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PROSPECTS FOR PROGRESS: THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES AFTER THE DOHA CONFERENCE

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Abstract: Intellectual property rights (IPRs) have long been the subject of contentious debate between developed and developing countries. While providing an incentive to invest in and develop new technologies, IPRs also vastly increase the cost of these new technologies to developing countries. Despite disagreement on the proper role for IPRs in the global economy, IPRs became a major element in the 1994 Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which established the World Trade Organization (WTO). Effective on January 1, 1995, the Trade-Related Aspects of Intellectual Property Agreement (TRIPS Agreement) formally linked compliance with minimum protection standards with international trade. This linkage directly affects technology flows to, and the course of development in, developing countries. While the Fourth Ministerial Conference at Doha, Qatar on November 9–13, 2001 integrated the concerns of developing countries more fully than previous Ministerial Conferences, the issue of technology acquisition and development in light of the increasing technology gap between developed and developing countries was overlooked.

INTRODUCTION

While globalization is breaking down barriers to trade and communication, it is also creating new forms of exclusion as the technology gap widens between rich and poor countries.¹ With the exception of the relatively recent emergence of a few East Asian countries and newly industrialized countries (NICs), developed countries retain economic power while developing countries and especially least de-

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¹ See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT, 2001, at 46–63 (2001) [hereinafter DEVELOPMENT REPORT].

veloped countries (LDCs)² continue to face economic marginalization.³ In order to increase capacity and foster both human development and economic growth, developing countries must be encouraged to foster innovation, enhance entrepreneurialism, and advance the acquisition of technical skills.⁴ Utilizing technology as a tool for development, however, has become complicated.⁵ Under the global intellectual property rights (IPRs) regime based primarily on the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement), member states of the World Trade Organization (WTO) must adhere to specified minimum standards of IPRs protection.⁶ The implementation and enforcement of these minimum standards, especially in the area of patents, directly affects transborder technology flows, and, as a result, the course of progress for developing countries.⁷

Even before signing the TRIPS Agreement, IPRs existed “at the heart of a highly polarized debate on technology and development.”⁸ IPRs provide incentives to invest in research and to develop new technologies because they allow investors to reap returns on their in-

² For the WTO’s approach to the definitions of “developing” countries and “LDCs” see http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Nov. 12, 2002).

³ See Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 HOUS. J. INT’L L. 169, 195–97 (2000).

⁴ See PENNY FOWLER, HARNESING TRADE FOR DEVELOPMENT 35–36 (Oxfam International 2001), at <http://www.oxfam.org.uk/policy/papers/trade/trade.pdf>; PES GROUP, A NEW DIRECTION IN WORLD TRADE: TOWARDS A WTO ROUND FOR DEVELOPMENT, DEMOCRACY AND SUSTAINABILITY 11–12 (Apr. 2001), at <http://www.ictsd.org/ministerial/doha/WTO-shortpaper-ENfinal.PDF>; see also DEVELOPMENT REPORT, *supra* note 1, at 95–117 (discussing technology as a tool for development).

⁵ See PES Group, *supra* note 4, at 11–12; Carlos A. Primo Braga, *Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and Its Economic Implications*, 45 (Jan. 1995) (paper presented at *The Uruguay Round and the Developing Economies—A World Bank Conference*); 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, 22–23 (1996–1997).

⁶ See Braga, *supra* note 5, at 12; Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), Annex 1C, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf. [hereinafter WTO Agreement]; LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement], available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

⁷ See Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT’L L. 735, 743 (1996).

⁸ DEVELOPMENT REPORT, *supra* note 1, at 102; see also Keith E. Maskus, *Intellectual Property Challenges for Developing Countries: An Economic Perspective*, 2001 U. ILL. L. REV. 457, 458 (2001).

vestments by providing temporary monopoly rights.⁹ However, the current regime dominated by the TRIPS Agreement does not strike the appropriate balance between creating private incentives and fostering technology transfers and development for the public benefit.¹⁰ Critical, yet insufficient, progress was made at the WTO's Fourth Ministerial Conference in Doha, Qatar from November 9–13, 2001 on pressing issues faced by developing countries as they try to strike a new balance between these private incentives and public benefits.¹¹

This Note will analyze the challenges faced by developing countries in light of the TRIPS Agreement. Part I describes the historical foundations of IPRs and the process by which they became intimately linked with global trade. Part II discusses divergent viewpoints on IPRs and considers the TRIPS Agreement's impact on developing countries. Part III analyzes relevant aspects of the Fourth Ministerial Conference of the WTO, and considers the prospects for developing countries with regard to accessing and developing technologies after Doha. This Note concludes by advocating for further investigation of the link between technology acquisition and creation, the TRIPS Agreement, and developing countries.

I. REVIEW OF THE INTERNATIONALIZATION OF INTELLECTUAL PROPERTY

A. *From Paris to WTO—Multilateral Treaties Emerge in Response to Desires for Increased Rights Protection Globally*

Historically, IPRs law resided primarily within the domestic sphere.¹² The Paris Convention for the Protection of Industrial Property (“Paris Convention”), signed in 1883, and the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), signed in 1886, are two of the oldest agreements on the international protection of IPRs.¹³ While both conventions provided for

⁹ DEVELOPMENT REPORT, *supra* note 1, at 102.

¹⁰ *Id.*

¹¹ See Ministerial Conference, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001), at http://docsonline.wto.org/gen_search.asp [hereinafter *Ministerial Declaration*]; Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001), at http://docsonline.wto.org/gen_search.asp. [hereinafter *Public Health Declaration*]

¹² See Su, *supra* note 3, at 173.

¹³ See Su, *supra* note 3, at 178–81; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, at <http://www.wipo.int/treaties/documents/english/pdf/d-paris.pdf> (last visited Nov. 12, 2002); Berne Convention for the Protection of Literary and

equal treatment of foreign and domestic claimants under international intellectual property law, they differed greatly on standards and remedies.¹⁴ The Paris Convention, which protects against trademark and patent infringement, did not set forth any substantive standards for patent protection to which members must adhere.¹⁵ Conversely, the Berne Convention, which protects against copyright infringement, established minimum standards of protection but “fail[ed] to outline clear legal remedies by which copyright holders may enforce their rights against infringers.”¹⁶

Established in 1967, the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, now administers the Paris and Berne Conventions along with other intellectual property treaties.¹⁷ Similar to the Paris Convention, later WIPO treaties and treaty revisions did not establish minimum protection standards.¹⁸ Plagued by weak enforcement and dispute settlement mechanisms, WIPO provided little in the way of coordination during the 1970s and early 1980s.¹⁹ As a result, “[d]espite WIPO efforts to promote international comity with respect to IPR protection, the level of harmonization across countries achieved by the mid-1980s remained limited.”²⁰ During this same time, industrialized countries began to articulate an “intellectual property problem,” namely the “unintended transfer of wealth from the industrialized country economies to the developing and newly industrialized country (NIC) economies.”²¹

During the 1980s, rapid increases in international trade and the drastic shift to high-technology products led businesses, and particularly multinational corporations, to voice concerns about piracy and lax intellectual property protections.²² A number of developing countries, including Brazil and India, either offered limited patent protec-

Artistic Works, Sept. 9, 1886, at <http://www.wipo.int/treaties/documents/english/pdf-berne.pdf> (last visited Nov. 12, 2002).

¹⁴ See Su, *supra* note 3, at 178–81.

¹⁵ *Id.* at 179–80.

¹⁶ *Id.* at 181.

¹⁷ *Id.* at 182.

¹⁸ See Braga, *supra* note 5, at 3.

¹⁹ See Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT’L L. REV. 277, 290 (2001); Su, *supra* note 3, at 183–84.

²⁰ Braga, *supra* note 5, at 3.

²¹ 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, 697 (1989); see also Cheek, *supra* note 19, at 284–85.

²² See Cheek, *supra* note 19, at 286.

tion for chemicals and pharmaceuticals or had compulsory licensing schemes for certain technologies, or utilized both practices.²³ In addition, industrialized countries viewed tolerance toward piracy in developing countries as a barrier to exports.²⁴ Differential treatment, combined with substantial research and development costs inherent in high-tech knowledge production, compelled companies to push for strong minimum standards for international protection of IPRs.²⁵

In 1988, the United States Trade Representative (USTR) requested that the United States International Trade Commission (ITC) attempt to quantify financial losses to the United States' worldwide trade as a result of unintended or unauthorized appropriation of intellectual property by developing country enterprises.²⁶ The ITC sent a questionnaire to 736 U.S. companies.²⁷ Based on responses to this questionnaire, the Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade Report (ITC Report) estimated that in 1986, U.S. industries faced worldwide trade losses ranging from \$43 billion to \$61 billion and that key U.S. industries lost \$23.8 billion in revenue due to lack of IPRs enforcement in foreign countries.²⁸ The ITC Report attributed significant losses to particular developing countries and NICs—namely Brazil, India, Mexico, Nigeria, the Republic of Korea, China, Hong Kong, and Taiwan.²⁹ In addition, “[t]he industries that appear[ed] most affected [were] chemicals and pharmaceuticals, computer software, and entertainment (audio and video).”³⁰

Seeking to establish minimum standards and an effective international mechanism for enforcement, the United States and other developed countries increased global pressure to include IPRs in the General Agreement on Tariffs and Trade (GATT).³¹ For those seeking

²³ See Abbott, *supra* note 21, at 743 (summarizing Foreign Trade Barriers Report).

²⁴ Marco C.E.J. Bronckers, *The Impact of TRIPS: Intellectual Property Protection in Developing Countries*, 31 COMMON MKT. L. REV. 1245, 1247 (1994).

²⁵ Su, *supra* note 3, at 173–4; see also Abbott, *supra* note 21, at 697 (discussing how intellectual property is easily appropriated once it has been produced and that it has marginal reproduction costs).

²⁶ See Abbott, *supra* note 21, at 699–700.

²⁷ *Id.* at 700.

²⁸ *Id.*; Cheek, *supra* note 19, at 287; U.S. Int'l Trade Commission, Pub. No. 2065, Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade (1988).

²⁹ Abbott, *supra* note 21, at 701.

³⁰ *Id.* at 701–02.

³¹ See *id.* at 695–96; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

a stronger international mechanism,"[t]he GATT had several advantages over WIPO. Most significantly, in contrast to the voluntary accession of countries to the various WIPO conventions, an agreement within the GATT would commit all signatories to minimum standards."³² Strong opposition to the inclusion of intellectual property rights in the GATT by developing countries—India and Brazil in particular—illustrated an emerging North-South debate about the propriety of linking intellectual property rights to the free-trade agenda.³³

B. *Establishing the WTO and the TRIPS Agreement*

The Uruguay Round of the GATT ended in April 1994 with the signing of the Marrakesh Agreement establishing the World Trade Organization, which outlines the rules for governing all of the Uruguay Accords.³⁴ Following years of lobbying by the United States and the European Community, intellectual property rights emerged as a prominent element in these negotiations.³⁵ Effective on January 1, 1995, the TRIPS Agreement formally linked intellectual property with international trade.³⁶ The TRIPS Agreement "obligates WTO-member countries to (1) provide minimum intellectual property rights protection through domestic laws; (2) provide effective enforcement of those rights; and (3) agree to submit disputes to the WTO dispute settlement system."³⁷ These substantive provisions, however, remain subject to the objectives and principles of the TRIPS Agreement as defined in Articles 7 and 8 respectively.³⁸

The spirit, if not the letter, of the TRIPS Agreement relies on the argument that increased technological capacity fosters development.³⁹ To this end, the TRIPS Agreement codified the rights and obligations of members in light of a desired balance between the protection of private IPRs on the one hand and socio-economic and technological development on the other.⁴⁰ With regard to the objectives of the TRIPS Agreement, Article 7 specifically states that "[t]he protection and enforcement of intellectual property rights should contribute to

³² Cheek, *supra* note 19, at 288.

³³ See Abbott, *supra* note 21, at 718.

³⁴ WTO Agreement, *supra* note 6.

³⁵ See Braga, *supra* note 5, at 12.

³⁶ See Bronckers, *supra* note 24, at 1249–50; TRIPS Agreement, *supra* note 6, at part III.

³⁷ Cheek, *supra* note 19, at 292.

³⁸ TRIPS Agreement, *supra* note 6, at arts. 7–8.

³⁹ See *id.*

⁴⁰ *Id.*

the promotion of technological innovation and to the transfer and dissemination of technology . . . and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."⁴¹ The principles in Article 8 build on the Article 7 objectives by acknowledging that member countries may adopt measures to promote the public interest in sectors that are vital to their individual socio-economic and technological development.⁴²

Despite the language in Articles 7 and 8 of the TRIPS Agreement, the provisions for "Patentable Subject Matter" outlined in Articles 27 through 34 seem to establish standards for IPRs protection that can hardly be deemed minimal.⁴³ Under the TRIPS Agreement, patents, for example, are available for inventions of both products and processes so long as they are "new, involve an inventive step and are capable of industrial application."⁴⁴ This precludes countries from establishing regimes that only provide protection to products or processes in order to foster innovation.⁴⁵ In addition, "Article 33 requires that patent protection be afforded for twenty years from the date of filing, preventing countries from tinkering with the length of patents in order to calibrate the longitudinal strength of the monopoly they confer."⁴⁶ Article 28, regarding the rights conferred by patents on their owner, in conjunction with Article 31, regarding other use without authorization of the right holder, limit the extent to which countries can engage in compulsory licensing of either a product or a process without the prior consent of the patent holder.⁴⁷

⁴¹ TRIPS Agreement, *supra* note 6, at art. 7.

⁴² *Id.* art. 8.

⁴³ *See id.* at arts. 27–34.

⁴⁴ TRIPS Agreement art. 27(1).

⁴⁵ Robert Weissman, *A Long, Strange TRIPS: the Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1098 (1996).

⁴⁶ *Id.*; TRIPS Agreement, *supra* note 6, at art. 33.

⁴⁷ TRIPS Agreement, *supra* note 6, at arts. 28, 31.

II. THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES

A. Divergent Viewpoints on IPRs

1. Views from the Developing World

Prior to the TRIPS Agreement, developing countries had little incentive to create highly protective IPRs regimes.⁴⁸ Rather, they focused on encouraging the free-flow of information and on acquiring a technological base from which to grow.⁴⁹ “Low standards of patent protection in countries such as India and Brazil, for example, facilitated the development of industries, particularly in the pharmaceutical field.”⁵⁰ In addition, little global consensus existed on what constituted patentable subject matter or the rights that a patent should confer.⁵¹

Opponents of creating strong IPRs protection in developing countries have argued that developing countries need maximum access to Western technology to increase development.⁵² This argument suggests that “[t]echnological information should be provided with minimal restriction because Third World development is in the interest of all nations.”⁵³ Other opponents of strong IPRs protection have also pointed out that most developed countries formerly enjoyed unprecedented freedom to exploit intellectual property for their own economic development during the 18th and 19th centuries.⁵⁴ They also argued that stronger IPRs protection would hamper economic development by forcing developing countries to pay for the use of intellectual property, which is held predominantly by individuals and corporations in developed countries.⁵⁵

2. Views from the Developed World

Headed by the United States, industrialized countries which rely heavily on information and the transfer of technology as major as-

⁴⁸ Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 *Geo. Wash. J. Int'l L. & Econ.* 327, 330 (1993–1994).

⁴⁹ See Gana, *supra* note 7, at 746–47.

⁵⁰ *Id.* at 746.

⁵¹ *Id.* at 764; Giunta & Shang, *supra* note 48, at 329–30.

⁵² See Giunta & Shang, *supra* note 48, at 330–31.

⁵³ *Id.* at 331.

⁵⁴ Ha-Joon Chang, *Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues*, 2 *J. Hum. Dev.* 287, 288–93 (2001).

⁵⁵ Bronckers, *supra* note 24, at 1247; *Development Report*, *supra* note 1, at 39.

pects of their economies argued loudly for the economic benefits of tight IPRs protection in opposition to demands by developing countries.⁵⁶ With regard to protecting their own economies, developed countries argued that organized piracy undermined the incentive structure that trademark, patent, and copyright laws were designed to promote.⁵⁷ Defenders of strong global IPRs protection further argued that developing countries would benefit from increased innovative activities domestically and from greater availability of advanced technologies from abroad.⁵⁸ These benefits to developing countries would stem from an increase in foreign direct investment (FDI) and technology transfer as a direct result of stronger IPRs protection.⁵⁹

B. *The TRIPS Agreement's Impact on Developing Countries*

The effects of the TRIPS Agreement on developing countries vary in part with the degree to which these countries had established a domestic system of IPRs protection prior to becoming WTO members.⁶⁰ For example, many developing countries such as Hong Kong, Indonesia, Singapore, and Guatemala were parties to neither the Paris nor the Berne Convention prior to becoming WTO members.⁶¹ Others, like India, Bangladesh, and Uganda had ratified either the Paris or the Berne Convention but not both.⁶² Therefore, by becoming parties to the WTO, many of these developing countries committed themselves to extreme levels of domestic reform.⁶³ To address this issue, developing countries made various concessions to facilitate the transition from weak or non-existent IPRs protection to domestic systems that would meet the minimum standards established by the

⁵⁶ Giunta & Shang, *supra* note 48, at 332.

⁵⁷ *Id.*

⁵⁸ Chang, *supra* note 54, at 300–01.

⁵⁹ *Id.* at 301.

⁶⁰ See generally Giunta & Shang, *supra* note 48, at 346–58 (discussing the levels of IPR protection available in Japan, China, and India); Christopher S. Mayer, *The Brazilian Pharmaceutical Industry Goes Walking from Ipanema to Prosperity: Will the New Intellectual Property Law Spur Domestic Investment?*, 12 TEMP. INT'L & COMP. L.J. 377, 378–80 & 387–89 (1998) (discussing Brazilian patent law).

⁶¹ Compiled from data listed in the Annex to Braga, *supra* note 5, at A9-A11, (listing Membership in GATT and in Major WIPO conventions as of April 5, 1994), and from *WTO Members and Observers*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (containing the date of membership for each member) (last visited Nov. 12, 2002).

⁶² *Id.*

⁶³ See Cheek, *supra* note 19, at 294–95.

TRIPS Agreement.⁶⁴ Along with the prior existence of IPRs protection, a country's technological and economic development plays a substantial role in determining the impact of the TRIPS Agreement.⁶⁵ In large part this is due to the costs of innovation that are much higher for low income developing countries and LDCs than they are for middle income countries, which are likely to experience greater benefit from higher IPRs protection as well.⁶⁶

Generally, developing countries received far fewer preferences than LDCs in the TRIPS Agreement.⁶⁷ For example, in order to provide developing countries and LDCs with time to implement massive reforms, the TRIPS Agreement established a staggered system of accession whereby developing countries had until January 1, 2000, and LDCs have until January 1, 2006, to comply fully with the TRIPS Agreement's standards.⁶⁸ "Moreover, if under the TRIPS Agreement a developing country is required to extend product patent protection to areas of technology not yet so protectable in its territory, an *additional* transitional period of *five years* will apply to such areas of technology."⁶⁹

In the TRIPS Agreement, however, a separate regime for pharmaceutical and agricultural chemical products was established.⁷⁰ Provisions for these items in particular state that patent applications for new inventions in these two areas may be filed during the transition period for developing countries and LDCs.⁷¹ Once the period has expired, patent protection shall be extended for the remaining patent period measured from the filing date.⁷² "For many pharmaceuticals and agrochemicals this in fact means the same thing as if there were no transitional period, because the development and testing of such products also easily takes ten years."⁷³

Additional measures to support both developing countries and LDCs include Article 67 of the TRIPS Agreement, which requires industrialized countries to assist developing countries and LDCs in their

⁶⁴ *Id.* at 295; TRIPS Agreement, *supra* note 6, at arts. 65(2), 66–67.

⁶⁵ DEVELOPMENT REPORT, *supra* note 1, at 104.

⁶⁶ *Id.*

⁶⁷ Bronckers, *supra* note 24, at 1257.

⁶⁸ See Cheek, *supra* note 19, at 295; TRIPS Agreement, *supra* note 6, at arts. 65(2) & 66.

⁶⁹ Bronckers, *supra* note 24, at 1258; TRIPS Agreement, *supra* note 6, at art. 65(4).

⁷⁰ Bronckers, *supra* note 24, at 1253; TRIPS Agreement, *supra* note 6, at art. 70(8).

⁷¹ Bronckers, *supra* note 24, at 1253.

⁷² *Id.*

⁷³ *Id.*; see TRIPS Agreement, *supra* note 6, at art. 70(8).

efforts to reform their domestic IPRs regimes.⁷⁴ This includes “assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse”⁷⁵

Specifically for LDCs, Article 66(2) of the TRIPS Agreement compels developed country members to provide incentives to enterprises and institutions, for the promotion and encouragement of technology transfer to LDCs, so that they may be able to create a “sound and viable technological base.”⁷⁶ Despite these mechanisms to support developing countries and LDCs and the principles and objectives of the TRIPS Agreement, it remains unclear whether the TRIPS Agreement truly fosters the acquisition of technology for advancement by developing countries.⁷⁷

III. DEVELOPING COUNTRIES AND THE WTO FOURTH MINISTERIAL CONFERENCE

Leading up to the WTO Fourth Ministerial Conference at Doha, Qatar in November 2001, developing countries and international civil society organizations began calling actively for a trade round that would focus on the needs of, and issues faced by, developing countries.⁷⁸ Key issues that had emerged around the TRIPS Agreement included technology transfer provisions, compulsory licensing, and extensions for transition periods.⁷⁹ In light of the failed attempts to commence a negotiation round at Seattle in 2000, developed countries felt particular pressure to ensure that these talks did not break down.⁸⁰

During the special session of the TRIPS Council in September 2001, a group of developing countries submitted a proposal to the

⁷⁴ TRIPS Agreement, *supra* note 6, at art. 67.

⁷⁵ *Id.* at art. 67.

⁷⁶ *Id.* at art. 66(2).

⁷⁷ See Carlos Correa, *Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries*, at <http://www.twinside.org.sg/title/foster.htm> (last visited Nov. 17, 2002).

⁷⁸ See, e.g., Fowler, *supra* note 4, at 2–3; PES Group, *supra* note 4, at 2; Developing Country Group’s Paper, TRIPS Council, IP/C/W/296 (June 20, 2001) [hereinafter *Developing Country Paper*].

⁷⁹ See generally PES Group, *supra* note 4, at 11–12; Fowler, *supra* note 4, at 36–42; *Developing Country Paper*, *supra* note 78.

⁸⁰ See The Economist Global Agenda, *Getting Close* (Nov. 13, 2001), at http://www.economist.com/agenda/displayStory.cfm?Story_ID=862698.

Secretariat for circulation.⁸¹ This proposal sought to reaffirm certain crucial rights and responsibilities and to clarify others established under the TRIPS Agreement at the conference in Doha.⁸²

Most notable in the proposal prepared by the group of developing countries was the focus on re-balancing rights and obligations in favor of the public interest.⁸³ This included allowances for compulsory licensing without prior attempts to obtain authorization from the rights holder in cases of national emergency or extreme urgency.⁸⁴ It also called for WTO members to refrain from threatening or imposing sanctions on developing countries and LDCs when they act within the TRIPS Agreement to promote and protect public health.⁸⁵

Another important factor included in the proposal on intellectual property is contained in paragraph 13, which focuses on extending the transition period.⁸⁶ Here, developing countries sought a five-year extension to the transition period established in Article 65(4) of the TRIPS Agreement, which relates to patent protection of products not protected at the time in which the TRIPS Agreement becomes applicable for a particular member.⁸⁷ They also sought a five-year extension from the expiration of the transition period for LDCs established by Article 66(1) of the TRIPS Agreement.⁸⁸ Finally, and perhaps most importantly, they focused on reaffirming the language of the objectives and principles outlined in Articles 7 and 8 of the TRIPS Agreement.⁸⁹

By the time the group of developing countries had put forth their proposal, the reaffirmation of the contents and spirit of Articles 7 and 8 had become a key element in their negotiating stance.⁹⁰ The failure of developed countries to engage in this technology transfer and to support the technological advancement of developing countries

⁸¹ See Council for Trade-Related Aspects of Intellectual Property Rights General Council: Proposal by the African Group, Bangladesh, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela, IP/C/W/312 (Oct. 4, 2001), available at http://docsonline.wto.org/gen_search.asp [hereinafter Developing Country Proposal].

⁸² *Id.* at pmb1.

⁸³ *Id.*

⁸⁴ *Id.* at para. 4.

⁸⁵ *Id.* at para. 10.

⁸⁶ See Developing Country Proposal, *supra* note 81, at para. 13.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at pmb1.

⁹⁰ See Developing Country Paper, *supra* note 78, at paras. 4, 17–23.

spurred criticism.⁹¹ In particular, developing countries were concerned that all provisions of the TRIPS Agreements should be read in light of these objectives and principles, thereby acknowledging that “the mere existence and the exercise of IPRs, such as patents, do not necessarily result in the fulfillment of the objectives of the [TRIPS] Agreement.”⁹²

The draft Ministerial Declaration that eventually became the framework for negotiations at Doha, however, was a far cry from the proposal put forth by developing countries.⁹³ While recognizing the gravity of public health crises that many developing countries face, this draft did little more than acknowledge the provisions and the flexibility already outlined in the TRIPS Agreement.⁹⁴ Markedly, the only substantial change from this draft to that of the actual Declaration on the TRIPS Agreement and Public Health adopted at Doha on November, 13, 2001, was the inclusion of tuberculosis and malaria to accompany HIV/AIDS as examples of public health crises for which members could invoke compulsory licenses.⁹⁵

Certainly the Fourth Ministerial Conference of the WTO made progress on critical issues surrounding the TRIPS Agreement. The Director-General, Mike Moore, went as far as to say that, “the meeting at Doha will be remembered as a turning-point in the history of the WTO and the trading system and in relations between developed and developing countries within that system.”⁹⁶ Despite important strides made in reaching consensus in a multilateral trade framework, the prospects for developing countries under the TRIPS Agreement after the Fourth Ministerial Conference remain unclear.

While the Ministerial Declaration stated that the needs and interests of developing countries resided in the heart of the Work Programme it created, the language pertaining to the TRIPS Agreement remains restrictive.⁹⁷ The only substantive issue addressed with regard to the TRIPS Agreement at this conference appears to be public

⁹¹ *Id.*; Correa, *supra* note 77, at 11–12.

⁹² See Developing Country Paper, *supra* note 78, at para. 19.

⁹³ See General Council, *Draft Declaration on Intellectual Property and [Access to Medicines] [Public Health]*, at <http://www.ictsd.org/ministerial/doha/docs/IP27oct.pdf> [hereinafter *Draft Ministerial Declaration*] (last visited Nov. 12, 2002).

⁹⁴ See *id.*; see generally TRIPS Agreement.

⁹⁵ See *Draft Ministerial Declaration*, *supra* note 93; *Public Health Declaration*, *supra* note 11.

⁹⁶ Director-General Mike Moore, Address at the 14th general meeting of the Pacific Economic Cooperation Council (Nov. 28, 2001), at http://www.wto.org/english/news_e/spmm_e/spmm73_e.htm.

⁹⁷ See *Ministerial Declaration*, *supra* note 11, at paras. 17–19.

health concerns for which Members ratified a separate Declaration—appropriately called the Declaration on the TRIPS Agreement and Public Health.⁹⁸ The core of this second Declaration resides in paragraph 5, which clarifies the flexibilities that already existed in the TRIPS Agreement that allow for compulsory licenses subject to restrictions and for parallel imports subject to domestic laws.⁹⁹ In addition, paragraph 5 also reaffirms that according to the customary rules of interpretation of public international law, each provision in the TRIPS Agreement should be read in light of the Agreement's objectives and principles.¹⁰⁰ Whether or not these objectives and principles are upheld by individual Members or the organization as a whole will become apparent in the days ahead.

CONCLUSION

The proper role of IPRs in light of a globalizing economy remains contested. "The difficulty stems from divergent concepts of property and ownership Different legal principles exist from country to country, stemming from the particular social, political and ideological experiences of each."¹⁰¹ Prior to the TRIPS Agreement, IPRs protection ranged from totally open regimes that did not protect private IPRs to highly protectionist regimes in which both products and processes could be protected.¹⁰² While views both for and against extensive IPRs protection, as evidenced by the TRIPS Agreement, are strong, there is little concrete evidence that it is the only incentive for innovation or that it will lead to socio-economic and technological development.¹⁰³

Ultimately, the TRIPS Agreement is the type of global protection of IPRs that developed countries have been seeking. "However, the TRIPS Agreement simultaneously narrows the developing countries' access to technology, discouraging the rapid diffusion of new technology needed for economic growth."¹⁰⁴ Some headway was made at Doha on addressing issues faced by developing countries and LDCs in relation to the TRIPS Agreement, but the balance between creating private incentives and fostering technology transfers and development

⁹⁸ *Public Health Declaration*, *supra* note 11.

⁹⁹ *Id.* at paras. 5b, 5d.

¹⁰⁰ *Id.* at para. 5a.

¹⁰¹ Giuta & Shang, *supra* note 48, at 329–30.

¹⁰² See Cheek, *supra* note 19, at 286.

¹⁰³ See Chang, *supra* note 54, at 294–95; Braga, *supra* note 5, at 36–47.

¹⁰⁴ Su, *supra* note 3, at 171.

for the public benefit has not yet been achieved. After Doha, it is clear that the TRIPS Agreement should not prevent developing countries from addressing public health needs. There is more work to be done, however, on the issue of technology acquisition and creation by developing countries, which remains largely unsupported by the TRIPS Agreement and the recent Ministerial Declarations.