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International Trade and Intellectual Property: Promise, Risks, and Reality

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I. INTRODUCTION

The trading nations of the world are set to make decisions that will determine the future pattern of international trade. Negotiations are currently underway to bring trade in certain agricultural products, services, and goods and services protected as intellectual property[1] within the General Agreement on Tariffs and Trade (GATT).[2] This Article will

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1. As used in this Article, the term "intellectual property" includes copyrights, patents, trademarks, trade secrets, and mask work protection. Due to space constraints, this article focuses on patents and copyrights.

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. As of the end of 1988 the GATT had 93 contracting parties. *See generally* J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF

outline how the consideration of intellectual property came to be included in this round of talks. It will assess the potential benefits and risks of including intellectual property, forecast the probable outcome, and, finally, suggest ways to improve the chances for inclusion of intellectual property into the GATT. The Article also stresses the congressional role in these negotiations and offers criteria for evaluating the success of the negotiations.

II. THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND INTELLECTUAL PROPERTY

Intellectual property protection for goods and services has become increasingly important to United States business in recent years. In the postwar era, the relative percentage of United States exports with a high intellectual property content (for example, chemicals, books, movies, records, electrical equipment, and computers) has more than doubled to more than twenty-five percent of all United States exports.[3] Royalties received by United States industries from the licensing of intellectual property exceeds $8 billion per year, which is more than six times the amount paid to foreign firms.[4] Equally significant are the losses that occur when such goods and services are pirated. According to some estimates, the value of lost sales due to unauthorized copying of United States products throughout the world exceeds $40 billion per year.[5] The increasing importance attached to trade-oriented intellectual property, growing levels of piracy facilitated by emerging technologies, and expanding research and development costs has motivated businesses to seek governmental intervention to protect their intellectual property rights.[6]

INTERNATIONAL ECONOMIC RELATIONS 396-432 (1986); J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

3. R. Oman, Register of Copyrights of the United States, Speech entitled *Prentice Hall Keynote Address*, Prentice Hall Symposium 4 (Oct. 17, 1988) [hereinafter *Oman Prentice Hall*].

4. U.S. DEPARTMENT OF COMMERCE, 3 SURVEY OF CURRENT BUSINESS 54-59 (March 1988) (Table 10).

5. U.S. INTERNATIONAL TRADE COMMISSION, FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE, App. H, at H3 (1988) [hereinafter ITC REPORT].

According to the Register of Copyrights, the problem is not limited to developing countries. A recent study of the intellectual property problems of seven industrialized countries revealed that pirate copies of United States books, radio, and video works, computer products, and pharmaceutical products exceeded two billion dollars. *Oman Prentice Hall, supra* note 3, at 6.

6. *See* ITC REPORT, *supra* note 5, at 5-1; Hoffman, Marcou, & Murray, *Commercial Piracy of Intellectual Property*, 5(11) COMPUTER LAW. 7 (1988).

The most comprehensive initiatives yet undertaken have been certain congressional efforts to improve United States intellectual property law.[7] Parallel to these initiatives has been the effort to include intellectual property standards, norms, and enforcement minimums as a code beneath the GATT umbrella.

Following several years of effort by the business community, intellectual property negotiations were included as a part of the Ministerial Declaration on the Uruguay Round of GATT talks.[8] The United States has provided governmental leadership on this issue, and the private sector in the United States, Europe, and Japan supports these efforts.

International recognition of the connection between intellectual property and the world of international trade is a relatively new phenome-

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7. *See, e.g.,* Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified in scattered sections of 15, 21, 28, 35 U.S.C.); Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 98 Stat. 2178 (codified in scattered sections of 18, 19, 28 U.S.C.); Trademark Clarification of 1984, Pub. L. No. 98-620, 98 Stat. 3335 (codified at 15 U.S.C. §§ 1116-18, 18 U.S.C. § 2311, 2300)); Patent Law Amendments Act of 1984, Pub. L. No. 98-622, 98 Stat. 3383 (codified at 28 U.S.C. § 1295, 42 U.S.C. §§ 2182, 2457, scattered sections of 35 U.S.C.); Pub. L. No. 100-159, 101 Stat. 899 (1987) (semiconductor chip protection act extension) (codified at 17 U.S.C. §§ 901-14); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853; Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935; Generic Animal Drug Patent Term Restoration Act, Pub. L. No. 100-670, 102 Stat. 3971 (1988).

8. *See, e.g.*, TASK FORCE ON INTELLECTUAL PROPERTY TO THE PRESIDENT'S ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS, SUMMARY OF THE PHASE II RECOMMENDATIONS (1986); *See generally* J. GORLIN, A TRADE-BASED APPROACH FOR THE INTERNATIONAL COPYRIGHT PROTECTION FOR COMPUTER SOFTWARE (1985); H. STALSON, PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND U.S. COMPETITIVENESS IN TRADE (1987); UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, A NEW MTN: PRIORITIES FOR INTELLECTUAL PROPERTY (1985); R. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES (1987).

Note, *Intellectual Property Rights and the GATT: United States Goals in the Uruguay Round*, 21 VAND. J. TRANSNAT'L L. 367 (1988); Dam, *The Growing Importance of International Protection of Intellectual Property*, 21 INT'L LAW. 627 (1987); Simon, *Trade Linkage Reemergence*, CONTEMP. COPYRIGHT & PROPRIETARY RTS. ISSUES 307 (1987); *Patent, Trademark and Copyright Law Section Reviews Recent Developments*, 32 PAT. TRADEMARK & COPYRIGHT J. (BNA) 473 (Aug. 28, 1986) (remarks of Emory Simon director of the Office of USTR concerning the merger of trade and intellectual property in 1984); Stokes, *Intellectual Piracy Captures the Attention of the President and Congress*, NAT'L J., 443 (1986) (outlining the political impetus behind various legislative changes); Mossinghoff, *The Importance of Intellectual Property Protection in International Trade*, 7 B.C. INT'L & COMP. L. REV. 235 (1984). *See also Intellectual Property and Trade: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) [hereinafter *Kastenmeier Hearings*].

non.[9] This linkage began in a publicly evident manner during the 98th Congress with the enactment of a series of measures requiring the Reagan Administration to examine the "adequacy and effectiveness" of the intellectual property laws of our trading partners, as a part of the trade assessment process.[10] This largely bilateral approach assumed that the

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9. There are some early examples of connecting trade and intellectual property protection, but the prominence of this linkage has emerged more recently. The French and Belgian Governments signed an agreement in the 19th century that required the Belgians to stop their printers from copying the works of French authors. Oman, *Trade and Copyright: The Trade and Copyright "Interface" and the Enhancement of Copyright Protection Through Trade Initiatives, reprinted in*, 1 ALBANY LAW SCHOOL ANNUAL CONFERENCE ON INTELLECTUAL PROPERTY, GLOBAL COMPETITION: THE ROLE OF INTELLECTUAL PROPERTY 8-7 (1988) [hereinafter *Oman Albany*].

According to some observers, the initial exposure of some private sector companies to the linkage between intellectual property and trade occurred in the late 1970s when they sought governmental assistance in responding to the piracy of patent rights in the chemical context by various Hungarian concerns. A limited amount of bilateral negotiations on various intellectual property issues began in 1981.

Private sector interests discovered that there was a paucity of tools to respond in a flexible and measured way to the intellectual property related problems they were confronting overseas. Partially as a result of this awareness, some private sector groups began to advocate the inclusion of intellectual property based trade sanctions in public reports. PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION, THE NEW REALITY (1985).

10. U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE 1985 REPORT at 222-37.

The Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, § 212(b)(5), 97 Stat. 369, 384-87 (1983), 19 U.S.C. § 2702(c)(9), 19 C.F.R. §§ 10.191-.198, conditions the benefits of Caribbean Basin Initiative (CBI) on an Executive Branch finding that governmental organizations not engage in "poaching" and rebroadcasting of broadcast signals. The CBI also permits the President to review theft of signals by private parties and the extent to which the applicant country provides "adequate and effective means for foreign nationals to secure, exercise and enforce exclusive rights in intellectual property. . . ." *Id.* § 212(c)(9), (10). This measure was initiated primarily for the benefit of the movie industry to counteract theft of movies from satellites, although it also assists publishers in the enforcement of their rights. *Oversight on International Copyrights, Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) *reprinted in* U.S. COPYRIGHT OFFICE, TO SECURE INTELLECTUAL PROPERTY RIGHTS IN WORLD COMMERCE (1984); Note, *Signal Piracy: The Theft of United States Satellite Signals*, 8 FORDHAM INT'L L.J. 62 (1984).

The Trade and Tariff Act of 1984, Pub. L. 98-573, §§ 503, 505, 98 Stat. 2948, 3019-23; (codified at 19 U.S.C. §§ 2462(c)(5), 2464(c)(3)(B)(ii)), delegated authority to the President to take into account a nation's laws and practices to protect adequately intellectual property rights as a condition of receiving the trade benefits offered by the Generalized System of Preferences Program (GSP). *See generally* H.R. REP. NO. 1090, 98th Cong., 2d Sess. 12-13 (1984).

United States could obtain significant changes in the intellectual property laws of other countries through the threat/negotiation process. For some American business interests, the results of this initiative were necessarily under-inclusive.[11] Moreover, because the potential impact of such a technique on some of the United States trading partners was limited, American businesses began to advocate the use of the GATT forum for en-

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Examples of countries that receive GSP benefits but also allegedly fail to protect intellectual property adequately include: Argentina, Bangladesh, Brazil, Chile, Colombia, Costa Rica, Egypt, Ecuador, Guatemala, India, [Indonesia, South Korea], Mexico, Pakistan, Peru, the Philippines, Portugal, Sri Lanka, [Taiwan], Thailand, Turkey, Uruguay, Venezuela, and Yugoslavia. U.S. OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 227 n. 40 (1986) [hereinafter OTA Report] (the countries in brackets were identified by the OTA, but have lost all or part of their GSP benefits since 1986 for unrelated reasons). In January, 1989 Thailand lost part of its GSP benefits, in part, as a result of inadequate copyright protection. Farnsworth, *U.S. Curbs Thai Goods,* N.Y. Times, Jan. 20, 1989, at b1, col. 6; Editor, *Thailand Denied Certain GSP Benefits for Weak Intellectual Property Laws,* 37 PAT. TRADEMARK & COPYRIGHT J. (BNA) 279 (1989).

Section 304 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 3002-06 (codified at 19 U.S.C. §§ 2411(e)(3)(C), 2411(e)(4)(B)), clarified that section 301 of the Trade Act applies to the denial of adequate and effective protection of intellectual property rights. *See generally* S. REP. NO. 308, 98th Cong., 1st Sess. 46 (1983); H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 146-47 (1984).

In 1988 Congress enacted the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164-84, 1211-16, sections 1301-1480, and 1341-42, 19 U.S.C. §§ 2411, 1337. These amendments require the United States Trade Representative to assess the adequacy and effectiveness of the intellectual property protection offered by our trading partners on an annual basis and to take appropriate action. *See generally* H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 579-80 (1988), 600. The use of mandatory self-initiated section 301 actions has the net effect of elevating the importance of intellectual property issues in the trade context.

It is interesting to note that the terminology used in these trade laws requires the United States to measure whether another nation's laws are "adequate and effective." These identical terms are used in article I of the Universal Copyright Convention. A drawback to this terminology in the context of the Universal Copyright Convention is vagueness. The terms permit a nation to adopt either a high level or minimum level of copyright protection. *How to Protect the Nation's Creativity by Protecting the Value of Intellectual Property: Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary,* 98th Cong., 2d Sess. 49-50 (1984) (testimony of David Ladd, Register of Copyrights).

11. For a description of the successful use of section 301 to secure changes in the intellectual property laws of Korea, Note, *A Trade-Based Response to Intellectual Piracy: A Comprehensive Plan to Aid the Motion Picture Industry,* 76 GEO. L.J. 417, 446-47, 458-59, 487-88 (1987) [hereinafter *Trade-Based Responses*]; *Kastenmeier Hearings, supra* note 8, (testimony of Ralph Oman, Register of Copyright Office).

hanced intellectual property protection.[12] Some advocates of the GATT process also saw it as complementary to the bilateral process. They argued that GATT standards could be applied to bilateral negotiations. Alternatively, some advocates of the GATT initiative viewed it as a useful device for energizing the other United Nations organizations responsible for intellectual property matters.

Genuinely disenchanted with the existing multilateral intellectual property fora (the World Intellectual Property Organization (WIPO) and UNESCO), and the absence of enforceable minimum standards within existing multilateral intellectual property treaties,[13] The United States private sector considered using the GATT as a vehicle for improving the level of international multilateral standards.[14] Members of the United States business community whose products rely on intellectual property protection—and their Congressional allies—urged the United States Government to attempt to include intellectual property protection in the then-forthcoming round of GATT talks.[15]

The United States promoted its position to the other GATT contracting parties. This effort succeeded in producing the Punta del Este Declaration, which outlines the negotiating goals for the round:

> In order to reduce the distortations and impediments to international trade, and taking into account the need to promote 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.
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> Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit

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12. The use of bilateral mechanism has limitations of several varieties. For example, a trading partner may not have enough trade with the United States at risk to concern itself with a bilateral threat. Other countries may be deemed too important to national security to be targeted for retaliation on an intellectual property issue.

13. *Oman Prentice Hall, supra* note 3, at 11; HOFFMAN, *supra* note 6, at 8.

14. M. GADBAW, T. RICHARDS, S. BENZ, L. KENNY, R. GWYNN, & J. MACLAUGHLIN, PROSPECTS FOR IMPROVEMENT OF INTELLECTUAL PROPERTY PROTECTION IN SEVEN DEVELOPING NATIONS 2-2, 2-3 (1987). *Patent, Trademark and Copyright Law Section Reviews Recent Developments*, 32 PAT. TRADEMARK & COPYRIGHT J. (BNA) 473 (Aug. 28, 1986). *Oman Albany, supra* note 9, at 8-9 (discussing the absence of adequate patent protection for pharmaceutical products).

15. A possible basis protecting intellectual property within the GATT would be through the use of article XXIII, which provides that when a country uses forbidden measures that injure the trade of a second country, the latter may assert that its benefits had been nullified or impaired and retaliate. *Oman Prentice Hall, supra* note 3, at 29-30.

goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.[16]

The envisioned GATT agreement would contain four basic elements: (1) substantive standards for intellectual property protection; (2) effective enforcement measures at the border and internally; (3) a multilateral consultation and dispute settlement mechanism; and (4) traditional GATT provisions, including transparency and national treatment applied to intellectual property. Creating norms and standards for intellectual property would be the most important and difficult area. During the two years of the current round of talks, representatives of the contracting parties have met in Geneva and informally at other locations to develop a set of norms or standards.[17] The United States, the European Community, and Japan have each submitted proposed standards.[18] In addition, the United States proposal includes provisions concerning the enforcement of intellectual property rights.[19] To date, the principal OECD countries[20] have failed to reach an agreement on substantive standards or

16. Punta del Este Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, September, 1986, at 7-8, *reprinted in* Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57, 95 (1987), *and* [3 July-Dec.] INT'L TRADE REP. 1150 (Sept. 24, 1986).

17. For example, a group of like-minded nations (including the United States, the European Community, Canada, Switzerland, Japan, and other countries) met in Washington, D.C., in March 1988 to discuss intellectual property standards. The same group met in Geneva, Switzerland in June 1988 to discuss enforcement measures.

18. Suggestion by the United States for Achieving the Negotiating Objective, MTN. GNB/NG11/W/14/Rev. 1 (October 17, 1988); *United States Submission to the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, United States (undated) (on file with authors) [hereinafter *US Submission*]; *United States Position on Standards and Enforcement of Intellectual Property Rights*, United States, (undated).

Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade-Related Aspects of Substantive Standards of Intellectual Property Rights, COMM. EUR., MTN.GNG/NG 11/W/26 (July 7, 1988); GREEN PAPER ON COPYRIGHTS AND THE CHALLENGE OF TECHNOLOGY-COPYRIGHT ISSUES REQUIRING IMMEDIATE ACTION, COMM. EUR. (June 7, 1988). *See also* Proposal by Switzerland, MTN.GNG/NG 11/W/25 (June 29, 1988). Submission by Japan, MTN.GNG/NG 11/W/17/Add. 1 (September 23, 1988).

19. *US Submission, supra* note 18.

20. These countries consist of the European Community, Japan, Canada, Norway, Sweden, Denmark, Austria, Australia, New Zealand, Switzerland, and the United States.

enforcement mechanisms. More significantly, the developing countries have shown no willingness to engage in serious negotiations.[21]

A December 1988 meeting in Montreal, Canada reviewed the progress made thus far in the Uruguay Round with respect to intellectual property. Four distinct positions emerged, without any signs of reconciliation between them. The United States, the European Community, and Japan were united in their willingness to negotiate substantive standards. The countries comprising the Association of Southeast Asian Nations (ASEAN)[22] were willing to continue the discussions, but argued that the end product should reflect the developmental differences of the Third World, Canada, and Switzerland, whose intellectual property laws are generally adequate, but who wish to see the standard-setting exercise include as many GATT signatory or contracting parties as possible, appeared more willing to enter into negotiations even if they produced lower intellectual property standards. The fourth approach, articulated by the Indian and Brazilian delegations, was shared by several developing countries, including some Latin American nations. This group questioned the nature and scope of the Punta del Este Mandate and sought to have intellectual property standards set by WIPO, if at all. These nations apparently have concluded that WIPO would be a more sympathetic forum for the preservation of their existing intellectual property laws. Therefore, they insisted on studying topics that would lead to the diminution of intellectual property protection, such as compulsory licensing. In sum, the developing nations' view was largely antithetical to the view articulated by the negotiators from the United States, the European Community, and Japan.[23]

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21. Third World countries have argued that WIPO not the GATT, should be the standard setting entity for intellectual property. *EC and Japan Present Intellectual Property Proposals for Uruguay Round Negotiations*, [4 July-Dec.] INT'L TRADE REP. 1499 (Dec. 2, 1987). The Brazilian paper put forward for discussion at Montreal suggested that WIPO, UNESCO, and UNCTAD were the only competent organizations within the United Nations system to set substantive intellectual property standards. This approach would have the net effect of nullifying the Uruguay Round on intellectual property issues because the decision-making process within WIPO (which requires *de facto* approval of any initiatives by the developing countries) would preclude any improved intellectual property standards with respect to copyright or patent protection in the short term. *See generally* Farnsworth, *Brazil and India Fight New Copyright Rules*, N.Y. Times, Dec. 7, 1988, at D2, col. 5; Stokes, *Trading on U.S. Cohesion in Montreal*, NAT'L J., 3201 (1988).

22. These countries are Thailand, Indonesia, Brunei, Malaysia, the Philippines, and Singapore.

23. The European and Japanese delegations reportedly urged the Midterm Review Declaration to include significant—albeit subtle—changes in the text of a Ministerial

III. The Uruguay Round of GATT Negotiations

A. *Potential Benefits to Intellectual Property Owners*

The current round of talks in the GATT negotiating process promises an internationally accepted and enforceable set of intellectual property norms and standards. This goal is of paramount interest to the many members of Congress who have advocated intellectual property reform, both domestically and internationally. Viewed optimistically, the GATT negotiations could avoid some of the more obvious problems that have occurred within the standard-setting and enforcement efforts within treaties administered by WIPO.[24] From the perspective of the United States

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Declaration to reflect the continued opposition to sections 301 of the Trade Act of 1974 and section 337 of the Tariffs Act of 1930. The concern about section 337 was not surprising given the active participation by these Contracting Parties in a pending GATT panel on the legality of section 337. *See generally* General Agreement on Tariff and Trade, United States-Section 337 of the Tariff Act of 1930 (the case name for the GATT complaint). Gilston, *GATT Report May Challenge U.S. Unfair Trade Rules*, 8 Washington Tariff and Trade Letter 1 (Dec. 5, 1988); P. Montagon, *GATT Panel Finds US Unfair on Patents*, Fin. Times, Dec. 7, 1988, at 7. According to press reports, the GATT panel has concluded that section 337 of the Tariff Act is incompatible with the GATT. Nelson, *GATT Panel Says U.S. Tariff Law is Unfair to Importers*, Wall St. J., Feb. 1, 1989, at A11, col. 3. Before a panel decision has any effect, however, it must be approved by the GATT Council. Under the present GATT dispute resolution rules, any Contracting Party, including the United States, can block the adoption of this panel report.

The concern about section 301 is not as transparent. These two parties apparently fear the use of any bilateral trade retaliation regardless of the subject matter. Alternatively, they could have been genuinely concerned about the possible section 301 actions that may be taken against them to improve their intellectual property laws. For example, Japan may wish to foreclose complaints about its record rental laws, its discriminatory patent enforcement mechanisms or other non-tariff trade barriers to importation and sale of goods protected by intellectual property. *But see Oman Albany, supra* note 9, at 8-10 (expressing doubt about whether the lack of a strong Japanese record rental law would produce a section 301 complaint).

24. The most significant deficiency in the WIPO process is the absence of a meaningful system for the enforcement of minimum standards of intellectual property protection. *Oman Albany, supra* note 9, at 8-3, 8-10 to 8-12. There is also a widespread impression among the leaders of the business community that the WIPO has been a sympathetic forum for the articulation of some anti-intellectual property activity. *Revision of the Paris Convention on Industrial Property: Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 1 (Comm. No. 23 Print 1982); *see generally* World Intellectual Property Organization, May 3, 1988 (relating the status of certain WIPO initiatives concerning the development of intellectual property standards). The authors do not necessarily share this view, but rather report this conclusion as a widespread perception within the United States.

business community,[25] the standards ideally would accomplish the following:

(1) Adoption of the Berne Convention[26] as the copyright norm, with two major clarifications: with additional copyright protection for (a) computer software and databases, and (b) sound recordings.[27]

(2) Adoption of a patent law minimum well *above* the requirements of the Paris Convention,[28] this would involve the patenting of virtually all subject matter, including pharmaceutical products, chemicals, pesticides, and plants, (especially products of modern biotechnology). This standard would also provide for a patent term of at least twenty years from filing.[29]

(3) Adoption of adequate trademark protection.

(4) Adoption of adequate trade secret protection.

(5) Adoption of the forthcoming WIPO treaty on semiconductor chips as the minimum standard for protection of mask works.[30]

It remains unclear whether the chances for agreement within the GATT will be greater than within WIPO. Some observers believe that changing the forum will not alter the attitudes of the governments involved in the negotiations.

25. *See generally Statement of the Views of the European, Japanese and United States Business Communities* (June 1988) [hereinafter *Basic Framework*]; *Basic Framework of a GATT Arrangement on Intellectual Property* (Dec. 18, 1986). Intellectual Property Committee, (The committee is composed of Bristol-Myers Company, E. I. DuPont de Nemours and Company, FMC Corporation, General Electric Company, General Motors Corporation, Hewlett-Packard Company, International Business Machines Corporation, Johnson and Johnson, Merck & Co., Inc., Warner Communication, and Monsanto, Pfizer, Inc., Rockwell International Corporation.).

26. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 *reprinted in* 7 COPYRIGHT 135 (1971).

For a discussion of the United States Adherence to the Berne Convention, *see generally* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); 134 CONG. REC. H. 10091-98 (daily ed. Oct. 12, 1988); 134 CONG. REC. S. 14544-67 (daily ed. Oct. 5, 1988); H.R. REP. NO. 609, 100th Cong., 2d Sess. (1988); S. REP. NO. 352, 100th Cong., 2d Sess. (1988); *Berne Convention Implementation Act of 1987, Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. (1988).

27. *See Oman Prentice Hall, supra* note 3, at 13-9 (discussing data base treatment under the Berne Convention).

28. Paris Convention for the Protection of Industrial Property of March 20, 1883, *as revised* at Stockholm on July 14, 1967, 21 U.S.T. 1538, T.I.A.S. 603, 828 U.N.T.S. 305.

29. *US Submission, supra* note 18.

30. *Report Adopted by the Committee of Experts on Intellectual Property in Respect of Integrated Circuits at its Fourth Session*, WIPO Doc. No. IPIC/CE/IV/15 November 16, 1988 (assuming that this Treaty is not agreed upon at the forthcoming Diplo-

(6) An agreement on the minimum undertaking a country must make to secure the "adequate and effective" enforcement of intellectual property laws, both at the border and internally.[31]

The most politically volatile issue included in the negotiations appears to be the extension of patent protection for pharmaceutical products. Many developing countries consider this issue one of health policy and technology transfer. Developed countries, however, believe the issue is of paramount financial importance due to the dollar volume of lost sales resulting from the exclusion of human drugs from patent protection.

The United States business community also seeks to obtain a new, improved GATT dispute resolution mechanism.[32] Unlike the multilateral conventions administered by WIPO—which do not contain any effective enforcement mechanisms—the GATT can measure a nation's laws[33] against a GATT code and, in effect, request changes upon finding an inconsistency with the GATT. The existing GATT process is not without flaws. Current practice provides no certainty that a panel will be established to review a complaint. More significantly, once a panel reviews a matter, its decision is not binding unless agreed to by the GATT council, which includes the parties to the dispute.

Already tentatively agreed to in Montreal were changes in the GATT dispute resolution process that would guarantee a contracting party the right to invoke the panel process and strict time deadlines. Yet to be secured is a change in the dispute resolution process such that when the GATT council reviews the results of GATT panel decisions, a party to the dispute cannot block adoption of the report. The European Community has most frequently used this blocking technique, but the United States has occasionally invoked it as well. Without a meaningful change in the existing panel report approval process—which maximizes the po-

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matic Conference scheduled for Washington, D.C. in May of 1989).

31. *U.S. Submission, supra* note 18.

32. On a general level, the goal is improvements in the operation of article XXIII of the GATT. A separate code on intellectual property within the GATT system is also desirable to this community. Such a code will include its own dispute resolution mechanism, perhaps tracking the article XXIII rules. Only the signatories of the intellectual property code would be involved in this dispute resolution process.

33. The GATT actually requires an assessment of measures. This tradition appears to have been ignored in the recent section 337 case where the panel, in assessing a case that is technically moot, examined the nature of the law, rather than the impact of a given measure on a set of goods. A panel, however, cannot alter GATT practice. Only the GATT Council can give a report status by adopting it. Even if a panel report did assess a law rather than measure, and such a decision was affirmed by the GATT Council, another future panel would not be bound by that interpretation.

litical nature of the GATT dispute resolution process—the *legal* effect of a finding of GATT inconsistency will be largely meaningless.[34]

The key to a strong international intellectual property system within the GATT is the ability to secure improvements in the laws of nations that are parties to an intellectual property agreement through the use of a strong dispute resolution mechanism. The use of binding dispute resolution, however, can cut both ways. If the United States is willing to further expose its national trade instruments (such as section 301 of the Trade Act) or border enforcement measures (such as section 337 of the Tariff Act of 1930) to critical analysis and bind itself to alter its law in light of an adverse decision by a GATT panel, then many domestic interests that benefit from these laws may force re-examination of the United States GATT negotiating position.

B. *Risks to American Business Interests*

How much is at risk for American interests in the Uruguay Round of negotiations? There are at least two ways to answer this question. From a domestic law perspective, we must compare our intellectual property

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34. Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31 (1987); *Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements: Report to the Senate Comm. on Finance and Investigation No. 333-212 Under Section 332(g) of the Tariff Act of 1930* (ITC 1985) (ITC Pub. No. 1793). For a discussion of the European view of the GATT as a forum for negotiation, see Phan van Phi, *A European View of the GATT*, 14 INT'L BUS. L. 150, 151 (1986).

Many serious conceptual and practical difficulties with respect to enforcement of intellectual property rights have not yet been addressed. First, the GATT offers protection to *goods*, and rights can only be enforced by *Contracting Parties*, that is, the nations that exported the goods. Intellectual property rights are created under a national law and are vested in an individual or other juridical entity. Intellectual property rights are also usually enforced by the private parties involved in the infringement dispute. To reconcile this difference in approach, fashioning a new enforcement mechanism would be necessary. One possible solution of this problem would be to alter the GATT system to permit Contracting Parties—but not private parties—to assert national rights in *goods* protected by the national law of the state in which the intellectual property right first attaches, rather than the country of origin. Other solutions may also emerge in the negotiations process.

The second, and more difficult, practical problem with the approach set forth above is that a *good* could be created in one nation, produced in another country, and shipped to a third nation where the intellectual property norms were insufficient. In these cases it is unclear why only the first nation would have GATT intellectual property rights and not the second. There also may be some inconsistencies concerning a Contracting Party who can assert rights in a tariff context (based on "country of origin") when a different Contracting Party may have those rights in an intellectual property dispute.

laws and enforcement measures with the proposals from the other negotiating countries.[35] Care should be taken that the negotiations do not produce an agreement requiring changes in domestic law that will significantly alter the public interest.[36] From an international intellectual property perspective, the strength and vitality of existing multilateral organizations such as GATT and WIPO could be seriously eroded if the negotiations fail.

The clearest examples of laws that the United States may be pressed to change as a result of these negotiations are those in which it does not provide the minimum protection our trading partners think necessary.[37] For example, the Europeans argue that we need to fashion a new, sui generis design law. They also assert that the United States should amend its trademark law to expand protection for both famous trademarks and provide protection for appellations of geographic origin. To harmonize its patent laws with those of Western Europe and Japan, the United States would also have to adopt major changes in the existing law, including a 20 year patent term from date of filing and deleting authority to patent sexually reproduced plants. Adoption of the European view of copyright might require extending performance rights to sound recordings or adopting an explicit federal statute on moral rights of authors.[38] Finally, a harmonized system of minimum intellectual property standards may require enactment of a federal trade secret statute. Notwithstanding the exclusion of the patenting of plants and the expansion of

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35. Interestingly, the private sector in Europe, Japan, and the United States have urged their governments to adopt a position that would not require amendments to the laws of this community of interests. *Basic Framework, supra* note 25.

36. The President has been explicitly granted general *fast track* authority, Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 1984 (1975) (codified at 19 U.S.C. § 2115), specifically for the GATT Round under the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1101-03, 102 Stat. 1107, 1121-32. Essentially, *fast track* means that the executive and legislative branches fully coordinate the position of the United States during the negotiations. The formal experience with the *fast track* negotiating authority has only generally involved the House Ways and Means Committee and the Senate Finance Committee; thus, it will be necessary to make some adjustments now that other committees of the Congress are more formally involved in the consultation process. *Id.* § 161. It may also be desirable to involve parties outside the traditional Advisory Committees on Trade Negotiations (appointed by USTR and Commerce) in the consultation process.

37. The United States approach has been to minimize the extent to which the laws of the United States would have to be amended. Thus, the items listed in the text are a "worst case" scenario.

38. The Register of Copyrights has raised the possibility of other GATT contracting parties' complaining about the lack of video rental rights under United States copyright law. *Oman Albany, supra* note 9, at 8-12.

moral rights for authors, these changes would serve to further the interests of intellectual property owners.

The second area of domestic law that could require amendment is our most effective border enforcement measure: section 337 of the Tariff Act of 1930.[39] The European Community, Japan, Canada, and South Korea all joined in a GATT complaint against section 337,[40] asserting that its failure to provide identical procedures and standards for the enforcement of patent rights for domestic and foreign-produced goods violates the GATT. The overwhelmingly negative nature of the concerns expressed by these important trading partners—and their strategic importance in this GATT round—makes modification of section 337 a distinct possibility. This is especially true in light of the fact that the GATT council is currently reviewing[41] a finding by a GATT panel that section 337 is inconsistent with the GATT.

A dramatic increase in the reliance on bilateral action may pose a real short-term and, perhaps, long-term risk if the United States fails to secure improved intellectual property protection in the GATT. A cornerstone of world intellectual property protection is multilateralism based on a concept of national treatment. The continued vitality of such an approach may be at risk if the GATT negotiations fail.[42] The most likely proof that a multilateral approach is failing may be seen in the United States frequent use of trade sanctions, under either section 301 or through the denial of Generalized System of Preferences (GSP) benefits, against countries who refuse to improve their intellectual property stan-

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39. 19 U.S.C. § 1337 (1982 & Supp. V 1987).

40. *See supra* note 21.

41. *EC Endorses Panel's Ruling that § 337 Violates GATT Non-Discrimination Rules*, 37 Pat. Trademark & Copyright J. (BNA) 302 (1989).

42. An example of another problem with bilateral negotiations is the possibility that one nation will secure advantages in the intellectual property laws of another nation that do not apply to other nations. There has already been concern expressed about the failure of the United States negotiations with South Korea to extend similar benefits to other nations such as Switzerland.

On the other hand, the use of bilateral pressure to secure intellectual property protection has shown some success in the context of semiconductor chips. Under section 914 of the Semiconductor Chip Protection Act of 1984, the United States will only extend protection to nations that have been willing to undertake a process leading to the enactment of a law similar in the degree of protection afforded to the law of the United States, Protection of Semiconductor Chip Products, Pub. L. No. 98-620, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901-14 (Supp. V 1987)). This approach has resulted in the enactment of foreign laws. Kastenmeier & Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 461-65 (1985).

dards.[43] Many trade specialists view this type of unilateral retaliation as antithetical to the multilateral trade system because it creates a significant risk of similar unilateral action against the United States.[44]

One final concern with the United States Government position is whether it is balanced. One inherent difficulty in making this assessment is that it must be made by the executive branch. No matter how much consultation occurs with the private sector and the Congress, the negotiating process is ultimately opaque to these interests. The final product of any negotiations will be evaluated by the Congress on a take it or leave it basis, making the dispassionate evaluation of smaller pieces of the negotiation more difficult. This is likely even if each set of negotiations produces a separate code, since the agreements are likely to be bundled together. Moreover, there is no clearly established forum for the balancing of sectorial interests, or even differences of opinion between committees having relevant jurisdiction within the Congress: a final agreement that furthers the interests of agriculture may or may not enhance intellectual property protection.

No matter how desirable changes in intellectual property laws are in

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43. The list of countries to be targeted could be largely similar to the existing priorities because the United States Government has already attempted to put pressure on some countries, such as Brazil and Thailand, through these mechanisms, to change their intellectual property laws. *President Reagan Imposes Sanctions on Brazilian Goods for Patent Piracy*, 36 Pat. Trademark & Copyright J. (BNA) 745 (1988). The Trade Act of 1984, as amended in 1988, already requires the executive branch to submit to Congress a list of offending countries. Pub. L. No. 100-418, § 1303, 102 Stat. 1107, 1179-81.

44. The reliance on trade laws such as section 301 poses a separate set of problems within the GATT process itself. Note, *Opening Up Trade Barriers with Section 301—A Critical Assessment*, 5 WIS. INT'L L.J. 176, 200 (1986) (overuse of section 301 poses the greatest danger to United States GATT obligations). Some targets of such actions have already complained that the use of section 301 itself violates the provisions of the GATT. Brazil has obtained a panel to evaluate the consistency of section 301 with the GATT. An *overwhelming consensus* existed in the GATT Council for the formation of a panel. *U.S. Agrees to GATT Panel to Study Brazilian Pharmaceutical Sanctions*, 37 Pat. Trademark & Copyright J. (BNA) 387 (1989). Trade retaliation in an effort to change the internal policies of another Contracting Party of the GATT may violate the unconditional most favored nation (MFN) on which GATT doctrine is based. *State Department Program Examines "GATT and Intellectual Property,"* 31 Pat. Trademark & Copyright J. (BNA) 497 (1986) (comments of Professor Robert Hudec); *Trade-Based Response, supra* note 11, at 458. For a discussion of MFN and the GATT, see Ehrenhaft, *A U.S. View of the GATT*, 14 INT'L BUS. LAW L. 146, 147 (1986). If such actions are seen to be GATT-inconsistent, further problems would arise. When the United States argues that other countries should negotiate in good faith in a multilateral forum in order to avoid unilateral actions, such an argument will be less credible if we have already demonstrated our willingness to ignore our GATT obligations.

the current GATT Round, some may suggest that failure to secure optimal results on intellectual property rights is not worth jeopardizing significant improvements that may be secured in the fields of agriculture and services.[45] More significantly, the failure to achieve significant advances in setting intellectual property standards should not serve as a motive for diminishing the already unsteady support within the United States for a multilateral, non-protectionist trade regime.

IV. Political Reality and the GATT/Intellectual Property Linkage

During the next two years the GATT contracting parties will hold further meetings at the working group level to discuss the inclusion of intellectual property standards. The first sign of how far these talks are likely to progress will come from the new Midterm Review scheduled for Geneva in early 1989. These sessions will reveal whether the group led by India and Brazil will continue to object to progress in this area. If these countries alter their position, it may be possible to fashion a generally applicable set of international standards and enforcement measures for intellectual property.

If the Indian/Brazilian faction maintains its current position, however, the developed countries will likely seek to establish a set of intellectual property standards on their own. This group, led by the United States, the European Community, and Japan—and perhaps including Switzerland, the Nordic countries, Canada, Australia, New Zealand, Hong Kong, and some of the ASEAN nations—could move relatively rapidly to adopt a high-level set of norms. These countries' legal systems and extent of protection, combined with their relative level of development, would facilitate agreement. The evolution of a set of standards that includes only thirty countries may present a problem for the GATT system, because it would undermine the need to integrate solutions to various trade distorting practices into one common legal system with the maximum possible number of participants. On the other hand, the previous GATT rounds have produced a series of agreements (for example, government procurement, subsidies, and antidumping) that have included fewer than forty signatories.[46] Thus, pre-existing precedents support a less than all-inclusive agreement.[47] Moreover, the inclusion of

45. The failure to incorporate intellectual property within the GATT does not eliminate the possibility that WIPO may be able to muster the political will to increase intellectual property standards or to develop enforcement standards.

46. *Oman Albany, supra* note 9, at 8-11.

47. J. Jackson & W. Davey, *supra* note 2.

most of the developed countries in an intellectual property code would represent a substantial portion (approximately seventy-two percent) of world trade in manufactured goods.[48]

Even without a GATT agreement on intellectual property, however, some private sector interests believe that the mere fact of GATT negotiations will produce a more hospitable atmosphere for bargaining within WIPO. Others believe that even the establishment of a set of standards agreed to by only developed countries will be useful because it could assist in establishing neutral criteria for use in the bilateral negotiation process.

V. Intellectual Property and the Developing World

A significant challenge posed by the current GATT/Intellectual Property talks is the articulation of a coherent set of arguments about why this exercise serves both the short-term and long-term interests of virtually all contracting parties. Intellectual property proponents have begun to make a case for the economic benefits of enhanced intellectual property protection,[49] but these assertions have not been accepted by the developing world.[50] The political reality for some developing nations may

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48. United Nations Trade Net (computer data base, a part of a file within the United Nations Trade Data System).

49. Speech by Denis Lamb, Bureau of Economic and Business Affairs, Department of State, to the Second Indonesia-U.S. Conference on Economic and Business Relations, Opportunities, Obstacles, Options, Intellectual Property Panel, 7 (January 22, 1987) ("[n]egative consequences for innovation [of copying] are clear . . . even more insidious is the long term effect that such practices can have on competitiveness by reducing potential economies of scale and lowering returns"); *see generally* Hoffman, *supra* note 6, at 9-10.

Intellectual Property Committee, *Briefing Book on Intellectual Property for U.S. Private Sector Advisors to the Midterm Review of the Uruguay Round, Montreal, Canada*, Tab I (December, 1988). The IPC paper attempts to show that strong intellectual property laws will: (1) stimulate innovation, generate new products, create new jobs and increase capital investment; (2) facilitate the transfer of technology; and (3) avoid permanent relegation to second class status as a "free rider" country.

M. Gadbaw, *supra* note 14, at 1-22, 1-13. Gadbaw also points out that the likelihood of change in the intellectual property context is the product of (1) the degree of pressure exerted; (2) the importance of trade and investment relations with the developed world; (3) the nature of the overall relationship to the developed world—including security issues; (4) the extent to which research and development activity is, or could be undertaken within the country; and (5) the nation's economic development strategy. *Id.*

50. Candor compels a recognition that in the past, developed nations have been less than fully protective of intellectual property rights. The United States, for example, was during the 19th century a leading publisher of English works without extending copyright protection to those works. *See generally* B. Kaplan & R. Brown, Cases on Copyright, Unfair Competition and Other Topics Bearing on the Protec-

be that local industries (such as pirates of software and records) deriving significant income from the piracy of the research and development of others are too strong to overcome. In other instances, the exclusion of pharmaceutical products from patent protection may have resulted from a conscious policy choice to lower drug prices.[51] Arguing that such a policy will actually serve to limit the access the population has to the latest and best medicines appears unavailing for this second group of countries.[52] Another form of incentive must be present before they will be willing to strengthen their intellectual property laws. For some nations, there may be no realistic way to escape from lesser-developed status because of a lack of resources and population; these nations may have no genuine hope of participating in a GATT code.

The United States may be able to secure a change in the position of some developing nations on intellectual property issues by using the threat or reality of trade sanctions under section 301.[53] This tool is less potent against larger developing countries that are less dependent on trade with the United States; it may also be unavailable for use against

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TION OF LITERARY, MUSICAL, AND ARTISTIC WORKS (Rev. Ed. 1978) (Part IV) (summarizes the denial of copyright protection by the United States and England during the 19th Century); *see also* Speech by Ralph Oman, Register of Copyrights of the United States, before Albany Law School Annual Conference on Intellectual Property, *The Growth of Internationalism in United States Copyright Policy*," 1, 3 (1988) [hereinafter *Oman Albany II*]. Similarly, the United States denigrated the importance of copyright by maintaining the manufacturing clause for more than eighty years. *Id. See also U.S. Adherence to the Berne Convention Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Jud.*, 99th Cong., 1st and 2d Sess. 119 (1986) (Testimony of Patent and Trademark Commissioner Donald J. Quigg) (quoting the remarks of Senator Chace in 1884 that the United States is "the Barbary Coast of literature and the people of the United States . . . the buccaneers of books").

For a discussion of a "weak" patent law in the evolution of Japan's economy, see Note, *The Role of the Patent System in Technology Transfer: The Japanese Experience*, 26 COLUM. J. TRANSNAT'L L. 131, 165 (1987) ("[T]he Japanese policy of tolerating the copying of imports appears to have benefitted their economy in the early period of development without producing long-term negative effects.").

51. M. GADBAW, *supra* note 14, at 1-2.

52. Even the recitation of the positive experience of Italy and Korea when they moved to protect product patents for pharmaceutical products may be unavailing, because some other nations may not have the personnel to move from the technology of piracy to that of research and development. *Id.* at 1-17.

53. Developing countries appear interested in requiring the use of multilateral dispute resolution mechanisms before resort can be had to unilateral national trade law sanctions. In this regard there may be a similarity with the views of the European Community and Japan. *See supra* note 21.

others because of political or military concerns.[54] Alternatively, the United States and its allies on this issue might be able to structure an arrangement on tropical products, agriculture, or services that provides an incentive to developing countries to facilitate agreement on intellectual property. In the event that these scenarios do not play out, other options should be explored. Possible suggestions for change in the multilateral trade environment, taking into account the developmental differences of some lesser developed nations, might include:

(1) Development of a registration and enforcement system (either on a national, regional, or international level) through the use of user fees. This system could be funded—if not exclusively—by creators and inventors from the developed world. For example, the United States could use AID funds to establish a strong national patent and copyright system within certain target countries.[55] Registrants in the initial years would be drawn mostly from the developed world.

(2) The private sector could alter its previously targeted overseas investment to countries that offer improved intellectual property protection. Differentiating on this basis among developing countries already targeted to receive capital investments may provide an incentive to some nations to improve their intellectual property laws and practices. Surely the amount of money at risk through the loss of revenues as a result of piracy justifies a modest investment in future business development in a Third World country. There are some examples of this commitment, including—albeit in the context of a developed country—an agreement in Canada by the pharmaceutical industry to increase its level of research and development expenditures to secure expanded patent protection for human pharmaceuticals. As a result of less formal processes, the record industry has engaged in licensing arrangements in Malaysia and Turkey with people who were pirates before the copyright law was strengthened. An American book publisher reportedly has expressed interest in locating publishing facilities in East Asia based, in part, on the nature and extent of the host country's protection against piracy.[56] Such investment commitments would, of course, have to be informal and nongovernmental in nature.[57] Further, any such commitment would have to

54. M. GADBAW, *supra* note 14.

55. OTA Report, *supra* note 10, at 252.

56. Speech By Ralph Oman, Register of Copyrights of the United States, before World Intellectual Property Organization and Indian Ministry of Human Resource Development, Sub-regional Workshop on Copyright and Neighboring Rights, *The Economic Impact of the Protection of Copyright and Neighboring Rights*, 8-9 (Nov. 26, 1986).

57. It may be possible to link the United States position on some loans or other

be in proportion to the relative size of the market and the ability of the local economy to provide the necessary labor.

(3) Establishment of a transition period of limited duration for developing countries to facilitate the enactment of strong intellectual property laws. Because the creation of such standards tends to freeze a lower level of protection into place, care should be exercised to avoid the adoption of special and differential standards for developing countries. The transition provisions should offer both a carrot and a stick. The United States—and other developed nations[58]—could offer to withhold unilateral trade sanctions pending satisfactory progress towards an agreed-upon goal.[59] In some instances, other positive trade benefits could be extended to countries making satisfactory progress.[60]

There should also be a strong sanction, however, for noncompliance. For example, expedited consideration of compliance with an intellectual property code by a surveillance body, followed by mandatory sanctions, could serve as an effective deterrent. For such an enforcement mechanism to be effective, the United States must secure changes in the GATT dispute resolution process applicable to an intellectual property code to guarantee that a panel decision will be implemented over the objection of the losing party.[61]

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financial guarantees within the World Bank or the International Monetary Fund to the status of intellectual property protection, but any such initiative would require a careful assessment of the competing United States geopolitical interests before it could be undertaken.

58. M. GADBAW, *supra* note 14 at 1-19, 1-20.

59. Authority for the USTR to take into account a Contracting Parties' role in international negotiations already exists. *See* Determinations by Trade Representative, Pub. L. 100-418 (to be codified at 19 U.S.C. § 2414(a)(3)(B)). H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 579 (1988).

60. Apparently Singapore and Hong Kong were the beneficiaries of extended benefits for a period of time. M. GADBAW, *supra* note 14, at 1-7, 1-23. However, GSP benefits were withdrawn after Singapore changed its law. This withdrawal, although undertaken for different policy reasons, effectively undercut the potential effect of the GSP sanction. Other countries threatened with GSP withdrawal will be leery about changing their domestic laws, unless they can receive a credible assurance that such changes will secure a continuation of GSP benefits.

Some observers may view these undertakings as inconistent with the MFN obligations of the GATT.

61. It is in the long-term best interest of the United States to have a strong dispute resolution system within the GATT. This is so even though the United States has lost important cases in the GATT, and despite the fact that we have blocked the adoption of some panel reports. The stronger the world legal dispute resolution system, the more likely that resort will be made to it, rather than to unilateral retaliatory actions. Bliss, *supra* note 34, at 38-45. ITC Review, *supra* note 34.

These three points are only tentative suggestions. More thoughtful suggestions might emerge from the continuing discussions among the contracting parties.

VI. CONCLUSION

The inclusion of intellectual property in the GATT is an audacious move by the developed countries. It represents a concrete opportunity for the improvement of the international trading system. The development within GATT of norms and standards for intellectual property is a process fraught with substantive and political difficulties. Despite these risks, the United States should continue this initiative with renewed vigor. If the United States hopes to expand intellectual property standards and norms to include developing countries, new perspectives need to be considered in negotiating with the developing world. Initiatives must be implemented for: (1) creative financing for the development of intellectual property registration and enforcement; (2) investment commitments in the developing world by developed world private sector concerns; and (3) special transition rules for developing countries.

A significant risk of any negotiating process is that the process takes on a life of its own, and that achievement of a settlement may be sought without regard to balanced content. Criteria for measuring the success of intellectual property negotiations should be articulated before the negotiations are completed. These standards should be established and understood by the Congress and the executive branch *before* the United States sets forth its negotiating positions.[62] Such standards include:

(1) The end product of the GATT negotiations should be balanced within each major negotiating objective. Thus, any agreement on agriculture, services, or intellectual property should be able to stand on its own. This does not mean that the total agreement should not be evaluated. Rather, it signifies that the process should not permit different United States interests to be set against each other. For example, an undesirable result would be to secure valid intellectual property advances at the expense of the farm community.

(2) Changes in United States intellectual property law should conform to the public interest test that Congress has traditionally used to evaluate

62. For an excellent discussion of the role of Congress in the foreign trade context, see Gorlin, *Foreign Trade and the Constitution reprinted in* CONSTITUTION AND FOREIGN POLICY (1989) (forthcoming from the American Enterprise Institute). *See also* Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lesson of the Iran-Contra Affair*, 97 YALE L. J. 1255 (1988).

legislation.[63] Therefore, any proposed extension of intellectual property protection must be for a limited term and offer a sufficient incentive for creators and inventors.

(3) A GATT intellectual property agreement should supplement, and not replace, the functions of WIPO; to do otherwise would risk undercutting existing multilateral intellectual property treaties and the expertise of the WIPO staff.

(4) An agreement should not require changes in the functioning of section 337 of the Tariff Act or section 301 of the Trade Act, unless the transparent, permanent benefits obtained through the negotiations clearly outweigh proposed changes in current law.

(5) The level of intellectual property standards must not be less than those of the Berne Convention in copyright or the proposed WIPO Treaty with respect to semiconductor chips. Sound recordings should be afforded adequate protection, either under copyright or neighboring rights. Computer software should receive adequate protection either as literary work or as a separate category of work under copyright that offers a similar scope of protection, albeit for a shorter term.

(6) Chemicals, pharmaceutical products, and micro-organisms as patentable subject matter should be a minimum. Compulsory licenses and working requirements should be avoided, unless they serve a compelling public policy purpose, such as a violation of antitrust laws or protection of national security.

(7) Border and internal enforcement mechanisms for intellectual property protection should be adequate in light of the legal traditions of the nation involved. Although it is unrealistic to expect every country to adopt our enforcement scheme, the effective denial of rights through meaningless enforcement mechanisms should be deterred.

(8) A GATT agreement should not adopt special and differential standards for developing countries with respect to intellectual property standards. Transition rules for individual nations should be encouraged, and incentives created to spur developing nations to graduate to GATT norms and standards.

(9) An equitable mechanism for funding the enforcement of intellectual property standards and norms that recognizes the financial differences between the contracting parties should be developed.

Anticipating probable negotiating issues and the development of a political consensus within the United States Government before the Uruguay Round proceeds further is an important ingredient for success. Use

63. *See, e.g.*, Kastenmeier & Reimington, *supra* note 42, at 314.

of the United States initial proposal as a bottom line negotiating position is not sufficiently flexible and cannot last very long. This process must take into account both domestic political concerns and the practical reality of international politics. With a realistic political agenda, this round of GATT talks can succeed in promoting world-wide enhanced intellectual property protection.