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TRIPS AND INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION IN AN AGE OF ADVANCING TECHNOLOGY

Michael L. Doane

INTRODUCTION

Over the last 25 years, the international marketplace has witnessed the growing presence of high technology products and the development of new forms of technology. Technology-based industries manufacturing products ranging from computers, semiconductors, and software to biotechnology goods and pharmaceuticals have become an increasingly vital sector of the U.S. economy. As a result, a large portion of American exports are high technology products and related services. Estimates place the international trade of such products at as much as five percent of the U.S. Gross National Product.

An important factor in the development of the United States as the world's leading technological innovator is its strong protection of intellectual property rights. It is hardly surprising, therefore, that the international protection of intellectual property rights through either multilateral or bilateral negotiations occupies an important position on the U.S. agenda for proposed reforms of the international trading system. The United States is a major producer and exporter of copyrighted materials as well as high technology products. In 1989, copyrighted materials accounted for $173 billion in U.S. sales and $22 billion in foreign exports. Furthermore, numerous American products are identified by well-

* L.L.M., 1994, Georgetown University Law Center; J.D., 1990, University of Washington School of Law; M.A.I.S., 1990, Jackson School of International Studies; B.A., 1986, Kent State University. The author wishes to thank Professor Don Wallace, Jr. for his advice in the preparation of this Article.


known and respected trademarks. Consequently, American businesses, artists, and scientists stand to suffer considerably from the piracy that results from the inadequate protection of intellectual property rights abroad. It is estimated that worldwide losses to U.S. industries from piracy and other forms of intellectual property right infringement exceed $60 billion annually.4

During the 1980s, the United States responded to the problem of inadequate intellectual property protection through a variety of domestic and international actions. Congress moved to strengthen actions taken under Section 337 of the Tariff Act of 19305 and created the Super 301 and Special 301 actions.6 The Reagan and Bush Administrations negotiated bilaterally and multilaterally in order to obtain adequate intellectual property protection abroad.

I. INTELLECTUAL PROPERTY IN THE URUGUAY ROUND

Due to the persistence of the U.S. business community and government, international intellectual property rights protection was placed on the negotiating agenda for the Uruguay Round of Negotiations of the General Agreement on Tariffs and Trade (GATT).7 The mere inclusion of intellectual property rights on the agenda remains controversial and many developing countries contend that it exceeds the limitations of the GATT’s mandate.8 The United States asserts that inadequate intellectual property protection leads to trade distortions and the impairment of concessions due to intellectual property piracy which amounts to a non-

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The consequence of this multilateral debate on intellectual property rights to date is the proposed Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS Agreement or Agreement). This proposed agreement has received mixed reviews from all sides, including some U.S. analysts who question the value of the TRIPS Agreement in its current form. Notwithstanding this criticism, the proposed TRIPS Agreement represents a significant step forward because it mandates the establishment of substantive standards for intellectual property protection and requires mechanisms for the enforcement of rights. It thus provides a framework for the continued development of international intellectual property protection.

At this stage of the negotiations, the issue no longer remains whether increased levels of intellectual property protection will arise, but rather, what forms the protection will take and how it will evolve. The proposed TRIPS Agreement and the remaining Uruguay Round Agreements may be rejected, but the United States has made intellectual property protection a centerpiece of its international trade policy and possesses several mechanisms with which to pursue that policy. The United States Trade Representative (USTR), Ambassador Mickey Kantor, recently stated:

One of my principal responsibilities as USTR is to open foreign markets and break down barriers to U.S. manufactured goods, agricultural products, and services. This includes pursuing the strong protection of U.S. intellectual property, so important to our high technology industries. When all is said and done, opening foreign markets is our main objective in the Uruguay Round; it is the impetus, from our standpoint, for the North

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10. See GATT Secretariat, Draft Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations (1991) [hereinafter The Dunkel Draft] (outlining the results of the Uruguay Round concerning international protection of intellectual property).

American Free Trade Agreement (NAFTA); it will be a principal focus of our efforts with respect to Japan and China, as well as in other nations around the world. Consequently, we need to use every tool at our disposal—multilaterally where possible, and bilaterally where necessary—to make sure that other markets are comparably open to our own.\textsuperscript{12}

The United States continues to pursue intellectual property protection through regional negotiations as demonstrated by the strong intellectual property provisions of the NAFTA. In addition, the USTR has aggressively used Special 301 to encourage nations such as Taiwan, Thailand, and South Korea to improve their intellectual property laws. Even with a TRIPS Agreement in place, it is unlikely that the United States will cease negotiating for the further development of intellectual property protection through regional and bilateral agreements.

Assuming that a TRIPS Agreement enters into force, the international community will face the problem of adjusting international intellectual property law to meet changes in technology. The development of new technology is highly dynamic and the law must be able to advance with it. The past two decades saw a pragmatic evolution in technology in areas such as computer software, semiconductors, and biotechnology.\textsuperscript{13} These areas, however, were inadequately covered by existing forms of intellectual property protection. This inadequacy prompted debates over whether to modify existing forms of protection, as with computer software, or create \textit{sui generis} forms of protection, as with semiconductors. One stated purpose of the U.S. negotiators in the Uruguay Round was to ensure that a mechanism for the advancement and adjustment of international intellectual property protection is included in any TRIPS Agreement.\textsuperscript{14}

Technological advancements and their importance to the world econo-

\textsuperscript{12} Testimony of Ambassador Mickey Kantor, United States Trade Representative, \textit{Before the Senate Comm. on Finance} (Mar. 9, 1993) (on file with \textit{The American University Journal of International Law and Policy}).


my placed intellectual property rights on the Uruguay Round agenda. This Article will examine the progress made in these negotiations by analyzing the proposed TRIPS Agreement and comparing it with progress made using other mechanisms like the NAFTA and Special 301 actions. The Article will then consider the place of the GATT in the continued development and spread of intellectual property law after the Uruguay Round. Technological advancements have improved both quality of life and the ability of pirates to infringe upon protected intellectual property rights. In order to meet the needs of the international marketplace, an effective mechanism for the protection of intellectual property rights must be established, hopefully multilaterally through the GATT, or if necessary, through regional and bilateral arrangements.

II. THE DEVELOPMENT OF THE TRIPS PROPOSAL

A variety of economic and technological variables initiated the drive to develop some form of an agreement to address the trade-related aspects of intellectual property. One purpose of intellectual property law is to provide innovators and investors with an incentive to participate in creative activity. Because investors tend to be averse to unreasonable or excessive risk, absent adequate intellectual property protection, many investors may shift their investments from intellectual property-dependant projects to less productive, albeit less risky investments. Intellectual property protection eliminates some investment risk and provides investors with an economic incentive to finance innovative activity. This investment, in turn, helps produce and support a prosperous economy. In an increasingly integrated global economy, intellectual property protection will assume a more vital role as industrialized nations begin to shift from traditional manufacturing bases to more knowledge-based and research-intensive industries.

Intellectual property piracy is rampant and affects a wide range of industries. In particular, piracy hurts pharmaceutical industries, indus-

15. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that copyrights and patents are intended to motivate the creative activity of both authors and inventors); Goldstein v. California, 412 U.S. 546, 555 (1973) (stating that the purpose of copyright protection is to encourage people to engage in artistic and intellectual creation).


17. See Gary M. Hoffman & George T. Marcou, Combatting the Pirates of
tries protected by trademark law, and producers and publishers who rely on copyright protection (i.e., developers of computer software, creators of literary and artistic works, and producers of audio and video recordings). Many nations deny patent protection to pharmaceutical products which by their nature require considerable time and expense to develop and bring to market. Consequently, some pharmaceutical companies face foreign competitors who misappropriate information with the active assistance and encouragement of their governments to produce inexpensive and potentially ineffective or dangerous imitations. New technology such as digital audio tapes, high quality digital broadcasts, optical character recognition scanners, and recordable compact discs threaten to make piracy easier and more difficult to detect. These technologies allow pirates to make high quality copies of copyrighted materials at

America's Ideas, 7 THE COMPUTER LAWYER 7, 8 (1990) (noting the extent of the damage inflicted by copyright piracy on many industries and areas).

18. See id. (noting that the communication and information industries are particularly injured by copyright piracy).


minimal cost and effort.\textsuperscript{22} Inadequate trademark enforcement leads to the marketing of substandard counterfeit products that are sold in both foreign markets as well as the trademark owner's home market.\textsuperscript{23} Trade distortions resulting from ineffective or nonexistent intellectual property protection led the United States and other industrialized nations to discuss an international framework for the protection of intellectual property rights.

Proponents introduced the international protection of intellectual property rights to the GATT at the end of the Tokyo Round in the context of halting the counterfeiting of trademarked goods. Although the parties reached no agreement, the United States and the European Economic Community (EEC) succeeded in bringing the issue to the attention of the GATT's contracting parties and submitted a proposed agreement on measures to inhibit trade in counterfeit goods.\textsuperscript{24} Actions taken by developing nations at the March 1980 Conference of the World Intellectual Property Organization (WIPO) further encouraged industrialized nations to pursue negotiations under the auspices of the GATT. At the conference, the Group of Developing Countries attempted to weaken the already inadequate standards of protection provided by The Paris Convention for the Protection of Industrial Property.\textsuperscript{25} Although the industrialized nations blocked this initiative, this action demonstrated both the futility of seeking broad-based reform in this forum and the need to pursue other avenues to advance international intellectual property protection.

During various ministerial GATT meetings throughout the early 1980s, members continued discussing the possibility of including the subject of trade in counterfeit goods on the agenda of the next round of


\textsuperscript{23} Dam, Growing Importance, supra note 20, at 628.

\textsuperscript{24} Jane Bradley, Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations, 23 STAN. J. INT'L L. 57, 64-65 (1987) (stating that, while not a complete success, the U.S. proposal resulted in a modest work program for trade in services and counterfeit goods); see also Agreement on Measures to Discourage the Importation of Counterfeit Goods, GATT Doc. L/5382 (Oct. 18, 1982).

negotiations. Developing nations resisted the inclusion of intellectual property rights, asserting that such a topic exceeded the GATT’s mandate. This period also saw greater use of domestic measures to protect intellectual property rights and to deter trafficking in counterfeit goods. Such measures included the instigation of Section 301 actions against nations with inadequate intellectual property protection and the use of Section 337 of the Tariff Act of 1930, which allows the seizure and destruction of infringing goods at the U.S. border. The Omnibus Trade and Competitiveness Act of 1988 further strengthened these domestic measures to combat intellectual property infringement more effectively. These negotiations and aggressive domestic enforcement measures signaled the industrialized nations’ determination to include strong intellectual property protection in the international trading system.

The persistence of the United States and the other industrialized nations was rewarded by the inclusion of trade-related aspects of intellectual property rights in the Uruguay Round agenda by the Punta del Este Ministerial Declaration on the Uruguay Round. Nations opposing strong international intellectual property protection continued to resist these negotiations by insisting that WIPO remained the appropriate fo-

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26. See Indonesia Amends Its Copyright Law, East Asian Executive Rep. 7 (Nov. 15, 1987) (stating that in response to a Section 301 action, Indonesia altered its copyright protection); New Opportunities for U.S. Exports Seen as South Korea Liberalizes Trade Policy, Int’l Trade Rep. (BNA) 1552 (Dec. 24, 1986) (reporting that South Korea pledged to introduce new copyright protection laws in response to two Section 301 cases).

27. See International Trade, USTR Requests $1.6 Million Increase in Authorization for 1990 Budget, Daily Rep. for Executives (BNA) No. 55 (Mar. 23, 1989) (noting the increase in the number of Section 337 actions during the late 1980s).


29. Ministerial Declaration, supra note 7, at 25. The declaration stated:

   In order to reduce the distortions and impediments to international trade, and taking into account the need to promote the effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

   Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

Id.
rum for such a topic. This resistance ceased when WIPO's Director-General was specifically mandated to participate in the GATT intellectual property negotiations. Further opposition to substantive TRIPS negotiations ended when India agreed to accept "the principle of policing trade-related aspects of intellectual property rights within the framework of the Uruguay Round multilateral trade negotiations." With this obstacle eliminated, substantive proposals could be considered.

The Governments and business communities of the United States, Japan, and the European Community submitted proposals stating basic objectives and outlining specific substantive requirements for a TRIPS Agreement. These proposals revealed the specific concerns and areas of common agreement of these parties. In general, the proposals contained several basic requirements, including the development of substantive standards, strong enforcement mechanisms, a strengthened dispute resolution system, and the application of traditional GATT obligations such as national treatment, transparency, and most favored nation treatment, to any intellectual property regime.

As part of its proposal, the United States announced that its objective in these negotiations was "to reduce distortions and impediments to legitimate trade in goods and services caused by deficient levels of protection and enforcement of intellectual property rights." To achieve this objective, the U.S. proposal included basic standards for patents, copyrights and trademarks generally found in its domestic intellectual property laws. It also specifically addressed two controversial elements of many developing nations' patent laws: short patent terms and compulsory licensing. The proposal provided for a patent term of twenty years from the time patent protection was sought or seventeen

30. GATT Negotiating Group, supra note 8, at 1358.
31. India Accepts Policing of Trade-Related Intellectual Property Rights in MTN Talks, 3 Int'l Trade Rep. (BNA) 244 (Sept. 20, 1989) (noting that India previously asserted that the responsibility for protecting intellectual property belonged to the WIPO). India's recognition of the importance of intellectual property protection in the GATT was seen as a retreat from their original hard-line position, thereby presenting an opportunity for continued negotiations. Id.
33. U.S. Framework Proposal to GATT, supra note 9, at 1371.
34. U.S. Framework Proposal to GATT, supra note 9, at 1373.
35. U.S. Framework Proposal to GATT, supra note 9, at 1373.
years from the date the patent was granted. The U.S. proposal also discouraged compulsory licensing and required full compensation and non-exclusivity for such licenses. The rest of the industrialized nations found these elements of the U.S. proposal and its suggestions concerning the protection of copyrights and trademarks generally acceptable.

The U.S. proposal also addressed new technologies. The proposal explicitly extended copyright protection to "computer programs and databases, and to forms yet to be developed." Furthermore, the United States proposed establishing a *sui generis* system for semiconductor chip layout design protection. This concern for a flexible system of international intellectual property protection to cover new technologies played an important role in the U.S. proposal. For example, the proposal recognized that:

> Forms of technologies and creative activity change and develop over time. The Agreement must be a living document, and flexible enough to accommodate future consensus on improved protection of intellectual property and to include new forms of technology and creativity as they appear. The mechanism for amendment and revision of the Agreement should be designed to encourage future improvements of the Agreement.

Technological innovation stretches the limits of intellectual property protection as it currently exists. This portion of the U.S. proposal ensured that the development of a TRIPS Agreement would take such innovations into consideration.

The Europeans and Japanese responded with less detailed, yet significant, proposals for the TRIPS negotiations. The initial European proposal lacked any statement concerning substantive standards, but did suggest national enforcement provisions. In addition, the EEC noted its general concerns regarding international intellectual property protection, suggesting that current GATT provisions inadequately resolved the problems found in the field of intellectual property rights. The EEC later submitted another proposal regarding substantive standards including measures relating to geographic indications and appellations of origin.

42. *Guidelines and Objectives Proposed by the European Community for the*
The Japanese proposal addressed the difficulties in protecting semiconductor chips and expressed the need to maintain traditional GATT principles in a TRIPS Agreement. The Japanese and other parties also expressed concern about the future role of mechanisms for the enforcement of international intellectual property rights such as the U.S. Special 301 action. While many of these proposals' differences represent minor debates in the field of intellectual property law that can be resolved during negotiations, other differences will require extensive discussion and compromise to reach mutually satisfying results.

Supplementing each of their Government’s proposals, the business communities of the United States, Japan, and the European Community submitted a substantial joint proposal to the TRIPS Agreement negotiators. The substantive standards proposed by the business groups represented a compromise between the industrialized nations’ intellectual property laws and the governments’ proposals. The business communities’ proposal also gave in-depth consideration to compulsory licensing and working requirements, stating that failure to work a patent in a particular nation should not be grounds for revocation and that “importation authorized by the patentee which meets local need shall be deemed to satisfy the requirements for working.” The business communities also suggested several incentives such as enhanced access to technology, bilateral economic assistance, and technical assistance, to encourage developing nations to join a GATT intellectual property code. Notwithstanding the receptive attitude, the business groups also suggested that industrialized nations condition access to their markets and the availability of general preferences on adequate intellectual property protection. The cooperation of the various business communities in the production and submission of such an extensive and detailed joint proposal further demonstrated the importance of intellectual proper-


44. See Basic Framework Proposal supra note 19 (containing recommendations from the business communities of the United States, Japan, and the European Community).

45. Basic Framework Proposal, supra note 19, at 32.

46. See Basic Framework Proposal, supra note 19, at 28 (discussing several incentive plans).

47. Basic Framework Proposal, supra note 19, at 28.
The process of negotiating the proposed TRIPS Agreement has proven to be long and difficult. The objective of eliminating trade distortions caused by inadequate international intellectual property protection, however, will continue to guide future negotiations. The industrialized nations recognize their common economic and political interests in developing some form of international intellectual property protection and further recognize that:

"Trade with technology constitutes a decisive pillar of the future competitiveness of research-oriented countries like the U.S. and the EC member states. Consequently, it appears as an absolute necessity to adequately protect the results of research and development achieved after heavy investments."

With the establishment of a TRIPS Agreement, the negotiations enter a new stage. Although problems and disagreements remain, a framework now exists for the continued development of the international protection of intellectual property rights.

III. THE TRIPS AGREEMENT

In order to advance the negotiations in all the areas covered by the Uruguay Round, the GATT Director-General issued The Dunkel Draft as a comprehensive statement of the status of the negotiations. The Director-General presented this document as an all or nothing agreement designed to prevent parties from splitting off sections to be adopted separately. This requirement proved to be useful in obtaining a TRIPS Agreement, as the United States and other industrialized nations could combine concessions sought by developing nations in such areas as agriculture and textiles to the achievement of an adequate TRIPS Agreement. The proposed TRIPS Agreement represents a compromise; though, and therefore receives much criticism. Although the proposed TRIPS Agreement has strengths and weaknesses, it nonetheless repre-


sents an important first step in obtaining effective international intellectual property protection.

The comprehensive TRIPS proposal covers the spectrum of intellectual property protection by providing minimum substantive standards, mandated national enforcement mechanisms, and international dispute settlement provisions.\textsuperscript{51} The proposal includes the traditional GATT requirements of national treatment and most favored nation treatment with some exceptions.\textsuperscript{52} For example, the nature of the national treatment concept in the context of intellectual property varies from the traditional understanding of GATT's national treatment conception.\textsuperscript{53} Questions of national treatment presented problems for negotiators and caused opponents to raise objections against the TRIPS Agreement, particularly in the area of copyright regulations. The question of national treatment, however, represents only one of the criticisms leveled at the Agreement. To evaluate the Trips Agreement adequately, it is necessary that the international community first analyze the strengths and weaknesses of the work as a whole before passing judgment.

A. PATENTS

The establishment of strong patent protection is of primary importance to the U.S. high technology industry. The proposed TRIPS Agreement provides minimum standards which closely match the initial proposal of the United States. In fact, some nations have complained that the proposed TRIPS Agreement favors U.S. interests too heavily.\textsuperscript{54} The patent section provides a twenty-year term of protection from time of filing and defines patentable subject matter as any invention, whether product or process, that is new, involves an inventive step, and is capable of


\textsuperscript{52} Id., art. 3-4.

\textsuperscript{53} David Hartridge & Arrind Subramanian, Intellectual Property Rights: The Issues in GATT, 22 VAND. J. TRANSNAT'L L. 893, 898-99 (1989). For example, [T]here is an important distinction between the subject matter of the national treatment rule in the GATT and that in intellectual property conventions. The GATT relates to products. The rule in intellectual property conventions concerns persons; each member state must accord nationals of other member states the same protection or treatment as it accords its own nationals.

\textit{Id.}

industrial application. Furthermore, the draft notes that "inventive step" and "capable of industrial application" should be considered synonymous with the terms "non-obvious" and "useful" as commonly used in U.S. patent law. The draft further strengthens the patent right by prohibiting patent discrimination based on the place of invention, the field of technology, or whether the product is imported or domestically produced. This language seeks to address problems common to the patent systems of many developing nations such as local working requirements and the exclusion of specific products, like pharmaceuticals and agrichemicals, from protection. This section represents a significant step towards establishing basic patent standards in international law.

Although the patent section provides a solid foundation for developing international patent protection, some problems exist. For example, the exclusions to patentable subject matter contained in Article 27, Paragraphs 2 and 3 could be abused. Article 27 recognizes the following grounds for exclusion: (1) protecting ordre public or morality; (2) protecting human, plant or animal life or health; and (3) avoiding serious prejudice to the environment. These exclusions are very broad and without a narrowing interpretation or interpretative statement, they could be understood to allow the continued exclusion of certain pharmaceutical products and processes from patentability. Nations may also exclude from patentability diagnostic, therapeutic, and surgical methods, as well as certain plants, animals, and biological processes for the production of plants or animals. In effect, such language substantially limits protection for the growing biotechnology industry.

The lack of pipeline protection in the patent section also particularly affects the pharmaceutical industry. Pipeline protection requires the nations that will for the first time provide patent protection to pharmaceuticals and agrichemicals to extend this protection to such products already patented in other nations for the remainder of their

55. _TRIPS Agreement_, supra note 51, art. 27.1.
56. _TRIPS Agreement_, supra note 51, at 13 & n.5.
57. _TRIPS Agreement_, supra note 51, art. 27.1.
58. _TRIPS Agreement_, supra note 51, art. 27.2.
60. _TRIPS Agreement_, supra note 51, art. 27.3.
patent terms. Article 70, Paragraph 8 of the proposed TRIPS Agreement fails to provide for such protection. A possible solution to this problem would be to provide early commercial advantages to the pharmaceutical patent holder through some form of exclusive marketing arrangement. Nevertheless, pipeline protection remains a great concern to the pharmaceutical industry and is included in the intellectual property provisions of NAFTA. Intellectual property interests must, however, remember that a balancing of interests will be required to establish a workable and acceptable TRIPS Agreement.

The proposed TRIPS Agreement effectively addresses the problem of compulsory licensing. Compulsory licensing is not specifically banned, but nations wishing to issue such licenses must satisfy important conditions. These conditions include the payment of adequate remuneration, non-exclusivity, non-assignability, limited duration and scope, and the requirement that a compulsory license only be used after the prospective licensee has tried to obtain authorization from the right’s holder on reasonable commercial terms and conditions. Moreover, limitations on the use of compulsory licenses for the exploitation of dependent patents also exist. The language of Articles 27 and 31 states that local working requirements for compulsory licensing purposes remain satisfied through the importation of patented products sufficient to meet local needs. Such language is necessary to avoid requiring a patent holder to produce the product in every jurisdiction where it is patented or face a compulsory license. With certain exceptions, the substantive standards of the patent section and the compulsory licensing provisions provide a useful starting point for the further development and advancement of

61. IFAC-3, supra note 59, at 17.
62. TRIPS Agreement, supra note 51, art. 70.8.
63. Gorlin, supra note 59, at 37-38.
64. See IFAC-3, supra note 59, at 6 (suggesting that the United States seek the inclusion of NAFTA provisions in the final GATT TRIPS text).
65. See IFAC-3, supra note 59, at 17 (stating that NAFTA provides pipeline protection and is a considerable improvement compared to the Dunkel text); see also Gorlin, supra note 59, at 38 (declaring that IFAC-3 believes “the NAFTA intellectual property provisions represent the highest standards of protection and enforcement so far achieved by United States negotiators”).
66. TRIPS Agreement, supra note 51, art. 31.
67. TRIPS Agreement, supra note 51, art. 31.
68. TRIPS Agreement, supra note 51, art. 31(e). A dependent patent is a patent on an improvement to an invention within the scope of an earlier dominant patent. Id.
69. TRIPS Agreement, supra note 51, arts. 27, 31.
international patent protection.

B. COPYRIGHTS

Copyright protection is a particularly important aspect of the TRIPS Agreement due to advances in technology that have made copyright infringement significantly easier and less expensive. The copyright and related rights provisions of the proposed TRIPS Agreement generally codify traditional copyright standards by requiring a minimum fifty-year term as well as compliance with Articles 1 to 21 and the Appendix of The Berne Convention For the Protection of Literary and Artistic Works (1971). This framework does not include provisions relating to moral rights. Copyright protection is extended to compilations of data and databases and to computer software which is treated as a literary work. Sound recordings also receive increased protection.

The primary area of conflict in the copyright and related rights provisions involves the role of national treatment. Many nations read their national treatment obligations narrowly thereby denying certain benefits to foreign nationals. These nations create what they consider to be new rights or subject matters and then assert that their national treatment obligation under copyright and neighboring rights agreements does not extend to such new areas. The most controversial example of this practice is the European video levy system which collects and distributes funds to compensate copyright holders for private copying. While authors, performers, and video producers receive the levy funds, foreign video producers are denied their fair shares because video producers are not specifically covered by any agreement with a national treatment obligation. Advances in technology such as digital broadcasting make it likely that similar regimes will be developed with the potential to generate billions of dollars in revenue. Consequently, American businesses with copyright and related rights interests stand to lose substantial

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70. TRIPS Agreement, supra note 51, arts. 9, 12.
71. TRIPS Agreement, supra note 51, art. 9.
72. Trips Agreement, supra note 51, art. 10.
73. See IFAC-3, supra note 59, at 12 (indicating that nations use these rights to justify the denial of payments to foreign rights owners).
74. IFAC-3, supra note 59, at 12.
75. IFAC-3, supra note 59, at 12.
76. See IFAC-3, supra note 59, at 11 (stating that the denial of national treatment could deprive a nation of billions of dollars and discourage industrial growth, productivity, and development).
revenue if national treatment concepts are not further extended in the realm of copyright and neighboring rights.\textsuperscript{77}

C. Transition Periods

The issue of transition periods is an area of concern in both the patent and copyright provisions. It is asserted that developing nations need time to adjust their economies and legal systems to meet the requirements of the proposed TRIPS Agreement. It is unclear, however, that transition periods need be as long as provided in Articles 65 and 66. The proposed transition period allows one year with a four-year extension for developing countries and those nations shifting from a centrally planned economy to a market economy.\textsuperscript{78} Furthermore, an additional extension period of five years is granted for developing nations providing patent protection to areas not previously covered by their patent regimes, such as pharmaceuticals and agrichemicals.\textsuperscript{79}

Due to the fast pace of technological development, this extended transition period is extremely burdensome to high technology industries and other creative or research-oriented industries. It is also possible that the transition period may inhibit the use of Special 301 against signatory nations for the duration of the transition. Former General Counsel for the Office of the United States Trade Representative (USTR), Joshua Bolten, testified before Congress that the moral authority to use Special 301 might be constrained under an agreement that allows nations long transition periods.\textsuperscript{80} Excessive transition periods merely allow nations with thriving pirate industries to continue operating to the detriment of foreign and domestic innovators. Furthermore, long transition periods unnecessarily delay the development of such nations' economies and their further integration into the international marketplace. Therefore, shorter transition periods would be in the interests of the United States and the other industrialized nations.

D. National Enforcement Measures

Along with the establishment of substantive standards for patents, copyrights, trademarks, and other forms of intellectual property, the

\begin{itemize}
\item \textsuperscript{77} IFAC-3, supra note 59, at 11.
\item \textsuperscript{78} TRIPS Agreement, supra note 51, art. 65.
\item \textsuperscript{79} TRIPS Agreement, supra note 51, art. 65.
\item \textsuperscript{80} Proposed TRIPS Text Would Limit Use of Special 301, USTR Counsel Says, 6 World Intell. Prop. Rep. (BNA) 102, 102 (1992).
\end{itemize}
proposed TRIPS Agreement also requires the creation of effective national enforcement measures for rights holders. The proposal provides for both internal and border enforcement measures. Although it does not require a signatory state to create an entirely new or separate judicial system for intellectual property rights, the Agreement does mandate certain minimal obligations. The proposal requires a signatory nation to:

[Ensure that enforcement procedures, as specified in this Part, are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.]

Specific requirements include fair and equitable procedures; decisions must be on the merits, reasoned, in writing, and made available to the parties; judicial authorities must be able to grant injunctions, award damages for infringement, and order that infringing goods be destroyed; and decisions are to be based only on evidence on which parties had the opportunity to be heard. The TRIPS Agreement also mandates the creation of a mechanism which enables a right holder to block the importation of infringing products.

Intellectual property rights are useless without adequate enforcement provisions. The United States demonstrated the importance of enforcement when it used the threat of a Special 301 action to convince Thailand to enforce its otherwise adequate copyright laws. Once substantive standards exist, the development of workable and effective national enforcement mechanisms may become the primary issue in international intellectual property protection. The United States listed the establishment of effective national enforcement measures as one of its requirements in its initial proposal. Many developing countries object to the mere fact that national enforcement measures, and internal enforcement measures in particular, appear in the proposed TRIPS Agreement.

81. TRIPS Agreement, supra note 51, art. 41.5.
82. TRIPS Agreement, supra note 51, art. 41.1.
83. TRIPS Agreement, supra note 51, art. 42.
84. TRIPS Agreement, supra note 51, art. 41.3.
85. TRIPS Agreement, supra note 51, arts. 44-46.
86. TRIPS Agreement, supra note 51, art. 41.3.
87. TRIPS Agreement, supra note 51, art. 44.
88. See Daniel Garner, Intellectual Property in the Uruguay Round, 3 INT’L LE-
Clearly, this area will continue to be a major area of dispute even if the parties accept the TRIPS proposal.

E. TECHNOLOGICAL ADVANCES

In addition to providing for current forms of technology and intellectual property protection, the negotiators of the proposed TRIPS Agreement heeded the suggestion by the United States of maintaining a flexible agreement capable of adjusting to the continuing dramatic advances in technological innovation. Accordingly, copyright protection was extended to cover computer software and a sui generis system for the protection of semiconductor chips was created. The proposed agreement provides for a ten-year term of protection and requires the parties to declare unlawful:

[Importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only insofar as it continues to contain an unlawfully reproduced layout design.90]

The use of these two different methods of protecting new innovations and the growing acceptance of this protection for these new technologies demonstrates the need for an ongoing mechanism for the adjustment of international intellectual property protection to meet new technological realities.

The initial U.S. proposal to the TRIPS negotiations included an express statement concerning the effect of new technologies on intellectual property protection and the need to prepare for further unique innovations not effectively covered by existing regimes. Because technology is dynamic, a static and rigid agreement would eventually become useless. Consequently, the proposed TRIPS Agreement provides for a review of the agreement after the expiration of the initial one-year transition period and every two years thereafter.91 The proposal further states that the parties may undertake further reviews in light of any developments which warrant modification or amendment of the Agreement.92

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89. TRIPS Agreement, supra note 51, art. 10.
90. TRIPS Agreement, supra note 51, art. 36.
91. TRIPS Agreement, supra note 51, art. 71.1.
92. TRIPS Agreement, supra note 51, art. 71.1.
though this is merely a general statement of authority to negotiate for the alteration of current forms of protection or the creation of new sui generis forms of protection to cover new technology, the provision recognizes the need for flexibility in an agreement of this nature and provides an international forum to address such issues.

The proposed TRIPS Agreement is an important step towards attaining strong international intellectual property protection. As is the case with most compromise agreements, it has received a wide range of criticism from all sides of the negotiations. As noted, however, by Ambassador Yerxa, the chief U.S. negotiator in the Uruguay Round, such talks will never produce a result that any government considers perfect. At the same time, however, the establishment of international standards for intellectual property protection with effective enforcement mechanisms and access to the GATT’s dispute resolution mechanism constitutes a significant advance. Even if the United States can resolve some of the problems with the text and bring a TRIPS Agreement into force, it will still face the problems of bringing other nations into the system and ensuring that international intellectual property protection evolves with technology. While a TRIPS Agreement would provide an international foundation for addressing these problems, the United States still has other mechanisms available to pursue its interests. Nonetheless, the proposed TRIPS Agreement is a significant contribution to the development of international intellectual property protection.

IV. THE FUTURE OF INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION

The implementation of a TRIPS Agreement will not be the end of the process of establishing an international intellectual property regime, but merely the beginning. Many questions remain concerning how this implementation will proceed and what role other international organizations such as WIPO, other international fora including regional and bilateral negotiations, and mechanisms such as Special 301 will play in this process. Moreover, their roles must be considered not only in the implementation, but in the evolution of international intellectual property protection.

After the Uruguay Round, a TRIPS Agreement will provide a floor for intellectual property protection below which no contracting party

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may fall. The Agreement will also establish a multilateral forum for negotiations concerning modifications required by technological advancements. Contracting parties may, in addition, wish to use other fora and mechanisms to encourage and negotiate for intellectual property protection beyond the requirements of a TRIPS Agreement. The interplay between negotiations under the auspices of the GATT, WIPO, and regional and bilateral talks such as those concerning NAFTA has already achieved advances in international intellectual property protection. How the international community uses the available fora to address the continued worldwide expansion of intellectual property protection to meet the needs of new technology will have significant influence in global marketplace.

As a new form of technology, the printing press once compelled governments to develop copyright rules as a means of protecting intellectual property. Technological innovations continue to exceed the conceptualizations of intellectual property law. In response to technological innovation, a more evolved body of intellectual property law will by necessity first originate in the domestic legal systems and later be incorporated into international law through negotiation. The development process of new intellectual property law, however, may affect its international acceptance, incorporation, and implementation. As noted above, two schools of thought generally dominate the understanding of intellectual property right development. The first argues for the modification of existing forms of intellectual property rights such as patents and copyrights to cover new technologies; the other asserts that sui generis protection for such technology is more efficient. The debates concerning the extension of protection to computer software and semiconductor chips clearly illustrate both sides of this dispute.

Copyright protection was extended to computer software only after considerable debate as to the nature of software. Traditionally, copyright only protects expression; it does not protect utilitarian subject matter. Computer software is utilitarian in nature in that its purpose is to cause


a computer to perform certain desired functions. Moreover, when in machine-usuable form, software cannot be read by humans. On the other hand, computer programs are basically creative writings and through the process of decompiling can be made readable. Consequently, Congress extended copyright protection to computer software and the federal courts undertook the job of developing guidelines for this protection.

The law is still developing while courts attempt to determine the necessary extent of protection. Courts have ruled that in certain circumstances, "substantial similarity" is sufficient to qualify as infringement. Additionally, courts are considering whether the user interfaces or the "look and feel" of software is copyrightable. Similar debates have occurred in the EEC and Japan with both eventually extending copyright protection to computer software. Japan has also taken the unique step of granting patents for algorithms, the basic building blocks of computer programs; a step some argue the United States should take. Although these debates continue, it is now generally accepted and included


97. See Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 609 F. Supp. 1325 (E.D. Pa. 1985), aff'd, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987) (finding that a copyright violation existed when the structural aspects of a computer program were copied, even with the absence of copying the program code); Arthur R. Miller, Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?, 106 HARV. L. REV. 977, 993-1013 (1993) (stating that the Court extends copyright protection to non-literal elements and thereby promotes the idea-expression standard).


100. See Garner, supra note 88, at 61 (indicating that the United States is following Japanese patent law by granting patents for innovative programs based on new algorithms); Donald S. Chisum, The Patentability of Algorithms, 47 U. PITL. L. REV. 959, 1020 (1986) (suggesting that a legal analysis of algorithms, the backbone of computer programs, reveals reasons that algorithms can be covered under patent laws).
in the proposed TRIPS Agreement that computer software will be protected by copyright.\textsuperscript{101}

\textit{Sui generis} protection was chosen as the preferential mode of protection for semiconductor chips for a variety of reasons. Copyright concepts failed to cover semiconductor chips and their mask designs due to their utilitarian nature. Patent law appeared an unacceptable alternative because the creativity involved in developing semiconductor chip layouts and mask designs does not reach the level of inventiveness required for patent protection. Congress, therefore, chose to create a \textit{sui generis} form of protection with the Semiconductor Chip Protection Act of 1984.\textsuperscript{102} The act represents a balancing of interests that gives protection to the designers of semiconductor chip layout designs, but limits the term of protection to ten years. By establishing a new form of intellectual property protection, the United States set a precedent for the international community. The act not only protects semiconductor chips, it also includes a reciprocity clause that requires other nations to grant the same or similar protection in order for their chips to receive the benefits of protection in the United States.\textsuperscript{103} This reciprocity requirement inspired such nations as Japan to rapidly develop similar forms of protection for semiconductor chips. Additionally, it led to the drafting of a Treaty on Intellectual Property in Respect of Integrated Circuits,\textsuperscript{104} which is incorporated by reference into the proposed TRIPS Agreement.

These two methods of addressing ongoing technological advances will play a continuing role in the development of international intellectual property protection. As innovators create new technologies and problems for intellectual property law, domestic legal systems will have to re-

\textsuperscript{101} TRIPS Agreement, supra note 51, art. 10.


\textsuperscript{103} See 17 U.S.C. §§ 902(a), 914 (Supp. II 1984), Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, Title III, 98 Stat. 3347 (1984) (stating that under Section 902(a), in order to qualify for reciprocal treatment, a nation must either be a party to a treaty created to protect computer designs or the President must extend the benefits directly to that nation). Furthermore, under Section 914, a nation receives this protection only for a temporary period of time. \textit{Id.} See also Jay A. Erstling, \textit{The Semiconductor Chip Protection Act and Its Impact on the International Protection of Chip Designs}, 15 RUTGERS COMPUTER \& TECH. L.J. 303, 321 (1989) (noting that Australia, Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Sweden, and Switzerland are entitled to reciprocal protection).

spond with new forms of protection. With the increasing importance of the international marketplace, governments will need to extend this protection globally through one of the international intellectual property protection mechanisms.

The United States achieved some success in this process through the GATT TRIPS negotiations, and to a lesser extent, in WIPO with the acceptance of copyright protection for software and *sui generis* protection for semiconductor chips. The United States was less successful in attempting to gain international patent protection for biotechnology products through the TRIPS negotiations and other international fora.\(^\text{105}\) In order to ensure the continued evolution of intellectual property law to meet the needs of new technology and to pursue the spread of intellectual property protection to all nations after the completion of the Uruguay Round and the ratification of a TRIPS Agreement, the United States must use all international fora available including, but not limited to, the GATT.

The decision to include trade-related aspects of intellectual property rights in the Uruguay Round negotiations stimulated activity in a variety of sectors, particularly in WIPO. The TRIPS negotiations inspired discussions aimed at improving the WIPO dispute resolution system.\(^\text{106}\) The lack of an adequate dispute resolution system was a primary reason for pursuing intellectual property protection under the GATT.\(^\text{107}\)

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105. See Richard L. Berne, *Clinton Supports Two Major Steps for the Environment*, N.Y. TIMES, April 12, 1993, at A1 (revealing that the proposed Biodiversity Treaty would arguably require biotechnology firms to share research with developing countries, thereby weakening patent protection). For this reason, President Bush refused to sign the Biodiversity Treaty. *Id.* President Clinton, however, stated that he would sign the treaty if an interpretive statement protecting patent rights was accepted and attached. The United States signed the treaty in June 1993. *Id.* See also PTO, *Biotech Group Explain Objection to Earth Summit Biodiversity Treaty*, 6 World Intell. Prop. Rep. (BNA) 192-93 (1992) (explaining that the United States rejected the Biodiversity Treaty because of its inadequate treatment of biotechnology); *U.S. Reverses Bush's Rejection of Environmental Pact*, L.A. TIMES, June 5, 1993, at 20 (stating that the signing of the Biodiversity Treaty illustrated Clinton's commitment to treating environmental threats as seriously as security threats).


107. See *id.* (explaining that WIPO proposed to form a Committee of Experts to hear disputes between States and private parties); *WIPO's Dispute Resolution Talks Highlight Conflicts With GATT*, 4 World Intell. Prop. Rep. (BNA) 78, 78 (1990)
GATT served as a model for some of the proposals concerning a new WIPO dispute resolution system. In addition to negotiating for a more effective dispute resolution system, WIPO participated in the process of adjusting intellectual property law to meet the problems raised by computer software, semiconductor chips, and other new technologies. A WIPO memorandum recognizes that:

[T]here are certain questions in respect of which professional circles have no uniform views and, what is of particular concern in international relations, even governments which legislated or plan to legislate on such questions seem to interpret their obligations under the Berne Convention differently. Such discrepancies in views already surfaced, or are likely to surface in the near future, in respect of certain subject matters of protection (e.g., computer programs, phonograms, computer-generated works) . . .

Discussions were initiated to determine whether copyright protection should be extended to computer software, and after much negotiation, a draft treaty for the protection of semiconductor chips was proposed. To this extent, the TRIPS negotiations have proven successful in generating productive activity in WIPO.

Since its accession to the Berne Convention, the United States has become active in negotiations for a protocol to the Berne Convention. This protocol was initially intended to include protection for computer software, databases, artificial intelligence, computer-produced works, and sound recordings. Of these areas, sound recordings in particular have attracted a great deal of attention. The WIPO Secretariat was mandated to draft a model law to address questions concerning the rights of sound recording producers as well as possible protection against new methods of piracy. New technologies like digital audio tapes and digital
broadcasting present questions regarding the enforcement of rights and the compensation of rights holders which may not be covered by existing agreements. The fact that the United States chose to pursue the resolution of these issues through WIPO demonstrates that this organization will have an ongoing role in the development of international intellectual property norms and standards after the Uruguay Round. With its technical expertise in the area of international intellectual property protection, WIPO could be a useful supplement to any action taken as part of a TRIPS Agreement.

In addition to its role in the TRIPS negotiations, the United States continues to pursue other avenues for the expansion of international intellectual property protection. These avenues include NAFTA; treaties with former communist nations such as the United States-Poland Treaty Concerning Business and Economic Relations; the Enterprise for the Americas Initiative; and Science and Technology Agreements with such nations as Brazil and the People's Republic of China.112

An important aspect of NAFTA is its strong intellectual property section which is modeled after the proposed TRIPS Agreement. As a result of these negotiations, Mexico, which at one time was a priority watch nation under Special 301 due to its weak intellectual property protection, has taken significant steps to improve its intellectual property system.113 For example, Mexico recently enacted the Law for the Promotion and Protection of Industrial Property, which, along with companion legislation, has drastically strengthened Mexico's intellectual property law.114 In addition, Mexico promulgated new regulations to liberalize


114. See John B. McKnight & Carlos Muggenburg R.V., Mexico's New Intellectual Property Regime: Improvements in the Protection of Industrial Property, Copyright, License, and Franchise Rights in Mexico, 27 Int'l Law. 27, 27-28 (1993) (acknowledging the changes to the domestic law that have been implemented by the Mexican
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its Transfer of Technology Law. The levels of protection negotiated under NAFTA further strengthen this intellectual property regime. Mexico’s acceptance of this regime provides a valuable example for other developing nations and its success could be a catalyst for gaining further acceptance of international intellectual property protection by other developing countries.

NAFTA’s intellectual property provisions were praised as an improvement on the proposed TRIPS Agreement. These improvements include broader national treatment obligations; more explicit and effective computer software, database and sound recording protection; pipeline protection for pharmaceuticals and agrichemicals; limitations on dependent patent compulsory licenses; and the immediate entry into force of the intellectual property provisions. Furthermore, the provisions require Canada to eliminate its compulsory licensing system for pharmaceuticals.

The primary weakness of NAFTA’s intellectual property provisions does not relate to Mexico, but to the extension of Canada’s Cultural Industries exclusion under the Canada-United States Free Trade Agreement. This exclusion allows Canada to violate its national treatment obligations and avoid providing minimum standards of protection when dealing with certain cultural industries. The United States, however, retains the right to “take measures of equivalent commercial effect” in response to actions taken by Canada under this exclusion. In spite of this problem and other weaknesses such as the failure to provide patent protection to various biotechnology products, NAFTA’s intellectual property provisions offer strong protection for intellectual property and constitute an improvement over the proposed TRIPS Agreement. The United States Congress has already used the NAFTA to speed up the continued reform of Mexico’s intellectual property system. The progress made

115. Id.
116. See IFAC-3, supra note 59, at 2-3 (outlining the key changes that will be achieved as a result of NAFTA).
117. See IFAC-3, supra note 59, at 3 (noting the changes made to Canada’s pharmaceutical licensing regime as a result of NAFTA).
118. See IFAC-3, supra note 59, at 2 (voicing disapproval that NAFTA does not affect Canada’s ability to discriminate against U.S. companies involved in “cultural industries”).
120. See Todd Robberson, Mexico Scrambles to Answer U.S. Critics: Congressio-
in the NAFTA negotiations as well as in other bilateral fora demonstrates the value of regional and bilateral negotiations along side of a multilateral international intellectual property regime. The improvements made in NAFTA’s intellectual property provisions should provide a basis for the United States to seek the eventual inclusion of the provisions in a TRIPS Agreement.

Another alternative mechanism the United States possesses for the establishment of international intellectual property protection is “Special 301.” Special 301 is quite controversial because it uses access to the U.S. markets as a lever. Accordingly, the United States has been accused of impeding the TRIPS negotiations and has been criticized by the GATT Director-General for its use of Special 301.121 Others, however, note Special 301’s success in obtaining higher levels of intellectual property protection in the trading partners of the United States and credit Special 301 for providing leverage to U.S. negotiators, stimulating the TRIPS negotiations, and increasing the prospects for an acceptable TRIPS Agreement.122 For example, after negotiations initiated under Special 301, Brazil agreed to the immediate implementation of the TRIPS provisions without regard to the transition period permitted developing nations.123 The success of Special 301 makes it a valuable, albeit controversial, instrument which can encourage other nations to protect U.S. intellectual property interests.

The controversy surrounding this provision has led to attempts to weaken mechanisms such as Special 301. As noted above, long transition periods restrict the ability of the United States to use Special 301. Furthermore, integrated dispute resolution provisions limit Special 301

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121. See GATT’s Dunkel Criticizes U.S. Section 301, Urges Strong Commitment to Uruguay Round, 7 Int’l Trade Rep. (BNA) 766, 766 (May 30, 1990) (reporting that the Director-General of the GATT urged the United States to eliminate its Section 301 process).

122. See, e.g., Judith H. Bello & Alan F. Holmer, “Special 301”: Its Requirements, Implementation, and Significance, 13 FORDHAM INT’L L.J. 259, 272-74 (1989-1990) (explaining the view of the United States that the effects of Section 301 are consistent with the goals of the GATT process because they serve as incentives for other countries to undertake significant reforms of their intellectual property regimes).

123. USSR Announces Termination of Brazil Special 301 Investigation, 11 Int’l Trade Rep. (BNA) 344, 344 (Mar. 2, 1994).
actions under Article 23. The article states that:

Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the Covered Agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding. 124

This language requires that a determination of violation or nullification be reached before any action can be taken. Thus, if an effective dispute resolution system is negotiated, it is likely that the United States will make less use of Special 301. Regardless of any treaty limitations, Special 301 could still be used to police compliance with the terms of a TRIPS Agreement during and after the transition period. Due to its success in encouraging nations such as Taiwan, South Korea, and Thailand to adopt stronger intellectual property protection, U.S. intellectual property interests will be loathe to give up Special 301 completely. The USTR has requested and received submissions from U.S. industries suggesting that several nations be included on priority, priority watch, and watch lists. These submissions include many of the nations which opposed the negotiation and entry into force of a TRIPS Agreement such as India, Brazil, and, ironically, Uruguay. 125 Even with the negotiation of a TRIPS Agreement, Special 301 and the other Section 301 actions play an important role in drawing attention to inadequate intellectual property protection and encouraging a rapid resolution of the problem.

If adopted, the proposed TRIPS Agreement would create a foundation for the continued development of international intellectual property protection. It must, however, be recognized that any such agreement will consist of intellectual property law as it is conceived of at the time of signing. Consequently, there must be a mechanism for adjusting international intellectual property protection to meet the evolving needs of technology. The TRIPS negotiators included such a mechanism in the proposed TRIPS Agreement. It must also be recognized that not all nations will accede to a TRIPS Agreement. The industrialized world,


125. See, e.g., Letter from James L. Bikoff, Attorney, Arter & Hadden, to Dorothy Balaban, Section 301 Committee, Office of the United States Trade Representative (Feb. 12, 1993) (filing Special 301 Comments on behalf of Nintendo of America, Inc., regarding the prevalence of video game piracy in parts of Asia and the Americas).
therefore, must be prepared to use the GATT along with other avenues including WIPO, regional and bilateral negotiations, and mechanisms such as Special 301, to pursue the spread and evolution of international intellectual property protection. All of these organizations and negotiations have contributed to the advance of intellectual property rights and helped initiate the negotiation and improvement of the proposed TRIPS Agreement. International intellectual property protection must be dynamic, therefore, to ensure progress; all avenues of negotiation and mechanisms for the protection of intellectual property rights must be aggressively pursued.

CONCLUSION

The Reagan and Bush Administrations initiated a strong U.S. commitment to the Uruguay Round negotiations. This commitment included recognizing the role that intellectual property protection will play in international trade and in the international marketplace. The Clinton Administration is giving the highest priority to the successful conclusion of the Uruguay Round negotiations, including the signing and entry into force of a TRIPS Agreement. It is agreed that the United States is one of the primary beneficiaries of the agreements coming out of the Uruguay Round and will receive significant benefit from a TRIPS Agreement in particular. President Bush made it clear that his Administration preferred pursuing U.S. trade goals in the GATT multilateral forum. Although there are some differences of opinion on the details, the rest of the industrialized world strongly supports the establishment of a TRIPS Agreement through GATT. Consequently, the question concerning international intellectual property protection is no longer whether a TRIPS Agreement will be signed, but when and by whom.

As trade in high technology products and other intellectual property

126. See President-Elect Clinton Seen Pursuing Aggressive Trade Policy To Open Markets, 9 Int’l Trade Rep. (BNA) 1920, 1920 (Nov. 11, 1992) (noting President Clinton’s support of GATT and his desire to pursue a prompt conclusion to the Uruguay Round during his time in office); Testimony of Ambassador Mickey Kantor, United States Trade Representative, Before the Senate Committee on Finance (March 9, 1993) (on file with The American University Journal of International Law and Policy) (presenting the intentions of the Clinton Administration with respect to GATT).

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rights-related goods has grown. intellectual property protection has become an increasingly important trade issue. Inadequate intellectual property protection and the resulting piracy interferes with legitimate trade. Disparities between the costs of innovation and the costs of pirating can effectively act as a trade barrier. Developing nations continue to resist establishing a strong intellectual property protection system despite the studies which illustrate the long term benefits of protective systems to developing nations' own entrepreneurs, innovators, and economies.

The proposed TRIPS Agreement represents the first attempt to balance these concerns, along with other trade considerations addressed in the Uruguay Round, and to establish an international intellectual property protection regime with relatively comprehensive substantive standards, mandated enforcement mechanisms, and an effective dispute settlement system. The multilateral framework is the most efficient and preferred mechanism for establishing a broadly based system of international intellectual property protection. Due to the continued resistance from nations with thriving pirate businesses, however, the United States and the other industrialized nations must consider alternative measures for ensuring the spread and advance of international intellectual property protection.

Although a TRIPS Agreement will be signed under the auspices of the GATT, the United States correctly continues to explore other avenues for improved international intellectual property protection. Bilateral and regional negotiations have achieved many positive results, including NAFTA’s intellectual property provisions, which improve on many of the elements of the proposed TRIPS Agreement. Some suggest that the United States should avoid relying excessively on multilateral efforts and instead focus on bilateral arrangements to achieve its trade objectives.

In addition, the United States shows no willingness to eliminate Special 301, which is very popular with the U.S. business community due

128. See Marshall A. Leaffer, Protecting United States Intellectual Property Abroad: Toward a New Multilateralism, 76 IOWA L. REV. 273, 298 (1991) (remarking that the difference between the costs of inventing and producing a good, and that of merely reproducing a good, can be as effective as a tariff, if not better, at artificially increasing the price of an imported good).


130. See Senator Max Baucus, A New Trade Strategy: The Case For Bilateral Agreements, 22 CORNELL INT’L L.J. 1, 1-3 (1989) (claiming that President Bush relied too much on multilateral approaches to trade issues and ignores the equally promising prospects of pursuing bilateral agreements that were successful with Canada).
to its effectiveness in obtaining substantive results. President Bush demonstrated the commitment of the United States to the multilateral process in 1990 by not designating any priority foreign countries under Special 301. For 1993, however, the USTR requested and received a wide range of Special 301 submissions proposing Taiwan, Thailand, and Italy as priority nations for inadequate copyright protection, as well as India and Brazil for inadequate patent protection.\textsuperscript{131} The proposed TRIPS Agreement will set a floor for the adequate protection of intellectual property rights. The United States and the rest of the industrialized world should remain engaged on a variety of fronts in the pursuit of increased intellectual property protection to continue to develop these rights to cover new technological achievements and to encourage more reluctant nations to join a TRIPS Agreement and meet its obligations.

Although the proposed TRIPS Agreement is imperfect, the United States remains committed to the process of establishing such an agreement under the auspices of the GATT. As the leading exporter of high technology and other products relying on intellectual property protection, the United States will benefit greatly from the signing of a TRIPS Agreement. In pursuing the advancement of international intellectual property protection, however, the United States need not look exclusively to such an agreement. As stated by the former Director for Intellectual Property at USTR:

\textit{[I]f the GATT fails in intellectual property, it does not mean the United States Government will stop pushing foreign governments to improve their international intellectual property regimes. It will simply shift to a different emphasis, one which is already ongoing, and may become more sharply focused, more contentious, and more confrontational than resolving issues through the GATT. In that context, I want to also say that there are advantages to resolving issues in the GATT. We prefer multilateralism. We prefer a regime by which everybody can abide, that provides discreet and distinct rules about how to proceed to resolve disputes. That is our preference, but it is not necessarily our only option.}\textsuperscript{132}

\textsuperscript{131} See, e.g., Submission of the Pharmaceutical Manufacturers Association; Identification of Priority Foreign Countries, Priority Watch and Watch Countries Under the Special 301 Provision of the 1988 Trade Act, (as amended) (Feb. 5, 1993) (commenting on the current protection of U.S. copyrights and patents provided by foreign countries in the pharmaceutical industry); International Intellectual Property Alliance, Special 301 Recommendations and Estimated Trade Losses Due to Piracy (Feb. 12, 1993) (providing a broad interpretation of the current state of international copyright and patent protection).

\textsuperscript{132} Remarks of Mr. Emory Simon, 22 VAND. J. TRANSNAT’L L. 367, 367-68
The proposed TRIPS Agreement, with or without the suggested improvements, marks significant progress in the quest for international intellectual property protection. The results of the Uruguay Round are conceived of as an integrated package balancing the demands of the industrialized nations for international intellectual property protection and an improved dispute resolution system with the interest of developing countries in achieving an agreement on agricultural and textile issues. At a time when the United States is aggressively pursuing international intellectual property protection those nations opposed to a TRIPS Agreement must consider both the benefits from these other areas that they risk losing should they fail to sign, and the consequences of not being covered by a TRIPS Agreement and its related dispute resolution provisions. Through the ongoing use of multilateral forums and other mechanisms, the United States and other industrialized nations should be able to ensure the acceptance of intellectual property rights in the international marketplace.