN SHAW, THEORY OF THE GLOBAL STATE: GLOBALITY AS AN UNFINISHED REVOLUTION 2-7 (2000) (describing globalization as a third narrative of change in the international realm. The first two are post-modernity and post-cold war world). He argues that:

> [G]lobalization became dominant once the political transition [of the post-cold war world] ceased to impress, and the most pervasive forms of change appeared to be located in the expansion of market relations, ubiquitous commodification and the communications revolution that mediated them. The global remained largely undefined, however, because the content of globalization seemed little more than a speeding up of the marketization of the previous, neo-liberal decade. The global meant principally, it seemed, the negation of the national boundaries which had defined the old order; it did not have a core meaning of its own.

Id. at 6.

dimensional predominant actors in international relations. Instead, markets and market actors propel the direction of international norms and rules.[186] It is not so much that state power/authority is diminished per se, as some have suggested is characteristic of globalization,[187] as that it is being exerted in directions dictated primarily by private economic transactions and at an unprecedented pace.[188] Further (or as a consequence), the state and private industries that dominate the globalization process collaborate in greater concert than previous milieus of international law and international relations could have foreseen or facilitated.[189] With such coordinated objectives, the state in the international context tends to represent the

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[186] *See* Jeff Gerth, *Where Business Rules: Forging Global Regulations That Put Industry First*, N.Y. TIMES, Jan. 9, 1998, at D1 (discussing this trend of "international business diplomacy" and reporting a variety of views expressing concern about this development).

[187] *See* Jan Narveson, *The Obsolescence of the State: New Support for Old Doubts*, *in* GLOBALISM AND THE OBSOLESCENCE OF THE STATE 3, 12 (discussing the state as inefficient in the global market). *See generally* GLOBALISM AND THE OBSOLESCENCE OF THE STATE (Yeager Hudson ed., 1997); DAVID HELD ET AL., GLOBAL TRANSFORMATIONS (1999); DAVID HELD, POLITICAL THEORY AND THE MODERN STATE: ESSAYS ON STATE, POWER AND DEMOCRACY (1989).

[188] *See* Robert O. Keohane & Joseph S. Nye, Jr., *Introduction*, *in* GOVERNANCE IN A GLOBALIZING WORLD 2 (Joseph S. Nye, Jr. & John D. Donahue eds., 1999); Jeffrey Frankel, *Globalization of the Economy*, *in* GOVERNANCE IN A GLOBALIZING WORLD 45, 67 (Joseph S. Nye, Jr. & John D. Donahue eds., 1999) (asserting that sovereignty remains an impediment for effective globalization).

[189] As evidenced by the de-emphasis on absolute sovereignty in international law generally. PHILPOTT, *supra* note 184, at 3 (stating that intervention and integration both challenge the sovereign state's "territorial supremacy"). *See also id.* at 18-19 (discussing different forms of sovereignty and noting that noting that sovereignty need not be absolute). In addition to the doctrinal dilution of the concept of sovereignty that has taken place in international law over the last fifty years, the Internet has also posed some threat to a static criterion for determining what sovereignty means in the context of cyberspace. *See* Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 443 (1998) (noting that we "live in a world of multiple, overlapping, contradictory, and often times intensely contested sovereignties"). For another perspective on the influence of the Internet on sovereignty, see generally Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423 (1998).

interests of domestic industry to greater and greater degrees.[190] As born out in the TRIPS negotiations, this paradigm is manifest in most industrialized countries.[191]

Defining the nature of state responsibility (or, in international law terms, "the function of the state") as distinct from market forces, yet at the same time responsive to market demands for harmonized legal regimes, is the core issue implicated by the greater integration of the domestic and the international domains generally evidenced by the WTO Agreements.[192] As the traditional and primary actor in international law, the determination of state function influences how international governance is constructed, regardless of the sub-interests or invisible actors[193] that influence state behavior. Insights from the work of political scientists, particularly international relations scholars, are useful in helping to identify the structural problems caused by the convergence of historic notions of "sovereignty," dynamic processes such as

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[190] This trend is visible in virtually all corners of international activity. *See* Gerth, *supra* note 186.

[191] It could also be argued that this is a characteristic of strong, highly evolved states and that as developing countries proceed toward greater levels of political and economic growth, this same pattern will be manifest in those countries as well. To the extent that one accepts this somewhat evolutionary narrative of rent seeking, then this critique is not directed at developed countries per se, but at the notion that a state in the international arena is somehow set free from its domestically imposed constitutional restraints and functions, and that its accountability to constituents is effected by its membership and compliance with an international obligation, regardless of the domestic costs of such compliance. Again, this argument seeks to preclude the legitimate use of international fora and process to *subvert*, simultaneously, the broader goals of international law and the imperatives of domestic governance.

[192] *See* SHAW, *supra* note 185, at 27-28. Shaw describes and defines this relationship as "nationality-internationality" and states that "this is the key constitutive principle of high modern order. The idea of internationality is generally entailed by that of nationality, and is also part of the constitution of nationality. Each idea presumes and is constituted in relation to the other." *Id.*

[193] Invisible because public international law only recognizes states as the legitimate objects of the discipline. This constraint in the discipline is at least partially responsible for the discipline's inability to fully rationalize the structure of international intellectual property.

globalization, the dialectic between the allocative efficiency of intellectual property by state regulation, and the desires of holders of private rights in such goods to earn economic rents.

In the United States, the use of domestic implementing legislation[194] to effectuate treaty obligations suggests that the only bargains that will be made are those that Congress will enforce by incorporating them into domestic legislation.[195] Implementing legislation, however, may undermine the security and the predictability of an international agreement because it invariably substitutes domestic law as the standard for application of the

[194] Not all treaties implicate the legislative arm; thus, not all treaties may be observed by executive action (or inaction). Other treaties may be "self-executing," i.e., the substantive provisions automatically become a part of domestic law. In recent times, however, self-executing treaties have become more infrequent. The focus on bilateral treaties by scholars who have worked on developing theories of breaches of international agreements limits the broad applicability of the conclusions to multilateral settings. *See, e.g.*, John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997).

[195] Of course, compliance in the sense of domestic legislation that incorporates the substantive treaty provisions into domestic law is not the same as enforcement of the substantive provisions of the treaty. Enforcement is the domain of the judicial branch (both international and domestic) and, as mentioned later in this Article, a judicial strategy of strict constructionism as a means of preserving sovereign discretion, while maintaining fidelity to the treaty, may not yield results satisfactory to treaty partners who construe the provisions differently, nor will it necessarily be consistent with international law prescriptions. An economic analysis of how separation of powers influences treaty compliance would yield important insights into when implementing legislation signals prospects of deviation and the degree of such deviation. This would, in turn, provide some guidelines for domestic compliance that may be explicitly included in future treaties. From a descriptive point of view, it would also help to predict the necessity for harmonization under the constraints of supranational adjudication. For contributions to the question of treaty compliance in the context of separation of power doctrine, see John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (arguing, in response to criticism to his article advancing historical arguments in support of non-self-executing treaties, that requiring domestic implementing legislation of treaties that touch on matters within Congress' Article I, section 8 powers reflects strong adherence by the Framers to a strong separation of powers doctrine).

substantive treaty provisions.[196] At least in theory, then, the use of implementing legislation may constitute an implicit allocation of interpretive power to the state as a matter of first principles.[197] Yet, the few TRIPS disputes so far submitted to the WTO suggest that the commitment of the dispute panels to the "rules-oriented" system has resulted in a dispute settlement process that necessarily (and, in some instances, justifiably) is less affected by the specific policy claims advanced to justify alleged derogations from TRIPS standards.[198] This might be defensible if the outcome is to reinforce a state's attempts to fulfill its constitutional functions,[199] rather than to undermine them.

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[196] *See, e.g.*, Itar-tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82 (2d Cir. 1998) (citing the Berne Convention Implementation Act (BCIA) as the source of law for selecting a conflicts rule). According to the court, Section 4(a)(3) of the Berne Implementation Act amends Title 17 to provide:

> No right or interest in a work eligible for protection under this title may be claimed by virtue of . . . the provisions of the Berne Convention . . . . Any rights in a work eligible for protection under this title that derive from this title . . . shall not be expanded or reduced by virtue of . . . the provisions of the Berne Convention.

Id. at 90 (ellipsis in original); Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 17 U.S.C. §101. *See also* The Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (concluding that while the Copyright Act, as amended by the BCIA, extends certain protection to the holders of copyright in Berne Convention works as there defined, the Copyright Act is the exclusive source of that protection).

[197] *See* Trachtman, *WTO Dispute Resolution, supra* note 13, at 335 (making the same point, but with regard to the design of the international institution; suggesting that design choices influence the decision to allocate power); Joel Trachtman, *The Theory of the Firm, and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 535-38 (1996-1997). *See also* Schneider, *supra* note 180 (outlining different kinds of international institutions and variables that influence the willingness of states to become members).

[198] The design choice of the WTO suggests that states agreed to cede authority to the WTO in the negotiated areas. *See* Schneider, *supra* note 180 (noting that supranational adjudicative bodies pose the most serious threat to sovereignty concerns).

[199] By "constitutional functions," the author is referring to the domestic democratic process of law-making, as well as the intellectual property mandate of the U.S. Constitution.

Rigid adherence by classical Realists to a paradigm of international relations based predominantly on state preoccupation with power has been modified by alternative theories that stress international cooperation and the role of subnational actors in the international arena. These theories provide important insight to the understanding of the international system. Nevertheless, the shared interests that produce regimes inevitably are a function of power.[200] To the extent that states act in coalitional form in the process of negotiating regimes, power and the desire for institutions are relevant variables in the pursuit of international cooperation.[201] The fact that institutions mediate the tendencies of "anarchical" international society does not discount the role of power because the meditative force of an international regime is defined by the continued presence of a "demand" for that institution in the form of incentives for states to comply.[202] Power thus influences the nature and the possibility of incentives available internationally.

In the area of intellectual property particularly, state power is a critical variable for predicting outcome because intellectual "property" is inherently a product of the

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[200] For a modern treatise on the coalitional strategies that are at the core of Realism, see HANS MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1985).

[201] *See* Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 731 (1995) (noting that the international system contains elements of all three leading theories of international relations).

[202] This implicates the rationalist theories of state behavior that regime theorists rely on heavily. A more subtle point is, however, that shared interests that facilitate coalitions can be a function of common positions of power in the international arena, as illustrated by developed countries during the TRIPS negotiations. The compromise made intra-coalitionally between the developed countries reflects the equal interests of these countries and the inability of one country to make a unilateral decision about the TRIPS outcome. *See* Sjostedt, *supra* note 65, at 69 (noting the "leadership problem" stemming from the lack of U.S. hegemony during the Uruguay Round negotiations because power relationships between the leading countries had become more symmetrical).

exercise of state regulatory powers.[203] Thus, domestic political institutions are, consistent with Liberal theories of international relations, even more important in determining what a state does in the international arena. As for Liberal theories of international law, domestic interests are significant in prescribing what the state should do in the international context. The importance of domestic constituents in influencing international outcomes significantly raises the level and costs of domestic interest group activity, as well as the cost of multilateral negotiations. For the latter, domestic government failure is associated with significant costs because the domestic interest groups with the most influence will exert decisive pressure on state behavior in international settings. Thus, for example, if traditional U.S. political resistance to international processes coincides with strong pro-consumer interest group politics in the area of intellectual property regulation, it is likely that deviation from particular TRIPS decisions would be rational.

Consider, for example, that state "power" is largely defined by domestic institutions. These institutions are, in turn, accountable to citizens who may exercise that power to exert pressure on the government, including voting the government out of power. Consequently, one of the factors that affect a state's strategy in international negotiations is the composition and relative influence of domestic constituents.[204] The reverberation of the cooperative strategies between sovereigns in international negotiations and the competing desires of relevant domestic interest groups indicate that the effectiveness of "power" in the international context is a reflection of the vibrancy of the domestic political system.[205]

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[203] As Lloyd Weinreb has put it, copyright is itself a form of market intervention and not a "natural" way of doing things. Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1240 (1998).

[204] *See* Putnam, *supra* note 138, at 442-50.

[205] *Id.* at 449.

Most international law and relations scholars recognize the intrinsic value of democratic government.[206] Thus, the domestic conditions that result in particular treaty outcomes should have some consideration in the dispute resolution process of the WTO. If the state lawfully cedes the advancement of domestic social goals to an international institution, then that institution should not focus solely on the outcome of "order" between states as its primary duty. Within the sphere of overlap between the national and international domains, there must be an evaluation of, and an accounting for, the substantive effects of compliance. Indeed, as suggested earlier, interpretations of treaty provisions by an international dispute body that exacerbates domestic tensions between interest groups will certainly contribute to the possibility of breach by a rational actor.[207]

B. A Review of TRIPS Disputes

The WTO dispute settlement process has been presented with several important challenges since its inception in 1995. A sampling of the disputes handled so far demonstrate that the issues raised concern differences in interpretation of TRIPS. More interestingly, some of the disputes reflect the failure of diplomatic negotiations during the pre-TRIPS era, and the dispute settlement process provides a new forum to resolve issues that have been a source of long-standing tension between developed countries.[208] The system does not yet appear to be strained,[209] despite the demonstrated force of the process.

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[206] Indeed, Liberal international relations theory assumes the existence of democracies. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207 (1993) (equating democracies and liberal states in describing the basic tenets of Liberal international relations theory).

[207] Putnam, *supra* note 138, at 444.

[208] The EC complaint over Section 301 of the 1974 Trade Act is an example of this

From an international perspective, the WTO Dispute Body's decisions have not been greeted with any measurable displeasure among scholars.[210] The decisions maintain a fidelity to the multilateral system as the end for which the WTO exists. This has been accomplished through several judicial mechanisms. They include the interpretive rule of "strict constructionism,"[211] the rejection of the "legitimate expectations" test[212] (in other words, careful adherence to the explicit rules of the TRIPS Agreement and nothing more), and the implicit preservation of the moratorium on claims of nullification or impairment.[213] Each of these mechanisms reflects attempts to circumscribe construction of TRIPS provisions as required by Article 19(2) of the DSU.[214] Indeed, in construing the requirement of Article 23,[215] the United States 301-310 Panel[216] found that the most relevant objects and purposes of the DSU, and of the WTO in general, "are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and

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resort to WTO dispute settlement to resolve pre-WTO grievances.

[209] *See generally* Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20 (cautioning against use that might engender such strain).

[210] The *United States v. India* decision was received quite well, although, as a paradigmatic case, its general approval rating may not be a measure of the success of the system. In general, there has been very little academic commentary on WTO decisions, other than the recent copyright decision. *See generally* Okediji, *Fair Use Standard*, *supra* note 21; Ginsburg, *Toward Supranational Copyright Law?*, *supra* note 61. *See also* Dinwoodie, *Development and Incorporation*, *supra* note 61, at 775.

[211] *See* Reichman, *Securing Compliance*, *supra* note 11, at 592-97.

[212] *See United States v. India Panel Report*, *supra* note 14, paras. 33-48.

[213] *See* TRIPS Agreement arts. 64(2), (3) (providing a five year moratorium on non-violation complaints which has been extended several times); Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 454-55 (observing the danger of this GATT doctrine in intellectual property matters).

[214] TRIPS Agreement art. 19(2) (providing that the Panel and Appellate Body "cannot add to or diminish the rights and obligations provided in covered agreements"). *See also id.* art. 3(2).

[215] *Id.* art. 23 (providing that members must resort to and abide by the rules and procedures of the DSU regarding any complaints of violation of obligations, or of nullification and impairment of benefits).

[216] U.S. Sections 301-310, *supra* note 76.

predictable multilateral system."[217] It further found that "[o]f all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the marketplace and its different operators."[218]

The TRIPS decisions reflect the applications of these principles and provide some insight into the development of governing principles of WTO TRIPS adjudication. With specific regard to the TRIPS Agreement, resort to the dispute settlement process suggests, at least initially, that the delegated responsibility for achieving the goals of intellectual property protection ought to be a significant factor in the construction of the obligations of member states. For the reasons that follow, it may be argued that narrow reliance on the text of the TRIPS Agreement is insufficient to generate results that will foster the accomplishment of identifiable welfare goals established by national intellectual property policies[219] or other national priorities. Thus, resort to strict constructionism is not necessarily the expedient choice of prudent judicial functioning but the inevitable outcome of decision-making in the absence of an enabling theory or policy mandate.

There is, as yet, no explicit international policy for global intellectual property protection.[220] This deficiency is problematic because it deprives dispute panels of any basis, other than the text of the TRIPS Agreement,[221] to evaluate and rationalize their decisions. Some scholars view

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[217] *Id.* para. 7.71.

[218] *Id.* para 7.75.

[219] *Id.* at 37 (noting that international organization may be necessary to assist in the supply of international public goods). International intellectual property is an example.

[220] *But see* TRIPS Agreement arts. 8, 9.

[221] As the Appellate Body has stated, "the words of the treaty form the foundation for the interpretive process." WTO Appellate Body Report on Japan and U.S. Appeal Concerning Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 8 (Oct. 4, 1996).

favorably TRIPS panels' strict textual adherence, suggesting that strict construction preserves the appropriate domain of state discretion with regard to intellectual property policy.[222] Nonetheless, "strict constructionism" is still constructionism. Despite the explicit caution in the DSU itself,[223] dispute panels are inevitably required to effect substantive provisions in situations that are not tailored to "fit" the language of the treaty. In other words, the process of applying substantive provisions entails discerning the meaning of the agreement and how that meaning should translate into specific acts of implementation. The result of the interpretive process is, thus, perforce an extension and expansion of the explicit rule being applied.[224] As the noted American legal scholar Roscoe Pound observed, "[t]he face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice."[225] The concept of mechanical application of the law is a fiction that has, today, lost much of its prominence in national and international settings.[226] The judicial function may be tamed by constitutional and legislative constraints, such as Article 3(2) of the DSU, but political and social forces ensure that the lawmaking proclivity of courts and dispute panels is never completely subdued. Further, a lack of policy will inevitably lead to difficulties in assessing whether the TRIPS Agreement has

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[222] *See* Reichman, *Securing Compliance*, *supra* note 11, at 594-97; Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 446.

[223] The dispute settlement system of the WTO

> serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSU cannot add to or diminish the rights and obligations provided in the covered agreements.

DSU art. 3(2).

[224] *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14-15 (1910).

[225] *Id.* at 20.

[226] *See* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 5 (1982) (asserting that "judicial law-making is a permanent feature of administration of justice in every society").

improved global and domestic social welfare,[227] thus introducing uncertainty in the compliance project of the TRIPS administrative structure. This informal compliance project constitutes a major part of the entire dispute resolution mechanism.[228]

The seminal TRIPS dispute before the WTO was a complaint brought against India by the United States.[229] In all respects, this case was paradigmatic of the arguments and perceptions that fueled the felt need for the TRIPS Agreement in the first place. It involved a developed country versus a developing country. The subject of the dispute was the alleged absence of protection for pharmaceuticals in India, an issue that had long symbolized the deep divisions between the North and the South with regard to intellectual property protection.[230] The issue of pharmaceutical patents had also been fairly contentious throughout the TRIPS negotiations, with India at the forefront of opposition.[231]

On July 2, 1996, the United States requested consultations with India, consistent with Article 4 of the DSU and Article 64 of the TRIPS Agreement, concerning the lack of protection for pharmaceutical and agricultural chemical products and the absence of a formal system to file patent applications for such products in India. The request also sought to address India's failure to provide exclusive marketing rights (EMRs) for these products as required by TRIPS Articles 70(8)[232] and 70(9). After the failure of these

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[227] Of course, it is possible to argue that the very enforcement of the agreed upon standards in the TRIPS Agreement is a welfare gain.

[228] *See* Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20, at 444-45 (noting the roles of the Council for TRIPS in promoting mediation, consultation, and persuasion, and discussing the applications of the rule of transparency established by Article 63).

[229] *See U.S. v. India* Panel Report, *supra* note 14, at 2.

[230] *Id.* at 2-3.

[231] *See* GERVAIS, *supra* note 51, at 12-25.

[232] Article 70(8) of TRIPS provides:

Where a Member does not make available as of the date of entry into force

consultations, the United States requested that the DSU establish a panel to examine the issue. A panel was consequently established on November 20, 1996 with standard terms of reference pursuant to Article 6 of the DSU.

The Panel first identified specific disputed facts by the parties.[233] In particular the Panel observed that under Indian law, international agreements require implementing legislation before the substantive obligations will be binding as a matter of domestic law.[234] Upon conclusion of the Uruguay Round negotiations, the Indian President issued an Ordinance to amend the Indian Patent Act to provide a means for filing and handling patent applications for pharmaceuticals and agricultural chemical products as required by the TRIPS Agreement. The Ordinance permitted the submission of such applications, even though these products were not yet patentable by virtue of the TRIPS transition period, and it provided that the handling of such applications would be postponed until the expiration of the TRIPS transition period or until an application for

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of the Agreement Establishing the WTO patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

> (i) notwithstanding the provisions of Part VI above, provide as from the date of entry into force of the Agreement Establishing the WTO a means by which applications for patents for such inventions can be filed;
> (ii) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application;
> (iii) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in sub-paragraph (ii) above.

TRIPS Agreement art. 70(8).

[233] *See U.S. v. India* Panel Report, *supra* note 14, paras. 2.1-.12.

[234] *Id.* para. 2.2.

the grant of an exclusive marketing right was submitted, if such occurred earlier.[235] It further provided procedures for applications for EMRs, the scope of the rights, and the manner for their enforcement.[236] The Ordinance was a stop-gap measure to implement the provisions of TRIPS since the Indian Parliament was not in session. It expired six weeks after its promulgation, prior to any permanent legislative change to the patent law.[237] To fill the legislative gap, the Indian government instructed the Patent Office to continue to receive the applications as prescribed by the Ordinance.[238] However, no written record of the instruction was ever produced to the Panel and no notification was made to the Council on TRIPS.[239]

The United States argued that India had failed to implement the obligation of Article 70(8) requiring the provision of a mechanism to protect the novelty of the applications and the filing date they would have received but for the transition period.[240] The United States also alleged that Article 70(8) requires India to ensure that those who did file applications pursuant to Article 70(8) (for example, while the Ordinance was valid), or who would have filed an application had a system been maintained, receive a retroactive filing date to reflect the date they

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[235] *Id.* para. 2.3.

[236] *Id.*

[237] A legislative amendment designed to make the prescriptions in the Ordinance a permanent feature of Indian law was introduced to the Indian Parliament, first to the Lower House (or "Lok Sabha") in 1995. The amendment passed the Lower House and was subsequently introduced to the Upper House ("Rajya Sabha") where it was referred to a Select Committee for examination. The Select Committee did not conclude its work before dissolution of the Lower House in 1996. Consequently, the bill lapsed. *See U.S. v. India* Panel Report, *supra* note 14, at paras. 2.4-.5.

[238] *Id.* para. 2.6.

[239] See TRIPS Agreement art. 63(2) (requiring members to notify the Council on TRIPS of laws and regulations).

[240] *See U.S. v. India* Panel Report, *supra* note 14, at para. 2.4. The so-called "mail-box" system of Article 70(8) would preserve the priority date of the invention for purposes of the actual processing of the patent application upon expiration of the transition period. *Id.*

would have received.[241] In the alternative, the United States argued that even if India had a valid mailbox system in place, India had failed to comply with its transparency obligations under Article 63(2).[242]

India claimed that it had indeed provided a "means" for the filing of patent applications for pharmaceutical and agricultural products sufficient to attain the objectives of Article 70(8),[243] and that the TRIPS Agreement did not obligate it to change its Patent Act so long as some "means" existed within its legal system to protect these applications.[244] Its legal mechanism for compliance with Article 70(8) was a set of "administrative instructions" to the Patent Office, directing it to store applications for patents for pharmaceutical and agricultural chemical products. India argued that these "administrative instructions" were legally binding under its domestic law as a matter of "absolute certainty."[245] Thus, it was sufficient to satisfy the TRIPS obligations. India further contended that the U.S. claim for retroactive application of the novelty and priority date was essentially a request for a ruling on how India should remedy an alleged violation of Article 70(8). With regard to the Article 63 claim, India argued that the claim exceeded the Panel's terms of reference. In the alternative, India argued that it was not subject to the obligations of Article 63 until the expiration of the transition period, and even if this was not the case, it had published the elements of its means of filing that were subject to Article 63(1) of the TRIPS Agreement.[246]

With respect to the mailbox issue, the United States contended that once the Presidential Ordinance lapsed, no formal mailbox system existed and therefore India had

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[241] *Id.* para. 2.13.
[242] *Id.* para. 2.16.
[243] *Id.* para. 2.2.
[244] *See supra* note 232 (providing text of TRIPS Article 70(8)).
[245] *U.S. v. India* Panel Report, *supra* note 14, at para. 2.12.
[246] *Id.* para. 2.22.

failed to comply with its obligations under Article 70(8).[247] India responded that Article 70(8) did not prescribe a particular method for filing patents for pharmaceutical and agricultural chemical inventions.[248] India invoked Article 1.1 of the TRIPS Agreement which provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own domestic legal system and practice" in support of its view of the obligation imposed by Article 70(8).[249] In India's view, both legislative and administrative options were legitimate "means" under Article 70(8).[250]Indeed, several companies had already filed such applications suggesting that the "means" in question were in place and working.[251]

The United States contended, however, that because of India's previous actions in passing an Ordinance, and given the fact that the proposed permanent legislation had failed to pass the Indian Parliament, it was perfectly clear that India knew that it had to amend its Patent Act to implement Article 70(8).[252] Further, while India had notified the Council on TRIPS about the Ordinance, it did not do so with regard to the means "that India claimed, therefore calling its very existence into question."[253] The United States argued that by failing to put a mailbox system in place, India had failed to protect the legitimate expectations of applicants, contrary to the WTO principle that members should protect the expectations of the

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[247] *See id.* para. 4.1.

[248] *See id.* para. 2.2.

[249] *Id.*; TRIPS Agreement art. 70(8).

[250] *U.S. v. India* Panel Report, *supra* note 14, at para. 2.6.

[251] The Panel noted that during the period that the Ordinance was in place, 125 applications were received. There was also evidence from the Indian Minister of Industry that as of July 1996, 893 patent applications had been filed. *See id.* paras. 2.4, 2.7.

[252] *See id.* para. 4.3.

[253] *Id.* Since India had notified the Council on TRIPS about the Ordinance, the United States argued that this notification made clear that the Ordinance was required to provide a basis for such applications. Once the Ordinance expired, so did the legal basis for such acceptance under Indian law.

members as to the competitive relationship between their products.[254]

In analyzing the claims of the parties, the Panel commenced with a review of the applicable interpretive framework of the TRIPS Agreement pursuant to Article 3.2 of the DSU, which requires that panels clarify the provisions of the WTO agreements in accordance with "customary rules of interpretation of public international law."[255] The Panel noted that GATT jurisprudence is also a source of interpretive guidance for the TRIPS Agreement, pursuant to Article XVI:1 of the WTO Agreement.[256] In view of this, the Panel held that the protection of members' legitimate expectations regarding competitive conditions in other countries is a well-established GATT principle that, according to the Panel, derives from the dispute settlement provisions of GATT.[257] The Panel went on to state that, "the protection of legitimate expectations is central to creating security and predictability in the multilateral trading system."[258] The Panel concluded that India's asserted administrative mechanism did not "sufficiently protect the legitimate expectations of the parties as to the competitive

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[254] *Id.* (citing GATT Panel Report on Canadian Request for Consultation Concerning U.S. Taxes on Petroleum and Certain Imported Substances, L/6175-34S/136, at 160 (June 5, 1987)). According to the *U.S. v. India Panel*, this GATT Report "established clearly the importance of creat[ing] the predictability needed to plan future trade." *Id.*

[255] DSU art. 3.2. The customary rules of interpretation referred to by the DSU have uniformly been identified as the rules of interpretation codified in the Vienna Convention on the Law of Treaties. *See U.S. v. India* Panel Report, *supra* note 14, at para. 7.18. These rules are embodied in Article 31(1) of the Vienna Convention which provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *See* Vienna Convention, *supra* note 29, at art. 31(1).

[256] Article XVI:1 of the WTO Agreement provides: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." GATT art. XVI:1.

[257] *See U.S. v. India* Panel Report, *supra* note 14, at para. 7.20.

[258] *Id.* paras. 7.21, 7.41, 7.43.

relationship" between their respective citizens, because the administrative instructions did not provide a sound legal basis to preserve novelty and priority. The administrative means, instead, introduced "legal insecurity" to a process that had been explicitly negotiated for the object and purpose of assuring investors of their priority and novelty dates in a country that previously had afforded no protection for patents on such goods.[259] The Panel concluded that India had an obligation to take legislative measures to implement Article 70(8),[260] and its reliance on non-legislative mechanisms did not satisfy the good faith requirement of the Vienna Convention.[261] The Panel also concluded that India had failed to comply with the transparency requirement of Article 63[262] and Article 70.9 regarding EMRs for pharmaceutical and agricultural chemical inventions.[263]

India appealed the Panel's decision to the Appellate Body.[264] The Appellate Body upheld the Panel's decision on the merits, but rejected the Panel's construction of the good faith requirement of the Vienna Convention. In particular, the Appellate Body rejected the "legitimate expectations test" and held that the text of TRIPS already reflects the parties' expectations.[265] The Appellate Body invoked the limitation of Article 19(2) of the DSU, which prohibits the dispute settlement process from adding or diminishing the rights and obligations in the covered agreements.[266] It

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[259] *Id.* paras. 7.29-.41.

[260] *Id.* para. 7.31.

[261] Vienna Convention, *supra* note 29, at art. 31(1).

[262] *U.S. v. India* Panel Report, *supra* note 14, at paras. 7.44-.50.

[263] *Id.* paras. 7.54-.64.

[264] *See* WTO Appellate Body Report on India Appeal Concerning Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter *U.S. v. India* Appellate Body Report].

[265] Specifically, the Appellate Body held that the concept of "legitimate expectations" of the parties evident in GATT jurisprudence derived from non-violation complaints of nullification and impairment which had been suspended with regard to the TRIPS Agreement. *See id.* paras. 41-42.

[266] *Id.* paras. 46-48.

affirmed the Panel's decision, however, that Article 70(8) requires members to provide a sound legal basis to preserve novelty and priority, and that this construction is consistent with the object and purpose of the TRIPS Agreement, namely "the need to promote effective and adequate protection of intellectual property rights."[267]

The Appellate Body reviewed India's claim that its administrative instructions were sufficient to carry out the obligations of Article 70(8). It found this claim to be inconsistent with the language of the Indian Patent Law, which precluded patent applications for pharmaceutical products, and with India's own initial actions in promulgating a domestic ordinance to implement Article 70(8).[268] The Appellate Body held that since the administrative instructions were in direct contradiction with provisions of the Indian Patent Act, which precluded the Patent Office from granting patents in the contested subject matter,[269] it was not a "sound legal basis" as required by Article 70(8).[270] Further, the Appellate Body noted, as did the Panel, that India's own experts had testified that there was a need for domestic legislative implementation of Article 70(8).[271] Finally, the Appellate Body affirmed the Panel's interpretation of Article 70.9, obligating developing countries to implement EMRs during the TRIPS transition period or forego the transition period and provide immediate protection for pharmaceutical and agricultural chemical products.[272] As the Panel had observed, this was a carefully negotiated concession during the Uruguay Round.[273] However, the Appellate Body found that the Article 63 claim was outside the Panel's jurisdiction and recommended a reversal of the Panel's

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[267] *Id.* paras. 56-57.
[268] *Id.* paras. 62-71.
[269] *Id.* para. 69.
[270] *Id.* para. 71.
[271] *Id.*; *U.S. v. India* Panel Report, *supra* note 14, at para. 7.36.
[272] *U.S. v. India* Appellate Body Report, *supra* note 264, at paras. 76-84.
[273] *See U.S. v. India* Panel Report, *supra* note 14, at paras. 7.29, 7.31.

finding that India had failed to comply with this obligation of the TRIPS Agreement.[274]

The Appellate Body decision effectively narrowed the potentially sweeping ramifications of the Panel's ambitious interpretive approach to the *United States v. India* decision.[275] By rejecting elastic doctrines such as "legitimate expectations"[276] as the measurement of the good faith requirement of the Vienna Convention, the Appellate Body provided a prudent, bounded approach to analyzing the parties' claims. The rejection of the Article 63 claim on due process grounds also suggests that the Appellate Body would favor a strict, even formalistic, approach to claims of TRIPS violations. From this perspective, the function of dispute resolution is not necessary to redress all TRIPS violations, but only those violations identified by members as problematic between themselves. This approach offers a two step structure for dispute resolution; it leaves the responsibility of securing outward compliance with TRIPS obligations to the informal process, and the responsibility of substantive evaluations of compliance to the formal process. The TRIPS system might then be considered self-policing in the sense that once outward compliance is secured, the only context in which substantive compliance will be evaluated is in the context of dispute resolution. This is a prospect that portends both the promise of accommodation of sovereign prerogatives in terms of modes of implementation and initial interpretation of obligations, as well as the perils of uncooperative behavior in the absence of the deployment of the formal process.

The EC was a third party complainant in *United States v. India*, as provided by Article 9.1 of the DSU.[277] However, on April 28, 1997, the EC requested consultations with India

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[274] *U.S. v. India* Appellate Body Report, *supra* note 264, at para. 97.

[275] *See generally* Reichman, *Securing Compliance*, *supra* note 11.

[276] Professor Reichman has discussed the negative payoffs of this ruling for developed countries. *See id.* at 595-600.

[277] DSU art. 9.1.

to discuss the absence of patent protection for pharmaceutical and agricultural chemical products in India.[278] Because the EC's complaint was in all respects identical to the U.S. complaint, India objected on a number of procedural grounds.[279] This was the second TRIPS dispute settlement case and, with the exception of some procedural questions, the dispute did not yield any new decisions in terms of the substantive provisions of the TRIPS Agreement. Like the United States, the EC claimed as a violation the lack of a formal system to permit the filing of patent applications and the grant of exclusive marketing rights for such products. Of interesting note is that India argued that its implementation of the *United States v. India* decision would satisfy the EC complaint and that the EC should have brought its complaint at the same time as the United States. However, the Panel held that WTO members are free to bring claims at any time, and that Article 9 does not limit this freedom.[280]

This second TRIPS decision is particularly important because, as the EC explained,[281] the enforcement options of Articles 21 and 22 of the DSU require the party seeking implementation of a panel report to have invoked the dispute settlement process as a complainant.[282] Failing to do so limits the ability to utilize the full panoply of remedial action provided by TRIPS.[283] The Panel held that it was not feasible for a single panel to be established for both the EC and United States complaints because, at the time, the EC had not yet engaged in consultations with India, which is a necessary prior step to invoking the formal dispute

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[278] WTO Panel Report on EC Complaint Concerning India's Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS79/R (Aug. 24, 1998) [hereinafter *EC v. India* Panel Report].

[279] *Id.* para. 4.2.

[280] *Id.* para. 7.15.

[281] *See id.*

[282] *See* DSU art. 22(2).

[283] *Id.*

process.[284] As to the scope of Article 10 of the DSU,[285] the Panel held that the provisions did not constitute a procedural bar to the EC claim. Therefore, the Panel proceeded to analyze the claim in essentially the same manner, with the same results as *United States v India*.[286]

Following the seminal case of *United States v India*,[287] other formally adjudicated TRIPS disputes have involved conflicts between developed countries.[288] This is an interesting development given the oft-stated lore of the TRIPS imperative. Conventional wisdom rationalizes the TRIPS Agreement as a function of the increased dependency of developed countries, particularly the United States, on information goods and the corresponding integration of markets that allow developing countries to imitate these goods without penalty.[289] Accordingly, an international agreement prescribing minimum standards of intellectual property protection was necessary to prevent further erosion of U.S. competitive and comparative advantages in an integrated global market. This orthodoxy would suggest, at least as an initial matter that the utility of the WTO dispute settlement process will be most evident

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[284] *EC v. India* Panel Report, *supra* note 278, at paras. 7.15-.16.

[285] Article 10 provides that the dispute resolution process should account for the interests of other members and provides for third party status for members who have a substantial interest in the matter and who have notified the DSU of that interest.

[286] The United States reserved third party rights. DSU para. 1.1.

[287] *U.S. v. India* Panel Report, *supra* note 14.

[288] This is best explained by the fact that the TRIPS Agreement did not come into force for developing countries until January 1, 2000, the date of expiration for the transitional period. *See* TRIPS Agreement art. 65. Least developed countries and former socialist countries were granted an eleven-year transition period. *See id.* art. 66. It is also likely that other conflicts have been resolved informally through the use of consultations and bilateral negotiations. *See, e.g.*, Press Release, Office of the U.S. Trade Representative, USTR Barshefsky Announces Victory in WTO Dispute on High-Technology Exports (Feb. 5, 1998), *available at* http://www.ustr.gov/releases/1998/02/98-11.pdf (last visited Oct. 3, 2003).

[289] This account is a standard feature of the vast scholarly literature on the TRIPS Agreement. For a few examples, see generally Reichman, *Universal Minimum Standards*, *supra* note 139; Reichman, *TRIPS Agreement Comes of Age*, *supra* note 20.

in claims of non-compliance brought by developed countries against developing countries.[290] Perhaps with the expiration of the transition period, this orthodoxy will be vindicated.

Further, with the exception of *United States v India*, the TRIPS disputes determined by the WTO have involved challenges to legislative initiatives purportedly intended to address specific domestic concerns in a manner consistent with domestic policies—intellectual property or otherwise. These initiatives are not all unmistakable violations of an explicit TRIPS rule. The dispute panels in these cases have had to construe TRIPS standards to yield norms that might have been too costly to bargain for during TRIPS negotiations.

The choice between rules or standards is typically made during the bargaining process. As a matter of international law, this choice may indicate where international jurisdiction stops and domestic prerogative begins.[291] However, in the case of the TRIPS Agreement, the extensive negotiations that took place and the repeated insistence by developed countries that intellectual property must be protected at certain minimum levels in the global market provides an interpretive context for dispute panels

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[290] Professor Reichman has cautioned against an overly litigious use of the dispute settlement process. Reichman, *TRIPS Agreement Comes of Age, supra* note 20, at 460-62. This Article affirms Professor Reichman's caution but for different reasons. These reasons include the prospects of ratcheting up the minimum standards, the manipulation of international process, and the subversion of domestic welfare concerns.

[291] Even this suggestion is contested by international law scholars. The question is whether a state may exercise its sovereign prerogative when a treaty is silent or when the treaty simply prescribes standards. Does the choice of standards over rules defer construction to the state, as a matter of international law, with the obligation that the standard be construed in a manner consistent with good faith application of the treaty? In such an instance, is the only function of an international forum akin to appellate review in the United States; that is, only if the construction is clearly erroneous in light of the objects and purposes of the treaty should it be deemed to violate the treaty? *See generally* Trachtman, *WTO Dispute Resolution*, *supra* note 13.

when construing the standards of protection for intellectual property. This context provides evidence that the road to TRIPS was paved very solidly with the bricks of high protectionism. As a matter of treaty interpretation, then, the WTO dispute panels have applied this high standard in a manner that is utterly consistent with the articulated intent of the members and, certainly, of the underlying sub-actors, the intellectual property coalitions. In the process, panel decisions are likely to intrude upon the domestic policy arena by interpreting TRIPS as the manifestation of a new global intellectual property policy that supercedes domestic intellectual property policy[292] in much the same way that international law, at least in theory, trumps domestic law.[293]

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[292] *See* WTO Appellate Body Report on Canadian Appeal Concerning Patent Protection, WT/DS170/AB/R (Sept. 18, 2000) [hereinafter Canada Appellate Body Report]. This case involved a claim by the United States against Canada, alleging violation of TRIPS Article 33, which provides a twenty-year term for patent protection. Section 45 of the Canadian Patent Act only provided a seventeen-year term for patents issued on the basis of applications filed before October 1, 1989. The United States argued that Article 70(2) of the TRIPS Agreement requires members to extend the twenty-year term to existing patents; Canada disagreed with this interpretation of Article 70(2) and argued, inter alia, that Article 33 applies prospectively to patents granted on or after January 1, 1996, the effective date of the TRIPS Agreement. Canada relied on Article 70(1) to support this argument. Both the Panel and the Appellate Body agreed with the United States and held that Section 45 of the Canadian Patent Act was inconsistent with Article 33. The Panel and Appellate Body also interpreted Article 70(2), which extends TRIPS obligations to "subject matter existing at the date of application of this Agreement for the Member in question" to mean that the TRIPS Agreement applies to inventions still protected on the date of application of TRIPS in Canada. *Id.* para. 101. Consequently, the patents subject to Section 45 of the Canadian Patent Act were entitled to the term of protection accorded by Article 33 of the TRIPS Agreement. In its conclusion, the Appellate Body noted that its decision did not "prejudge the applicability of Article 7 or Article 8" of the TRIPS Agreement (which recognize some sovereign discretion in intellectual property policy in light of domestic objectives) in possible future cases with respect to measures to promote the policy objectives of the WTO members that are set out in those Articles. *Id.* The Appellate Body concluded that "[t]hose Articles still await appropriate interpretation." *Id.*

[293] Or, constitutional law trumps state law.

In *Canada—Patent Protection of Pharmaceutical Products*,[294] the EC challenged sections of the Canadian Patent Act that provided exemptions for the manufacture, construction, use, or sale of a patented invention "solely for uses reasonably related to the development and submission of information required under any law of Canada," or for the same purposes in any other country, from infringement claims.[295] In essence, this provision allowed the use of patented subject matter for purposes of securing regulatory approval prior to patent expiration. The EC also challenged the TRIPS consistency of the stockpiling provision that permitted generic drug manufacturers to stockpile drugs prior to patent expiration.[296] The EC argued that by allowing manufacturing and stockpiling of pharmaceutical products during the six months before the expiration of the patent term, Canada was in violation of TRIPS Articles 33 and 28(1).[297] The EC argued further that to the extent these provisions singled out pharmaceutical patents, Canada was in violation of the TRIPS prohibition of discrimination in the enjoyment of patent rights between fields of technology.[298]

Canada argued that neither of the contested provisions were violations of TRIPS obligations and invoked the patent

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[294] Canada Appellate Body Report, *supra* note 292.

[295] *Id.* para. 2.1.

[296] Section 55.2(2) of the Patent Act provides:

> It is not an infringement of a patent for any person who makes, constructs, uses or sells a patented invention . . . to make, construct or use the invention, during the applicable period provided for by the regulations, for the manufacture and storage of articles intended for sale after the date on which the term of the patent expires.

Patent Act, R.S.C., ch. P-4, § 55.2(2) (1985) (Can.) (repealed 2001).

[297] Article 28(1) prescribes the rights that a patent "shall" confer on its owner. Where the subject matter of the patent is a product, the owner has the right to prevent the unauthorized making, using, offering for sale, selling, or importing the product. TRIPS Agreement art. 28(1)(a). Where the subject matter is a process, the owner has the exclusive right to prevent unauthorized use of the process, and to prevent use, offering for sale, selling, or importing for these purposes the product obtained directly by that process. *Id.* art. 28(1)(b).

[298] *Id.* art. 27(1).

limitations clause of the TRIPS Agreement,[299] as well as the "general welfare" provisions codified in Articles 7 and 8.[300] Canada provided a detailed explanation of the public policy concerns that animated the disputed legislation.[301]

Prior to the TRIPS Agreement, Canada maintained a system of compulsory licensing consistent with the Paris Convention, of which Canada was a member. The compulsory licensing regime was an important policy tool for containing the cost of Canada's public health system by allowing competitively priced medicines during the period of patent production.[302] With the simultaneous negotiation of both the North American Free Trade Agreement (NAFTA) and the TRIPS Agreement, Canada preemptively

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[299] TRIPS Agreement Article 30 states that:

> Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Id. art. 30.

[300] These penumbral provisions establish guidelines for states to adopt policies necessary to further identified social objectives. Article 7 states that the objective of the TRIPS Agreement is the protection and enforcement of intellectual property rights, which "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." *Id.* art 7.
Article 8 provides as follows:

> 1. Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
> 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Id. art. 8.

[301] WTO Report of the Panel on Canadian Complaint Concerning Patent Protection, WT/DS114/R, para. 4.21 (Mar. 17, 1997) [hereinafter Canada Panel Report].

[302] *Id.* This scheme had been in force in Canada since 1923. *Id.*

amended its legislation to reflect the dominant sentiment of the TRIPS negotiations and to eliminate completely, or at least drastically reduce, the use of compulsory licensing systems.[303] The amendment repealed the compulsory licensing provisions of the Canadian Patent Act, and eliminated all compulsory licenses issued on or after December 20, 1991.[304] The amendment also sought to continue the policy of containing healthcare costs while providing a level of protection required by international treaties.[305] To continue to accomplish the public health objectives targeted by the compulsory licensing system, the amendment included measures both to "provide balance in the post-expiry market, as contemplated by Articles 7 and 30 of the TRIPS Agreement," and to address concerns regarding the costs of public health care that enhanced patent protection would likely require.[306] The stockpiling provision was implemented to facilitate the production and availability of generic drugs as soon as possible after patent expiration.[307]

Despite the government's careful calibration of interests, the Patent amendment bill generated intense public debate and controversy in Canada.[308] Proponents argued that heightened protection would result in a more profitable domestic industry and generate greater levels of research and more jobs.[309] Opponents argued that it would raise the cost of health care to unmanageable levels and destroy the generic drug industry.[310] Interest groups on both sides of the debate lobbied the legislature and, as a result, some modifications were made to the proposed bill. The dominant policy of maintaining a balance between the

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303 *Id.*
304 *Id.*
305 *See id.*
306 *See id.*
307 *See id.*
308 *See id.*
309 *Id.*
310 *Id.*

domestic policy concerns and fidelity to the emerging international requirements, however, remain unchanged.[311]

The WTO Panel held that Canada's stockpiling legislation was inconsistent with Article 30 of the TRIPS Agreement.[312] Article 30, like its TRIPS copyright counterpart,[313] establishes a three-step test to determine if an exception is legitimate. According to the Panel (and both Canada and the EC agreed), three criteria must be met to satisfy the TRIPS requirement: (1) the exception must be limited; (2) the exception must not "unreasonably conflict with the normal exploitation of the patent"; and (3) the exception must not "unreasonably prejudice the legitimate interests of the patent owner, taking account of legitimate interests of third parties."[314] Each of the three conditions must be satisfied before a particular exception will be deemed to be consistent with TRIPS.[315]

Canada argued that the word "limited" in Article 30 should be interpreted according to its ordinary meaning, which would suggest something that is "restricted in scope, extent and amount."[316] It argued that the stockpiling exception satisfied this meaning because stockpiling does not affect the patent owner's commercial sales to the ultimate consumer during the six-month period when stockpiling is allowed under Canadian law.[317] In addition, Canada argued that the six-month period is itself a limitation on the exception and that the exception is also

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[311] *Id.*

[312] Article 30 deals with limitations and exceptions to patent rights. It states: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties." TRIPS Agreement art. 30.

[313] *See id.* art. 13.

[314] Canada Panel Report, *supra* note 301, para. 7.20.

[315] *Id.*

[316] *Id.* para. 7.27.

[317] *Id.*

limited to a narrow class of individuals who have made, constructed, or used the invention for the purposes identified in the Patent Act.[318] The EC argued, to the contrary, that the condition "limited" means "narrow, small, minor, insignificant or restricted," and thought that this should be measured by reference to the impact of the exception on the "exclusionary rights granted to a patent owner."[319] The EC noted that "there was no limitation on the quantities of drugs that could be produced during this period, nor any limitation on the markets in which the products could be sold."[320] Finally, the EC noted that no royalty fees were required for such use, and the patent holder was not afforded a right even to be informed of such use.[321]

The Panel first turned to the TRIPS negotiation history to seek clarification of Article 30. The negotiating history did not yield any information as to why the negotiators used the phrase "limited exception," but the Panel nevertheless agreed with the EC that the word "limited" in Article 30 has a narrower connotation than the interpretation suggested by Canada.[322] According to the Panel:

> Although the word itself can have both broad and narrow definitions, . . . the narrower definition is the more appropriate when the word "limited" is used as part of the phrase "limited exception."" . . . When a treaty uses the term "limited exception," the word "limited" must be given a meaning separate from the limitation implicit in the word "exception" itself. The term "limited exception" must therefore be read to connote a narrow exception—one which makes only a

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[318] *Id.*
[319] *Id.* para. 7.28.
[320] *Id.*
[321] *Id.*
[322] *Id.* para. 7.30.

small diminution of the rights in question.[323]

To the Panel, the question of whether the stockpiling provision was a "limited exception" depended on the extent to which it curtailed the patent holder's exclusive rights.[324] The patent holder's rights to exclude "making" and "using" is intended to cut off any supply of competing goods.[325] Because the Canadian stockpiling exception removed that protection, patent owners' rights in this regard were entirely abrogated.[326] Further, although Canada acknowledged its obligation to preserve patent holders' commercial benefits before expiration, the Panel held that enforcement of the explicit rules in TRIPS means that *patent owners should enjoy an extended term of market exclusivity even after expiration*.[327] According to the Panel, the fact that TRIPS repeats a provision which exists in other international intellectual property treaties is evidence that the parties had knowledge of the universal market effects and "can only be understood as an affirmation of the purpose to produce these market effects."[328] Consequently, the Panel concluded that the stockpiling exception did not meet the first criterion of Article 30 and, thus, was inconsistent with Canada's obligations under Article 28(1) of TRIPS.[329]

With regard to the regulatory review exception, the Panel found that it was a limited exception within Article 30.[330]

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[323] *Id.*

[324] *Id.* paras. 7.31, 7.34.

[325] *Id.* para. 7.34.

[326] *Id.*

[327] *Id.* para. 7.35.

[328] *Id.*

[329] *Id.* paras. 7.36, 7.38. The Panel did not find the limitations measure—the time period of six months and the limited number of persons eligible to benefit from the exception—sufficient to modify its conclusion. *See id.* paras. 7.37-.38. Since any limitation must satisfy all three criteria in Article 30, and finding that the first criteria was not satisfied, the Panel did not have to analyze the last two criteria in the three-part test of Article 30. *See id.*

[330] *Id.* paras. 7.45, 7.50.

The Panel held that as long as the use was for a regulatory approval process, the unauthorized acts permitted "will be small and narrowly bounded."[331] In particular, the Panel noted that neither the exception nor the stockpiling provision involved any commercial use.[332] The Panel addressed the other two conditions of Article 30 and found that the regulatory exception satisfied these as well.[333]

With regard to considering whether the limitation interfered with the "normal exploitation" of the patent, the Panel held that the scope of "normal exploitation" entails exclusion of all competition during the patent term.[334] The Panel again acknowledged that the "basic" patent rights typically will produce a certain period of market exclusivity after expiration of the patent.[335] It did not agree with the Canadian contention that any market exclusivity occurring after the twenty-year patent term is more than "normal."[336] The Panel did agree, however, that an additional de facto period of exclusivity created by excluding use of the patented item for regulatory processes was not "a natural or normal consequence of enforcing patent rights."[337] Consequently, it concluded that the regulatory review exception did not conflict with the normal exploitation of the patent. Having concluded this, the question of unreasonableness of the conflict was irrelevant to the Panel's task.[338]

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[331] *Id.* para. 7.45.

[332] *See id.*

[333] *Id.*

[334] *Id.*

[335] *Id.* para. 7.56.

[336] *Id.* (rejecting as a "categorical proposition" Canada's argument that a patentee is entitled only to a strict twenty-year term and no more).

[337] *Id.* paras. 7.57-.58.

[338] As the Panel stated,

> [T]he fact that no conflict has been found makes it unnecessary to consider the question of whether, if a conflict were found, the conflict would be unreasonable. Accordingly, it is also unnecessary to determine whether or not the final phrase of Article 30 . . . does or does not apply.

Id. para. 7.59.

The final condition, that the exception must not prejudice the legitimate interests of the patent owner, was also resolved in Canada's favor. The EC argued that "legitimate interests" means the full panoply of rights accorded by Article 28(1) of TRIPS.[339] The Panel disagreed and held, instead, that "legitimate interests" refers to a "normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms."[340] The TRIPS negotiating history, again, was silent on what the drafters meant by this provision. The Panel concluded that in the absence of guidance from the negotiating history to illuminate Article 30, it could only conclude that "legitimate interests" must be construed broader than legal interests as suggested by the EC.[341] The Panel concluded that the EC's claim, premised solely on the legal interests of Article 28(1), "did not raise a relevant claim of non-compliance with the third condition of Article 30."[342]

Next, the Panel addressed the EC's secondary claim with regard to the legitimate interest's prong of Article 30. The EC argued that patent owners suffer economic loss because delays in obtaining government approval prevent them from marketing their product for a significant portion of the patent term.[343] The Panel held that delays in obtaining the requisite marketing approvals were insufficiently compelling to be regarded as a legitimate interest within the scope of Article 30.[344] In essence, the Panel upheld the consistency of the TRIPS provisions allowing product testing and data submission for purposes of regulatory approval.[345]

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[339] *Id.* para. 7.68.
[340] *Id.* para. 7.69.
[341] *Id.* para. 7.71.
[342] *Id.* para. 7.73.
[343] *Id.* para. 7.74.
[344] *Id.*
[345] *Id.* para. 7.84.

Finally, the Panel determined that the evidence in the record did not give rise to a plausible claim of discrimination under Article 27(1) of the TRIPS Agreement. The Panel held that the EC did not prove that the contested provisions of the Canadian Patent Act were limited to pharmaceutical patents, or that the adverse effects were limited to the pharmaceutical industry.[346] The Panel also rejected Canada's argument that important domestic policies recognized in Articles 7 and 8 of the TRIPS Agreement permit discriminatory treatment of certain patents.[347] The Panel concluded that the anti-discrimination rule of Article 27.1 applies to exceptions authorized by Article 30.[348]

In another TRIPS dispute, the WTO process was invoked in a claim against the United States. On January 29, 1999, the EC invoked the dispute settlement mechanism to challenge Section 110(5)[349] of the U.S. Copyright Act.[350] The EC argued that Section 110(5), which establishes copyright exemptions for certain home and businesses uses, is a violation of the TRIPS Agreement. The dispute panel held that Section 110(5)(B), the business exemption, is a violation of Article 13 of the TRIPS Agreement.[351] In a

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[346] *Id.* paras. 7.98-.105.

[347] *Id.* para. 7.92.

[348] *Id.* para. 7.93. According to the panel:

> Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies. . . that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible, as the EC argued that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers.

Id. para. 7.92.

[349] *See* 17 U.S.C. § 110(5) (2000).

[350] *See* 110(5) Panel Report, *supra* note 32. *See also* 17 U.S.C. § 110(5).

[351] *See* 110(5) Panel Report, *supra* note 32. Article 13 of the TRIPS Agreement states: "Members shall confine limitations or exceptions to exclusive rights to certain

similar manner to the Panel in *Canada—Patent Protection of Pharmaceutical Products*, the 110(5) Panel provided a seminal analysis of the three-step test of Article 13, which was based on Article 9 of the Berne Convention.[352] It concluded that the United States did not meet its burden of proving that the business-style exemption does not unreasonably prejudice the legitimate interests of the right holder,[353] but upheld the TRIPS consistency of the home-style exemption.[354] The 110(5) case has already been the subject of some commentary.[355] Thus, this Part will not provide a detailed account of the dispute.

Following adoption of the Panel Report, the United States communicated its intention to implement the recommendations and rulings of the decision but requested "a reasonable period of time" to do so.[356] On January 15, 2001 an Arbitrator ruled, pursuant to Article 21.3(c) of the DSU, that a reasonable period of time for the United States to implement the decision is twelve months from the date of adoption of the Panel Report.[357] The United States has not yet implemented the WTO decision by changing its domestic law.[358] In arguing for a longer period for

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special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." TRIPS Agreement art. 13.

[352] 110(5) Panel Report, *supra* note 32, para. 6.71

[353] *Id.* para. 6.265.

[354] *See* Okediji, *Fair Use Standard*, *supra* note 21, at 123-36 (providing an analysis of the TRIPS Agreement's consistency with the U.S. fair use standard and evaluating the Section 110(5) decision in this context).

[355] *See, e.g., id.*

[356] *See* DSU art. 21.3.

[357] *Id.* Twelve months from the date of adoption of the panel report was July 27, 2001.

[358] As of this writing, the United States had not implemented the WTO decision. On July 12, 2001, the United States requested that the "reasonable period of time" for implementation of the rulings of the DSU be extended until December 31, 2001, or on the date that Congress adjourns, whichever is earlier. According to the communication by the United States, "such an extension of time would promote a principal aim of the dispute settlement system, which is to provide mutually satisfactory solutions to disputes." WTO Publication of U.S. Communication Concerning a Proposed Modification of the Reasonable Period of Time, WT/DS160/14

implementing the Panel decision, the government pointed to, among other things, the "complexity" of the U.S. legislative procedure, the Congressional schedule for 2001, including the effect of the Presidential elections, and the "controversy" that the repeal of Section 110(5) (B) would entail, as well as its need to account for the "divergent views of stakeholders."[359] The WTO Arbitrator held that the DSU requires "prompt" implementation of dispute rulings and that the global nature of TRIPS obligations suggest "that this is the type of matter for which Congress would try to comply . . . as soon as possible, taking advantage of the flexibility that it has within its normal legislative procedures."[360] The Arbitrator held that any domestic contentiousness regarding the ruling on Section 110(5) "is not relevant" for the purposes of determining the reasonable length of time a Contracting Party should be given to implement a WTO decision.[361]

C. Preliminary Observations from TRIPS Dispute Settlement

The Section 110(5) case, as with the other TRIPS decisions, are all breathtaking in their level and degree of intrusion and indifference to the limits of domestic governance. Again, while the TRIPS Agreement, as negotiated, did not require any major changes to U.S. intellectual property policy, the power of a dispute body to determine the precise meaning and scope of the legal text

(July 18, 2001). On July 23, 2001, the United States and the EC agreed to submit the dispute to arbitration as provided under Article 25 of the DSU. Arbitration under Article 25 is an alternative system of dispute settlement. It is a wholly separate process from the multilateral system of the DSU and is defined primarily by the agreement of the two disputing parties. In this case, the purpose of the Arbitration was to determine the level of nullification and impairment sustained by the EC as a result of Section 110(5) (B). The Arbitrator's award is final as to the dispute between the parties and is consistent with Article 22 of the WTO Agreement.

[359] *See* WTO Award of the Arbitrator on Report of the Panel Concerning Section 110(5) of the U.S. Copyright Act, WT/DS160/12, at para. 36 (Jan. 15, 2001).

[360] *Id.* para. 39.

[361] *Id.* paras. 41, 42.

is, in the enforcement stage, nothing less than the delegation of law-making authority to an international body. Within this multilateral dispute settlement process, the WTO's commitment to rules will ultimately force a harmonization of norms to bridge the divisions between intellectual property policies of member states. Particularly for the United States, the 110(5) dispute brings to the surface a difficult issue for TRIPS compliance—how to obtain the benefits of a more secure international order for intellectual property protection while retaining sovereignty over domestic policy and autonomy to respond to domestic constituencies. As the economic analysis has already suggested, the coordination game that produced the TRIPS Agreement is not necessarily going to produce compliance by developed countries, despite the fact that it is their interests that TRIPS, at least in the short term, is designed to effectuate.

A particularly revealing aspect of these disputes is the way each of the Panels and the Appellate Body have ducked the thorny question of how to apply the preambular statements and the broad themes of Article 7 and 8 to evaluate the substantive obligations of the TRIPS Agreement. While tribunals can use strict construction to constrict or expand the requirements of TRIPS, the vagueness of these general qualifications in Articles 7 and 8 will likely lead to a one-way ratchet of rights. In each of these cases, the dispute panels have invariably emphasized the market preserve of intellectual property owners as a dominant factor in determining whether a TRIPS violation had occurred. Further, the cases suggest that the panels, in focusing on the purpose and objective of the TRIPS agreement, and the context of the negotiations,[362] have

[362] In the *Canada—Patent Protection of Pharmaceutical Products* case, the Panel stated that the interpretive context for the TRIPS Agreement is not limited to its text, or to its Preamble and Annexes, but includes provisions of all the international instruments incorporated in the TRIPS Agreement, as well as any agreements between the parties relating to these agreements. Thus, the Panel reviewing the

interpreted the provisions almost solely in light of the economic expectations of the private right holders. This was particularly evident in the 110(5) decision and the *Canada—Patent Protection of Pharmaceutical Products* decision. Indeed, according to the Panel in *Canada—Patent Protection of Pharmaceutical Products*, the TRIPS Agreement already reflects a negotiated balance of competing interests.[363] Thus, the provision for limitations on patent rights in domestic legislation would only permit "certain adjustments" and not measures or policies that would amount to a renegotiation of this "basic balance."[364]

The TRIPS dispute settlement, then, turns the traditional national/international paradigm upside down; it appears to contemplate a substitution of domestic processes that have produced a competitive balance in the domestic setting with an international process that presumes that the domestic balance should be renegotiated in light of the obligations in the TRIPS Agreement. The decisions suggests that the multiple levels of tension—between diverse legal systems, between domestic policies themselves, and between domestic policies and international process—were all resolved in the TRIPS Agreement. Consequently, it is the responsibility of the dispute settlement system to produce decisions that reflect this resolution. The history of the negotiations, however, certainly does not reflect a level of understanding that is anywhere close to such a conclusion. Cross-sectoral bargains, bargain linkages, trade-offs between rules and other interests all indicate that the TRIPS Agreement (indeed, all the Uruguay Round Agreements) meant something different to different governments. By "clarifying" negotiated rules, the dispute resolution process will invariably produce norms that will

request for consultation concerning Section 110(5) of the U.S. Copyright Act felt comfortable applying the context of Article 9(2) of the Berne Convention to Article 30 of the TRIPS Agreement. *See* 110(5) Panel Report, *supra* note 32, at paras. 7.13-.15.

[363] *Id.* para. 7.26.

[364] *Id.*

guide the development of intellectual property regulation of member states. It must do so in a manner that accounts for the importance of mechanisms or policies designed by such states to promote their domestic welfare goals.

The effect of WTO TRIPS jurisprudence extends beyond pure intellectual property disputes to include other policy interests. In essence, any regulation of intellectual property appears to fall within the TRIPS ambit so long as the intellectual property category is covered by the TRIPS Agreement. In a recent decision,[365] a WTO Appellate Body ruled that Section 211 of the U.S. Omnibus Appropriations Act (OAA) violates the TRIPS Agreement because it denies owners of trademarks, trade names, and commercial names that were confiscated by the Cuban Government access to U.S. courts.[366] The EC argued, and the Appellate Body agreed, that it was a violation of the national treatment and most-favored-nation principle of the TRIPS Agreement.[367] As in the other TRIPS disputes, the Appellate Body rejected the U.S. interpretation of this law[368] and focused on the interpretation of U.S. obligations under TRIPS.[369] The

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[365] *See* Havana Club, *supra* note 18.

[366] Section 211(1)(a) 2 provides:

> No U.S. court shall recognize, enforce or otherwise validate any assertion of rights by a designated national based on common law rights or registration obtained under such section 515.527 of such a confiscated mark, trade name, or commercial name.

Department of Commerce Appropriations Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1999). Section 211(b) further provides:

> No U.S. court shall recognize, enforce or otherwise validate any assertion of treaty rights by a designated national or its successor-in-interests under sections 44(b) or (e) of the Trademark Act of 1946 (15 U.S.C. 1126 (b) or (e)) for a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of such mark, trade name, or commercial name, or the bona fide successor in interest has expressly consented.

Id.

[367] Havana Club, *supra* note 18, at para. 360.

[368] *Id.*

[369] Interestingly, the Appellate Body reversed the Panel's ruling that trade names are not covered by the TRIPS Agreement. The Appellate Body determined that the

Appellate Body concluded that while its ruling was not a "judgment on confiscation" as defined by the OAA, all WTO members in choosing what position they might take on any given domestic policy matter must comply with TRIPS where "a measure resulting from and implementing . . . [a particular] choice . . . affects other WTO Members."[370]

The dominant approach of all these decisions is to interpret the text of the TRIPS Agreement solely in light of the concerns which animated the integration of intellectual property in to the world trade system. Such an approach is not inconsistent with the free trade model which, in its classical mode, hardly admits of any limitations or exceptions.[371] Intellectual property rights have historically been justified by reference to national priorities unlike the free trade ideal, which from its earliest articulation, has treated national and global interests as interdependent parts of the welfare calculus. To some degree, the question of the scope of international intellectual property rights is a reflection of the indeterminate nature of these exclusive proprietary interests in the domestic context.

In its long history, intellectual property rights have existed primarily for the welfare of the state. The extension of intellectual property rights to the global context, and its rationalization as a free trade issue, obscures the importance of national conditions and the priority of domestic welfare goals even where these may be inconsistent with globalization.

CONCLUSION

An examination of the TRIPS Agreement primarily through the public health lens will yield both distorted and

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TRIPS Agreement encompasses trade names. *See id.*

[370] *Id.* para. 363.

[371] *See generally* Gana Okediji, *supra* note 40 (comparing the welfare ideal in U.S. intellectual property policy with the welfare ideal in international trade).

exaggerated results on both sides of the debate. Developed countries, with significant investments in R&D and pharmaceutical drug development can point to the high costs associated with the production of pharmaceutical products. Developing countries faced with health challenges will point to the avoidable but ongoing loss of human life. Undoubtedly, public health or other development goals cannot be resolved simply by integrating welfare interests in the interpretation and enforcement of the TRIPS Agreement. However, intellectual property rights play a vital role in determining what legal constraints are imposed on governments in addressing development concerns. Important structural changes are needed in the current international rules governing the protection of innovative endeavor and the enforcement of associated property rights. The advancement of general welfare, including the challenges of global health, requires accountability on the part of institutions that manage the international intellectual property system and the processes that inform the negotiation, content, interpretation, and enforcement of intellectual property treaties. Where domestic institutions fail, international institutions vested with such enormous responsibility as the WTO should not remain indifferent to the complex and important task of developing a jurisprudence of public welfare.