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The two excellent papers we just heard pose quite a challenge for a commentator at the end of a long and intense day. Rather than attempting to expand on the interesting statements made by Professor Reichman and Emery Simon about intellectual property rights, I would like to talk about what the two speakers did not say. Namely, I will highlight the significance of bringing intellectual property issues into the trade arena.

A few key points illustrate the significance. First, placing intellectual property protection in the trade framework has important implications for the use of trade sanctions. Second, the incorporation in GATT TRIPS[1] and NAFTA[2] of traditional intellectual property rights adds an inherent tension to trade relations, particularly for new technologies. And finally, because of the tension, intellectual property issues may increasingly drive GATT members to form regional and bilateral intellectual property arrangements.

While the expansion of intellectual property protection around the world can be attributed to American trade pressure, the trade framework will constrain any country's ability to take unilateral measures against infringements of intellectual property rights. The TRIPS text and NAFTA will set basic minimum standards for protection of intellectual property. If, following the entry into force

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187; Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991), Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade In Counterfeit Goods (Annex III).

2. North American Free Trade Agreement, Dec. 22, 1991, *available in* LEXIS, Genfed Library, Extra File, NAFTA.

of these international codes, a signatory lacks protection, the trade agreements will require that any dispute over the compliance of national law to the treaty standards, whether those disputes arise in a North-North or North-South context, be resolved through the multilateral GATT panel process or the NAFTA arbitration mechanism rather than through unilateral action.

This multilateralism may cause particular difficulties for the United States. In the last few years, the United States has taken unilateral action under sections 337[3] and 301[4] of the U.S. trade law to block the import of patent infringing products and to sanction countries that did not adequately protect American intellectual property. A GATT Panel has already ruled that section 337 violates existing U.S. obligations under the GATT.[5] With the addition of the TRIPS code, section 301 may also be challenged as contrary to the new GATT obligations. Because the final GATT and NAFTA texts will necessarily contain compromises on substantive standards, American industry is likely to have objections to at least some of the negotiated outcome for intellectual property rights. And, if national implementation of new intellectual property standards is insufficient, the gains may lose a great degree of their value.

Should the United States not be satisfied with foreign intellectual property protection, the risk to international trade of continuing unilateral action under GATT and under NAFTA is increased. If the United States imposes intellectual property sanctions outside the treaty framework, cross-sectoral retaliation may be permitted. For example, if the United States continues to act under section 337 or sanctions a country under section 301, the harmed country may be permitted under GATT to impose sanctions against the United States in another area, such as the withdrawal of new foreign investment protections.

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3. Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (1988).

4. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1988).

5. *See* United States—Section 337 of the Tariff Act of 1930, Report by the Panel Adopted on 7 November 1989 (L/6439), GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 345, 345-402 (36th Supp. 1990).

While these implications of including intellectual property rights in a trade framework may not have been carefully thought out, the constraints on unilateral sanctions are, of course, not without benefit. As Emery Simon noted, the trade negotiations have helped to spread intellectual property rights around the world.

In spreading intellectual property rights, the trade negotiations are, however, setting up an inherent tension, particularly in TRIPS. The trade negotiations focus on traditional forms of intellectual property protection. For example, TRIPS will require signatories to enact basic copyright protection. Yet, as Professor Reichman pointed out earlier, there are many problems with the form and scope of copyright protection for new technologies and applied scientific know-how. The traditional rights now being enshrined in TRIPS are also at odds with emerging national trends. New technologies do not fit neatly within traditional forms of intellectual property. Although in the United States, copyright law is generally used to protect software and databases, the protections are, in effect, struggling to achieve sui generis forms of protection. The "look and feel" and "sweat of the brow" issues went beyond the traditional scope of copyright. Elsewhere, sui generis rights are also emerging for intellectual property, such as semiconductor chip protection and the European Community's proposed database extraction right.

By focusing on the traditional forms of protection at the same time, these protections are pressured to move in a sui generis direction, we may have defined some rights, but have left significant gaps for the scope of protection. Neither TRIPS nor NAFTA go very far in articulating standards for the scope of each new international intellectual property right. As Emery Simon noted, this may be better than nothing. Yet, these gaps are a major problem for effective international protection, especially for information technologies. National differences in the scope of protection will exist rather than an "all or nothing" regulatory framework. These differences in scope are likely to challenge the fundamental trade principles limiting the imposition of unilateral sanctions. The United States and other intellectual property producing countries will most likely face domestic pressures to sanction countries that do not

extend the scope of protection as far as the intellectual property producing country.

This pressure is likely to push a second generation in the evolution of intellectual property rights in a trade environment. The TRIPS text provides in Article IV for most-favored-nation treatment, but does not spell out the relationship to Article XXIV of the GATT, the provision on free trade areas. This suggests that we may see interesting movements toward intellectual property free trade areas. Once the basic rights are established in TRIPS, the combination of differences in the scope of protection, political pressure for sanctions, and limits on unilateral action are likely to encourage countries to seek free-trade areas defined by uniform standards. In other words, countries may try to deal with second generation intellectual property issues outside the broad multilateral framework. The timing sequence of NAFTA and TRIPS should not go unnoticed; it illustrates this point.

To conclude, I would just like to reiterate comments that Emery Simon and Professor Reichman made earlier. As Emery Simon said, including at least the traditional intellectual property rights in the trade treaties is better than what we had before; and as Professor Reichman noted, the inclusion of intellectual property rights in GATT and NAFTA is no panacea because another set of questions will remain to be addressed as technologies develop and as forms of intellectual property change.