

## THE TRIPS AGREEMENT COMES OF AGE: CONFLICT OR COOPERATION WITH THE DEVELOPING COUNTRIES?

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## INTRODUCTION

The international minimum standards of intellectual property protection set out in the TRIPS Agreement<sup>1</sup> will eventually determine the level of competition for knowledge goods that are sold or licensed on the global market that emerged from the Agreement Establishing the World Trade Organization ("WTO Agreement") of 1994.<sup>2</sup> The extent to which these standards will exert pro- or anti-competitive effects on global commerce remains to be seen and will, in my view, depend in part on how the developing countries implement them after the five-year transitional period, which expired on January 1, 2000.<sup>3</sup>

As is now widely known, the TRIPS component of the WTO Agreement represented a revolution in international intellectual property law.<sup>4</sup> Although it built on the Paris and Berne conventions of 1883 and 1886, respectively,<sup>5</sup> TRIPS went well beyond the original anti-copying

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<sup>1</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

<sup>2</sup> See generally MICHAEL BLAKENEY, TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT 45-107 (1996)(discussing the rights protected in TRIPS); J. WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WORLD TRADE ORGANIZATION: THE WAY FORWARD FOR DEVELOPING COUNTRIES (forthcoming 2000); J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 21 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998) [hereinafter Reichman, *Universal Minimum Standards*].

<sup>3</sup> See TRIPS Agreement, *supra* note 1, art. 65. Developing countries and former socialist countries have five years in which to delay application of TRIPS standards, other than national treatment and most-favored-nation rules. Least-developed countries (LDCs) enjoy an eleven-year period of transition. See *id.* art. 66. See generally Adrian Otten, *Implementation of the TRIPS Agreement and Prospects for its Future Development*, 1 J. INT'L ECON. L. 523, 529-30 (1998).

<sup>4</sup> For the nature and limits of this revolution, see J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL 11, 13-16, 26-86 (1996-97) [hereinafter Reichman, *From Free Riders to Fair Followers*].

<sup>5</sup> See TRIPS Agreement, *supra* note 1, arts. 1(3), 2(1); Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 25 Stat. 1372, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

objectives of the drafters.<sup>6</sup> It imposed a comprehensive set of relatively high international minimum standards governing copyrighted literary and artistic works (including computer programs), rights related to copyright law (including sound recordings), patents, trademarks, geographical indications of origin, trade secrets, industrial designs, integrated circuit designs<sup>7</sup> and even (indirectly) unfair competition.<sup>8</sup> It does not cover competition law, as such, although it touches on related issues,<sup>9</sup> especially licensing agreements.<sup>10</sup>

TRIPS also mandated a detailed set of enforcement procedures, that is to say, rules of judicial and administrative conduct for all states, including a duty to reject counterfeit trademarked and pirated copyright goods at the borders of all member countries.<sup>11</sup> Finally, it established speedy and tough dispute-settlement machinery within the WTO framework, which leads, in the end, to the possibility of cross-collateral trade sanctions for non-

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<sup>6</sup> See, e.g., Gail E. Evans, *Intellectual Property as a Trade Issue – The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, WORLD COMPETITION L. & ECON. REV., Dec. 1994, at 137 (discussing the negotiations surrounding the TRIPS agreement and the breadth of the intellectual property rights it protects); 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); Friedl Weiss, *TRIPS in Search of an Itinerary: Trade Related Intellectual Property Rights and the Uruguay Round Negotiations*, in LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT 87 (Giorgio Sacerdoti ed., 1990) (comparing and contrasting the principles of GATT and the Paris Convention).

<sup>7</sup> See TRIPS Agreement, *supra* note 1, arts. 9-39.

<sup>8</sup> See *id.* art. 2(1) (incorporating by reference the Paris Convention, *supra* note 6, art. 10bis).

<sup>9</sup> See generally Eleanor M. Fox, *Trade, Competition, and Intellectual Property – TRIPS and Its Antitrust Counterparts*, 29 VAND. J. TRANSNAT'L L. 481 (1996) (recognizing the need to ensure that competition law does not undermine the obligations of TRIPS); 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) (analyzing the relationship between trade and competition policy under TRIPS); see also Robert D. Anderson, *The Interface Between Competition Policy and Intellectual Property in the Context of the International Trading System*, 1 J. INT'L ECON. L. 655 (1998).

<sup>10</sup> See TRIPS Agreement, *supra* note 1, arts. 8(2), 40 (recognizing the need for provisions to prevent abuse of intellectual property rights and to control anti-competitive practices in contractual licenses, respectively).

<sup>11</sup> See *id.* arts. 41-61; Thomas Dreier, *TRIPs and the Enforcement of Intellectual Property Rights*, in FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 248, 249-51 (ICC Studies Vol. 18, Freidrich-Karl Beier & Gerhard Schricker eds., 1996); J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT'L L. 335, 340-44 (1997) [hereinafter Reichman, *Enforcing the Enforcement Procedures*].

compliance with the agreed minimum standards of intellectual property protection.<sup>12</sup>

Despite the rapid escalation of international intellectual property protection that this scheme envisions, the TRIPS Agreement, unlike prior GATT legislation, contains no preferential or differential measures for developing countries.<sup>13</sup> After the five-year transitional period expires, all developing countries will be held to full compliance with all the agreed standards.<sup>14</sup> However, we must continue to distinguish between developing countries and least developed countries ("LDCs"). The poorest of the poor have another six years in which to comply, and then there are many loopholes for them in both the WTO Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").<sup>15</sup> So it may be a long time before the least-developed countries are fully integrated into the system.

This article focuses on the critical juncture in the TRIPS Agreement that occurred on January 1, 2000, when the developing countries (but not the LDCs) became liable for compliance with the relevant international minimum standards. After summarizing some of the positive achievements of the past five years, I intend to review some of the negative trends that could become worrisome in the post-transitional period, especially if the developed countries adopt a hardline, confrontational approach to the coming implementation process. I then explore the virtues of a non-confrontational (or less confrontational) approach and close with some long-term forecasts.

#### I. POSITIVE AND NEGATIVE DEVELOPMENTS DURING THE TRANSITIONAL PHASE

First of all, on the positive side, the Council for TRIPS and the WTO secretariat that services the Council have truly been forces for mediation,

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<sup>12</sup> See TRIPS Agreement, *supra* note 1, arts. 63-64; Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, WTO Agreement, *supra* note 2, Annex 2, 33 I.L.M. 1226 (1994) [hereinafter DSU]; Rochelle Cooper Dreyfuss & Andreas L. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

<sup>13</sup> See, e.g., Abbott, *supra* note 6, at 731-32 (noting that transitional procedures giving "special relief to less economically developed countries" were "not uncommon" in prior multilateral trade arrangements).

<sup>14</sup> See TRIPS Agreement, *supra* note 1, art. 65(2). *But see id.* art. 65(4) (allowing an additional five years for developing countries to extend product patent protection to areas of technology not previously protectible in their territories); *id.* art. 70(8)(mail box rule); *id.* art. 70(9) (exclusive marketing rights during interim period).

<sup>15</sup> See TRIPS Agreement, *supra* note 1, art. 66; DSU, *supra* note 12, art. 24.

consultation and persuasion.<sup>16</sup> I realize that Professor Jacques Bourgeois has said that consultation is like an herbal tea,<sup>17</sup> but a lot of very good and effective herbal tea has been drunk. On the whole, this process has avoided needless confrontation, largely due to the effectiveness of bringing into intellectual property law the rules of transparency that are a basic part of the GATT (General Agreement on Tariffs and Trade) jurisprudence.<sup>18</sup>

*A. Positive Applications of Transparency and the Appellate Standards of Review*

Article 63 of the TRIPS Agreement clearly establishes a rule of transparency as the first step in "Dispute Prevention and Settlement."<sup>19</sup> This provision makes all countries aware of the risks of non-compliance with the black letter rules by rendering it difficult to avoid detection of non-conforming laws. Because the Council for TRIPS has the power to invite countries to present their laws, to discuss these laws, and to challenge them through periodic review mechanisms and other consultative procedures, it has successfully introduced respect for the rule of law and reduced pressures for unilateral measures.<sup>20</sup> The attitude of both the Council and the Secretariat is, "whenever possible, to resolve differences between countries without the need for formal recourse to dispute settlement."<sup>21</sup>

However, the transparency doctrine also reveals disputes that cannot be settled by herbal tea, by consultation or mediation, and for which states may logically turn to the dispute settlement procedures of the DSU.<sup>22</sup> Even

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<sup>16</sup> See TRIPS Agreement, *supra* note 1, art. 68 (charging the Council for Trade-Related Aspects of Intellectual Property Rights); see also *id.* art. 69 (mandating international cooperation to eliminate trade in goods that infringe intellectual property rights); Otten, *supra* note 3, at 524-29.

<sup>17</sup> Jacques Bourgeois, *WTO – The Global Trade Approach*, in *EUROPA IM ZEITALTER DER GLOBALISIERUNG* (Carl Baudenbacher & Erhard Busek eds., 2000), at 107.

<sup>18</sup> See, e.g., General Agreement on Tariffs and Trade art. X, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S., 194 (Publication and Administration of Trade Regulations); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 461-64 (1969).

<sup>19</sup> See TRIPS Agreement, *supra* note 1, art. 63.

<sup>20</sup> See TRIPS Agreement, *supra* note 1, arts. 63(2) (requiring members to notify laws and regulations to Council for TRIPS), 68 (Council for Trade-Related Aspects of Intellectual Property Rights); Otten, *supra* note 3, at 525 (monitoring by Council for TRIPS "seen as an important dispute-avoidance vehicle for resolving problems that might otherwise become the subject of formal dispute settlement proceedings").

<sup>21</sup> Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 *VAND. J. TRANSNAT'L L.* 391, 411 (1996).

<sup>22</sup> See generally Dreyfuss & Lowenfeld, *supra* note 12 (discussing hypothetical cases necessitating resort to the dispute settlement procedures); see also Frederick M. Abbott, *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE*

though no analogous machinery was ever applied to the pre-existing intellectual property conventions, the WTO process has worked surprisingly well so far. The first Appellate Body decision, in 1997, in the case of *United States v. India*,<sup>23</sup> better known in Europe as the *India mailbox case*, represents a new milestone en route to Professor John Jackson's vision of a rule-based global trading system.<sup>24</sup>

In its groundbreaking opinion, the Appellate Body opted for a strict constructionist interpretation of the TRIPS Agreement, in keeping with its view of Article 31 of the Vienna Convention on the Law of Treaties.<sup>25</sup> While there had been some doubt as to whether the Appellate Body would in fact apply the Vienna Convention to the TRIPS Agreement, it has now done so in a rather emphatic and strict constructionist manner.<sup>26</sup> The Appellate Body also manifested considerable deference to local law, if good faith efforts to implement the TRIPS Agreement were being made.<sup>27</sup>

In so doing, the Appellate Body gave three reasons why deference to local law should become a cardinal principle of its interpretative jurisprudence. First, Article 1(1) of the TRIPS Agreement allows states to determine the appropriate methods of implementing its provisions within their own legal system and practice. Second, Article 19(2) of the DSU says that the dispute settlement process cannot add to or diminish the rights and obligations in the covered agreements. Finally, Article 1(1) of TRIPS says members are not obliged to implement more extensive protection than that to which they have expressly agreed.<sup>28</sup> This approach, in turn, is consistent

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SETTLEMENT SYSTEM 413 (Studies in Transnational Economic Law Vol. 11, Ernst-Ulrich Petersmann ed., 1997)[hereinafter Abbott, *WTO Dispute Settlement*].

<sup>23</sup> Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Bernan's Annotated Rep., vol. 4, at 249 (Dec. 19, 1997) [hereinafter *United States v. India*].

<sup>24</sup> See generally John H. Jackson, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 1-30 (2<sup>nd</sup> ed., 1997).

<sup>25</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 (stating that a treaty will be interpreted in good faith according to the text, object and purpose of the treaty unless otherwise established).

<sup>26</sup> See *United States v. India*, *supra* note 23, ¶ 45 (stating that the "legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself"); see also Jerome H. Reichman, *Securing Compliance With the TRIPS Agreement After U.S. v. India*, 1 J. INT'L ECON. L. 585, 594-97 (1998) [hereinafter Reichman, *Securing Compliance*].

<sup>27</sup> See *United States v. India*, *supra* note 23, ¶ 59; see also Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996) (discussing the possible standards of review of a national government's rulings and actions under the WTO Agreements).

<sup>28</sup> See TRIPS Agreement, *supra* note 1, art. 1(1); DSU, *supra* note 12, art. 19; *United States v. India*, *supra* note 23, ¶¶ 43-48.

with Article XX(d) of the GATT, which reserves intellectual property law and policy to member states except as otherwise agreed.<sup>29</sup>

When, however, the Appellate Body scrutinized the facts presented in the dispute between the United States and India, it discovered a “smoking gun” that led it to rule against India despite the principle of deference to national governments. The Indian government’s own experts had found that the law and administrative procedures questioned by the United States failed to meet the relevant TRIPS standards.<sup>30</sup>

### *B. Resisting the Temptation to Gap-Fill the Minimum Standards*

That was enough for the Appellate Body. Yet, that Body chose to modify the panel’s own decision against India, which had been based on a test of “competitive expectations” arising from the treaty as a whole.<sup>31</sup> This “expectations test” was said to derive from past GATT jurisprudence and also from a doctrine of “nonviolation acts of nullification or impairment” that was embedded in GATT and carried over into the TRIPS Agreement, subject to a five-year moratorium.<sup>32</sup> The latter doctrine holds that, even if there is no direct violation of a GATT provision, a state may remain liable for measures that indirectly frustrate the purposes of the treaty, such as non-tariff barriers to trade.

In the TRIPS Agreement, there is a five-year moratorium on complaints for non-violation acts of nullification and impairment.<sup>33</sup> The Appellate Body accordingly held that a panel could not base its decision on principles derived from the non-violation acts provision because of that moratorium.<sup>34</sup>

At the same time, the Appellate Body declined to apply the panel’s “expectations” test on the alternative ground that it was inconsistent with

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<sup>29</sup> See Reichman, *Securing Compliance*, *supra* note 26, at 596 (citing authorities).

<sup>30</sup> See *United States v. India*, *supra* note 23, ¶¶ 80-81.

<sup>31</sup> See Report of the Panel, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, Bernan’s Annotated Rep., vol. 4, ¶¶ 7.18-7.22, at 1, 48-49.

<sup>32</sup> See TRIPS Agreement, *supra* note 1, art. 64(1) (incorporating by reference Articles XXII and XXIII of the General Agreement on Tariffs and Trade 1994); DSU, *supra* note 12, arts. 3(1), 26; see also ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 6-7, 144, 156-61, 269 (1993); Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM*, *supra* note 22, at 123 (discussing issues arising from and practical effects of the concept of nullification and impairment). This provision lapsed automatically on Dec. 31, 1999, and was not renewed at the WTO Ministerial Conference in Seattle, Nov. 1999.

<sup>33</sup> See TRIPS Agreement, *supra* note 1, art. 64 (2).

<sup>34</sup> See *United States v. India*, *supra* note 23, ¶ 42.

the strict constructionist principle that the court had derived from the Vienna Convention on the Law of Treaties.<sup>35</sup> Invoking this principle, the Appellate Body required India to accept the foreign patent applications at issue and to prioritize them under the “mailbox” rule of Article 70(8) of the TRIPS Agreement;<sup>36</sup> but it refused to require India to process these same applications, as the United States had demanded, because India was entitled to the full transitional period applicable to newly patentable subject matter in its territory.<sup>37</sup>

A reasonable inference from this seminal decision is that TRIPS law consists essentially of the negotiated rules and no more. Panels cannot fill gaps in international intellectual property law on a theory of commercial or competitive expectations.<sup>38</sup> A further reasonable inference is that violations will have to be clear, if not flagrant. The Court has specifically reminded members that the TRIPS Agreement governs intellectual property relations between states. Hence, the WTO is not to be treated as a court of last resort in which private parties can bring their own disputes and vent their displeasure with local judicial decisions.<sup>39</sup> It is a forum for governments, in which the matter at issue must have an impact on international trade.

The Appellate Body’s overall approach should permit developing countries to adapt the TRIPS standards to their own economic conditions by exploiting the flexibility or “wobble room” in the international minimum standards.<sup>40</sup> Two caveats deserve mention, however. First, in *United States v. India*, the Appellate Body was interpreting new TRIPS rules unencumbered by pre-existing treaties and relevant state practice. That

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<sup>35</sup> See *id.* ¶¶ 43-48.

<sup>36</sup> See TRIPS Agreement, *supra* note 1, arts. 70(8), 70(9) (providing for exclusive marketing rights).

<sup>37</sup> See *United States v. India*, *supra* note 23, ¶ 58; TRIPS Agreement, *supra* note 1, art. 65(4).

<sup>38</sup> See Reichman, *Securing Compliance*, *supra* note 26, at 594-97. *But see* Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?*, 29 INT’L LAW. 99, 109-10 (1995) (arguing for the opposite view); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. (forthcoming 2000) (further extending the “gap filling” principle to national courts as de facto agents of the international system).

<sup>39</sup> See Frederick M. Abbott, *The Enduring Enigma of TRIPS: A Challenge for the World Economic System*, 1 J. INT’L ECON. L. 497, 514 (1998) [hereinafter Abbott, *Enduring Enigma*]. *But see* GAIL E. EVANS, LAW-MAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANISATION § 7.4.1 (forthcoming 2000) (advocating that private parties should have standing to sue before WTO tribunals).

<sup>40</sup> See *infra* note 72 and accompanying text.



Body may or may not become bolder when applying the Paris or Berne Conventions and their cultural baggage.<sup>41</sup>

Second, a lifting of the moratorium on nonviolatory complaints, which formally expired on January 1, 2000, might conceivably loosen the Appellate Body's interpretative process. This result seems doubtful, however, because that tribunal took pains to link the bargained-for expectations of member countries strictly to the standards expressed in the text, independent of the moratorium in question.<sup>42</sup>

### C. Eroding the Free-Rider Mentality

Another positive result of this whole process has been the erosion of the free-rider mentality that predominated in the developing countries before the Uruguay Round of Multilateral Trade Negotiations, especially in the Newly Industrialized Countries ("NICs").<sup>43</sup> These countries have moved promptly to implement the TRIPS Agreement. They are ready and eager to be reviewed. They want a good report card, and some of them, Taiwan, for example, which I visited recently, are clearly beginning to realize the benefits of a more mature intellectual property system.<sup>44</sup>

Now, this could make the NICs formidable competitors of the developed countries with respect to high-tech and knowledge goods later on,<sup>45</sup> but at least such competition would transpire on a level playing field. Meanwhile, studies suggest that compliance with TRIPS can help all developing countries, and not just the NICs, to attract more foreign investment and to improve the terms on which technology is likely to be transferred.<sup>46</sup>

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<sup>41</sup> Geller and Dinwoodie would both favor such a development. *Cf., e.g.,* Geller, *supra* note 38; Dinwoodie, *supra* note 38.

<sup>42</sup> See Reichman, *Securing Compliance*, *supra* note 26, at 595-96 (citing authorities).

<sup>43</sup> See generally J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 751-68 (1989) (presenting the debate between industrialized and developing countries about strengthening international intellectual property protection) [hereinafter Reichman, *GATT Connection*]; see also Abbott, *supra* note 6, at 697; Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991).

<sup>44</sup> Cf. Carlos A. Primo Braga & Carsten Fink, *Reforming Intellectual Property Rights Regimes: Challenges for Developing Countries*, 1 J. INT'L ECON. L. 537, 538-41 (1998) (recognizing the growing importance of IPRs in developing countries).

<sup>45</sup> See, e.g., HAMBURG INSTITUTE FOR ECONOMIC RESEARCH ET AL., CONFLICT AND COOPERATION IN NATIONAL COMPETITION FOR HIGH-TECHNOLOGY INDUSTRY 19-24 (1996)[hereinafter COMPETITION FOR HIGH TECHNOLOGY INDUSTRY].

<sup>46</sup> See, e.g., Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 175-81 (1998); Carlos A. Primo Braga & Carsten Fink, *The Relationship*

#### *D. Negative Factors on the Horizon*

Let me now identify some of the more ominous negative factors that should also be placed on the table. If we disregard the APEC countries, which are reportedly on schedule to meet the deadline,<sup>47</sup> the bulk of the developing countries appear behind schedule in implementing the TRIPS Agreement.<sup>48</sup> Many will not be ready by January 1, 2000, and they are in an increasingly angry and resentful frame of mind.

##### 1. Transaction Costs Unlimited

The transaction costs of building and staffing intellectual property systems, including patent offices and other administrative agencies, constitute a palpable drain on very scarce resources.<sup>49</sup> Poor countries also have to send high-level delegations to numerous meetings at the World Intellectual Property Organization (WIPO), the WTO, and other bodies, not to mention regional and sub-regional meetings on related issues, whose costs further burden their treasuries. It is an open secret that many countries could simply not afford to attend these meetings if WIPO or other organizations did not foot all or part of the bills.

The developing countries have also become increasingly conscious of the social costs that their TRIPS obligations will entail in the short and medium terms.<sup>50</sup> There are, in particular, certain hot-button issues that have fanned resentment. At the top of the list, perhaps, is the problem of acquiring essential medicines at affordable prices.<sup>51</sup> I personally do not see

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*Between Intellectual Property Rights and Foreign Direct Investment*, 9 DUKE J. COMP. & INT'L L. 163 (1998).

<sup>47</sup> Shigeo Takakura, *The Role of APEC and the JPO in the Field of Intellectual Property Rights*, Speech at the 1999 High Technology Protection Summit (July 24, 1999) (transcript available at the Center for Advanced Study and Research on Intellectual Property, University of Washington School of Law).

<sup>48</sup> See, e.g., Otten, *supra* note 3, at 529-31.

<sup>49</sup> See, e.g., Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 770 (1996); Primo Braga & Fink, *supra* note 44, at 549-50.

<sup>50</sup> See, e.g., U.N. Conference on Trade and Development (UNCTAD), *The TRIPS Agreement and Developing Countries*, at 15-20, U.N. Doc. 96/II/D/10 (1996) [hereinafter UNCTAD, *TRIPS*]; see also Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 172-89 (1999).

<sup>51</sup> See, e.g., Jayashree Watal, *TRIPS and the 1999 WTO Millennium Round: Some Reflections on Future Issues Related to IPRs in the WTO and the Way Forward for Developing Countries*, 3 J. WORLD INTELL. PROP. 3, 7-24 (2000); *Globalization and Access to Drugs: Perspectives on the WTO/TRIPS Agreement*, World Health Organization, DAP Series No. 7, WHO/DAP/98.9 Rev. (1999), available at World Health Organization (visited May 26, 2000) <[http://wholibdoc.who.int/hq/1998/WHO\\_](http://wholibdoc.who.int/hq/1998/WHO_)

this as an insoluble problem, but the big pharmaceutical companies and their government patrons had been taking a hard line at the time of writing.<sup>52</sup>

Problems of maintaining biodiversity and sharing in the gains from exploiting local plants and medicines, as well as from traditional know-how, have likewise attracted considerable attention.<sup>53</sup> There are also ethical and emotional issues, such as questions concerning the patenting of life forms. Efforts of hybrid seed manufacturers to prevent farmers from using seeds of improved crop varieties without having to repurchase them is another hot-button issue at the moment.<sup>54</sup>

## 2. Uneven Distribution of Benefits

There is also a growing perception that the benefits of higher intellectual property protection may be very unevenly distributed, at least in the short and medium terms, even though all the developing countries must bear the transaction costs mentioned above.<sup>55</sup> Numerous small countries in Latin America, for example, find themselves significantly disadvantaged in this respect, unlike two or three of the region's larger economic powers that have virtually attained the status of Newly Industrialized Countries.<sup>56</sup> How smaller or less advanced countries can limit these disadvantages and their

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DAP\_98.9\_Revised.pdf>; CARLOS M. CORREA, INTEGRATING PUBLIC HEALTH CONCERNS INTO PATENT LEGISLATION IN DEVELOPING COUNTRIES (forthcoming).

<sup>52</sup> See, e.g., Watal, *supra* note 51, at 17-22.

<sup>53</sup> See, e.g., Thomas Cottier, *The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law*, 1 J. INT'L ECON. L. 555, 557-84 (1998); Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998); see also Margaret Llewelyn, *Patenting or Plant Variety Protection?*, Paper Presented to the World Trade Forum 1999, Berne, Switz. (Aug. 27-28, 1999); Anil Gupta, *Securing Traditional Knowledge and Grassroot Innovation: What Role for the Global Trading System?*, Paper Presented to the World Trade Forum 1999, Berne, Switz. (Aug. 27-28, 1999).

<sup>54</sup> See, e.g., Cottier, *supra* note 53, at 561-84; Watal, *supra* note 51, at 9-10, 17-22.

<sup>55</sup> See UNCTAD, *TRIPS*, *supra* note 50, at 15-20; see also Samuel A. Oddi, *TRIPS – Natural Rights and a “Polite Form of Economic Imperialism,”* 29 VAND. J. TRANSNAT'L L. 415, 455-60 (1996); Carlos A. Primo Braga, *Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and its Economic Implications*, in *THE URUGUAY ROUND AND DEVELOPING ECONOMIES* 341 (World Bank Discussion papers No. 307, Will Martin & L. Alan Winters eds., 1996).

<sup>56</sup> Cf. Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471.

attendant social costs during a foreseeably long technological "catch-up" period is perceived as a major strategic issue.<sup>57</sup>

At the same time, proposals for new forms of intellectual property protection that might generate income streams for developing countries at the expense of public domain users in developed countries have, until recently at least, received a cool reception at the international level. Resistance to proposals that would protect folklore and native arts under rights related to copyright law,<sup>58</sup> for example, is often couched in terms of avoiding unacceptable deviations from Western legal traditions and doctrinal orthodoxy. Such purist foot-dragging infuriates the representatives of the poorer countries, who are well aware that the developed countries recently turned orthodox copyright principles on their head in order to accommodate their own manufacturers of computer programs.<sup>59</sup>

### 3. A "Pound of Flesh" Mentality

Meanwhile, the various intellectual property owners' associations in developed countries are clearly gearing up for a fight, as are their respective trade representatives. Having failed to accelerate the implementation of TRIPS during the transitional period, these associations now want full compliance after January 1, 2000. They are helping governments to prepare the necessary country by country reviews. This, in turn, has bred considerable anxiety among the developing countries as they contemplate the order in which they will be called before the Council for TRIPS,<sup>60</sup> not to mention the impending bilateral requests for consultations with their implicit threat of formal litigation in the end.

In this connection, the intellectual property owners who most dominate the process are pressing maximalist claims and interpretations of TRIPS standards that are consistent with their earlier negotiating positions, but are

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<sup>57</sup> Cf. Abbott, *Enduring Enigma*, *supra* note 39, at 502-10.

<sup>58</sup> See, e.g., Kamal Puri, *Preservation and Conservation of Expressions of Folklore*, COPYRIGHT BULL., Oct.-Dec. 1998, at 5; Folarin Shyllon, *Conservation, Preservation, and the Legal Protection of Folklore in Africa: A General Survey*, COPYRIGHT BULL., Oct.-Dec. 1998, at 37; Rachel Massey & Christopher Stephens, *Intellectual Property Rights, the Law, and Indigenous Peoples' Art*, COPYRIGHT BULL., Oct.-Dec. 1998, at 49; see also ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 208-47 (1998).

<sup>59</sup> See, e.g., TRIPS Agreement, *supra* note 1, art. 10(2) (requiring computer programs to "be protected as literary works under the Berne Convention (1971)"). See generally Pamela Samuelson, Randall Davis, Mitchell D. Kapur & J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2315-65 (1994) [hereinafter Samuelson et al., *Manifesto*].

<sup>60</sup> See, e.g., Otten, *supra* note 3, at 524-30 (discussing monitoring and dispute settlement issues under TRIPS).

often inconsistent with the black letter rules of the various disciplines.<sup>61</sup> Moreover, powerful firms and trade associations seem determined to press certain scope of protection issues on which there is often no consensus, even in the developed countries.<sup>62</sup> Attempts to bully the international organizations that advise the developing countries on these issues are frequently encountered; and even organized efforts to provide technical cooperation under Article 67 of the TRIPS Agreement<sup>63</sup> have sometimes reportedly degenerated into crude propaganda exercises that give exclusive voice to the views of the high protectionist coalition.

The TRIPS Agreement itself calls for review of certain borderline issues that were not fully resolved in 1994 and that are extremely controversial.<sup>64</sup> Prime examples are the patenting of biogenetically engineered products and processes and the protection of plant varieties in the domestic intellectual property laws, both of which must be reviewed after January 1, 2000.<sup>65</sup> Because the European Union has finally adopted a Directive on the legal protection of biotechnology,<sup>66</sup> which had been unattainable in the early 1990s, their negotiators may press the developing countries for higher levels of intellectual property protection in this field.<sup>67</sup>

Yet, these issues will hardly prove less controversial in the developing countries than they were in the European Union. Moreover, any intellectual property regime governing biotechnology will affect developing countries in different ways, depending on the state of their existing technological

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<sup>61</sup> See, e.g., Watal, *supra* note 51, at 4-5 (contrasting views of research-based pharmaceutical companies with those of consumer activist groups and NGOs also in developed countries); Harvey E. Bale, Jr., *The Conflicts Between Parallel Trade and Product Access and Innovation: The Case of Pharmaceuticals*, 1. J. INT'L ECON. L. 637, 650-51 (1998); Eric H. Smith, *Worldwide Copyright Protection Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 559, 573-78 (1996); see also Graeme B. Dinwoodie, *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM. VLA J. L & THE ARTS 63 (2000).

<sup>62</sup> Cf. Dreyfuss & Lowenfeld, *supra* note 12.

<sup>63</sup> See TRIPS Agreement, *supra* note 1, art. 67 (mandating technical cooperation on behalf of both developing and least developed countries); Watal, *supra* note 51, at 27-28.

<sup>64</sup> See, e.g., Otten, *supra* note 3, at 531-33 (discussing the "built-in agenda" of TRIPS).

<sup>65</sup> See TRIPS Agreement, *supra* note 1, art. 27(3)(b).

<sup>66</sup> See Directive 98/44 of the European Parliament and of the Council on the Legal Protection of Biotechnological Inventions, July 6, 1998, 1998 O.J. (L 213) 13.

<sup>67</sup> But see Watal, *supra* note 51, at 9-10 (noting more cautious views among both business and governments about reopening the debate concerning article 27.3(b) of TRIPS during preparatory period for Ministerial Meeting in late 1999).

infrastructures,<sup>68</sup> and it may prove objectively difficult for them to formulate a coherent policy with which to resist demands for prematurely high levels of protection.

Meanwhile, the United States continues to threaten the rest of the world with Section 301 actions, even though the DSU, in Article 23, appears to outlaw resort to unilateral actions as the price of the package deal underlying the Uruguay Round.<sup>69</sup> The European Union has, in fact, challenged some aspects of the United States resort to Section 301 in a formal WTO dispute settlement action.<sup>70</sup> Whether the WTO (or the U.S. Congress and Administration) are prepared to deal with the aftershocks of conflicts of this magnitude remains to be seen.

#### 4. New Demands for Ever Higher Levels of Protection

At the time of writing, the United States, the European Union, and Japan had drawn up a list of new topics, including new demands for higher intellectual property protection, to become the basis for a Millennium Round of Multilateral Trade Negotiations. Especially ominous was the inclination to allow the moratorium on non-violatory complaints of nullification and impairment under Article 64 to lapse.<sup>71</sup> This move would further encourage powerful coalitions of intellectual property owners to press for maximalist interpretation of existing norms, including their own views of the gray areas, the “wobble room” areas, on which there is much disagreement.<sup>72</sup>

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<sup>68</sup> See Joshua V. Funder, *Rethinking Patents for Plant Innovation*, 21 EUR. INTELL. PROP. REV. 551, 566-77 (1999); Llewelyn, *supra* note 53; Reichman, *From Free Riders to Fair Followers*, *supra* note 4, at 36-39 (citing authorities).

<sup>69</sup> See DSU, *supra* note 12, art. 23 (strengthening of the multilateral system); WTO Agreement, *supra* note 2, art. XV(4) (requiring members to conform their laws to the obligations of all the Uruguay Round Agreements); see also Reichman, *Securing Compliance*, *supra* note 26, at 598-99.

<sup>70</sup> See Report of the Panel, United States — Sections 301-310 of the Trade Act of 1974, WT/DS152/R (Dec. 22, 1999), available at World Trade Organization (visited May 26, 2000) <<http://www.wto.org/wto/dispute/wtds152r.pdf>> (warning against violations, but accepting U.S. administrative undertakings to avoid inconsistencies between Section 301 actions and DSU proceedings).

<sup>71</sup> See TRIPS Agreement, *supra* note 1, art. 64(2)-(3). Technically, the moratorium automatically expired on January 1, 2000 (a consensus of the Member States could not agree to suspend application of the existing provision on the recommendation of the Council for TRIPS).

<sup>72</sup> See, e.g., Watal, *supra* note 51, at 8-9 (fearing “activist” interpretations of TRIPS norms by panels and other WTO bodies under cover of “non-violatory acts”); Dreyfuss & Lowenfeld, *supra* note 12, at 283-97 (exploring difficulties of non-violation complaints in the context of the TRIPS Agreement). See generally Reichman, *From Free Riders to Fair Followers*, *supra* note 4, at 27-51 (identifying gaps in the TRIPS standards that provide developing countries with flexible compliance options).

Those who favor lifting the ban on nonviolation complaints underestimate the extent to which this doctrine, once set loose in the fluid world of intellectual property rights, could boomerang against developed countries, especially those wedded to a common law approach, such as the United States. It could, indeed, expose many federal appellate decisions affecting foreign intellectual property rights holders to second guessing actions filed before the WTO in Geneva. Should the WTO panels or the Appellate Body become receptive to complaints of this kind, it could hamper the ability of the U.S. authorities to formulate domestic intellectual property policy over time.

The availability of nonviolation complaints would also magnify existing temptations to wring unnegotiated benefits out of the dispute-resolution process rather than seeking to resolve pending intellectual property issues by offering to exchange greater market access for higher levels of protection. Such a strategy would further elevate tensions and put more pressure on the fledgling dispute-settlement apparatus than it is yet ready to bear. To their credit, some developed country negotiators appear less keen than others about lifting the moratorium on nonviolation acts, and Professor Jackson has questioned the wisdom of continuing to rely on this doctrine at all, now that states have begun systematically to negotiate the removal of non-tariff barriers.<sup>73</sup>

Meanwhile, authorities in the United States and the European Union seem relatively unconcerned about either the ability of the developing countries to defray the costs of still higher levels of intellectual property protection or the unwillingness of U.S. political circles to endure the countervailing costs of new trade concessions to be given in exchange.<sup>74</sup> Perhaps the protests at the Ministerial Meeting in Seattle will have kindled second thoughts in this regard.

When questioned publicly about new concessions for developing countries, high-level spokespersons for the U.S. Administration and the European Commission have, in the recent past, tended to duck the issue by feigning a reluctance to reveal their hand.<sup>75</sup> Prior to the Uruguay Round, however, the developed countries did reveal their hand. From the beginning, everybody knew that developing countries were going to gain

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<sup>73</sup> Cf. John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U. J. INT'L L. & POL. 823 (1999). However, no action was taken to renew the moratorium, which expired at the end of 1999.

<sup>74</sup> See, e.g., Sir Leon Brittan, *The Contribution of the WTO Millennium Round to Globalisation: An EU View*, in *EUROPA IM ZEITALTER DER GLOBALISIERUNG*, *supra* note 18, at 81; Richard Self, *The Contribution of the WTO Millennium Round to Globalization: The U.S. View*, in *EUROPA IM ZEITALTER DER GLOBALISIERUNG*, *supra* note 17, at 77; see also Bourgeois, *supra* note 17.

<sup>75</sup> See, e.g., Brittan, *supra* note 74; Self, *supra* note 74.

concessions in agriculture and textiles and that developed countries were going to obtain stronger intellectual property rights, and that is what happened.<sup>76</sup>

One reason that the authorities have not wanted to reveal their hand is that they may hold no cards. President Clinton did not obtain fast-track authority, and Congressional actions continually belie the rhetoric of free trade. Nevertheless, the big multinational firms with greatest access to USTR keep on pressing for ever higher levels of intellectual property protection, regardless of the costs, and few have bothered to ask the small and medium-sized firms that actually drive the U.S. economy whether they would benefit or suffer from such proposals.

Another reason that we do not hear much about new trade concessions for developing countries is that some of the developed countries' negotiators may view debt forgiveness as a trump card in any future round of multilateral trade negotiations. While debt forgiveness is long overdue, a strategy of wringing untenable levels of intellectual property protection that mortgaged the technological future of poor countries out of weak governments could discredit the entire enterprise.

This theme leads directly into my next topic. The question becomes how to confront this sobering list of negative factors on the TRIPS horizon without straining the new institutional infrastructure built around the WTO to the breaking point.

## II. CONFRONTATION OR COOPERATION IN THE NEW MILLENNIUM?

The negative trends summarized above should focus attention on the kind of process that would yield the greatest benefits after January 1, 2000, when the developing countries became fully liable for breaches of their international obligations under the TRIPS standards. Shall it be a process of confrontation or cooperation? Some of us believe that a more cooperative approach would lead to greater gains while lessening the risks to the survival of the WTO system as a whole.<sup>77</sup>

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<sup>76</sup> See, e.g., Will Martin & L. Alan Winters, *The Uruguay Round: A Milestone for the Developing Countries*, in *THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES*, *supra* note 55, at 1, 1-14.

<sup>77</sup> See, e.g., Martine de Koning, *Why the Coercion-Based GATT Approach is Not the Only Answer to Piracy in the Asia-Pacific Region*, 19 *EUR. INTELL. PROP. REV.* 59 (1997) (examining how a cooperative approach could function in the Asia-Pacific region); J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 *DUKE J. COMP. & INT'L L.* 11 (1998); see also Rochelle Cooper Dreyfuss, Comment, *Coming of Age With TRIPS: A Comment on J.H. Reichman, The TRIPS Agreement Comes of Age: Conflict or Cooperation in the Post-Transitional Phase?*, 33 *CASE W. RES. J. INT'L L.* (forthcoming).



### A. Why a Confrontational Approach Seems Likely to Fail

While the TRIPS Agreement harmonizes the domestic intellectual property regimes to an unprecedented degree, there is a tendency to forget that the end result is a long way from a set of uniform laws. If the greatest gains occurred in patent law, for example, this was largely because international patent protection under the Paris Convention had remained abysmally weak, despite concerted and ultimately unsuccessful efforts to revise the Paris Convention between 1979 and 1985.<sup>78</sup>

#### 1. Gaps in the Law

My own assessment is that the TRIPS Agreement left the intellectual property glass either half full or half empty, depending on one's point of view. TRIPS was largely a backwards-looking agreement that relied on time-honored doctrinal norms that seemed well-suited to the creative productions of the Industrial Revolution. However, it did not seriously address the problems caused by the newer technologies, especially information technologies, which fit imperfectly within the classical patent and copyright paradigms;<sup>79</sup> and it did not begin to address the broad areas of traditional intellectual property law in which state practice in developed countries varies widely.

There is still no consensus concerning such basic patent issues as the subject matter of protection (computer programs and biotechnology remain unsettled, for example); the novelty and nonobviousness standards of eligibility; the scope of the exclusive rights (including the doctrine of equivalents); or the exceptions that all states should be allowed to make.<sup>80</sup> Even in copyright law, where the Berne Convention represented a much higher degree of systemic harmonization than was true under the Paris Convention, no consensus has been reached with respect to fundamental

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<sup>78</sup> See, e.g., Reichman, *GATT Connection*, *supra* note 43, at 751-68 (discussing contrasting views of developed and developing countries during failed efforts in WIPO to revise the Paris Convention in the period 1979-1985); see also Evans, *supra* note 6, at 146-48.

<sup>79</sup> See, e.g., Charles R. McManis, *Taking TRIPS on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, 41 VILL. L. REV. 207, 232-86 (1996); International Association for the Advancement of Teaching and Research in Intellectual Property, *Emergent Technologies and Intellectual Property: Multimedia, Biotechnology and Other Issues* 13-56 (Kraig M. Hill & Laraine Morse eds., 1996); Abbott, *Enduring Enigma*, *supra* note 39, at 514-16; Cottier, *supra* note 53. See generally J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2483-88 (1994); J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475 (1995).

<sup>80</sup> See TRIPS Agreement, *supra* note 1, arts. 27-34; Reichman, *From Free Riders to Fair Followers*, *supra* note 4, at 27-42.

scope of protection issues, or to the kinds of exceptions and limitations that states may freely implement.<sup>81</sup> However, some progress with respect to basic norms governing transmissions of literary and artistic works in cyberspace was made at a WIPO Diplomatic Conference in December 1996,<sup>82</sup> and proposals to integrate these norms into the TRIPS Agreement may logically appear on the agenda for a future round.<sup>83</sup>

Against this backdrop, hard-nosed confrontational strategies for implementing the TRIPS standards risk backfiring by revealing the full extent of the residual disagreement, as reflected in conflicting state practices. Undue pressure may also convince governments in the developing countries to resist further harmonization at all costs.

## 2. Defensive Measures

If the developing countries do decide to stiffen their resistance, they can formulate regional positions on key intellectual property issues, which, as instances of state practice, could greatly influence the future development of international intellectual property law and policy.<sup>84</sup> Indeed, something of this sort is already underway in the APEC framework. While these countries are determined to meet the deadline for compliance with the basic TRIPS standards, they see themselves as the one region that most acutely needs to reconcile the intellectual property strategies of highly developed countries with those likely to benefit poorer developing countries.<sup>85</sup> APEC thus seems determined to forge its own policies and standards for the post-transitional phase, and their example could influence other regions and subregions.

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<sup>81</sup> See TRIPS Agreement, *supra* note 1, arts. 9-14; Kenneth D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, 6 IND. J. GLOBAL LEGAL STUD. 117, 132-38 (1998); Pamela Samuelson, *Challenges for the World Intellectual Property Organization and the Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Right in the Information Age*, 21 EUR. INTELL. PROP. REV. 578 (1999); Okediji, *supra* note 50, at 157-72; see also Reichman, *From Free Riders to Fair Followers*, *supra* note 4, at 42-51.

<sup>82</sup> See World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76; Agreed Statements Concerning the WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO doc. CRNR/DC/96; see also Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 U.VA. J. INT'L. L. 369 (1997).

<sup>83</sup> See, e.g., Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L. L. 441, 441-43 (1997).

<sup>84</sup> See Abbott, *WTO Dispute Settlement*, *supra* note 22, at 418-27 (discussing application of Vienna Convention on the Law of Treaties to TRIPS disputes).

<sup>85</sup> See, e.g., Takakura, *supra* note 47.

Besides exploiting the flexibility or “wobble room” that pervades existing international minimum standards of intellectual property protection, the developing countries retain broad powers to tax and otherwise regulate intellectual property owners in ways that could significantly undermine their commercial expectations.<sup>86</sup> There is even more room for states to use competition law to limit the social costs of higher standards of intellectual property protection.<sup>87</sup> This risk seems likely to trigger serious initiatives to bring competition law within the WTO disciplines, despite the lack of consensus surrounding all but the most basic norms even in the developed countries.<sup>88</sup>

Of course, incautious use of such regulatory powers becomes a double-edged sword, which could discourage direct foreign investment and transfers of technology, undermine local innovation, and lessen overall economic efficiency.<sup>89</sup> Nevertheless, they are logical responses to excessive or premature demands by intellectual property owners who focus only on their own short-term interests. Governments in developing countries that find it politically expedient to respond to the social discontent of intellectual property users may seek to gain time by relying on these regulatory measures, without sufficiently evaluating their costs; and they may also come to assess the relevant policy variables from their own unique perspective, just as the United States did when it was still a developing country.<sup>90</sup>

### 3. Litigating to Impasse

Conflict and confrontation in the post-transitional phase could soon cripple the mediatory powers of the Council for TRIPS<sup>91</sup> and lead to

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<sup>86</sup> See generally Oddi, *supra* note 55, at 461-69 (discussing strategies to mitigate the initial economic costs of TRIPS).

<sup>87</sup> See TRIPS Agreement, *supra* note 1, arts. 8(2), 40; Fox, *supra* note 9; Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 349-60 (1997) (discussing the failure of international harmonization efforts and the success of regional efforts).

<sup>88</sup> See generally Fox, *supra* note 9 (discussing the relationship between TRIPS and competition law); Ullrich, *supra* note 9; Waller, *supra* note 87, at 349-52; see also Bourgeois, *supra* note 17; Alexander Schaub, *Fusionskontrolle in der Globalen Wirtschaft [Merger Control in the Globalized Economy]*, in *EUROPA IM ZEITALTER DER GLOBALISIERUNG*, *supra* note 17, at 129; Eleanor Fox, *Global Governance: Towards a Multi-Dimensional One-World*, in *EUROPA IM ZEITALTER DER GLOBALISIERUNG*, *supra* note 17, at 140.

<sup>89</sup> See Reichman, *From Free Riders to Fair Followers*, *supra* note 4, at 52-58 (citing authorities that illustrate the double-edged sword effect).

<sup>90</sup> See, e.g., Fox, *supra* note 9, at 490 (discussing the swing in the U.S. position over the last quarter-century).

<sup>91</sup> See TRIPS Agreement, *supra* note 1, art. 68.

wholesale litigation. Seasoned observers already expect the number of dispute settlement actions to increase exponentially once the developing countries lose their immunities, and the coalition of intellectual property owners can hardly wait to bring test cases. The successes of the transitional phase thus appear to have bred unrealistic expectations founded on unwarranted faith in a system that had yet to face the most potentially disruptive issues,<sup>92</sup> at least until the vocal expressions of discontent voiced at Seattle in November 1999.<sup>93</sup>

I predict that no one will be satisfied with the results of an excessively litigious strategy, and that the coalition of intellectual property owners may find their potential leverage much diminished in the end if they pursue it. The Appellate Body will not be maneuvered into affording rights holders more than their governments bargained for in the Uruguay Round.<sup>94</sup> The hard truth is that these same governments compromised far more, and obtained far less, than the various trade associations can afford to admit.

For example, spokespersons for the big pharmaceutical interests have claimed that public interest compulsory licenses facilitating access to patented, essential medicines are illegal; that requiring the local working of patented inventions is no longer permitted; and that the patentee's exclusive right to import patented products trumps a state's right to allow competing imports under the doctrine of international exhaustion.<sup>95</sup> Instead, I believe that, were the Appellate Body forced to decide these issues, it would uphold the validity of virtually all public-interest compulsory licenses, so long as the governments concerned observed the conditions set out in Article 31;<sup>96</sup> it would find that local working requirements to correct abuse remain protected by the Paris Convention and that "abuse" is very broadly defined;<sup>97</sup> and it would decline to limit resort to international exhaustion on

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<sup>92</sup> Cf. Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 364-67 (1997).

<sup>93</sup> For the view that developed countries are now less eager to press for higher levels of international intellectual property protection owing, in part, to fears of "an emerging coalition between powerful lobbies in developed countries and governments of developing countries," see Watal, *supra* note 51, at 4-5.

<sup>94</sup> See, e.g., Dreyfuss & Lowenfeld, *supra* note 12, at 316-24 ("The Appellate Process"); Reichman, *Securing Compliance*, *supra* note 26, at 594-97 (discussing the *India Mail Box case*).

<sup>95</sup> See, e.g., Bale, *supra* note 61, at 649-51; Watal, *supra* note 51, at 17-21, 26; see also Joseph Straus, *Implications of the TRIPS Agreement in the Field of Patent Law*, in FROM GATT TO TRIPS, *supra* note 11, at 160.

<sup>96</sup> See TRIPS Agreement, *supra* note 1, art. 31; Reichman, *Universal Minimum Standards*, *supra* note 2, at 34-36.

<sup>97</sup> See TRIPS Agreement, *supra* note 1, art. 2(1); Paris Convention, *supra* note 5, art. 5A; G.H.C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, AS REVISED AT STOCKHOLM IN 1967, at 67, 70-71 (1968).

the grounds that Article 6 of the TRIPS Agreement makes the issue non-justiciable before WTO panels.<sup>98</sup>

Moreover, putting too much pressure too soon on the developing countries could induce them to push back by invoking safeguards codified in Articles 7 and 8,<sup>99</sup> whose potential impact is fortified by the preambular objectives.<sup>100</sup> Experts in developing countries now perceive Articles 7 and 8(1) as a basis for seeking waivers to meet unforeseen conditions of hardship.<sup>101</sup>

These countries could attempt to trigger the safeguards implicit in Articles 7 and 8 in one of two ways. The least destructive approach would be to convince the Council for TRIPS itself to recommend narrowly described waivers to meet specified circumstances for a limited period of time.<sup>102</sup> This approach would strengthen the mediatory powers of the Council for TRIPS and help to offset the problems arising from the inability of that body to quash or stay requests for consultations and dispute-settlement panels launched by trigger-happy governments.<sup>103</sup>

Alternatively, developing country defendants responding to complaints of nullification and impairment under Article 64<sup>104</sup> might invoke the application of Articles 7 and 8(1) to meet unforeseen conditions of hardship. This defense, if properly grounded and supported by factual evidence, could persuade the Appellate Body either to admit the existence of a tacit doctrine of frustration built into the aforementioned articles or to buttress those articles by reaching out to the general doctrine of frustration

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<sup>98</sup> See TRIPS Agreement, *supra* note 1, art. 6; Frederick M. Abbott, *First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation*, 1 J. INT'L ECON. L. 607 (1998). *But see* Bale, *supra* note 61, at 637-54.

<sup>99</sup> See TRIPS Agreement, *supra* note 1, arts. 7-8.

<sup>100</sup> See *id.* Preamble. Among other things, these recitals stress the need "to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade." *Id.* They also stress that effective means of enforcement must "tak[e] into account differences in national legal systems"; that the "transitional arrangements [should aim] at the fullest participation in the results of the negotiations"; and that "intellectual property rights are private rights" that must be reconciled with, or balanced against "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives." *Id.*

<sup>101</sup> See, e.g., CORREA, *supra* note 51.

<sup>102</sup> Technically, a waiver requires a three-fourths vote of the Ministerial Conference in "exceptional circumstances" after a recommendation from the Council for TRIPS. See WTO Agreement, *supra* note 1, art. IX.

<sup>103</sup> See Dreyfuss & Lowenfeld, *supra* note 12, at 310-16 (criticizing this perceived lacuna).

<sup>104</sup> See TRIPS Agreement, *supra* note 1, art. 64.

recognized in the Vienna Convention on the Law of Treaties.<sup>105</sup> Either way, overly aggressive complainants could wind up with what would amount to a judicially imposed waiver.

Recall, moreover, that the legal product available to most citizens of most developing countries is poor by Western standards, in part because the legal and judicial system in a poor country is likely to suffer from the same lack of capital as other areas. Article 41(5) of TRIPS says that member countries are under no obligation to provide foreign intellectual property owners with a better legal product than is available to nationals even if the TRIPS procedures set out in Articles 41-61 must be implemented.<sup>106</sup> A confrontational atmosphere will thus decrease the developing countries' incentives to enforce intellectual property laws protecting foreigners in subtle ways that will seldom become actionable.<sup>107</sup>

Let me reiterate that ending the moratorium on nonviolatory complaints in a climate of confrontation and hostility could thoroughly destabilize the WTO. Consider, for example, that under a common law process of legal evolution, the U.S. federal appellate courts have slowly developed case law limiting copyright protection of software and opening patent protection of software.<sup>108</sup> If this process had been disrupted by suits filed in Geneva by government attorneys acting on behalf of disgruntled foreign litigants, the loss of sovereign control over intellectual property law and policy might have appalled Congress. Yet, that is the kind of risk all countries face in a climate of conflict and unbridled litigation once non-violatory complaints are allowed.<sup>109</sup>

Summing all these risks together, I conclude that an overly litigious climate that produced a stream of controversial decisions on the limits of intellectual property protection would convince most states that they had lost too much sovereignty in this area, and it would undermine confidence

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<sup>105</sup> See Vienna Convention on the Law of Treaties, *supra* note 25, arts. 61(1), 62.

<sup>106</sup> See TRIPS Agreement, *supra* note 1, arts. 41(5), 42-61; Reichman, *Enforcing the Enforcement Procedures*, *supra* note 11, at 340-41.

<sup>107</sup> Cf. MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 156-58 (1998) (predicting difficulties in implementing both intellectual property laws and judicial reforms in developing countries).

<sup>108</sup> See, e.g., J.H. Reichman, *The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 767-68 (1995). See generally Samuelson et al., *Manifesto*, *supra* note 59, at 2332-64 (arguing that existing regimes do not adequately protect the industrial compilations of applied technical know-how embodied in computer programs).

<sup>109</sup> For detailed examples of this risk, see Dreyfuss & Lowenfeld, *supra* note 12, at 282-97.

in and loyalty to the WTO process.<sup>110</sup> If the United States lost too many cases, a Congress that had declined to pay its dues to the United Nations and that had withdrawn from the United Nations Educational, Scientific, and Cultural Organization (UNESCO), could reconsider its commitment to the WTO.

Conversely, if the United States and European Union won too many cases, the resentment of developing countries could spill over to other, non-negotiated areas. It does not take much practical wisdom or experience to see how easy it is for a truly determined group of countries spanning three continents to find ways to put spikes in the wheels of a weak and decentralized international system.

### *B. Bargaining Around the TRIPS Agreement: Elements of a More Cooperative Approach*

In contrast to a confrontational approach, I urge consideration of a more cooperative approach to the post-transitional phase, an approach that Professor David Lange and I have termed "bargaining around the TRIPS Agreement."<sup>111</sup> Under this approach, governments would treat the TRIPS Agreement as a basic set of default rules that they bargained around, with a view to obtaining win-win positions for all the players.

Such a process is, of course, perfectly consistent with the philosophy underlying prior development of the GATT. From this perspective, it is useful to distinguish government to government actions from public-private initiatives.

#### 1. Government to Government Undertakings

Looking at government to government transactions, the first goal, in my view, is to consolidate the transparency and mediatory functions of the Council for TRIPS as an effective alternative to litigation.<sup>112</sup> In particular, we need to consolidate the anti-copying, anti-counterfeiting and anti-freeriding thrust of TRIPS on which everyone agrees. This entails the notion that governments should reserve dispute-settlement actions for slam-dunk decisions, like that in the *United States v. India* case, but that they should not bring such actions to test the gray, unbargained for areas. They should, moreover, avoid recourse to non-violatory complaints and leave the gray, or "wobble room," areas to WIPO, where market power is less of a

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<sup>110</sup> Cf., e.g., COMPETITION FOR HIGH-TECHNOLOGY INDUSTRY, *supra* note 45, at 91-94 (stressing costs of enforcement and calling for "a cooperative effort ... to adjust existing intellectual property rules to the needs of new fields such as global information systems and biotechnology. Multilateral efforts to address these issues constructively should be encouraged.").

<sup>111</sup> See Reichman & Lange, *supra* note 77, at 49-65.

<sup>112</sup> Cf. Otten, *supra* note 3, at 524-29.

factor and where methodical negotiations and deliberations can take place at a high technical level and with inputs from regional caucuses.

With the Cold War ended, the climate for negotiations within the WIPO framework has changed for the better. This is attested by the successful outcome of the 1996 Diplomatic Conference that produced two fundamental treaties governing international copyright relations in the networked environment.<sup>113</sup> Since 1998, WIPO's procedures have been further streamlined, with a view to facilitating direct inputs by Regional Groups on pending issues before Standing Committees, with fewer overlays of so-called Groups of Experts that were prone to manipulation in the past.

Moreover, WIPO's legislative process has been made more open by the recent practice of allowing both intergovernmental and nongovernmental representatives to take the floor during deliberations of the Standing Committees. The WIPO process has, of course, also benefited from the success of the TRIPS Agreement itself, which gives all countries a stake in the international intellectual property system and obliges them to seek a balance of interests that both developed and developing countries can accept.<sup>114</sup>

In the new WIPO framework, experience demonstrates that the United States and the European Union cannot dictate to the rest of the world and still hope to come away with positive legislative results. Despite much huffing and puffing, for example, real progress on WIPO Treaties I and II of 1996 could not be made until the United States and European Union delegations persuaded a powerful coalition of "content providers" that a more balanced, genuinely negotiated set of ground rules was preferable to no treaty at all.<sup>115</sup> Once compromise became possible, the need to obtain the votes of the Latin American, Asian, and African Regional Groups, coupled with the self-interest of those groups in constructing a robust, worldwide cyberspace environment, led to hard bargaining and determined efforts to reach a broad consensus.<sup>116</sup>

In the end, the new WIPO treaties represented a balanced and reciprocally beneficial set of foundational rules, with which each state

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<sup>113</sup> See *supra* note 82 and accompanying text.

<sup>114</sup> See, e.g., World Intellectual Property Organization Copyright Treaty, *supra* note 82, Preamble; Abbott, *Enduring Enigma*, *supra* note 39, at 512-13. See generally Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661, 663-82 (1997) (discussing the institutional roles of the WTO and WIPO).

<sup>115</sup> See Samuelson, *supra* note 82, at 380-427 (discussing the bargaining process at the WIPO Diplomatic Conference).

<sup>116</sup> The author represented the International Council for Science (ICSU) at the WIPO Diplomatic Conference in December 1996, and since then he has continued to represent ICSU at various meetings of WIPO's Standing Committee on Copyrights and Related Rights.



could adapt its Internet policies to its own needs. Thus, while both the United States and the European Union have opted to enact legislation that is far more protective than these treaties require, the rest of the world remains free to adopt a less protectionist approach that would not, however, undermine the global telecommunications network and the electronic commerce it is expected to sustain.<sup>117</sup> Having participated directly in this process and in follow-up deliberations on related issues,<sup>118</sup> I am confident that the WTO has much to gain (and many losses to avoid) by placing greater reliance on these WIPO processes for the formulation of new intellectual property norms to be incorporated into future revisions of the TRIPS Agreement.

Meanwhile, at the WTO, the primary goal in the post-transitional phase should be to find ways in which everyone wins by implementing the TRIPS standards. When each of the developing countries comes up for review by the Council for TRIPS, the developed countries should approach the issues by asking, "how can we help you to implement these international minimum standards so that you win and we win, too?"

Consider, in this connection, the possibility of linking targeted technical assistance and public sector aid or investments to satisfactory outcomes. This obviously includes technical assistance in training intellectual property cadres and building intellectual property offices, although there is some innovative thinking about even these mundane matters.<sup>119</sup> There is also a need to encourage regional cooperation so as to reduce everyone's transaction costs.<sup>120</sup>

Less obvious is the need to focus on ways to assist the developing countries in identifying areas in their own economies that can profit from the global intellectual property system. Governments should encourage and assist the developing countries to strengthen a "fair followers" mentality by building up the capacities of their own national systems of innovation and by helping them to improve the terms on which technology is transferred.<sup>121</sup> In this regard, even simple or rudimentary improvements in the status quo

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<sup>117</sup> See, e.g., Okediji, *supra* note 50, at 176-79; cf. Otten, *supra* note 3, at 533-34.

<sup>118</sup> See *supra* note 116.

<sup>119</sup> See, e.g., Robert M. Sherwood, *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA: J.L. & TECH. 473 (1999) (advocating, *inter alia*, unilateral action aimed at combined implementation of a "rapid-patent system with delayed examination" and a "system of reference" for granting patents).

<sup>120</sup> See, e.g., de Koning, *supra* note 77, at 60 (commending cooperative and consultative approach of southeast Asian countries).

<sup>121</sup> See generally Reichman, *From Free Riders to Fair Followers*, *supra* note 4.

can yield big payoffs if the developed countries back them up with appropriate technical assistance and financial support.<sup>122</sup>

For example, governments in developing countries can be encouraged to foster the use of off-patent technology (including generic drugs);<sup>123</sup> to promote the study of patent disclosures, with a view to local adaptations and improvements; to invest in expanding local reverse-engineering skills, to be supplemented by recourse to the international labor market as the need arises; to preserve and manage their biogenetic endowments, with a view to directly participating in projects to explore and exploit these resources by foreign firms; to promote the use of national trademarks on high quality goods and to help publicize these products and marks in foreign markets; and to identify local strengths, including cultural assets, such as design, folklore, and musical or dance traditions, which increasingly lend themselves to intellectual property protection and to commercial exploitation.<sup>124</sup>

More ambitious projects could link effective implementation of TRIPS standards with helping these governments to invest wisely in telecommunications and Internet capacity. Particular emphasis should be placed on maximizing access to scientific and technical data and information.<sup>125</sup> Developing country governments will also require considerable assistance in stimulating transfers of technology from the public to the private sectors.

In the end, of course, the developing countries' greatest need is to make the worldwide intellectual property system work for them and not just for coalitions of powerful rights holders operating from the developed countries.<sup>126</sup> To this end, I have elsewhere proposed a pro-competitive strategy for implementing the TRIPS Agreement in developing countries, which consists of the following five prongs:

1. Accommodating established intellectual property regimes to national development goals;
2. Using competition law to curb the abuse of market power;

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<sup>122</sup> See, e.g., Maskus, *supra* note 56, at 488 (concluding that "concluding that "stronger IPRs could have potentially significant and positive impacts on the transfer of technology to developing countries...").

<sup>123</sup> See, e.g., Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Provision in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507, 510, 524-32 (1996).

<sup>124</sup> See generally UNCTAD, *TRIPS*, *supra* note 50, at 29-52; cf. Abbott, *Enduring Enigma*, *supra* note 39, at 519-20 (noting the role of the World Bank and other institutions).

<sup>125</sup> Cf. Primo Braga & Fink, *supra* note 46, at 550-54.

<sup>126</sup> Cf. COMPETITION FOR HIGH-TECHNOLOGY INDUSTRY, *supra* note 45, at 51-54 (stressing legitimacy of different policy goals for different economies).

3. Fashioning new intellectual property regimes to stimulate local innovation;
4. Resisting the drive for stronger intellectual property rights (absent new trade concessions);
5. Strengthening national infrastructures for the acquisition and dissemination of scientific and technical knowledge.<sup>127</sup>

If, in fact, the developing countries were to move in this direction, they would emulate prior pro-competitive strategies that the United States and Japan practiced when they were still developing countries. In this regard, perhaps the greatest contribution that governments in developed countries could make would be to avoid thwarting these good faith efforts to balance the TRIPS incentives against the need for access to intellectual creations and for the benefits of free market competition.<sup>128</sup> Such a policy of restraint would require these governments to avoid unnecessary confrontations and to check the ability of private rights holders to convert the WTO process into a circus of needless and wasteful litigation that would quickly dissipate the good will and comity that all sides need in order to make this experiment work.

## 2. Public-Private Initiatives

Let me close by calling attention to Professor David Lange's proposal for public-private initiatives that constitute another means of bargaining around the TRIPS Agreement. Because we have explained this proposal in a recent article,<sup>129</sup> I will limit myself to a capsule summary here.

In essence, we believe that government representatives, local entrepreneurs, and foreign rights holders should negotiate on a transactional basis to resolve conflicts arising from the TRIPS standards by devising tailor-made deals that produce win-win solutions for all the protagonists. Here, by government representatives, we mean that the relevant state commercial entities and their overseers should participate at the bargaining table in their capacities as economic actors, not as political exponents, in order to secure implementation of private sector deals to resolve specific intellectual property conflicts.

Presumably the presence of government representatives at the table would ensure that any deals struck between foreign rights holders and local firms would also redound to the public interest, without, however, compromising the larger political organs' ability to maintain official

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<sup>127</sup> See Reichman, *From Free Riders to Fair Followers*, *supra* note 4, at 26-86.

<sup>128</sup> Cf. Maskus, *supra* note 56, at 476 ("In economic terms it is socially efficient to provide wide access to new technologies and products, once they are developed, at marginal production costs").

<sup>129</sup> See Reichman & Lange, *supra* note 77, at 49-65.

positions on intellectual property law and policy in the relevant international forums. At the same time, the government's representation at the table should help to ensure that any deals struck would be implemented in practice, with the backing of the relevant administrative and judicial organs as the case may require.

While we believe that an endless array of intellectual property conflicts involving specific foreign initiatives lend themselves to mediated solutions of this kind, a hypothetical transaction might result in a specific commitment to direct investment or to a transfer of technology by a foreign rights holder in exchange for guaranteed levels of intellectual property protection and enforcement that would remove existing obstacles and make such an investment both feasible and reciprocally beneficial. Another hypothetical transaction might result in the conversion of alleged pirates into authorized licensees of the intellectual property in question, with perhaps an understanding that the rights holders might devote a fraction of their expected gains to defraying the costs of enforcement in poor countries.

In evaluating these proposals, one must take into account both the limits imposed by basic TRIPS principles, especially the national treatment and most-favored nation principles, and the need for the state's political organs to defend their publicly held positions on intellectual property issues while promoting win-win transactions in economies that are still susceptible to considerable government regulation. As regards the first consideration, so long as deals between foreign firms and local commercial entities (both public and private) conferred no legal or administrative benefits on foreign governments and did not entail legal or administrative discrimination that favored nationals over similarly situated foreigners, there would seem to be broad opportunities for resolving individual disputes on such a transactional basis.<sup>130</sup>

At the same time, the tripartite approach to deal-making envisioned in our proposal does seem to call for a special forum in which the public and private sectors could negotiate confidentially without compromising the political organs of the state in question. To this end, Professor Lange has established an International Forum for Intellectual Property Initiatives within the Duke Law School's Center for Global Capital Markets, which aims to develop the specialized expertise to facilitate the kind of public-private initiatives we envision.<sup>131</sup>

Such a Forum is also open to trade associations from both developed and developing countries. It could thus encourage sectoral collaboration and alliances between small and medium-sized firms in developed and developing countries, which often have more in common with each other

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<sup>130</sup> See TRIPS Agreement, *supra* note 1, arts. 3-4.

<sup>131</sup> See Reichman & Lange, *supra* note 77, at 16; see also *id.* at 66-68 (Mission Statement of the International Forum for Intellectual Property Initiatives).

than with the larger firms whose interests have dominated the multilateral trade negotiations.

### 3. The Long-Term Payoffs

The marriage of convenience between international trade law and intellectual property law<sup>132</sup> has produced powerful new institutions that could stimulate innovation and invention on an unprecedented, worldwide scale.<sup>133</sup> But the fragility of these institutions is easily underestimated because the first five-year test run has benefited from the immunities afforded both developing and least-developed countries during a transitional phase. While least-developed countries will continue to enjoy these immunities for at least another six years, the exposure of the developing countries to the full weight of the WTO's dispute-settlement machinery after January 1, 2000 poses a serious new challenge for the stability of the international trading system established in 1994.

That system needs to survive the shocks and pitfalls likely to be encountered in the post-transitional phase of the TRIPS Agreement. Let me, therefore, end with a plea for restraint and for a more cooperative and less confrontational approach than that which has sometimes characterized relations between developed countries during the transitional phase.

Once the developing countries see that they, too, have a big stake in the global intellectual property system, the long-term prospects for that system would become bright, indeed. In the long term, we should expect the economic stimulus of the TRIPS standards to influence business and investment decisions everywhere, without regard to those North-South divisions inherited from the Cold War that seem increasingly anachronistic in principle, if not in practice. The trick, however, is to reach that long-term understanding without capsizing the vessel on which we collectively embarked in 1994.

Professor John Jackson once stated that, if the 130 or more states that entered the WTO Agreement had really known what they were getting into, they would never have signed it.<sup>134</sup> Having embarked on this great adventure, however, it is well to recall the Italian proverb to the effect that, if one finds oneself unaccountably at sea, the best course of action is to keep on rowing.

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<sup>132</sup> See generally R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223 (1989) (examining the interaction between trade and intellectual property rights policies).

<sup>133</sup> Cf. RYAN, *supra* note 107, at 141-58; Primo Braga & Fink, *supra* note 44. See generally KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000) (discussing the role of intellectual property rights in fostering innovation).

<sup>134</sup> John H. Jackson, Remarks at the University of Michigan (Fall 1998).

If developed and developing countries can learn to cooperate with each other during the delicate, post-transitional phase of the TRIPS Agreement, they may jointly preside over a new epoch of investment and technological innovation. If, however, they insist on fighting each other to divide the spoils from the production of knowledge goods at the end of the twentieth century,<sup>135</sup> they risk compromising the progressive and orderly development of international intellectual property law within the framework of the TRIPS Agreement. Such disarray could, in turn, destabilize the world trading system as a whole, which will inevitably become ever more dependent on the progressive development of that same body of law.

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<sup>135</sup> Cf. RYAN, *supra* note 107, 191-201 (discussing knowledge diplomacy); COMPETITION FOR HIGH-TECHNOLOGY INDUSTRY, *supra* note 45, at 12-71 (sources of friction and competition in high-technology industries).