

# Anti-competitive Practices as Trade Barriers in Korean and Japanese Intellectual Property Markets

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## I . Introduction

The obligations contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>1</sup> (hereinafter, TRIPs Agreement) are somewhat different from those in the General Agreement on Tariffs and Trade (hereinafter, GATT)<sup>2</sup> and General Agreement on Trade in Service (hereinafter,

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<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instrument-Result of the Uruguay Round vol. 31, 33 I.L.M. 112 (1994).

<sup>2</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 stat. A-II T.I.A.S. 1700, 55 U.N.T.S. 194. GATT

GATS).<sup>3</sup> Out of the TRIPs Agreement's major commitments, only the national treatment and the most favored-nation treatment deal with direct obstacles to trade.<sup>4</sup> Considering intellectual property and trade, the absence of intellectual property protection is not a direct barrier to international trade.<sup>5</sup> Moreover, the terms "competitive" and "protective" between intellectual property community and GATT regime have traditionally been in contrast.<sup>6</sup>

In regard to intellectual property community, the protection of intellectual property rights has been considered anti-competitive because it could limit public access.<sup>7</sup> However, the TRIPs Agreement within the WTO system,<sup>8</sup> intended mainly to promote global competition,<sup>9</sup> treats the protection of intellectual property rights as pro-competitive.<sup>10</sup> In other words, in adopting the TRIPs Agreement,<sup>11</sup>

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1994 was incorporated into the 1994 World Trade Organization Agreement. Arts. 3, 4, 10.

<sup>3</sup> The GATT and GATS under WTO regime intend to assure non-discrimination in restraints on trade through national treatment and most-favored-nation treatment; to prevent quantitative restrictions on trade; to prevent unfair trade practices; and to preserve commitments or bindings undertaken in trade negotiations. *See* General Agreement on Trade in Service, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1B, The Result of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts 325, 33 I.L.M. 1667 (1994).

<sup>4</sup> *See* 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. 137, 140, 160 (Dec. 1994), *cited by* Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievement of the Uruguay Round: Putting TRIPs and Dispute Settlement Together*, 37 Va. J. Int'l L. 275, 279 n.6 (1997).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> For the TRIPs as the most significant movement forward the creation of specific or hard rules in the WTO/GATT system, *see* Frederick M. Abbott, *Incomplete Rules Systems, System Incompatibilities and Suboptimal Solutions: Changing the Dynamic of Dispute Settlement and Avoidance in Trade Relations Between Japan and the United States*, 16 Ariz. J. Int'l & Comp. L. 185, 199 (1999).

<sup>9</sup> *See* TRIPs Agreement, *supra* note 1, Preamble.

<sup>10</sup> For an argument that minimum intellectual property standards are a free trade issue, *see* Evans, *supra* note 4.

<sup>11</sup> For a summary of the Uruguay Round negotiations leading to the TRIPs Agreement, *see* Carlos A. Primo Braga, *Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and its Economic Implications, in* The Uruguay Round and The Developing Economics, 381, 384 (Will Martin & L. Alan Winters eds. 1995); John Croome, *Reshaping The World Trading System: A History of The Uruguay Round* 130, 251, 283 (1995); Ernest H. Preeg, *Traders in a Brave New World: The Uruguay Round and The Future of The International Trading System* (1995). *See* generally Edmond McGovern, *International Trade Regulation*, ch. 21 (Globefield Press, 1995); L. Peter Farkas, ABA Sec. Int'l L. & Prac., *Trade-Related Aspects of Intellectual Property in The World Trade Organization: The Multilateral Framework for the 21<sup>st</sup> Century and U.S. Implementing Legislation* 463 (Terence P. Stewart ed., 1996); Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPs*, 20 Hastings Int'l & Comp. L. Rev. 661, 661 (1997); J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement*, 29 Int'l Law. 345, 345 (1995); J. H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 Fordham Intell. Prop. Media & Ent. L. J. 171, 171 (1993); Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. Copyright Soc. 18, 18 (1994); Jeffrey A. Divney & Gary J. Connell, *Intellectual Property Provisions of the GATT*, 23 Colo. Law. 1069, 1069 (1994); Hans Ullrich, *TRIPs: Adequate Protection, Inadequate*

WTO members framed the role of IPRs protection within the overall WTO trade-centered strategy for economic growth.<sup>1 2</sup>

Thus, the ultimate purpose of the international regime of trade-related<sup>1 3</sup> aspects of intellectual property rights under the WTO is to promote protection of intellectual property rights and to remove trade barriers in order to secure fair opportunities for the member countries.<sup>1 4</sup> The unfair and anti-competitive practices by public or private entities in the domestic intellectual property markets,<sup>1 5</sup> as well as in commodity<sup>1 6</sup> or service<sup>1 7</sup> markets, can provide a further means of protection in addition to frontier barriers.<sup>1 8</sup> Such anti-competitive practices in the domestic markets have been regarded as important in

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*Trade, Adequate Competition Policy*, 4 Pac. Rim L. & Pol'y J. 153, 153 (1995); Michael L. Doane, *TRIPs and International Intellectual Property Protection in an Age of Advancing Technology*, 9 Am. U. J. Int'l & Pol'y 465, 465 (1994).

<sup>1 2</sup> Concerning the role of intellectual property rights protection within the overall WTO trade-centered strategy for economic growth, see Frederick M. Abbott, *The Enduring Enigma of TRIPs: A Challenge for the World Economic System - Editorial*, 1 J. Int'l Econ. L. 497, 497 (1998) (stating "... under-and over-protection of IPRs did not undermine the economic strategy and ultimate objectives of the organization. ... protection of IPRs may be an important part of the WTO's strategy for achieving world-wide economic growth, and the protection of the IPRs may itself be important ...").

<sup>1 3</sup> For the 'trade' vs 'trade-relate' relating to TRIPs, see Chantal Tomas, *Trade-Related Labor and Environment Agreement?* 5 J. Int'l Econ. L. 791, 792 (2002) (stating "... although intellectual property right can be traded in licensing and other rights-transfer agreements, neither intellectual property rights nor intellectual property need be traded for TRIPs to apply. Rather, the larger premise of TRIPs is that intellectual property rights are affected by trade ...").

<sup>1 4</sup> See TRIPs Agreement, *supra* note 1, Preamble.

<sup>1 5</sup> See James F. Rill & Mark C. Schechter, *International Antitrust and Intellectual Property Harmonization of the Interface*, 34 Law & Pol'y Int'l Bus. 783, 797 (2003) (stating "different countries have distinct antitrust approaches ... fundamentally speaking, intellectual property law and antitrust law present no major conflicts with each other, as both areas of law center on the innovation process and the expansion of economic activity.").

<sup>1 6</sup> See Eun Sup Lee, *Anti-Competitive Practices as Trade Barriers Used by Korea and Japan*, 17 Transnat'l Law. 177, 179 (2004) (discussing anti-competitive practices as trade barriers).

<sup>1 7</sup> See Eun Sup Lee, *Anti-Competitive Practices as Trade Barriers Used by Korea and Japan: Focusing in Service and Investment Markets*, 16 Bond L. Rev. 117, 118-19 (2004) (discussing anti-competitive practices as trade barriers in service/investment markets).

<sup>1 8</sup> As for the most visible and well documented instance of a cross border dispute regarding alleged restrictive business practices affecting trade, see the film dispute between the U.S. and Japan [Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg.30, 929(June 18, 1996)] cited by William H. Barringer, *Competition Policy and Cases Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute*, 6 Geo. Mason L. Rev. 459, 460 (1998).

the intellectual property markets as in commodity<sup>1 9</sup> or service<sup>2 0</sup> markets due to their competition and trade-distorting effects<sup>2 1</sup>.

Simultaneously, as for major frontier barriers to international trade among the member countries have been reduced through the multilateral negotiations under the GATT/WTO system, worldwide interest in the anti-competitive practices in domestic intellectual property markets<sup>2 2</sup> as well as in goods<sup>2 3</sup> and service<sup>2 4</sup> markets under the WTO mechanism has been increasing.<sup>2 5</sup> With relation to these practices, Korea and Japan have traditionally been targets of criticism from their trade partner countries<sup>2 6</sup> due to the lack of proper and sufficient protection of intellectual property rights in domestic markets<sup>2 7</sup> compared to their respective trade volumes and market sizes.<sup>2 8</sup>

This paper is a comparative study of the anti-competitive practices in the Korean and Japanese intellectual property markets to examine the regulation of anti-competitive practices and suggest some direction for the improvement of the regulatory policy/measures in those markets and for more efficient operation of the TRIPs Agreement. It focuses on cultural/social aspects of the two countries' anti-competitive practices which could not properly be evaluated under the current WTO framework, and suggests some proposals to improve the current WTO provision and dispute settlement mechanism.

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<sup>1 9</sup> See Lee, *supra* note 16, at 178-80.

<sup>2 0</sup> See Lee, *supra* note 17, at 119-20.

<sup>2 1</sup> See *id.* at 117.

<sup>2 2</sup> For the difficulty to ascertain the extent to which anti-competitive business practices have replaced formal barriers to trade as impediments to market access, see Barringer, *supra* note 18, at 477, cited by Lee, *supra* note 16, 179 n.6.

<sup>2 3</sup> See Lee, *supra* note 16, at 177.

<sup>2 4</sup> See Lee, *supra* note 17, at 117.

<sup>2 5</sup> As for the notable comment on the continuously emerging character of the new trade barriers, particularly, the private restraints and uncaught government restraints, see Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 Am. J. Int'l L. 1, 3-4 (1997), cited by Jason E. Kearns, *International Competition Policy and the GATS: A Proposal to Address Market Access Limitation in the Distribution Service Sector*, 22 U. Pa. J. Int'l Econ. L. 285, 285 (2001).

<sup>2 6</sup> For example, Japanese and Korean policies and practices related to market access have usually been discussed in the annual National Trade Estimate Report on Foreign Trade Barriers. This report is prepared by the United States Trade Representative to identify policies and practices of U.S. trading partners that the USTR considers inconsistent with a legal obligation or otherwise unfair to U.S. industry. Abbott, *supra* note 8, at 190.

<sup>2 7</sup> For the little protection against weak national competition laws under the WTO, see Kearns, *supra* note 25, at 293-94 (stating that an across-the board failure to enact strong competition laws is not obvious breach of any obligation).

<sup>2 8</sup> See Lee, *supra* note 17, at 118.

It analyzes the effects of competition on their trade policies,<sup>2 9</sup> considering the growing interest in anti-competitive practices, particularly in intellectual property markets, and the criticism focused around these two countries. In this study, the term "anti-competitive practices" includes the private restrictive business practices or infringement of intellectual property rights as well as the governmental regulations of such practices or infringements, which hamper the flow of trade and fair competition, and have been regarded as trade barriers.

## II. International Regulation

### A. Anti-competitive Practices as Trade Barriers

One approach to regulate unfair and anti-competitive practices as trade barriers<sup>3 0</sup> is to ameliorate the conflicts between the trade policy and the competition policy.<sup>3 1</sup> Herewith, trade barrier means any kind of entry barrier to an importing countries' domestic market which impedes the complete national

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<sup>2 9</sup> As for the recent trends of international trade institutes to concentrate on the effects of domestic competition policy on trade policy, Michael K. Young, *Lessons from the Battle Fronts: U.S.-Japan Trade Wars and Their Impact on the Multilateral Trading System*, 33 Geo. Wash. Int'l L. Rev. 753, 753, 755-56 (2001), cited by Lee, *supra* note 16, at 179.

<sup>3 0</sup> For papers on international aspects to regulate anti-competitive practices, see Lee, *supra* note 16; D. Daniel Sokol, *Express Delivery And The Postal Sector In The Context Of Public Sector Anti-Competitive Practices*, 23 Nw. J. Int'l L. & Bus. 353, 353-81 (2003) (focusing on the problem of a particular type of service and the trade barriers on this service(express delivery)); Hiroyuki Fuji, *The Kodak-Fuji Dispute: A Spectrum Of Divergent Colors And A Blueprint For A New WTO Procedure For Disputes Involving Government Toleration Of Anti-Competitive Practices*, 2 UCLA J. Int'l L. & Foreign Aff. 317, 317-42 (1997-1998) (proposing a revision of the General Agreement on Tariffs and Trade in order to establish the WTO as the new and credible champion of international dispute settlements); William H. Barringer & James P. Durling, *Out Of Focus: The Use Of Section 301 To Address Anticompetitive Practices In Foreign Markets*, 1 UCLA J. Int'l L. & Foreign Aff. 99, 99-142 (1996) (discussing particular problems in using Section 301 to target allegedly anti-competitive private company acts and offering some thoughts for a more constructive approach to the future disputes); Peter Glossop, *Anti-Competitive Practices In The South African Film Industry: Applying Apartheid-Era Competition Law In A Post-Apartheid Environment*, 17 Eur. Competition L. Rev. 40, 40-50(1996) (regarding the problem of controlling anti-competitive practices in the new South Africa); Frank J. Schweitzer, *Flash Of The Titans: A Picture Of Section 301 In The Dispute Between Kodak And Fuji And A View Toward Dismantling Anticompetitive Practices In The Japanese Distribution System*, 11 Am. U. J. Int'l L. & Pol'y 847, 847-75 (1996) (focusing on the discretionary use of Section 301 in response to Kodak's claim of denied access to the Japanese film market because of "unreasonable" acts of the Japanese Government in its "toleration" of anticompetitive trade practices by Fuji); James Kirkbride, *Anti-Competitive Practices Under the Competition Act 1980- The Real Meaning And Approach*, May 1991 J. Bus. L. 245-60( reviewing the application, under the Competition Act 1980, of this all -embracing effects-based definition).

<sup>3 1</sup> See Terence P. Stewart, *U.S.-JAPAN Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 Ariz. J. Int'l & Comp. L. 689, 736 (1999) (criticizing that the members of the GATT/WTO have accomplished much in the way of trade liberalization, however, they have not changed the relationship between trade laws and competition laws in a global economy).

treatment.<sup>3 2</sup> Anti-competitive practices in domestic intellectual property markets could also be considered as one type of trade barrier<sup>3 3</sup> as in the case of goods<sup>3 4</sup> and service<sup>3 5</sup> markets, due to such practices in domestic markets that could hamper the trade flow and impede the national treatment.

While the multilateral or plurilateral efforts<sup>3 6</sup> chronically have been made in vain<sup>3 7</sup> to create a consensus<sup>3 8</sup> on the regulation of anti-competitive business practices,<sup>3 9</sup> the issue of the anti-competitive practices<sup>4 0</sup> has been raised in recent years in WTO contexts,<sup>4 1</sup> particularly, since the

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<sup>3 2</sup> See Lee, *supra* note 16, at 178.

<sup>3 3</sup> For the difficulty to question the matters of domestic regulation on the anti-competitive practices through WTO dispute resolution mechanism, see James, D. Southwick, *Addressing Market Access Barriers in Japan through the WTO: A Survey of Typical Japan Market Access Issues and the Possibility to Address Them through WTO Dispute Resolution Procedures*, 31 Law & Pol'y Int'l Bus. 923, 925 (2000) (stating "... should not be questioned through WTO ... absent strong proof of discrimination, nullification or impairment of trade benefits, or a violation of another WTO rule); See Abbott, *supra* note 8, at 185; See Kearns, *supra* note 25, at 297 (stating " ... more troubling, ... is that the WTO panel ... lacks the competence and resources to address the problem of discriminatory enforcement of domestic competition laws ...").

<sup>3 4</sup> See Lee, *supra* note 16, at 179.

<sup>3 5</sup> See Lee, *supra* note 17, at 119-20.

<sup>3 6</sup> For the details of those efforts, see John H. Jackson, William J. Davey & Alan O. Sykes, Jr., *Legal Problems of International Economic Relations* 1090 1102 (3d ed. 1995).

<sup>3 7</sup> See Abbott, *supra* note 8, at 185 (stating that even though the WTO mechanism strengthens the GATT system to the law-based framework, there are important gaps in the WTO rule system, one of which is the absence of minimum rules on the maintenance of competitive domestic markets).

<sup>3 8</sup> For the general consensus about the importance of the interface between trade and competition policies, see Kevin C. Kennedy, *Foreign Direct Investment and Competition Policy at World Trade Organization*, 33 Geo. Wash. Int'l L. Rev. 585, 587 (2001), cited by Lee, *supra* note 16, at 183-84 (stating major factors to trigger the consensus).

<sup>3 9</sup> For the major facts about domestic competition laws to be added to the complexity of the international agreements on competition policy, see Kearns, *supra* note 25, at 288-90, cited by Lee, *supra* note 17, at 120.

<sup>4 0</sup> For the discussed hierarchical status of the WTO Agreement on competition designed to deal with market access problems caused by anti-competitive practices, see Hindly, *Competition Law and the WTO: Alternative Structures for Agreement on Fair Trade and Harmonization: Prerequisite for Free Trade*, cited by Jean-François Bellis, *Anti-competitive Practices and the WTO: The Elusive Search for New World Trade Rules*, in *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, 365-66 (Marco Bronckers & Reinhard Quick eds., 2000), cited by Lee, *supra* note 16, at 181 n.18 (stating "... it has been suggested that a WTO Agreement on Competition could be limited to a Ministerial Declaration to facilitate the application of Article XIII ...").

<sup>4 1</sup> TRIPs Agreement speaks directly to the issue of restrictive business practices: "i) Article 9 directs the Council ... to consider ... provisions on ... competition policy; ii) Articles 8, 31 and 40 address ... anticompetitive practices in licensing agreements, the abuse of intellectual property right, and restrictions on compulsory licensing." Kennedy, *supra* note 38, at 602-03. The TRIPs Agreement, however, has been evaluated to do little to resolve issues of the intellectual property/antitrust interface. See Rill & Schechter, *supra* note 15, at 789-90. Besides, WTO dispute resolution mechanism has been established to provide a WTO-sanctioned basis for challenging national laws that are designed ostensibly to prevent anticompetitive abuses of intellectual property but that actually unjustifiably impede the legitimate exercise of intellectual property rights. See TRIPs Agreement, *supra* note 1, arts. 63-64, cited by *id.* at 790. Nevertheless, there does not appear to have been any dispute resolution proceeding to date involving the intersection of intellectual property and competition. *Id.* at 790-91.

Doha Ministerial Declaration following the Singapore Ministerial Conference<sup>4 2</sup> contained a provision for negotiations concerning trade-related competition subjects.<sup>4 3</sup>

Besides the international attempts to deal with this matter, many developed countries have regulated various kinds of anti-competitive practices through the expansion and application of the concept of "fair trade" provided in international or individual domestic trade laws,<sup>4 4</sup> as in the commodity<sup>4 5</sup> and service/investment<sup>4 6</sup> markets. For example, anti-competitive or unfair practices in intellectual property markets under Special 301 of the Trade Act of 1974<sup>4 7</sup> would include the government's acts, practices or policies to deny "adequate and effective protection of intellectual property rights", or to deny "fair and equitable market access to United States persons who rely upon intellectual property protections".<sup>4 8</sup> The concept of reasonable or fair practices, which exceeds the scope of the tariff or non-tariff barriers at the borders, has become the widely and strictly accepted basis of securing fair competition in the foreign market.<sup>4 9</sup>

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<sup>4 2</sup> A Ministerial Conference in Singapore in 1996 agreed to study issues relating to the interaction between trade and competition policy. WTO/Singapore Ministerial 1996-Ministrial Declaration, *available at* <http://www.wto.org/english/thewto-e/minist-e/min96-e/wtodoc.e.htm> (lasted visited Jan. 13, 2006).

<sup>4 3</sup> The Working Group on the Interaction Between Trade and Competition has focused into effects on "hardcore" cartels transparency, nondiscrimination, procedural fairness and modalities for voluntary cooperation. WTO Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01) /DEC/1, 23-25 (2001), *available at* <http://www.wto.org/english/thewto-e/minist-e/min01-e/mindecl-e.%20pdf> (last visited Jan. 15, 2006), *cited by* Rill & Schechter, *supra* note 15, at 791.

<sup>4 4</sup> Besides, the developed countries have tried to regulate those practices with the extraterritorial application of their domestic laws or positive comity. For the cases relating to extraterritorial enforcement of the U.S. Antitrust Laws, *see* Jackson, et al., *supra* note 36 at 1078-89 *cited by* Lee, *supra* note 17, at 122 n.23; Merit E. Janow, *Public, Private, and Hybrid Public/Private Restraints of Trade: What Role for the WTO?*, 31 Law & Pol'y Int'l Bus. 977, 978-79 (2000), *cited by* Lee, *id.* For the positive comity as an important development to substitute the extraterritorial application of the domestic anti-trust law, *see* Janow, *id.* at 979, *cited by* Lee, *id.* n.24.

<sup>4 5</sup> *See* Lee, *supra* note 16, at 179-80.

<sup>4 6</sup> *See* Lee, *supra* note 17, at 119-20.

<sup>4 7</sup> Special 301(19 U.S.C.A. §2411(d)) requires the USTR to name as "priority foreign countries" those countries: "... ) ... not ... provide adequate and effective protection of intellectual property rights." *cited by* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, Jr., *International Business Transactions*, 857 (2002). Under a special 301 violation, the USTR is directed to identify those foreign countries, *see* Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPs" Over Special 301*, 7 Minn. J. Global Trade 179, 195 (1998), and once a country is identified under a special 301 violation, a super 301 measure is initiated. *See id.* at 184. Hence, whether employing a regular, special, or super 301 measure, the USTR has the weapons needed to properly fight intellectual property theft. Richard J. Ansson, Jr., *International Intellectual Property Rights, The United States, and the People's Republic of China*, 13 Temp. Int'l & Comp. L. J. 1, 10 (1999).

<sup>4 8</sup> *See* Folsom, et al., *supra* note 47; For the details of these and other petitions, *see* the USTR website, *at* <http://www.ustr.gov> (last visited Jan. 15, 2006) (stating "by way of example, ... the Section 301 action ... against Brazil in 1987 was in response to a petition brought by the Pharmaceutical Manufacturers Association (PMA). The PMA also filed a petition in 1988 against Argentina on the issue of patent protection ...").

<sup>4 9</sup> For the possible options for solving cases involving such anti-competitive practices, for example, in the United States, *see* Peter E. Ehrenhaft & Asil Holdo, *Corporate Counsel Committee Briefing on International*

## B. TRIPs Agreement

### 1. General Regulations

While there have been many elaborate systems of international institutions<sup>5 0</sup> and rules<sup>5 1</sup> to internationally regulate the intellectual property and associated rights thus far,<sup>5 2</sup> the TRIPs component of the WTO Agreement<sup>5 3</sup> represented a revolution in international property law.<sup>5 4</sup> TRIPs Agreement

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*Antitrust and U.S.-Japan Relations*, The American Society of International Law Newsletter, Sept. 1995, (file-Lexis), cited by Lee, *supra* note 16, at 184 n.46 (stating "... ) ... Section 301; ) ... anti-trust action in the ... court ... ; ) ... procedures under WTO; or ) urge 'positive comity' ...").

<sup>5 0</sup> There are International institutions involved in IPRs-related work: Intellectual Property Organization(WIPO), World Bank, Food and Agriculture Organization(FAO), International Telecommunications Union(ITU), United Nations Conference on Trade and Development(UNCTAD), United Nations Development Program(UNDP), United Nations Environment Program(UNEP), and World Health Organization(WHO); limited membership or regional organizations are organization for Economic Co-operation and Development(OECD), European Patent Office(EPO), African Regional Industrial Property Organization(ARIPO), Andean Pact, APEC, European Union, Mercosur and NAFTA. See Abbott, *supra* note 12, at 498-99.

<sup>5 1</sup> Even though each of these rules has covered different types of intellectual property rights and have varied in terms of their objectives, the "ultimate goal has been movement towards internationally recognized and enforceable intellectual property rights". Pechman, *supra* note 47, at 180-81, cited by Evelyn Su, *The Winners and the Losers: The Agreement on Trade-related Aspects of Intellectual Property Rights and It's Effects on Developing Countries*, 23 Hous. J. Int'l L. 169, 178 (2000).

<sup>5 2</sup> For a discussion on the benefits and criticisms of the international lawmaking for the protection of intellectual property rights, see Peter K. Yu, *World Trade Intellectual Property and the Global Elites: International Lawmaking in the New Millennium: An Introduction*, 10 Cardozo J. Int'l & Comp. L. 1, Symposium, 1-4 (2002).

<sup>5 3</sup> There have been the serious debates on the issues in relation with this component: ) whether the GATT has competence in the full range of issues addressed by TRIPs. Eileen Hill, *U.S. Addresses Contentious Issues in Negotiation on Trade-Related Aspects of Intellectual Property Rights*, Business America, Nov. 19, 1990, at 18, cited by Su, *supra* note 51, at 202 n.189; ii) whether the WTO should have jurisdiction over intellectual property instead of WIPO. Pechman, *supra* note 47, at 183-84, cited by Su, *supra* note 51, at 202 n.189; iii) the TRIPs Agreement exceeds the purpose of GATT. Doane, *supra* note 11, at 465, 472-73, cited by Su, *supra* note 51, at 202 n.189; iv) developed countries prevent new technology from being transferred to the developing countries by the intellectual property protections. Carlos A. Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View From the South*, 22 Vand. J. Transnat'l L. 243, 252 (1989), cited by Su, *supra* note 51, at 202 n.189.

<sup>5 4</sup> See J.H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 Case W. Res. J. Int'l L. 441, 442 (2000) (stating "... it built on the Paris and Berne convention ... TRIPs went well beyond the original anti-copying objective of the drafters ...").



introduced a brand new era<sup>5 5</sup> that extends the global reach of IP regulation<sup>5 6</sup> based on the concepts of protection and exclusion rather than dissemination and competition.<sup>5 7</sup>

Unlike the earlier conventions, TRIPs does not merely circumscribe the range of acceptable policies governments may practice,<sup>5 8</sup> but obliges a government to take positive action to protect intellectual property rights.<sup>5 9</sup> The international standards of intellectual property protection set out in the TRIPs Agreement to determine the level of competition for knowledge goods that are sold or licensed on the global market that emerged from the WTO Agreement.<sup>6 0</sup>

For the purpose of the TRIPs Agreement, the term "intellectual property"<sup>6 1</sup> being defined as a set of the intangible products of human activity<sup>6 2</sup> refers to all categories<sup>6 3</sup> of intellectual property<sup>6 4</sup>

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<sup>5 5</sup> The earlier GATT 1947 [art. XX(d), now art. XX (d) of GATT1994] specially referred to intellectual property rights, permitting measures which would otherwise be inconsistent with the General Agreement to be taken to secure compliance with laws or regulation resulting, inter alia, to intellectual property rights.

<sup>5 6</sup> For the two main reasons to promote governments to enter the international agreements on the TRIPs, see Su, *supra* note 51, at 173.

<sup>5 7</sup> For the three major problematic areas in respect to the balanced approach to intellectual property protection for facilitating innovation, assuring wide dissemination of advances, and allowing countries to continue their individual development, see Howard C. Anawalt, *International Intellectual Property, Progress, and the Rule of Law*, 19 Santa Clara Computer & High Tech. L. J. 383, at 392-400 (2003). See also United Nations Development Programme, Human Development Report 2001: Making New Technologies Work For Human Development, 102 (Oxford University Press 2001) at <http://hdr.undp.org/reports/global/2001/en/pdf/completenew.pdf> (last visited Jan. 19, 2006).

<sup>5 8</sup> See Anawalt, *supra* note 57, at 387.

<sup>5 9</sup> Bernard Hoekman & Michel Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* 156 (Oxford University Press 1995), cited by Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPs, and Post-TRIPs Strategies*, 10 Cardozo J. Int'l & Comp. L. 79, 79 (2002).

<sup>6 0</sup> Reichman, *supra* note 54, at 442.

<sup>6 1</sup> This intellectual property, in general, divides into two main branches: one branch protects the variety of inventive works through doctrines such as patents and copyrights; the other protects the identification of goods and the "goodwill" value associated with that identification or branding. See Howard C. Anawalt & Elizabeth Enayati Powers, *IP Strategy-Complete Intellectual Property Planning, Access, and Protection* 1-3 (West Group 2001).

<sup>6 2</sup> See Gabriel Garcia, *Economic Development and the Course of Intellectual Property Protection in Mexico*, 27 Tex. Int'l L. J. 701, 707 (1992), cited by Su, *supra* note 51, at 172; Folsom et al., *supra* note 47, at 758-66, cited by Su, *supra* note 51, at 173; Abbott, *supra* note 12, at 500. It is defined also: "In the sense in which intellectual property is relevant to the process of economic development, it refers to legal claims to knowledge, information and creative expression." Abbott, *supra* note 12.

<sup>6 3</sup> Besides these 7 categories indicated herewith, a subject-matter category mentioned in Part II of the TRIPs Agreement (but not included within the definition of "intellectual property") is entitled "Control of Anti-Competitive Practices in Contractual Licenses." See TRIPs Agreement, *supra* note 1, art. 40, cited by J.H. Reichman, *Compliance with the TRIPs Agreement: Introduction to a Scholarly Debate*, 29 Vand. J. Transnat'l L. 363, 366 n.12 (1996)

<sup>6 4</sup> For the serious criticism about the TRIPs Agreement in regard to the term "intellectual property" referred in TRIPs Agreement, see Scott Holwick, *Developing Nations and the Agreement on Trade-related Aspects of Intellectual Property Rights*, 1999 Colo. J. Int'l Envtl. L. & Pol'y 49, 49 ("while the TRIPs Agreement was initially conceived to protect product counterfeiting and industrial theft, the language of the Agreement ... threatens each

including copyrights and related rights, trademarks,<sup>6 5</sup> geographical indications,<sup>6 6</sup> industrial designs, patents,<sup>6 7</sup> layout-designs of integrated circuits<sup>6 8</sup> and protection of undisclosed information.<sup>6 9</sup>

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member nation's sovereignty and also undermines the cultural fabric of their respective societies. This is due... to the entirely western definition of intellectual property ... which recognizes only private and not communal rights, and recognizes knowledge and innovation only on the basis of generating profit and not of meeting social needs. ... The split over this issue has often been characterized as arrogant, cash-rich, resource-poor northern nations attempting to solidify their economic position at the expense of native cash-poor, resource rich southern nations.").

<sup>6 5</sup> For the definition of trademark for the purpose of the TRIPs Agreement, see TRIPs Agreement *supra* note 1, art. 15(1). For papers on Trade marks, see Philippe Zylberg, *Geographical Indications V. Trademarks: The Lisbon Agreement: A Violation of TRIPs?*, 11 U. Balt. Intell. Prop. L. J. 1, 1-69 (2002-2003) (dealing with the issue of conflicting trademarks and geographical indication to recommend adopting Article 14 of E.U. Regulation 2081/92 as an alternative to Article 24(5)'s mechanism of resolving conflicting trademarks and geographical indications); Amir H. Houry, *Well-Known And Famous Trademarks In Israel: TRIPs From Manhattan To The Dawn Of A New Millennium!*, 12 Fordham Intell. Prop. Media & Ent. L.J. 991, 991-1039 (2002) (examining the rise of well-known and famous marks in the Israeli legal system); Joanna Schmidt-Szalewski, *The International Protection Of Trademarks After The TRIPs Agreement*, 9 Duke J. Comp. & Int'l L. 189, 189-212 (1998) (examining the new rules of trademark protection under TRIPS and compares them with existing Paris Convention rules); Paul J. Heald, *Trademarks And Geographical Indication: Exploring The Contours Of The Trips Agreement*, 29 Vand. J. Transnat'l L. 635, 635-60 (1996) (examining TRIPS' substantive trademark provisions); Eleanor K. Meltzer, *TRIPs And Trademarks, or GATT Got Your Tongue?*, 83 Trademark Rep. 18, 18-37 (1993) (focusing on the TRIPs requirements proposed in the area of trademarks, marks of geographical origin, and industrial designs).

<sup>6 6</sup> For the definition of geographical indications for the purpose of the TRIPs Agreement, see TRIPs Agreement, *supra* note 1, art. 22(1). For the geographical indications as the agricultural nature, see Paris Convention, *infra* note 100, art. 1(3), cited by Jacqueline Nanci Land, *Global Intellectual Property Protection as Viewed Through the European Community's Treatment of Geographical Indications: What Lessons Can TRIPs Learn?* 11 Cardozo J. Int'l & Comp. L. 1007, 1010 n.19 (2004).

<sup>6 7</sup> For the definition of patents for the purpose of the TRIPs Agreement, see TRIPs Agreement, *supra* note 1, art. 27(1). For papers on patents, see N.S. Gopalakrishnan, *Trips And Protection Of Traditional Knowledge Of Genetic Resources: New Challenges To The Patents System*, 27 Eur. Intell. Prop. Rev. 11, 14 18(Jan. 2005) (examining the Agreement on TRIPs Art. 27(3)(b) and the arguments of developing countries for express provisions on the disclosure of information on traditional knowledge in the patent specification); Bryan C. Mercurio, *Trips, Patents, And Access To Life-Saving Drugs In The Developing World*, 8 Marq. Intell. Prop. L. Rev. 211, 211-53 (2004) (analyzing the agreement implementing Paragraph 6 of the Doha Declaration); Rishi Gupta, *Trips Compliance: Dealing With The Consequences Of Drug Patents In India*, 26 Hous. J. Int'l L. 599, 599-648 (2004) (examining the policy choices of India in granting pharmaceutical product patents); Ellen't Hoen, *Trips, Pharmaceutical Patents, And Access To Essential Medicines: A Long Way From Seattle To Doha*, 3 Chi. J. Int'l L. 27, 27-46 (2002) (reviewing Doha Declaration in relation with the sovereign right of governments to take measures to protect public health); J. Benjamin Bai, *Protecting Plant Varieties Under Trips And Nafta: Should Utility Patents Be Available For Plants?*, 32 Tex. Int'l L.J. 139, 139-54 (1997) (comparing *sui generis* system in Europe with the plant protection available in the United States and proposing a more desirable compromise than TRIPs and *sui generis*).

<sup>6 8</sup> For the scope of protection in layout-design, see TRIPs Agreement, *supra* note 1, art. 36. For the definitions of integrated circuits and lay-out design (topography), see Article 2 of the Treaty on Intellectual Property in Respect of Integrated Circuits of 1989. [providing "integrated circuits means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, ... Layout-design (topography) means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, ..."], cited by Elina Mangassarian, *Technological Trends and the Changing Face of International Intellectual Property Law*, 11-SPG Int'l Legal Persp. 125, 132 n.17 (2001). For general aspects of layout-design, see Carlos M. Correa, *Legal Protection Of The Layout Designs Of Integrated Circuits: The WIPO Treaty*, 12 Eur. Intell. Prop. Rev. 196, 196-203 (July 1990) (regarding a Treaty on Intellectual Property in respect of integrated circuits).

<sup>6 9</sup> For the characteristics of undisclosed information as the intellectual property rights, see Carlos Maria Correa, *Public Health and International Laws: Unfair Competition under the TRIPs Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals*, 3 Chi. J. Int'l L. 69, 82 (2002) (stating "under the discipline of unfair competition, ... , protection is not based on the existence of property rights. Hence, the provision of protection under such a discipline does not give rise to claims of property rights, with respect to trade secrets and data ... There

Before the Uruguay Round,<sup>7 0</sup> there was not any specific agreement relating to intellectual property rights<sup>7 1</sup> under the GATT framework.<sup>7 2</sup> However, the principles contained in the GATT relating to measures affecting importation or exportation of goods and to the treatment of imported goods could apply, inter alia, to measures taken in connection with intellectual property rights,<sup>7 3</sup> to the extent that they fell within their scope.<sup>7 4</sup> A salient feature of TRIPs<sup>7 5</sup> is that comprehensive intellectual property right obligations are linked to membership in the worldwide trade system.<sup>7 6</sup> TRIPs is a part of more general movement to standardize both the substance and procedure of intellectual property rights on a worldwide basis.<sup>7 7</sup>

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is only possession of this information, which is not treated as property under the TRIPs Agreement. The TRIPs Agreement itself, ... , refers to undisclosed information under control of a person, in clear contrast to the concept used in the sections relating to other categories ... , such as trademarks or patents.").

<sup>7 0</sup> For the development of the TRIPs proposal under the GATT mechanism, see Doane, *supra* note 11, at 470-77.

<sup>7 1</sup> For the disputes in relation with the inclusion of the intellectual property right to the GATT between the developed countries and the developing countries, see 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, 695-96, 718 (1989).

<sup>7 2</sup> The GATT earlier addressed the issue of protection for intellectual property rights in 1979, when the member nations, however, rejected the Anti-Counterfeit Code which would have addressed trademark counterfeiting. Frank Romano, *Global Trademark and Copyright 1998: Protecting Intellectual Property Rights in the International Marketplace*, in *International Conventions and Treaties*, 562 (Practising Law Institute 1998), cited by Su, *supra* note 51, at 185.

<sup>7 3</sup> For the uneasy contrast between the vocabulary of intellectual property and the vocabulary of the GATT/WTO concerning, for example, "competitive" and "protective", see Dreyfuss & Lowenfeld, *supra* note 4, at 280-81 (stating "... They(intellectual property rights) are ... considered anti-competitive. The TRIPs ... treats(them) ... as pro-competitive ... . The GATT disfavors protectionism - a word the intellectual property community has long used to describe ... the copyright ... and trade secrets ... Intellectual property regimes were initially to be integrated by the WIPO. The Uruguay Round succeeded where WIPO failed ... . One of the reasons ... was that the architects of the TRIPs Agreement used words - and a concept of minimum standards - that allowed each state to read into the Agreement that it wished to see ... . Success will depend on how will the GATT/WTO system addresses the difference between intellectual property and often trade matters.").

<sup>7 4</sup> For the difficulty to apply the GATT principles to trade-related intellectual property rights, see Michael A. Ugolini, *Gray-Market Goods under the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 12 Transnat'l Law. 451, 454 (1999) (stating "in the evolution of international intellectual property, the first hurdle to protection was a failure to observe the rule of national treatment that has been carried over into the TRIPs Agreement... . Another hurdle to protection was to fail to observe the most-favored-nation rule that was incorporated into the TRIPs Agreement.").

<sup>7 5</sup> For one of the debates between the developed countries and developing countries, which are partial backgrounds of the TRIPs to be termed "salient", see Frederick M. Abbott, *TRIPs in Seattle: The Not-So Surprising Failure and the Future of the TRIPs Agenda*, 18 Berkeley J. Int'l L. 165, 170 (2000).

<sup>7 6</sup> Anawalt, *supra* note 57, at 387.

<sup>7 7</sup> For the limits of a trade-based approach to intellectual property under the WTO, see Emery Simon, *The Integration of Intellectual Property and Trade Policy*, Address at ALAI Conference, Geneva (June 27-28, 1994), cited by Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPs?* 15 Cardozo Arts & Ent. L. J. 281, 306-07 (1997) (stating

The TRIPs Agreement,<sup>7 8</sup> the most ambitious international intellectual property convention ever attempted,<sup>7 9</sup> does not specify how members are to implement the provisions in their individual countries<sup>8 0</sup>, but sets out a comprehensive set of relatively high international minimum standards of protection<sup>8 1</sup> to be provided in relation to the rights and even indirectly unfair competition by each member.<sup>8 2</sup>

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"... Focusing on the most visible issue not resolved by the TRIPs, the failure of the WTO agreement to guarantee true national treatment to copyright holders is quickly becoming an excuse for discrimination and exploitation.").

<sup>7 8</sup> For the comment on the TRIPs Agreement which was the most important and the most controversial agreement in the 20th century, see Peter Drahos & John Braithwaite, *Proceedings of the 2002 Conference Access to Medicines in the Developing World: International Facilitation or Hindrance? : Panel #1: The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in Context: Economics, Politics, Law and Health: Intellectual Property, Corporate Strategy, Globalization: TRIPs in Context*, 20 Wis. Int'l L. J. 451, 451 (2002) (commenting " ) It was the product of duress by powerful states against weak states. ) It is part of a hand bargain in which developing states received very few reciprocal gains. iii) There is the criticism on the adverse consequences for developing countries of implementing the agreement.").

<sup>7 9</sup> See Ministerial Declaration of Punta del Este Sept. 20. 1986, GATT Doc. Min. Dec. No. 86-1572, cited by Reichman, *supra* note 63, at 366.

<sup>8 0</sup> The TRIPs Agreement states that members are free to determine the appropriate method of implementing its provisions [TRIPs Agreement, *supra* note 1, art.1, 3(1)], though the context of the treaty and the economic force of the trade system combine to force member nations to be thorough in implementing these obligations (Anwalt, *supra* note 57, at 388). Partly due to this reason, deference to local law in the WTO dispute settlement procedures regarding TRIPs disputes has become a cardinal principle of the interpretative jurisprudence. See Reichman, *supra* note 54, at 446-47 (Stating "First, Article 1(1) of the TRIPs Agreement allows states... Second, dispute settlement process cannot add or diminish the rights and obligations... Finally, members are not obliged to implement more extensive protection than that to which they have expressly agreed ...").

<sup>8 1</sup> For the general view that TRIPs provides minimum standards of protection, see Reichman, *supra* note 54, at 443; Unilever NV v. Instituto Nacional de la Propiedad Industrial, IX J.M.P.M.I 179 (1998); Mag Instrument Inc. v. Instituto Nacional de la Propiedad Industrial, XIII J.M.P.M.I 121 (1998); see also Pablo Challu & Mirta Levis, Adecuacion de la ley Argentina de Patentes al GATT 23 (1996); Carlos M. Correa & Salvador D. Bergel, Patents y Competencia 147 (1996); Peter Kolker, GATT-ADPIC y la industria farmaceutica, D. Intel. 13 (1996); Daniel R. Zuccherino & Carlos O. Mitelman, Marcas y Patents en el GATT 51 (1997); Felix Rozanski, Nueva legislacion Argentina de patentes de invencion, D. Intel. 123 (1996), cited by Silvia Fabiana Faerman, *Argentina: The New Patent Law and the Agreement on Trade Related Aspects of Intellectual Property Rights*, 8 Sw. J. L. & Trade Am. 157, 169 n.55 (2001/2002). For the reason to adopt the international minimum standards in TRIPs, see Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 Vand. J. Transnat'l L. 735, 757 (1996) (stating "... the reason ... was the problems which arose if one attempts to import intellectual property laws from a developed country to an underdeveloped country. Developing countries ... are unable to immediately align their current intellectual property laws with developed countries' intellectual property law ..."). For the distinctive characteristics of the TRIPs in relation with the minimum standards, see Dreyfuss & Lowenfeld, *supra* note 4, at 279 (stating "of the TRIPs Agreement's three core commitments-national treatment, most-favored-nation treatment, and minimum standards-only the first two are obligations derived from pre-Uruguay Round versions ... In contrast to the traditional GATT provisions, the minimum standards propounded by the TRIPs Agreement are based on the Berne and Paris Conventions, ..."). For the controversiality of the minimum standards in WTO system, see Dreyfuss & Lowenfeld, *supra* note 4, at 281 (stating "... neither the DSU, nor the TRIPs ... provide guidance on how minimum standards ... rather than actual or optimal standards will work in conjunction with an adjudicatory dispute resolution system ...") .

<sup>8 2</sup> See TRIPs Agreement *supra* note 1, at 2(1). (incorporated by reference the Paris Convention, art. 10 bis), cited by Reichman, *supra* note 63, at 366-67.

TRIPs established broad categories<sup>8 3</sup> of obligatory protection for intellectual property with the creation of specific obligations,<sup>8 4</sup> sometimes in excruciating detail.<sup>8 5</sup> The agreement sets these standards by requiring the substantive obligations of the main conventions of the World Intellectual Property Organization (WIPO),<sup>8 6</sup> the Paris Convention<sup>8 7</sup> and the Berne Convention<sup>8 8</sup> to be complied with, adding a substantial number of additional obligations<sup>8 9</sup> on matters where the pre-existing conventions are silent or were seen as being inadequate,<sup>9 0</sup> which makes it a "Berne<sup>9 1</sup> and Paris<sup>9 2</sup>-plus Agreement."<sup>9 3</sup>

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<sup>8 3</sup> The breadth of subject matters comprising the "intellectual property" to which minimum standards apply is unprecedented, as is the obligation of all WTO member states to guarantee that detailed enforcement procedures as specified in the TRIPs Agreement are available under their national laws. Reichman, *supra* note 63.

<sup>8 4</sup> For the decentralized and centralized approaches of the TRIPs to be adopted, see Jonathan T. Fried, *Two Paradigms for the Rules of International Trade Law*, 20 Can.-U.S.L.J.39, 39 (1994) (contrasting decentralized model which rely on the judicial systems of member states, with centralized model which relies increasingly on a new, supra-national enforcement structure); Adrian Otten & Hannu Wager, *Compliance with TRIPs: The Emerging World View*, 29 Vand. J. Transnat'l L. 391, 409-11 (1996) (stressing Council for TRIPs' role in monitoring implementation and compliance as a defining characteristics of the trade-based approach); Reichman, *supra* note 11, at 384-85, (stressing role of periodic reviews by Council for TRIPs as substituting for unilateral policy review by trade ministries of developed countries).

<sup>8 5</sup> This switch from general to specific is seen by comparing the overarching requirement under TRIPs that member nations provide basic protections of copyrights, patents and other forms of intellectual property with the specific protection prescribed for computer software. Anawalt, *supra* note 57, at 388.

<sup>8 6</sup> For the WIPO's role in producing TRIPs, see Dreyfuss & Lowenfeld, *supra* note 4, 294 n.48 (1997); Frederick M. Abbott, *The New Global Technology Regime: The WTO TRIPs Agreement and Global Economic Development*, 72 Chi.-Kent. L. Rev. 385, 385-86 (1996).

<sup>8 7</sup> The TRIPs adopts a patent law minimum well above the previous standards of the Paris Convention, extending both subject matter covered and term of protection. See Sell, *supra* note 59, at 80.

<sup>8 8</sup> The TRIPs adds additional copyright protection, incorporating the Berne Convention for copyright norms. *Id.*

<sup>8 9</sup> The agreement adds more specific standards protecting computer programs, databases, sound recordings, and pharmaceutical and agricultural chemical companies. Otten & Wager, *supra* note 84, at 391, 397.

<sup>9 0</sup> Seeking to provide great intellectual property protection, reduce barriers to trade and provide more effective enforcement and dispute settlement procedures (see TRIPs Agreement *supra* note 1, Preamble), TRIPs was a direct response to this need to fill the gaps previous treaties left. See *id.* (a), *cited by* Land, *supra* note 66, at 1010.

<sup>9 1</sup> Sept. 9. 1886, 828 U.N.T.S. 221 revised by multilateral copyright 25 U.S.T. 1341, July 14, 1971, Berne Convention, available at <http://wipo.org> (last visited December 27, 2005). For papers on Berne Convention, see Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights after Dastar*, 61 N.Y.U. Ann. Surv. Am. L. 111, 111-50 (2005) (reviewing the Daster decision in relation with Berne Convention); Edward J. Ellis, *National Treatment Under the Berne Convention and the Doctrine of Forum Non Conveniens*, 36 J. L. & Tech. 327, 327-29 (1996), (addressing the recent conflict over the role of the doctrine of forum non conveniens); William Belanger, *U.S. Compliance With The Berne Convention*, 3 Geo. Mason Indep. L. Rev. 373, 373-402 (1995) (reviewing the U.S. compliance with the Berne Convention); Ancel W. Lewis, Jr. Bruce E. Hayden & Sandeep Seth, *Recent Developments in Copyright Law: The Berne Convention*, 22 Colo. L. 2525, 2525-27 (1993) (analyzing the effect of the change to copyright law ushered in by the Berne Convention on the attorney's business); Brad Swenson, *Intellectual Property Protection Through The Berne Convention: A Matter Of Economic Survival For The Post-Soviet New Commonwealth Of Independent States*, 21 Denv. J. Int'l L. & Pol'y 77, 77-102 (1992) (examining the development of the Soviet copyright law and discussing the new Commonwealth of Independent states' necessary

The spirit of the TRIPs Agreement relies on the argument that increased technological capacity<sup>9 4</sup> fosters development.<sup>9 5</sup> To this end, the TRIPs Agreement codified the rights and obligations of members in light of a desired balance<sup>9 6</sup> between the protection<sup>9 7</sup> of private intellectual property rights

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adherence to the Berne Convention); Lee D. Neumann, *The Berne Convention And Droit De Suite Legislation In The United States: Domestic And International Consequences Of Federal Incorporation Of State Law For Treaty Implementation*, 16 Colum.-VLA J.L. & Arts 157, 157-83 (1992) (analyzing the incorporation of state droit de suite legislation into U.S. law giving effect to Berne); Christine L. Chinni, *Droit D'auteur Versus The Economics Of Copyright: Implications For American Law Of Accession To The Berne Convention*, 14 W. New Eng. L. Rev. 145, 145-74 (1992) (contrasting the treatment of authors' moral rights in the United States with the approaches taken in France and by the Berne Convention); Corien Prins, *Emile Zola Receives An Answer: The Soviet Union Is To Join The Berne Convention*, 13 Eur. Intell. Prop. Rev. 238, 238-47 (July 1991) (discussing some of the most important changes in Soviet copyright practice that came about with the advent of perestroika); Scott M. Martin, *The Berne Convention And The U.S. Compulsory License For Jukeboxes: Why The Song Could Not Remain The Same*, 37 J. Copyright Soc'y U.S.A. 262, 262-329 (1990) (examining the nature of the conflict between present U.S. law and the Berne Convention).

<sup>9 2</sup> Mar. 20, 1883, 828 U.N.T.S. 305 revised by 21 U.S.T. 1583 July 14, 1967, Paris convention, available at <http://www.wipo.int/clea/docs/en/wo/wo020en/html> (last visited Jan. 7, 2006). The Convention concerns only: "patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition" *id.* art. 1(2). The convention applies particularly to the subject of geographical indications due to its recognition of agricultural and extractive products as a part of protected industrial property. *See* Land, *supra* note 66, at 1009-10 (2004). For papers on Paris Convention, *see* Gustavo Bravo, *From Paris Convention To Trips: A Brief History*, 12 J. Contemp. Legal Issues 445, 445-49 (2001) (assessing the various international treaties and multilateral agreements from the treaty's ability to provide trade marks protection); Donald G. Daus, *Paris Convention Priority*, 77 J. Pat. & Trademark Off. Soc'y 138, 138-50 (1995) (regarding the development and application of Gosteli); Hans Peter Kunz-Hallstein, *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, 22 Vand. J. Transnat'l L. 265, 265-84 (1989).

<sup>9 3</sup> *See* Michael J. O'Sullivan, *International Copyright: Protection for Copyright Holders in the Internet Age*, 13 N.Y. Int'l L. Rev. 1, 3 (2000), *cited by* Su, *supra* note 51, at 186 (stating that the TRIPs Agreement is not considered a new concept in international law, rather it supplements the existing international agreements governing the protection of intellectual property rights on a global scale).

<sup>9 4</sup> For the fundamental logic of the TRIPs to stimulate the innovation, *see* H. E. Bale, Jr., *The Conflicts Between Parallel Trade and Product Access and Innovation: The Case of Pharmaceuticals*, *cited by* Abbot, *supra* note 12, n.53 (stating "... the fundamental logic ... to make intellectual property part of the WTO ... is ... : to stimulate the innovation..."). For the criticism against the TRIPs, however, in relation with not coping with the issue of new technology, *see* Reichman, *supra* note 56, at 457-58 (stating "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..., There is still no consensus concerning such basic patent issues as the subject matter of protection; the novelty and non-obviousness standards of eligibility; the scope of the exclusive rights; or the exceptions that all states should be allowed to make. Even in copyright law... , no consensus has been reached...").

<sup>9 5</sup> *See* TRIPs Agreement, *supra* note 1, arts. 7, 8, *cited by* L. Danielle Tully, *Prospects for Progress: The TRIPs Agreement and Developing Countries After the DOHA Conference*, 26 B.C. Int'l & Comp. L. Rev. 129, 134 (2003).

<sup>9 6</sup> For the function of patent system in inventing and manufacturing, for example, in the United States, *see* Edwin J. Pringle, *The Marvellous Performance of the American Patent System*, 10 J. Pat. Off. Soc. 255, 258 (1927-1928), *cited by* Drahos & Braithwaite, *supra* note 96, at 456. (stating "our Patent

on the one hand and socio-economic and technological development.<sup>9 8</sup> The trade-related goals of the agreement<sup>9 9</sup> include the reducing of distortions<sup>1 0 0</sup> and impediments to international trade,<sup>1 0 1</sup> and ensuring that measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade.<sup>1 0 2</sup>

## 2. Enforcement of Intellectual Property Rights

TRIPs Agreement requires member countries to create a comprehensive and detailed enforcement mechanism.<sup>1 0 3</sup> Procedural requirements cut even more deeply into national legal systems than

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System has been the primary factor in marking the United States foremost among the nations in agriculture, inventing and manufacturing. While, of course, there were other factors, the Patent System was by far the most potent one.").

<sup>9 7</sup> For the contradicting function of the intellectual property protection in relation with innovation, see Dreyfuss & Lowenfeld, *supra* note 4, at 279 n.10. (stating "In one scenario, innovations could flow more readily across state lines in the absence of intellectual property protection, and in the opposite scenario, innovations flow through investment and licensing, which is made more likely by the existence of intellectual protection in the receiving country."). Besides, for the link in intellectual property law between innovation and free trade, see Anawalt, *supra* note 59, at 396-400.

<sup>9 8</sup> Dreyfuss & Lowenfeld, *supra* note 4 at 279 n.6.

<sup>9 9</sup> For the purpose of the TRIPs Agreement to be constructed in consideration of the goal of the WTO, see Abbott, *supra* note 12, at 497 (stating "the overarching goal of the WTO is to raise world-wide standards of living ... . The TRIPs Agreement was added to the GATT/WTO framework to assure that adequate protection of intellectual property rights promoted world trade ... the protection of intellectual property rights may itself be important. Nonetheless, the core objectives of the WTO are to improve world-wide standards of living, and not to protect intellectual property rights.").

<sup>1 0 0</sup> For the controversial interpretation of the term "trade distortion", see Dreyfuss & Lawenfeld, *supra* note 4, at 281 n.14 (stating "trade distortion was interpreted ... as law of comparative advantage through failure to enforce intellectual property rights. However, the term was interpreted ... as foreign government intervention in the market place in the name of protecting intellectual property rights.").

<sup>1 0 1</sup> For the intellectual property protection in relation with the trade barriers, see Dreyfuss & Lowenfeld, *supra* note 4, at 276 (stating "in the case of minimum standards, the absence of intellectual property protection is not a direct barrier to international trade."). For the reduction of impediments to trade in relation with intellectual property protection, see Carlos A. Primo Braga & Carsten Fink, *The Relationship Between Intellectual Property Rights and Foreign Direct Investment*, 9 Duke J. Comp. & Int'l L. 163, 168-69 (1998) (stating that, for example, developed countries wanting to export to developing countries with weak intellectual property protection infrastructure have to bear the additional transaction cost preventing local imitation of their goods. However, developed countries exporting to countries with a strong intellectual property protection infrastructure do not have to worry about this extra transaction cost. Thus an international intellectual property protection system will help diminish this transaction cost, which would promote the legitimate trade).

<sup>1 0 2</sup> TRIPs Agreement, *supra* note 1, Preamble. For the empirical study on the effects of the TRIPs Agreement on international trade by Keith E. Maskus, see Keith E. Maskus & Mohan Penubarti, *How Trade-Related are Intellectual Property Rights?* 39 J. Int'l Econ. 227, 229-30 (1995) (stating that a higher level of intellectual property protection can have different effects on the imports, that is, import decrease and also import increase).

<sup>1 0 3</sup> See Anawalt, *supra* note 57, at 390. For papers on general enforcement, see Mike Willis, *A Survey Of Enforcement Measures For International Intellectual Property Rights Under The WTO: Compliance Issues For*

substantive requirements because they dictate how a nation's courts and administrative bodies shall behave.<sup>1 0 4</sup> Considerable provisions are devoted to the enforcement issues in the agreement<sup>1 0 5</sup> to ensure the effective means of enforcement<sup>1 0 6</sup> to be available to the right holders,<sup>1 0 7</sup> and to ensure the enforcement procedures be applied to avoid creating of barriers to legitimate trade,<sup>1 0 8</sup> as well as to issues of the abuse<sup>1 0 9</sup> and the deferent to further infringements.<sup>1 1 0</sup>

The agreement provides for infringing activity in general, providing civil judicial procedures and remedies,<sup>1 1 1</sup> distinctively with counterfeiting<sup>1 1 2</sup> and piracy<sup>1 1 3</sup> - the more blatant and egregious forms of infringing activity<sup>1 1 4</sup> - providing for additional procedures and remedies, that is, border

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*Developing Countries*, 6 Int'l Trade L. Reg. 180, 180-88 (Dec. 2000) (analysing information and material about selected Member countries' national laws for informal guide for officials and policymakers in developing countries in their efforts to become TRIPs compliant); Donald K. Duvall, *Enforcement of Intellectual Property Rights at The Border Under US Law: The Impact of Gatt/Trips*, 1 Int'l Trade L. Reg. 201, 201-04 (Dec. 1995) (concerning the special border measures in TRIPs which establish border controls to protect each implementing country from infringing imports).

<sup>1 0 4</sup> See Anawalt, *supra* note 57, at 390.

<sup>1 0 5</sup> TRIPs Agreement, *supra* note 1, part III.

<sup>1 0 6</sup> See Richard Schaffer, Beverley Earle & Filiberto Agucti, *International Business Law and Its Environment* 519 (2002) (stating that TRIPs was the first WTO agreement to impose positive obligations on WTO signatories to adopt the new law; previously, WTO agreements had relied on negative prohibitions, not affirmative obligations).

<sup>1 0 7</sup> For the right holders' status in TRIPs, see e.g., Jasna Arsic, *Combatting Trade in Counterfeit Goods-The GATT and the EC Approaches*, 18 World Competition Law & Econ. Rev. 86-87 (1995) (stating that "State-to-State Nature of the enforcement procedures leaves right owners without effective resource if they are rebuffed in foreign courts" because their "only choice is to notify [their] government, which might initiate...[WTO] procedures" which do "not provide for compensation for the breach of private rights by countries"); Thomas Dreier, *TRIPs and the Enforcement of Intellectual Property Right, in From GATT to TRIPs\_ The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Friedrich-Karl Gerhard Schricher eds.) 269-70 (1996) (stating "Even when states treat certain provisions of the TRIPs Agreement as self-executing ..."); J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPs Agreement*, 37 Va. J. Int'l L. 335, 346 n.53. (stating "only governments can raise the issue of noncompliance outside the domestic legal system.").

<sup>1 0 8</sup> For some ambiguous provisions in the TRIPs, in relation with a country's ability to restrain trade, Cahn & Schimmel, *supra* note 77, at 306 (criticizing, for example, the article 13 of the TRIPs Agreement).

<sup>1 0 9</sup> For the intellectual property misuse and risk-abuse in relation with competition law in WTO, see Dreyfuss & Lowenfeld, *supra* note 4, at 286 (stating that intellectual property law holds always risk-abuse of the market power created by exclusivity, however, the negotiators of the Uruguay Round did not place competition law on their agenda except some statements adopted in the biennial meeting of the WTO at ministerial level.); See Abbott, *supra* note 86, at 400.

<sup>1 1 0</sup> TRIPs Agreement *supra* note 1, art. 41.

<sup>1 1 1</sup> *Id.* part III, §2, 3.

<sup>1 1 2</sup> Counterfeit goods are in essence defined as goods involving slavish copying of trademarks, and pirated goods as goods which violate a reproduction right under copyright or a related right.

<sup>1 1 3</sup> TRIPs Agreement, *supra* note 1, part III, § 3.



measures and criminal procedures.<sup>115</sup> The enforcement provisions of the TRIPs Agreement have been established as broad legal standards rather than narrow rules.<sup>116</sup> The criticized ambiguousness<sup>117</sup> has allowed the dispute-settlement panels to take local circumstances and diverse legal philosophies into account when seeking to mediate actual or potential conflicts between states.<sup>118</sup>

On the whole, the TRIPs Agreement increases the range of regulatory standards that states are obliged to implement: specifies in greater detail what those standards must be; requires states to implement those standards; mandates and institutionalizes greater substantive convergence of national

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<sup>114</sup> For the criticism against loose usage of piracy and infringement, for example, during the Uruguay Round negotiations, see J.H. Reichman, *Intellectual property in Intellectual Trade: Opportunities and Risks of a GATT Connection*, 22 Vand. J. Transnat'l L. 747, 769-80 (1989); David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge?*, 25 Colum. J. Envtl. L. 253, 262-63 (2000) (stating "Intellectual Property fit awkwardly into the context of trade negotiations. ... U.S. found itself in the perverse position of arguing that the goal of trade liberalizations... To help support this counterintuitive argument, U.S. ...employed the rhetorical device of branding foreign copies of U.S. Technology as "pirates". The "piracy" slogan is misleading ...").

<sup>115</sup> For the careful consideration required by the concept of minimum standards in regard to such a distinction, see Dreyfuss & Lowenfeld, *supra* note 4, at 296 (stating "Where consensus among nations is clean, as it is with respect to counterfeiting and piracy, best rules have emerged ... . Where consensus has not emerged, however, minimum standards represent an agreement to disagree on the optimal level of protection. Imposing a level of protection that was not bargained for ... may, ... , promote trade and enrich current rights holders, but it may also work hardship on individual states. ... most worrisome was that high standards of protection could raise the costs of innovation and impede the creation of new knowledge.").

<sup>116</sup> Reichman, *supra* note 107, at 344.

<sup>117</sup> See 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* 259-61, 272-73 (Friedrich-Kael Beier & Gerhard Schricker eds. 1996), *cited by* Reichman, *id.* at 344 (criticizing preference for flexible standards over formal rules in general and the watered down language of art. 41(1) which was changed from a requirement to "provide effective procedures" to that of providing procedures that "permit effective action" in particular).

<sup>118</sup> See Adrian Otten & Hannu Wager, *Compliance with TRIPs: The Emerging World View*, 29 Vand. J. Transnat'l L. 391, 391 (1996). (stating "These provisions aim to recognize basic differences between national legal systems, while being sufficiently precise to provide for effective enforcement action as well as safeguards against abuse in the use of enforcement procedures."); Gana, *supra* note 81, at 735, 770-71, *cited by* Reichman, *supra* note 107, at 344 (stressing alien and conflicting values of some developing countries in regard to enforcement procedures).

intellectual property systems; and ties the principle of national treatment<sup>1 1 9</sup> to a higher set of standards for intellectual property protection.<sup>1 2 0</sup>

### III. Korean Markets

Korea's intellectual property-protection system has allegedly not been operated well, and, particularly, before the establishment of TRIPs Agreement, the terminology of intellectual property rights' protection included patent protection has not been familiar to Korean individuals and companies. The Korean system to protect intellectual property rights has been a core subject of trade friction between Korea and its trade partner countries since 1980s.<sup>1 2 1</sup>

Korea was often listed on the priority watch list of the Super 301 in 1990s, and occasionally spend a significant amount of time on the Special 301 priority watch list<sup>1 2 2</sup> due to inadequate IPR protection for the following reasons: They include insufficient IPR enforcement,<sup>1 2 3</sup> improper provisions of Korea's Copyright Act and Computer Program Protection Act(CPPA),<sup>1 2 4</sup> inappropriate protection of

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<sup>1 1 9</sup> For papers on national treatment in relation with intellectual property rights, see Gail E. Evans, *The Principle of National Treatment and the International Protection of Industrial Property*, 18 Eur. Intell. Prop. Rev. 149, 149-60 (Mar. 1996) (reviewing the evolution of national treatment principle and the impact of Paris Convention, GATT and TRIPs on treatment of intellectual property rights); Margaret Ann Wilkinson, *National Treatment, National Interest and the Public domain*, 1 U. Ottawa L. & Tech. J. 23, 23-49 (2003-2004) (examining the notion of the "public domain" in relation with national treatment and national interest); Amy M. Au, "National Treatment" and the International Recognition and Treatment of Trademarks, 12 J. Contemp. Legal Issues 450, 450-53 (2001) (commenting the options for the treatment of international intellectual property rights focusing on trademarks); Ellis, *supra* note 91 at 327-28 (addressing the recent conflict over the role of the doctrine as applied to copyright cases); Seppo Puustinen, *Geographical Indications, Trademarks and the WTO dispute*, Int. T.L.R. 2003, 9(6), 167-71 (2003) (examining the WTO dispute on trademarks and geographical indications for agricultural products and foodstuffs); Teruo Doi, *Japan: Intellectual Property- Copyright*, 8 Computer & Telecom. L. Rev. N130, N130-31(2002) (examining Japanese copyright law focusing on establishment of moral rights for performers and extension of national treatment to performance and phonograms connected with WIPO copyright treaties).

<sup>1 2 0</sup> See Peter Drahos, *Thinking Strategically about Intellectual Property Rights*, 21 Telecomm. Pol'y 202 (1997), cited by Sell, *supra* note 59 at 80-81.

<sup>1 2 1</sup> See Eun Sup Lee, *Regulation of Foreign Trade in Korea*, 26 Ga. J. Int'l & Comp. L. 135, 155 - 59 (1996) (discussing the trade disputes between Korea and the United States).

<sup>1 2 2</sup> Korea was evaluated from the Special 301 Watch List to be on the Priority Watch List in 2004 as the result of an Out of Cycle Review conducted in 2003. For the more details, see U.S. Trade Representative, 2004 National Trade Estimate Report on Foreign Trade Barriers (Korea) (hereinafter, USTR, NTE(Korea)) 299-300, *at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2004/2004\\_National\\_Trade\\_Estimate/2004\\_NTE\\_Report/asset\\_upload\\_file776\\_4779.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file776_4779.pdf) (last visited Jan. 10, 2006).

<sup>1 2 3</sup> See TRIPs Agreement, *supra* note 1, arts. 41 - 61.

<sup>1 2 4</sup> See *id.* arts. 9 - 14.

clinical drug test data,<sup>1 2 5</sup> lack of full retroactive protection of pre-existing copyright works<sup>1 2 6</sup> and pharmaceutical patents,<sup>1 2 7</sup> lack of coordination between Korean authorities in charge of foreigners' patent protection, and continued counterfeiting<sup>1 2 8</sup> of consumer products.<sup>1 2 9</sup>

IPR enforcement has been an issue of serious concern among the trade partner countries despite the progressive actions taken by the Korean government in this area over the recent past years:<sup>1 3 0</sup> They have, particularly, had serious concerns about the consistency, transparency and effectiveness of Korean IPR enforcement efforts regarding software, books, and other products in the Korean market, as well as regarding specific provisions of IPR laws<sup>1 3 1</sup>, which may be in breach of the provisions specified in the TRIPs Agreement.<sup>1 3 2</sup>

The Korean government retained a flawed system for notice and takedown of infringing material from a service provider's system.<sup>1 3 3</sup> This system has been criticized by the trade partner countries because the system allows all right holders to employ the superior notice and takedown system found in

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<sup>1 2 5</sup> See *id.* art. 34(3).

<sup>1 2 6</sup> See *id.* art. 70.

<sup>1 2 7</sup> See *id.* arts. 27 - 34.

<sup>1 2 8</sup> Counterfeit goods are in essence defined as goods as involving slavish copying of trademarks, and pirated goods as goods which violate a reproduction right under copyright or a related right. (*see* Black's Law Dictionary, (8<sup>th</sup> ed. 2004)). Counterfeit goods and services, the most pervasive area of trademark infringement, accounted for approximately nine percent of the current market of goods in 2003, a percentage that has been estimated to double by the end of 2005. Timothy W. Maier, Counterfeit Goods Pose Real Threat, *Insight on the News* (Oct. 30, 2003) (noting statistics by Carratu International PLC, a firm which investigates intellectual property crimes), *available at* <http://www.insightmag.com/news/2003/11/11/world/Coun-terfeit.Goods.Pose.Real.Threat-539999.shtml> (last visited Jan. 19, 2006). See also Press Release, U.S. Dep't of Commerce, Strategy Targeting Organized Piracy (STOP!) (Oct. 5, 2004) ("Bogus products . . . are estimated to account for up to seven percent of global trade and cost legitimate rights holders around the world billions of dollars annually."), *at* [http://www.commerce.gov/opa/press/Secretary\\_Evans/2004\\_Releases/October/05\\_STOP\\_FactSheet.htm](http://www.commerce.gov/opa/press/Secretary_Evans/2004_Releases/October/05_STOP_FactSheet.htm) (last visited Jan. 19, 2006).

<sup>1 2 9</sup> For the issue of intellectual property rights protection from the viewpoint of trade dispute between the United States and Korea, *see* Abbott, *supra* note 86 at 388 - 89 (viewing that one of the motivations of Korea in accepting the multilateral TRIPs Agreement was to ameliorate the trade pressure from the United States. Thus, there is the appearance of a bargain between the United States and Korea: If Korea abides by their TRIPs Agreement commitments, the United States will not unilaterally decide that they are failing to live up to their obligations and impose trade sanctions).

<sup>1 3 0</sup> For the Korean government's pro-active efforts to combat the intellectual property right infringement violation, USTR, NTE(Korea), *supra* note 122, at 300.

<sup>1 3 1</sup> USTR, NTE(Korea), *supra* note 122, at 299 - 301.

<sup>1 3 2</sup> See TRIPs Agreement, *supra* note 1, arts. 9 - 14.

<sup>1 3 3</sup> USTR, NTE(Korea), *supra* note 122, at 301.

the Copyright Act, which is not in compliance with the WIPO Copyright Treaty.<sup>1 3 4</sup> The provisions on online service provider's liability<sup>1 3 5</sup> are also vague regarding the establishment of liability required to clarify the obligations.<sup>1 3 6</sup>

It has been suggested that Korea delete the reciprocity provision relating to data protection<sup>1 3 7</sup> in the Copyright Act, which might serve to discourage the introduction of databases<sup>1 3 8</sup> by other countries without such legislation. Under the TRIPs Agreement, members are required to protect compilations of any form of data or other material when the selection or arrangement of their contents constitutes intellectual creations.<sup>1 3 9</sup>

Having one of the highest levels of broadband Internet penetration in the world, the Korean government is required to effectively respond to the challenges pressed by the changing nature of digital piracy by adopting new legal tools and making substantial improvements in enforcement practices. Important aspects of Korea's copyright<sup>1 4 0</sup> law structure have failed to keep pace with the

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<sup>1 3 4</sup> *Id.* at 302. For the issue of service providers' liability under WIPO Copyright Treaty, *see* World Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use, chap. 5.226 - 5.228 (2d ed. 2004), at <http://www.wipo.int/about-ip/en/iprm/index.htm> (last visited Jan. 19, 2006).

<sup>1 3 5</sup> Computer Program Protection Act, Law No. 6843 (2002) arts. 34.2, 34.3; Copyright Act, Law No. 7233 (2002), arts. 77, 77. 2.

<sup>1 3 6</sup> While the TRIPs Agreement overarches requirements that member nations provide basic protection of copyrights, patents, and other forms of intellectual property, the agreement prescribed the specific protection for computer software. *See* TRIPs Agreement, *supra* note 1, arts. 10-11, 27(1).

<sup>1 3 7</sup> For the general types of legal protection for databases, computer software and programs, information, and information technology, *see* Mangassarian, *supra* note 68, at 125, 134 (2001).

<sup>1 3 8</sup> Art. 10, § 2 of the TRIPs Agreement provides that databases are a separated subject of the protection of databases: The protection, not extending to the data or material itself, shall not be in contradiction with any copyright subsisting in the data or material itself. Thus, this Article may well do no more than codify the existing position under copyright law. Michael Blakeney, Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement 50 (Sweet & Maxwell 1996), *cited by* Mangassarian, *id.* at 131.

<sup>1 3 9</sup> TRIPs Agreement, *supra* note 1, art. 10(1) (protecting computer programs as literary works). TRIPs Agreement also states that member nations "shall provide authors and their successors on title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works." TRIPs Agreement *supra* note 1, art. 11, *cited by* Anawalt, *supra* note 57, at 388.

<sup>1 4 0</sup> For papers on the copyright, *see* Manesh Jiten Shah, *Problems With Sharing The Pirates' Booty: An Analysis Of Trips, The Copyright Divide Between The United States And China & Two Potential Solutions*, 5 Rich. J. Global L. & Bus. 69, 69 (illuminating the effect of software piracy on the United States economy by analyzing the current system of preventing, punishing and recovering from such activities); Elaine B. Gin, *International Copyright Law: Beyond The WIPO & TRIPs Debate*, 86 J. Pat. & Trademark Off. Soc'y 763, 763-91 (2004) (focusing on international copyright law and the organizations that deals with such rights); Graeme B Dinwoodie & Rochelle C. Dreyfuss, *TRIPs And The Dynamics of Intellectual Property Lawmaking*, 36 Case W. Res. J. Int'l L. 95, 95-122 (2004) (examining approaches to TRIPs dispute resolution that could cabin the choices of legislation available to deal with emergent substantive problems); Ruth Okediji, *TRIPs Dispute Settlement And The Source of (International) Copyright Law*, 49 J. Copyright Soc'y U.S.A. 585, 585-635 (2001) (discussing the various strategies for dispute settlement and the resulting implications for the future of copyright law and policy); Laurence R. Helfer, *A European Human Rights Analogy For Adjudicating Copyright Claim Under TRIPs*, 21 Eur. Intell. Prop. Rev. 8, 8-16(1999) (arguing that TRIPs jurists will benefit significantly from employing a "European human rights analogy" when adjudicating IPR disputes); J.H. Reichman & David Lange, *Bargaining Around The Trips Agreement: The Case For*

transformation of the market resulting from digitalization and high-speed access to the Internet: Korea should, for example, introduce legislation that provides a full set of exclusive rights for sound recording producers.<sup>1 4 1</sup>

Relating to technical protection measures (TPMs), although the Korean government improved the Copyright Act,<sup>1 4 2</sup> the Act does not clearly protect technologies that manage accession privileges, nor does it prohibit the act of circumvention itself, only the creation or distribution of circumvention tools, which does not comply with the global minimum standards embodied in the WIPO Copyright Treaty<sup>1 4 3</sup> and TRIPs Agreement.<sup>1 4 4</sup> Korea has been requested to establish the sufficient copyright protection system as required under the TRIPs Agreement,<sup>1 4 5</sup> and also to clarify the availability of injunctive and *ex parte* relief in civil enforcement actions as is required by the TRIPs Agreement.<sup>1 4 6</sup>

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*Ongoing Public-Private Initiatives To Facilitate Worldwide Intellectual Property Transactions*, 9 Duke J. Comp. & Int'l L. 11, 11-68 (1998) (explaining the need for a cooperative approach, and a means of implementing for the international intellectual property); Paul Edward Geller, *From Patchwork To Networks: Strategies For International Intellectual Property In Flux*, 9 Duke J. Comp. & Int'l L. 69, 69-90 (1998) (analyzing the shifting process in intellectual property from patchwork to network in relation with laws in conflicts and strategies available during such shift); Laurence R. Helfer, *Adjudicating Copyright Claims Under The TRIPs Agreement: The Case For A European Human Rights Analogy*, 39 Harv. Int'l L. J. 357, 357-439 (1998) (arguing that TRIPs jurists can effectively address core methodological questions by reaching beyond the confines of the WTO system to learn from and build upon the accumulated wisdom generated by a supranational tribunal that has already addressed similar concerns); Shira Perlmutter, Jerome H. Reichman & Whitmore Gray, *Copyright And International TRIPs Compliance*, 8 Fordham Intell. Prop. Media & Ent. L. J. 83, 83-97 (1997) (focusing on the current efforts toward implementing the TRIPs Agreement); Frank Wooldridge, *The Interpretation And Application Of Articles 45 And 61 Of The TRIPs Agreement*, 1997. Intell. Prop. Q. 514, 514-20 (regarding for infringement of intellectual property rights); Eric H. Smith, *Worldwide Copyright Protection Under The TRIPs Agreement*, 29 Vand. J. Transnat'l L. 559, 559-78 (1996) (discussing piracy losses on a regional and global basis, emphasizing industry-based variations and the economic impact of these losses).

<sup>1 4 1</sup> See John J. P. Howley & Antonino B. Roman, *Assessing Enforcement Status of Intellectual Property Rights in Asia*, 1999 N.Y.L.J. S2, S2, cited by Su, *supra* note 51, at 193 n.133; USTR, NTE(Korea), *supra* note 122, at 301.

<sup>1 4 2</sup> For the important steps taken to strengthen the Copyright Act in 2003, see USTR, NTE (Korea), *supra* note 12, at 301.

<sup>1 4 3</sup> See World Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use, 5. 562 (2004).

<sup>1 4 4</sup> See TRIPs Agreement, *supra* note 1, arts. 44-46.

<sup>1 4 5</sup> *Id.* arts. 9 - 14.

<sup>1 4 6</sup> See TRIPs Agreement, *supra* note 1, arts. 44, 50. Enforcement procedures, besides the permission of effective action against infringements, must include expeditious remedies and Member's judicial authorities are required to have authority to order prompt and effective provisional measures, for the two situations, that is, to prevent infringement from occurring by preventing the distribution for sale or importation of infringing goods and to preserve evidence. [TRIPs Agreement, *supra* note 1, art. 50(1).] The provisional measures, herewith, is quite similar to a preliminary injunction. [Silvia Fabina Faerman, *The New Patent Law and the Agreement on Trade Related Aspects of Intellectual Property Rights*, 8 Sw. J. L. & Trade Am. 157, 160 (2001/2002)]. Above provision obliges to allow local judiciaries to order "provisional measures" even without a prior hearing of the alleged infringers, but there is no firm obligation to exercise this power in practice. See TRIPs Agreement, *id.* art. 50(2). For the more details about preliminary injunction, see Thomas Dreier, *TRIPs and the Enforcement of Intellectual Property Rights*, in 18 IIC Studies: Studies in Industrial Property and Copyright Law: From GATT to TRIPs - The Trade-Related Aspects of

While the amendments to the patent, trademark, utility model and industrial designs<sup>1 4 7</sup> laws were made in 2001 to strengthen the penalties for infringement cases,<sup>1 4 8</sup> they are required to be strengthened further for IPR violations to serve as a more effective deterrent to piracy as required by the TRIPs Agreement.<sup>1 4 9</sup> Under the TRIPs Agreement, member states are required to maintain enforcement procedures available under the law to effectively block any act of infringement of intellectual property rights as specified in the TRIPs Agreement.<sup>1 5 0</sup>

The Korean government has taken steps over the years to strengthen the protection of data or patent, but problems remain, including the lack of coordination among the government agencies concerned

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Intellectual Property Rights 248, 263 - 64, 272 - 73(Friedrich -Karl Beier and Gerhard Schricker eds. 1996) (noting reluctance of French courts to issue preliminary injunctions); *see also* Jay Dratler, Jr., *Intellectual Property Law : Commercial Creative and Industrial Property* § 13.01[1] (1996).

<sup>1 4 7</sup> For papers on industrial design, *see* Ziad J. Katul, *The Anatomy of an Eye of the Court: The Test for Infringement of an Industrial Design*, 18 *Intell. Prop. J.* 327, 327-54 (2005) (reviewing the case law setting out two tests for the infringement of an industrial design and articulating what the test should be, and why); G. Scanlan & Sarah Gale, *Industrial Design and the Design Directive: Continuing and Future Problems in Design rights*, 2005 *J. Bus. L.* 91, 91-112 (examining how the EC reforms will affect English intellectual property law and considering some of difficulties that existed and to what degree these difficulties have been resolved by the implementation of the Design Directive); Jonathan Hudis & Philippe Signore, *Protection of Industrial Designs in the United States*, 27 *Eur. Intell. Prop. Rev.* 256, 256-64 (2005) (discussing the protection of industrial designs in the US through the use of design patents, trade dress and copyright); Susanna H.S. Leong, *Protection of Industrial Designs as Intellectual Property Rights: New Laws in Singapore*, May, 2003 *J. Bus. L.* 239, 239-51(discussing the law pertaining to the protection of designs of industrial products in Singapore which was based on UK law); William T. Fryer III, *European Union (EU) Revolutionizes General Industrial Design Protection*, 84 *J. Pat. & Trademark Off. Soc'y* 899, 899-904 (2002) (emphasizing some of the features of the new EU Community Design Regulation, its history and importance to future development of global design protection); William T. Fryer, III, *An Overview of Industrial Design Law Global Development*, 10 *U. Balt. Intell. Prop. L. J.* 63, 63-67 (2002) (overviewing international industrial design law, including a history, current events, and the vision for the future); Amy Muhlstein, *Margaret Ann Wilkinson, Whither Industrial Design*, 14 *Intell. Prop. J.* 1, 1-57 (1999-2000) (reviewing the development of the protection of industrial designs, the extent of international co-operation, and the protection of industrial design in advanced countries, and leading suggestions for Canada's design laws and treatment); Teruo Doi, *Japan: Industrial Designs-Priority Dates for Conversation for Utility Models*, 21 *Eur. Intell. Prop. Rev.* N45, N45 (1999) (analyzing the case on whether design was unregistrable on basis that original application for utility model had been converted into one for design registration); Jason G. Ellis, *Industrial Design Protection After Phillips Electronics NV v. Remington Consumer Products – The Shape of Things to Come*, Mar. 1999 *J. Bus. L.* 167, 167-80 (providing a perspective on the development of industrial design law in the United Kingdom and examining the potential impact on this area that possible trade mark registration will have in light of the Philips decision); William T. Fryer, *The Evolution of Market Entry Industrial Design Protection: An International Comparative Analysis*, 21 *Eur. Intell. Prop. Rev.* 618, 618-23(Dec. 1999) ( analyzing two steps in the direction of improved market entry protection of product appearance and discussing their practical implications); K.H. Pun, *China's Protection of Industrial Designs: Is it Well Designed*, *Intell. Prop. Q.* 56, 56-65 (reviewing China's protection of industrial designs offered by patents, copyright, and unfair competition law); David Goldenberg, *The Long And Winding Road, A History of The Fight Over Industrial Design Protection in The United States*, 45 *J. Copyright Soc'y U.S.A.* 21, 21-62 (1997) (showing the breadth of impact the lack of effective design protection has had on American industry); Francois Curchod, *The Revision of the Hague Agreement concerning the International Deposit of Industrial Designs*, 24 *AIPLA Q.J.* 599, 599-610 (1996).

<sup>1 4 8</sup> USTR, NTE(Korea), *supra* note 122, at 300 - 01.

<sup>1 4 9</sup> *See* TRIPs Agreement, *supra* note 1, art. 41(1).

<sup>1 5 0</sup> *See id.* arts. 44 - 46.

resulting in the approval of marketing for products that may infringe on existing patents.<sup>1 5 1</sup> Korean government is required to provide full protection against unfair<sup>1 5 2</sup> commercial use<sup>1 5 3</sup> of test data submitted for marketing approval,<sup>1 5 4</sup> as outlined in the TRIPs Agreement.<sup>1 5 5</sup>

Many of the above indicated anti-competitive practices would not be in compliance with the concerned provisions of the TRIPs. In some areas, particularly in the Internet-related industries, speedy innovation and penetration in Korean society could not be handled through the proper enacted or improved provisions concerned. Out of such practices not in compliance with the international regulation, many parts are not directly related to substantial parts of the legal protection systems but the enforcement procedures ensured by the WTO member countries' governments as required under the TRIPs Agreement.<sup>1 5 6</sup> Korea's general IPR enforcement is required to be more non-discriminatory,<sup>1 5 7</sup> transparent,<sup>1 5 8</sup> and sustained,<sup>1 5 9</sup> as required by the TRIPs Agreement.<sup>1 6 0</sup>

Out of anti-competitive or unfair trade practices discussed so far, some parts, however, are affected by the social or cultural circumstances specific to Korea including the deeply accepted social idea that the intellectual property rights are part of human heritage and also social stability is more important than the social productivity or efficiency, as well as by the over-all low level of social and economic development. Under the current WTO provisions, these controversial social and cultural aspects are very complicated and difficult to justify. It may take a substantial amount of time to clarify and to find acceptance from developed western countries and WTO standards partly because of the cultural characteristics of Korean society.

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<sup>1 5 1</sup> USTR, NTE(Korea), *supra* note 122, at 303.

<sup>1 5 2</sup> Regarding the difficulty to define the legal concept of "unfair", see Carolos Maria Correa, *Public Health and International Laws: Unfair Competition under the TRIPs Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals*, 3 Chi. J. Int'l L.69, 72 - 73(2002) .

<sup>1 5 3</sup> For the concept of unfair commercial use in Article 39.3 of TRIPs Agreement, see Correa, *id.* at 78.

<sup>1 5 4</sup> For the issue of test data protection, particularly, regarding the extent to which a competitive model - protection without exclusivity - is compatible with the minimum standards set forth by Article 39.3. See *id.* at 70 - 73.

<sup>1 5 5</sup> See TRIPs Agreement, *supra* note 1, art. 39.3.

<sup>1 5 6</sup> *Id.* art. 41.

<sup>1 5 7</sup> See *id.* arts. 3 - 4, 41(2).

<sup>1 5 8</sup> See *id.* art. 63.

<sup>1 5 9</sup> See USTR, NTE(Korea), *supra* note 12, at 299 - 301.

<sup>1 6 0</sup> See also GATT 1994, *supra* note 2, arts. I, X.

## IV. Japanese Markets

Transparency issues as trade barriers in Japanese intellectual property markets as well as in commodity and service markets have traditionally been the core subjects of trade disputes with other trading partner countries:<sup>1 6 1</sup> At stage of rule making process, even though public policy and regulations are made by and instituted through constant interaction with the private sector,<sup>1 6 2</sup> few opportunities exist for interested parties without special access to the authorities or related councils to have input into the legislative process.<sup>1 6 3</sup> To solve this problem, Japan adopted its first government-wide Public Comment Procedures in 1999, nevertheless, it has been evaluated to have only had a marginal impact on the substance of new regulations.<sup>1 6 4</sup>

Administrative guidance in Japan has been utilized as a traditional tool of Japanese government policy and is the key to the lack of transparency.<sup>1 6 5</sup> In Japan, the vaguely worded statues allow courts to grant ministries' broad discretion in their regulatory methods. Combined with low levels of judicial review, this broad discretionary authority insulates much of Japan's industrial policy from challenge.<sup>1 6 6</sup> The opaqueness inherent in this excessive or extensive use of informal directives or administrative guidance<sup>1 6 7</sup> has traditionally been evaluated as an impediment to Japanese markets.<sup>1 6 8</sup>

The increasing use of the Internet and explosive growth of high-speed access in Japan has presented new challenges for protecting intellectual property rights, in particular, copyrighted materials. The protection of this material is critical for electronic commerce to flourish and for content-related industries,

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<sup>1 6 1</sup> See James D. Southwick, *Operation of The WTO Agreements in The Context Of Global Commerce And Competition, Investment and Labor Markets*, 31 Law & Pol'y Int'l Bus. 923, 925 (2000) (stating that transparency issues in Japan would be difficult to solve through WTO procedures).

<sup>1 6 2</sup> See Ken Duck, *Now that the Regulation Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Governance*, 19 Fordham Int'l L. J. 1686, 1669-70 (1996) (criticizing the Japanese *Shingikai* system that even though the system's purpose is to gather expert opinion and provide an open forum in legislation, and etc., bureaucrats frequently use this system to diminish opportunities for open conflict in policy adjustments).

<sup>1 6 3</sup> See Higuchi Norio, *Lecture on Japanese Information Disclosure* (Mar. 1992), cited by David Bolong, *Access to Government - Held Information in Japan: Citizens' "Right to Know" Bows to the Bureaucracy*, 34 Stan. J. Int'l L. 1, 4 (1998).

<sup>1 6 4</sup> See Lee, *supra* note 16, at 190 - 91.

<sup>1 6 5</sup> See Duck, *supra* note 16 at 1709 - 11.

<sup>1 6 6</sup> See Frank K. Upham, *Law and Social Change in Post War Japan*, 169 (1987), cited by Duck, *id.* at 1703.

<sup>1 6 7</sup> For the chronic feature of administrative guidance in Japan, see Hiroko Yamane, *Deregulation and Competition Law Enforcement in Japan: Administratively Guided Competition?*, 23 W. Comp. 141, 155 (2000).

<sup>1 6 8</sup> Duck, *supra* note 16 at 1687.



such as programs,<sup>1 6 9</sup> games, music, film and software<sup>1 7 0</sup> to develop.

Despite an improvement of Japan's legal and administrative intellectual property framework, several key issues, including the improvement of the protection framework for the digital copyrights remain.<sup>1 7 1</sup> As a result, Japan has been a main target of the United States' unilateral acts<sup>1 7 2</sup> under the Special 301 with regard to the improper protection of the foreigners' intellectual property rights.<sup>1 7 3</sup> Japan is required to ensure clear-cut and balanced ISP liability rules through the proper implementation process for this new law.<sup>1 7 4</sup>

Even though the Japanese government took a significant step forward in protecting temporary copies by recognizing that temporary storage implicates the reproduction right,<sup>1 7 5</sup> the scope of protection for temporary copies remains vague,<sup>1 7 6</sup> which could erode the protection of copyrighted materials in Japan. The Berne Convention incorporated into the TRIPs Agreement provides that authors must have the right of authorizing the reproduction of their works in any manner or form,<sup>1 7 7</sup> and the WIPO Copyright

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<sup>1 6 9</sup> Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). TRIPs Agreement, *supra* note 1, art. 10.1.

<sup>1 7 0</sup> For the definition of software, *see* United States Copyright Office, Library of Congress, Compendium of Copyright Office Practices, 1984, para. 32, *cited by* Mangassarian, *supra* note 68, at 137; Chris Reed, *Computer Law*, 19 Eur. Intell. Prop. Rev. 626, 626-27 (Sweet & Maxwell Limited and Contributors 1996), *cited by* Mangassarian, *id.* at 136. For the software as a deeply controversial subject matter in the intellectual property regime, *see* Anawalt, *supra* note 57, at 388 - 89.

<sup>1 7 1</sup> For the areas needed to be improved in Japan, which have been identified by the United States, *see* U.S. Trade Representative, 2004 National Trade Estimate Report on Foreign Trade Barriers (Japan) (hereinafter, USTR, NTE(Japan)) 266, *at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2004/2004\\_National\\_Trade\\_Estimate/2004\\_NTE\\_Report/asset\\_upload\\_file860\\_4776.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file860_4776.pdf) (last visited Jan. 10, 2006).

<sup>1 7 2</sup> For the criticism against unilateral trade acts of the United States under the WTO regime, *see* Abbott, *supra* note 86, at 389 n.15.

<sup>1 7 3</sup> Japan was removed from the Special 301 Watch List on May 1, 2000. However, the United States has since expressed concern about some aspects of intellectual property rights protection in Japan. *See* USTR, NTE(Japan) *supra* note 171, at 266 - 68.

<sup>1 7 4</sup> For review of the key differences between the Japanese and American approaches to copyright protection for computer programs and databases, *see* Dennis Karjala & Keiji Sugiyama, *Fundamental Concept of Japanese and American Copyright Law*, 36 Am. J. Comp. L. 613, 613 (1988), *cited by* Frank X. Curci, *Protecting Your Intellectual Property Rights Overseas*, 15 Transnat'l L. 15, 22 n.33 (2002).

<sup>1 7 5</sup> For the treatment of temporary copies in Japan which has been exacerbated by a Japanese court decision in 2000, *see* U.S. Trade Representative, 2003 National Trade Estimate Report on Foreign Trade Barriers (Japan) (hereinafter, USTR, NTE(Japan)) 217, *at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2003/2003\\_NTE\\_Report/asset\\_upload\\_file214\\_6206.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_NTE_Report/asset_upload_file214_6206.pdf) (last visited Jan. 10, 2006).

<sup>1 7 6</sup> For the rights of reproduction in a digital environment where a reproduction is of a temporary nature, *see* World Intellectual Property Organization, *supra* note 134, ch. 5.220, 5563 (2004).

<sup>1 7 7</sup> Berne Convention, *supra* note 91, art. 9.

Treaty and WIPO Performances and Phonograms Treaty, to which Japan is a party, contain an agreed statement affirming that the reproduction right fully applies to works in digital form.<sup>178</sup>

The sound recordings dispute of 1996-97, the first intellectual property dispute settlement case at the WTO,<sup>179</sup> was resolved with a Japanese amendment of its law to satisfy its WTO obligations, which has been evaluated to increase the level of protection afforded to foreign countries' intellectual property rights in Japan.<sup>180</sup> Despite the Japanese government's progress to prohibit copyright infringement,<sup>181</sup> and to combat software piracy,<sup>182</sup> the Japanese government should take steps to reduce the software piracy.<sup>183</sup> To create an effective deterrent against piracy, Japan's Civil Procedures Act needs to be modified to award statutory damages rather than actual damages,<sup>184</sup> and to provide for more effective procedures for evidence.<sup>185</sup>

For Japan's accession to the WIPO Copyright Treaty, the Copyright Law was revised to implement criminal penalties for producing and distributing devices designed to circumvent copyrights and for illegally revising copyright management information to make a profit. The provisions on anti-circumvention devices to be applied only to devices whose "principal function" is circumvention are allegedly inefficient for anti-circumvention.<sup>186</sup> The law also expands the coverage of screening rights from motion pictures to still pictures and sets transfer rights so that the first-sale doctrine covers film, books, and CDs and is essentially in compliance with the TRIPs Agreement.<sup>187</sup>

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<sup>178</sup> World Intellectual Property Organization, *supra* note 134, ch. 5.562 (2004).

<sup>179</sup> For the WTO as a place to resolve dispute concerning intellectual property right, *see* Dreyfuss & Lowenfeld, *supra* note 4, at 275.

<sup>180</sup> USTR, NTE(Japan), *supra* note 175, at 215 - 16.

<sup>181</sup> *See id.* at 216 - 17.

<sup>182</sup> For the definition of piracy for the purpose of the TRIPs Agreement, *see* TRIPs Agreement, *supra* note 1, art. 51.

<sup>183</sup> For example, Japan's Civil Procedures Act is required to award statutory damages than actual damages and to provide for more effective procedures for collecting evidence. USTR, NTE (Japan), *supra* note 171, at 267.

<sup>184</sup> *See* TRIPs Agreement, *supra* note 1 art. 44. Regarding remedies in general, the TRIPs provisions require that states empower local judicial authorities to order compensatory damages, expenses. *Id.* art. 45. Courts must likewise have authority to impound or destroy infringing goods, and they must not normally release counterfeit trademarked goods into the stream of commerce in any case. *See id.* art. 46.

<sup>185</sup> USTR, NTE(Japan), *supra* note 171, at 267.

<sup>186</sup> *Id.*

<sup>187</sup> Member countries are required to provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of original or copies of their copyright works, in respect of at least computer programs and cinematographic works. TRIPs Agreement, *supra* note 1, art. 11.

Regarding industrial property rights, the trading partner countries have been concerned with several aspects of Japan's patent administration,<sup>1 8 8</sup> including the narrow patent claim interpretation,<sup>1 8 9</sup> the relatively slow process of patent litigation in Japanese courts and the lack of an effective means to compel compliance with discovery protection for confidential information produced relative to discovery.<sup>1 9 0</sup>

Those concerns are related to the purpose and principles of the TRIPs to reduce distortions and impediments to international trade, and promote effective protection of intellectual property rights.<sup>1 9 1</sup> The trading partner countries are also concerned about the lack of patent protection for business methods in Japan, particularly those related to the Internet, which contradict the provisions of the TRIPs requiring member countries to provide patents for inventions in all fields of technology, including business methods.<sup>1 9 2</sup>

Addressing these issues, Japan revised patent law in 2000 to provide more sufficient patent protection: Key provisions included increasing requirements on alleged violators to justify their actions, obligating alleged violators to cooperate with calculation experts, giving judges discretion over the penalty for damages, increasing the penalty in fraudulent patent case, and allowing courts to seek technical advice from the Japan Patent Office(JPO).<sup>1 9 3</sup> This improvement is expected to improve the level of patent protection as well as the burden of proof required by Japanese courts<sup>1 9 4</sup> and also the

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<sup>1 8 8</sup> For the different administration of the patents among the countries, *see* D.Somoya, Obtaining and Protecting Patents in the United States, Europe and Japan, in *Regulatory Encounters: Multilateral Corporations and American Adversarial Legalism* 279 - 309 (R.A.Kargan & L. Axelrad eds. 2000), *cited by* Drahos & Braithwaite, *supra* note 78, at 476 (analyzing comparatively the Japanese, the United States, the European, the German/Japanese, and the Anglo - Saxon models).

<sup>1 8 9</sup> For example, under Japan's Patent Law (Law No.121 of 1959, art. 36), if prior to filing a patent application, the invention is publicly known or used in Japan or abroad, if it is described in a printed publication and distributed, or if it became publicly available through electric telecommunications in Japan or abroad, the Japanese Patent Office will deny registration of the patent because the invention is no longer "absolutely novel". (*See* Japan's Patent Law, *id.* art. 29, *cited by* Curci, *supra* note 174, at 25). However, Japan's "first - to - file" registration system in patent application is indicated to foster patent flooding in Japan, along with other Japanese patent practices. Under the "first - to - file" registration system, patent rights are granted to the first person who files a patent application for a particular invention, even if the applicant was not the first person to conceive the idea for that invention. *See* Jennifer Chung, *Does Simultaneous Research Make an Invention Obvious? The 35 U.S.C. 103 Nonobvious Requirement for Patents as Applied to the Simultaneous Research Problem*, 11 Alb. L.J. Sci & Tech. 337, 342 (2001), *cited by* Curci, *id.*

<sup>1 9 0</sup> *See* TRIPs Agreement, *supra* note 1, art. 34.3 ("... the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account"); USTR, NTE(Japan), *supra* note 171, at 266.

<sup>1 9 1</sup> TRIPs Agreement, *supra* note 1, Preamble.

<sup>1 9 2</sup> For the rather earlier comment on the patent system as a fundamental tool of business, *see* Edwin Prindle, *quoted in* David F. Noble, *America by Design* 8 (Alfred A. Knopf ed. 1979), *cited by* Drahos & Braithwaite, *supra* note 78, at 457.

<sup>1 9 3</sup> USTR, NTE(Japan), *supra* note 171, at 266.

<sup>1 9 4</sup> The burden of proof has been particularly enormous to foreign patent owners in the past. USTR, NTE(Japan), *supra* note 175, at 216.

business circumstances in Japan.<sup>1 9 5</sup> This, in turn, would lower the cost of access to Japanese courts that has particularly been onerous to foreign patent owners in the past.<sup>1 9 6</sup>

Regarding trade secrets, Japan amended its Unfair Competition Prevention Law to impose criminal sanctions against the disclosure of corporate secrets, and Civil Procedures Act to improve the protection of trade secrets<sup>1 9 7</sup> in Japanese courts by excluding court records containing trade secrets from public access, which, however, are assessed to be inadequate: Under the Unfair Competition Prevention Law, the scope of the amendment is limited, and in case of the Civil Procedures Act, since Japan's Constitution prohibits closed trials, the owner of a trade secret seeking redress for its misappropriation in a Japanese court is forced to disclose elements of the trade secrets while seeking protection.<sup>1 9 8</sup>

Because of this fact, as well as the problem that court discussions of trade secrets remain open to the public with no attendant confidentiality obligation on either the parties or their attorneys,<sup>1 9 9</sup> protection of trade secrets in Japan's court are considerably weaker than in the courts of other developed countries.<sup>2 0 0</sup> This constitutional interpretation in Japanese court in relation with trade secret protection will not be in compliance with the TRIPs Agreement,<sup>2 0 1</sup> which should be observed by the member countries even though its observance is against constitutional interpretations under the strict WTO dispute settlement mechanism.<sup>2 0 2</sup>

With relation to border enforcement, trade partner countries remain concerned about the 1997 Japan Supreme Court decision to allow parallel imports<sup>2 0 3</sup> of patented products. Furthermore, insofar as

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<sup>1 9 5</sup> This improvement would be very important to the, so called, "knowledge creating company". For the importance of the patent system to the global knowledge firms, *see* Drahos & Braithwaite, *supra* note 78, at 452 - 55.

<sup>1 9 6</sup> USTR, NTE(Japan), *supra* note 171, at 266.

<sup>1 9 7</sup> Trade secrets are defined as confidential and proprietary information of an owner which is used in the owner's business to provide an economic value or advantage to that owner because the information is not generally known to the public and under circumstances where the owner has taken reasonable measures to keep the information secret. *See* e.g. U.S. Patent and Trademark Office website, *available at* <http://www.uspto.gov/main/glossary/index.html> (last visited Jan. 17, 2006), *cited by* Curci, *supra* note 174, at 27.

<sup>1 9 8</sup> USTR, NTE(Japan), *supra* note 171, at 268.

<sup>1 9 9</sup> *Id.*

<sup>2 0 0</sup> For the controversial aspects of protection of undisclosed information, *see* Anawalt, *supra* note 57, at 389.

<sup>2 0 1</sup> *See* TRIPs Agreement, *supra* note 1, art. 39.

<sup>2 0 2</sup> The provisions of the GATT 1947 that Part II (mostly on non - tariff barriers) would apply only to the fullest extent not inconsistent with existing legislation were deleted from the GATT 1994 provisions.

<sup>2 0 3</sup> For the parallel imports under the TRIPs Agreement, *see* Dreyfuss & Lowenfeld, *supra* note 4, at 280 n.12; Frederick M. Abbott, *First Report (Final) to the International Trade Law Committee of the International Law Association on the Subject of Parallel Importation (June 1997)*, 1 J. Int'l Econ. L. 607, 607 (1998). For the United States' softening of its stand against parallel trade in patent pharmaceuticals, particularly, after the Seattle Ministerial Conference, *see* Abbott, *supra* note 75, at 171.

Japan provides *ex officio* border enforcement of trademarks and copyrights through the Japan Customs and Tariff Bureau, efforts should be made to enhance such enforcement through aggressive interdiction of infringing articles.

Japan has been required to improve its application, inspection and detention procedures to make it easier for foreign right holders to obtain effective protection against infringed intellectual property rights at the border, as required by the TRIPs Agreement.<sup>204</sup> According to TRIPs Agreement, border measures should be applied to, at least, counterfeiting and piracy cases, leaving flexibility to member governments determining to include other infringements of intellectual property rights.<sup>205</sup>

Japan has faced demands that its intellectual property-related policy, law and enforcement should be operated in a more clear-cut or balance-based direction notwithstanding its government's sustained efforts to enhance its level of enforcement of intellectual property-related policy and regulations. Substantial parts of the anti-competitive practices indicated above would be incompatible with the level of Japanese economic development. It would, however, need more serious consideration to evaluate them just in accordance with the concerned provisions of the TRIPs Agreement which provides relatively high levels of minimum standards without cultural/social considerations in protecting intellectual property rights: because the reasons for such criticism and demands may more or less be related to the cultural characteristics of Japanese society, which is similar to those of Korea.

For example, Japanese constitutional interpretations prohibiting closed trials even in the case of trade secret-related trials may reflect the government's policy objectives to emphasize social stability and the protection of people before the courts secured by the strict enforcement of the principles regarding judicial procedures. These policy objectives might be somewhat different from those of developed western countries that put more emphasis on efficiency or productivity of the societies' competitiveness or operative efficiency compared to the stability or protection.

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<sup>204</sup> Members are required to adopt administrative or judicial procedures which afford right holders the opportunity to stop the importation of infringing goods at the border through customs action. (TRIPs Agreement, *supra* note 1, art. 51). Each member is also obligated to designate an administrative competent authority to treat with the right holders' application for customs action. (TRIPs Agreement, *supra* note 1, art. 51). Competent national authorities may also act *ex officio* to suspend the release of goods for which prima facie evidence of infringement is available, although the TRIPs Agreement does not require WTO member states to authorize this option. (See TRIPs Agreement *supra* note 1, art. 58). A wrongful detention of goods requires compensation. See TRIPs Agreement *supra* note 1, arts. 55-56 (regarding deadlines for provisional relief).

<sup>205</sup> TRIPs Agreement, *supra* note 1, art. 51. This provision is one example of international minimum standards of protection to be provided in TRIPs Agreement.

## V. Review

The anti-competitive practices in intellectual property markets of the two countries outlined above as trade barriers could be grouped into two categories if they are analyzed from the policy-motivational backgrounds of such practices: anti-competitive practices resulting from the overall underdevelopment of their legal and regulatory systems including negative policy objectives to disregard the real value of the intellectual property protection; anti-competitive practices originating from and reflecting the cultural-social factors<sup>206</sup> unique to the two countries.

The two countries' governments should try to positively and strictly implement competition policies and regulations to eliminate or avoid the anti-competitive practices originating from the underdevelopment of regulatory systems and the negative policies.

In the second category, those anti-competitive practices could not easily be eliminated by their government's short-term policy or regulation, but could be improved gradually through the social awareness to a new significance of the intellectual property rights which should be supported by the long-term policy consideration. In the debatable aspects of those practices, particularly, in relation with the policy objectives affected from the cultural and social environments<sup>207</sup> of the two countries, it will take substantial time to get them in line with the global standards required by the TRIPs or other international norms incorporated into the TRIPs.

The above analysis fundamentally shows that the anti-competitive practices as trade barriers in intellectual property markets of the two countries have almost identical characteristics, in scope and effectiveness, even though there are the differences in the degree of the criticism against those barriers from their trading partner countries, which may reflect each market's economic value to their partner countries.<sup>208</sup>

This result is very similar to the result of the study that the author made about their service markets,<sup>209</sup> and somewhat different from their commodity markets,<sup>210</sup> which revealed that there

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<sup>206</sup> For the cultural-social factors as the legitimate concerns or excuses for protectionism, particularly, in service sectors, see Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 Minn. J. Global Trade 159, 167 (1994) (stating the cultural concerns prompting, maybe, countries to limit foreign lawyers and scope of practice).

<sup>207</sup> For the Japan's cultural distinctiveness, in relation with competition policy, see Naohiro Amaya, *Harmony and the Antimonopoly Law*, 3 Japan Echo 85, 91 (1981) cited by Tony A. Freyer, *Restrictive Trade Practices and Extra Territorial Application of Antitrust Legislation in Japanese-American Trade*, 16 Ariz. J. Int'l & Comp. L. 159, 168-69 (1999) (stating "... Americans ... argued that the distinctiveness of Japanese society constituted an illiberal, illegitimate barrier to their exports. ... the critics maintained that Japan's ideological or cultural distinctiveness encouraged collusive and anticompetitive practices ... proponents of such views agreed ... that the Japanese version of competition takes the form of solidarity within the company ... and burning enthusiasm for combat in inter-company relationships. For the Japanese, it was 'hard to accept' that competition 'produces losers.'").

<sup>208</sup> For the case of the service/investment markets, see Lee, *supra* note 17, at 160.

<sup>209</sup> *Id.* at 141-64.

were substantial differences between the anti-competitive practices of the two countries' markets based on their characteristics, scope and effectiveness: that is, some Japanese exclusive business practices in commodity and investment markets (more accurately, private markets) were determined to be rooted in the intrinsic Japanese social environment which might not be easily controlled by the government policy and is different from that of Korea.<sup>2 1 1</sup>

Considering the over-all economic situations of the two countries-including the level of the development of the intellectual property, service and commodity markets of the two countries- this result implies that regulation on intellectual property markets as well as the service markets<sup>2 1 2</sup> is deeply affected by social or cultural factors as well. As viewed by international standards, the two countries' cultural backgrounds are almost identical,<sup>2 1 3</sup> which makes their governments' policy objectives for their intellectual property market regulations very similar in their characteristics.<sup>2 1 4</sup>

For example, anti-competitive practices indicated by the Japanese trade partner countries in the Japanese intellectual property markets including lack of enforcement of the laws to protect the intellectual property rights are very similar to those in the Korean markets, which reflect the policy objectives or priorities of both countries not to lay stress on intellectual property protection<sup>2 1 5</sup>. The two countries are also commonly negative to regulate the temporary copies disregarding the fact that such copies infringe on the right holders' reproduction right, which reflects leniency of the policy objectives of both countries in regard to the infringements of the other's intellectual property rights. There are many other situations in both countries' intellectual property regulations, including constitutional interpretations prohibiting closed trials even in the case of trade secret-related trials which is identical to the case of Korea, which mirror their particular cultural/social circumstances.

Those policy objectives may come from the cultural atmosphere of the two countries to regard principally the intellectual property rights as the human beings' common heritage, which has deeply been rooted in eastern countries irrespective of their economic or social development levels.<sup>2 1 6</sup> Such policy

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<sup>2 1 0</sup> See Lee, *supra* note 16, at 184-95.

<sup>2 1 1</sup> See *id.* at 194-95.

<sup>2 1 2</sup> See Flores, *supra* note 206, at 167.

<sup>2 1 3</sup> See Lee, *supra* note 17, at 161.

<sup>2 1 4</sup> See Flores, *supra* note 206, at 167.

<sup>2 1 5</sup> The lack of enforcement of the laws to protect the intellectual property rights may seemingly be assessed to be resulted from the over-all underdevelopments of the two countries' legal and regulatory systems, however, this assessment would not be proper making consideration of the significant difference of the overall development levels of both countries' legal and regulatory systems.

<sup>2 1 6</sup> For the intersection of antitrust and intellectual property, reflecting the atmosphere of intellectual property protection as the antitrust regulation in Japan, see Rill & Schechter, *supra* note 15, at 798 (stating "...countries have different substantive standards and different enforcement regimes. ... The Japanese system, like that of several others,

objectives are, seemingly, closely related to the policy objectives of the two countries in regulating intellectual property markets to put more emphasis on social stability or consumer protection as compared to the social competitiveness or objective efficiency in the developed western countries: Such policy objectives reflect the overall social and cultural environment of the two countries which stress stability rather than productivity or efficiency of any institute.<sup>2 1 7</sup>

Considering the cultural and social environments of the two countries, their governments are apt to be persuaded to respect such environments in enacting and enforcing the related regulations.<sup>2 1 8</sup> Even though the governments of both countries have systematically and legally tried to achieve the minimum standards of the TRIPs Agreement in regulating the intellectual property markets, particularly under pressure from their trade partner countries as well as the international institutions, it will take substantial time to eliminate the real gap between both countries' policy objectives and those required by the TRIPs or their trade partners.

Those situations could also partly rationalize the high level minimum standards to regulate the intellectual property rights in the TRIPs and also the inducement of the agreement to disagree in certain complicated sectors, as well as the compromise between the developed and underdeveloped countries. However, the similarity of the anti-competitive practices in intellectual property markets between the two countries could not be illustrated as, so called, the south/north issue discussed seriously during the negotiations of the TRIPs, considering the significant difference in the level of over-all development between the two countries. These analytical results imply that such social/cultural aspects of the intellectual property markets should be treated differently from the controversial aspects in the TRIPs mechanism<sup>2 1 9</sup> between the developed and the developing countries.

Regarding international regulations on the cultural aspects of intellectual property markets, no cultural exceptions or provisions per se emerge from the text of the TRIPs Agreement as well as in the GATS.<sup>2 2 0</sup> This is in contrast with the case of GATT, where, even though it is far from being sufficient to deal with the cultural aspects of trade, there are a few cultural-related provisions.<sup>2 2 1</sup>

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does provide low standards because the predominant enforcement tool is through an opaque administrative guidance process.").

<sup>2 1 7</sup> See Lee, *supra* note 17, at 160-61.

<sup>2 1 8</sup> See Lee, *id.* at 161.

<sup>2 1 9</sup> See, for example, Abbott, *supra* note 71, at 695-96, 718.

<sup>2 2 0</sup> See *supra* note 17, at 161.

<sup>2 2 1</sup> There are cultural exclusions such as Article XX(f) (protection of national treasures of artistic value), Article XIX. (emergency action on imports of particular products), and Article IV (special provisions to cinematograph films).



The current provisions of the TRIPs Agreement have been estimated to be broad and ambiguous without considering cultural aspects of intellectual property protection, which allows the interpretation of them taking local circumstances and diverse legal philosophies into account. In the WTO world, essentially a rule-based society<sup>2 2 2</sup>, the TRIPs disagreement on cultural factors influencing trade-related intellectual property rights makes the regulation of them by TRIPs inefficient and controversial among the member countries with different cultural and social backgrounds and circumstances.

Complementary provisions reflecting the cultural differences among the member countries<sup>2 2 3</sup> are expected to be incorporated into the TRIPs in the near future.<sup>2 2 4</sup> The points bearing in mind when they provide for those provisions are that the cultural/social differences among the members or their neighboring regions should not be interpreted just with one-sided standards from any grouped members and that the provisions should be more detailed and full-fledged than the GATT provisions.

Until such complementary provisions have been made, the governments of both countries should try to establish scientific and concrete evidence to support those practices resulting from the policy objectives that reflect their particular cultural-social environments. Such evidence could demonstrate the reasonableness and fairness of those factors to international trade, to be necessary to sustain the specific public policy objectives, or to be the inevitable reflection of the particular situation intrinsic to their countries.

At the same time, it is advisable to establish the interpretation rules of the WTO Agreement<sup>2 2 5</sup> that takes into account the cultural and social environments unique to the member countries.<sup>2 2 6</sup> These newly established rules would, to some extent, consider the individual countries' specific situations

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<sup>2 2 2</sup> For the rule-based global trading system, *see generally* John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 1-30 (1997).

<sup>2 2 3</sup> For the cultural-social differences between/among countries including, for example, good faith difference, *see Abbott, supra* note 8, at 186.

<sup>2 2 4</sup> For the case of GATS Agreement, *Lee, supra* note 17, at 162.

<sup>2 2 5</sup> For the definition of the term "interpretation" in comparison with the term "construction", *see* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harv. Int'l L.J.* 333, 339 (1999) (stating "In Anglo-American parlance, interpretation refers to the determination of the meaning of words contained in a contract, statute or treaty, while construction refers to the determination of the intent of the parties in connection with a matter not specifically addressed in the text of the document. While the distinction may be a matter of degree, construction raises greater questions of legitimacy, of fidelity to the intent of the parties and-in statutory or treaty contents-of democracy."). For the adoption of the concept of the interpretation and construction involved by the WTO dispute resolution process, *see Trachtman, id.* at 340 (stating "The WTO dispute resolution process often involves interpretation: ... Some dispute resolution proceeding involve construction. ... construction decisions are those involving non-violation nullification or impairment. ... recent WTO jurisprudence has seemingly rejected construction. ... However, construction occurs where concepts that are intended are implicit in the text though they are not expressly articulated. ...").

<sup>2 2 6</sup> For the case of the GATS Agreement, *see Lee, supra* note 17, at 162-63.

regarding the cultural,<sup>2 2 7</sup> social, political, or historical backgrounds and environments when they apply the WTO rules and regulations to certain countries.<sup>2 2 8</sup> The establishment of such rules might seem to contradict to the recent trends of international trade-related regulations toward hard laws<sup>2 2 9</sup> as in the case of the WTO regime from the GATT.<sup>2 3 0</sup> However, for the practical and efficient formation of international trade and competition regulations, their uniform enforceability should properly be mixed with flexibility,<sup>2 3 1</sup> which should be complemented with the adoption of strict rules of evidence for avoiding unnecessary obstacles to trade.<sup>2 3 2</sup>

It could also be indicated that current dispute settlement mechanisms under the TRIPs would not be sufficiently capable to meet the controversial disputes in respect with the trade-related aspects of intellectual property rights, which were established without sufficient consideration of the cultural/social aspects of them. Even though sufficiently evaluating the anti-competitive practices in intellectual property market in the terms of cultural and social factors as well as the legal interpretation and applications of the concerned WTO provisions might be very difficult and complicated, such an undertaking is recommended in order to continue to promote international trade related with intellectual property rights without serious cultural/social contradictions among the member countries under the WTO system: such cultural/social contradictions among the member countries would function as impediments to the

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<sup>2 2 7</sup> For the lack of specificity regarding culture and cultural products within WTO, *see* Karsie A. Kish, *Protectionism to Promote Culture: South Korea and Japan, A Case Study*, 22 U. Pa. J. Int'l Econ. L. 153, 161-62 (2001) (stating "Its panels have largely to acknowledge that culture may have a dual nature... . The panels have also ignored the fact that cultural products may also have a conflicting nature... . This refusal to create specific rules for culture and cultural products could reveal the WTO's reluctance to believe that governments that employ protectionist measures are trying to preserve and foster the unique entity of culture ...").

<sup>2 2 8</sup> For a general discussion of costs and benefits of these construction rules, *see* The TRIPs Agreement and Developing Countries, UNCTAD, United Nations, New York and Geneva, 1996, *cited by* Drohas & Braithwaite, *supra* note 78, at 451 n.3. This approach, of course, is not contradictory to the strict constructionist interpretation of the TRIPs Agreement adopted by the Appellate Body. *See* Report of the Appellate Body, India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, *cited by* Reichman, *supra* note 54, at 446.

<sup>2 2 9</sup> Hard law refers to a system of norms as to which a relatively high expectation of compliance exists. *See* Abbott, *supra* note 8, at 196.

<sup>2 3 0</sup> *See* Abbott, *id.* at 196 n.44 (stating "The principal evidence of this trend may be found in two areas. The first is in the progressive refinement of rules from the general to the specific. The second is in the transition of the dispute settlement system from consensus-based to quasi-judicial. ... The phenomenon of rule refinement has been underway since the founding of the GATT, ... However, rule refinement does not always result in a significant reduction of the level of discretion allowed to national governments, as evidenced to some extent by the SPS Agreement.").

<sup>2 3 1</sup> For example, in the case of the TBT Agreement, taking into account the existence of legitimate divergences of geographical and other factors between countries, the Agreement extends to the Members the regulatory flexibility to reflect the differences between them. (*See* TBT Agreement, art. 2.2.) This provision extending flexibility to the application of the TBT Agreement could be expanded and applied more generally to the construction of the WTO Agreements concerned.

<sup>2 3 2</sup> In the case of the TBT Agreement, the degree of flexibility shall be limited by the requirement that technical regulations "should not become unnecessary obstacles to trade". *See* TBT Agreement, art. 2.4.

continuous development of the WTO regime, which could be adding to the world-wide anti-WTO emotion emerging particularly from the non-governmental organizations.

It is also advisable to improve the current dispute settlement mechanism. One approach to improve the current dispute settlement mechanism is to establish the independent TRIPs dispute settlement body including a panel and an appellate body.<sup>2 3 3</sup> The panel and the appellate body would be constituted with permanent members with the intellectual property-specified qualifications to deal with the cultural and social aspects of the disputes in addition to legal aspects of them and appointed by the WTO through open competition procedures. Thus, TRIPs dispute settlement framework would be operated as the well established domestic-like international court with a two-tier mechanism with reliable authority, which could provide more predictable legal environments in coordinated international intellectual property markets.<sup>2 3 4</sup>

## VI. Concluding Remarks

Many of Japan's and Korea's competition or international trade-related laws, particularly in the intellectual property rights, have been enacted and modified passively due to the expressed or implicit pressure from their trade partner countries and to the requirements of international organizations like the WTO and WIPO. Trade pressure on both countries in the intellectual property fields was particularly serious from 1980s to 1990s and then after the establishment of WTO system, during which both countries took various positive measures to protect the trade-related intellectual property rights. Thus such enactments or modifications were relatively not a voluntary response by the governments of both countries to internal public and private sector concerns.

They may have occurred in this manner because of the two countries' rapid economic growth and development during the past 40 years were influenced by their governments' strong export-driven policies without being properly balanced by the corresponding competition regulation and the trade-related intellectual property considerations, and their heavy dependence on foreign trade. However, under the WTO mechanism, both countries' trade-related competition, intellectual property regulations should be

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<sup>2 3 3</sup> For the similar suggestion in the case of GATS Agreement, *see* Lee, *supra* note 17, at 163-64.

<sup>2 3 4</sup> For the "soft approach" through the non-binding panel to treat the disputes raised from competition policy, under which the parties to the dispute are allowed to select the members of the panel, *see* Jason E. Kearns, *International Competition Policy and the GATS: A Proposal to Address Market Access Limitations in the Distribution Services Sector*, 22 U. Pa. J. Int'l Econ. L. 285, 313-17 (2001) (stating "First, an *ad hoc* selection mechanism allows the parties to tailor the panel to the specific issue in dispute. ... Second, because the losing party participates in the selection of the panel and because the panel will have particular expertise in the precise issue before it, panel findings will be more persuasive and legitimate").

improved voluntarily and continuously to implement their plans in accordance with the fairly liberalized global market systems, under which they could pursue their continuing trade policy objectives.

Competition policies or anti-competitive practices particularly in the intellectual property markets are substantially affected by the historical, political, cultural or social fabrics or environments of the individual countries. Thus, it makes it difficult to evaluate those anti-competitive practices in intellectual property markets under uniform standards of current TRIPs Agreement as well as to re-establish the internationally accepted uniform norms to regulate them. In consideration of this point, this study is limited by the fact that the anti-competitive practices of both countries have been comparatively reviewed from the viewpoint of international trade norms or competition norms that have only been discussed but not yet established, without consideration of other external factors.

This study is expected to be followed by an interdisciplinary analysis of the anti-competitive business practices of the two countries' intellectual property markets to discover effective and cooperative policy directions for treating with those practices. Such an analysis could also suggest a direction towards more effective regulation of trade-related aspect of intellectual property rights in these coming WTO negotiation rounds.