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Remarks of Dr. Carlos A. Primo Braga; Professor Robert Hudec; Yoichiro Yamaguchi; Alice T. Zalik; David Beier; Professor Donald S. Chisum; Professor John H. Jackson; Professor Suman Naresh; Professor Paul Goldstein; Mr. Emory Simon; Mr. Fred Koenigsberg; Mr. Harvey Schein; Mr. Ralph Oman; Mr. Michael Remington

Dr. Carlos A. Primo Braga

Remarks* of Dr. Carlos A. Primo Braga**

I would like first of all to give thanks for the invitation, particularly to Professor Reichman and to the editors of the *Vanderbilt Journal of Transnational Law*, and I would like to say that coming here is a pleasure. Many of you do not know but there is a very close link between Vanderbilt University and the University of Sao Paulo, many of my colleagues studied here during the 1970s. For me it is a first visit to Nashville and it's a pleasure to be here.

I cannot avoid, however, the feeling of being the odd man out among this distinguished group of lawyers. And I would say that maybe you'll be hearing more and more of economists, because, as Dean Costonis said yesterday, intellectual property rights will be a major issue in the years to come; it will, no doubt, be one of the main issues in economic international relations in the twenty-first century. I would also suggest that up to now lawyers have taken intellectual property rights too seriously, while economists have been taking them too lightly. But things are bound to change.

I would like to point out that the origins of my interest were pretty much related to the Uruguay Round. I co-coordinated the Rockefeller Foundation Project for Brazil concerning the role of LDCs in the multilateral trade negotiations. And I did not know much about intellectual property rights until two years ago. If somebody asked me about "neighboring rights," I probably would have said that these probably had to do with the fact that I, being a fan of Beethoven, faced somebody who is a fan of Willie Nelson playing his stereo system too loud. Since then I have learned a little bit. But I have to recognize that my view is not a lawyer's perspective. And more than that, I would have to ask your permission to adopt a very utilitarian approach to the whole problem, because that is the economist's approach. I would suggest even that any American economist would take the same approach, the utilitarian, not

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* Editor's Note: The remarks given by the various individuals following are the actual comments that were made during the live portion of the *Symposium* which took place on March 24-25, 1989. The order in which the remarks appear is not necessarily the order in which they were given.

** In addition to the presentation of his Article, Dr. Primo Braga made these remarks.

the natural law approach, that Mr. Gadbaw just mentioned. And I am going to discuss a little bit about that.

I am going to talk about LDCs intellectual property rights and the GATT. I do not think I need to talk too much on this, because Dr. Subramanian made an excellent presentation on the main issues yesterday. I will try to present the debate along the so-called North-South divide, and this is, of course, an oversimplification. I will be talking about the North proposal, which is basically the American proposal. It is a maximalist proposal, although parts of it are supported by other industrialized countries. The South proposals are basically the proposals of the foot draggers like Brazil and India, which, of course, are also maximalist proposals on the other extreme of the spectrum. So this is a simplification to frame the debate.

Let's begin with intellectual property rights in the GATT. As you know, intellectual property rights are addressed by the General Agreement. Several articles make reference, as Dr. Subramanian mentioned yesterday: article 9, Marks of Origin, and article 20, which includes intellectual property rights as a part of the general exceptions. But as you know, the degree of coverage was, to say the least, poor.

During the Tokyo Round, there was an attempt by the United States to draft a kind of anti-counterfeit code. This attempt failed, however, to achieve a consensus, so it did not even appear in the final declaration of the Tokyo Round, although it was able to garner growing support from other industrialized countries.

Well, by the end of the Tokyo Round, there was a widespread sense of frustration, both in the North and in the South with respect to the multilateral trade system. The reasons behind the frustration were different. The North felt that GATT was not covering many areas that were becoming more and more important for international trade, such as, trade-related aspects of intellectual property rights, services, trade-related aspects of investment measures, and trade in high-tech products. Another reason for frustration in the North was a point that Mr. Gadbaw just made, the fact that most LDCs acted as free riders in the process, and that's quite true. So these were the main reasons for frustration from the point of view of the industrialized countries.

But you have to recognize that there was also a lot of frustration from the developing countries. What were the reasons for frustration? First, the recognition that the so-called special and differential treatment for LDCs was a big failure. GSP, the Generalized System of Preference, basically did not deliver what LDCs were looking for. And, actually, I could make a very compelling case that S & D was a bargaining chip for industrialized countries that distorted the attention of LDCs away from

the major issues in agricultural trade, in textiles, and in clothing. So many areas of major importance for LDCs were also not adequately covered by GATT disciplines.

So this sense of frustration evolved into an attempt for recognition that the whole multilateral trade system could be in danger. By 1982, during the Geneva Ministerial Meeting, the United States tried to use the meeting as a launch pad for a new round of multilateral trade negotiation. The agenda that the United States presented was an attempt to put issues that could garner support in a very widespread base. So the United States put agriculture and safeguards on the agenda, issues which were very important for LDCs. But, mainly, the United States tried to put the so-called new themes on the agenda. So what was the United States trying to do? It was trying to implement a reform of GATT through a new multilateral round of negotiations.

Well, as you know, this attempt failed, not only because of resistance which was very strong from LDCs, but also because among industrialized nations at this point in time, there were serious doubts about the adequacy of going into a new round of negotiations amid world-wide economic crisis; France felt particularly adamant against it. So the American attempt failed, but there was a milestone in the Ministerial Declaration of 1982. For the first time, there was a very explicit recommendation to examine the question of intellectual property rights. As you all know, the debate continued, and finally led to the Uruguay Round with the Punte del Este Declaration in 1986.

Many compromises had to be made. The best example of a compromise is the dual track approach to service. But from the point of view of this paper, my main interest, of course, is the fact that in the Punta del Este Declaration TRIPs became one of the formal groups for negotiation in the Uruguay Round. So we could say that the United States, to a certain extent, won this process, which, I would suggest was an inevitable step for the enhancement of international trade relations. Because—and I am now speaking from an economist's point of view—it is not so much the question of using intellectual property rights in a way that could be tantamount to a non-tariff barrier to trade—one of the main problems vis-à-vis United States practice. But the whole issue nowadays is the growing recognition that differences between intellectual property systems, and by intellectual property systems; I am talking not only of the laws, but also of implementation of these laws. So differences among national intellectual property systems are ioevitably barriers to trade. This is an economic proposition that is basically behind the push that the United States is making for enhancement of standards of intellectual property rights protection around the world.

If you look at the Punta del Este Declaration, you can find there, first, a proposition that we should draft a multilateral framework to deal with counterfeiting. There is also the explicit recognition of the need to promote effective and adequate protection of intellectual property rights, as well as the recognition of the necessity to avoid excess, of course, we are talking about section 301. And, the need to take into account initiatives and institutions, mainly WIPO.

I would suggest, however, that the United States had changed its agenda from 1982 to 1986. By the end of the Tokyo Round, the anti-counterfeiting code was very much in American minds, but since then it had lost importance. By the beginning of the Uruguay Round, the main issue was the development of a set of standards for intellectual property rights protection to curb piracy, presumably, modeled after United States legislation.

You can imagine that this interpretation of the Punta del Este Declaration, raised a lot of critical issues, not to mention philosophical and political issues. LDCs, of course, were eager to point out that the only instance in the General Agreement where contracting parties are required to protect intellectual property is article 9.6, with respect to marks of origin, to prevent misleading indications of origin. And LDCs of course, emphasized other aspects of the Punta del Este Declaration. They emphasized the question of competence or jurisdiction. They emphasized the need to avoid excess. And it is fair to say that the European Community and Japan had some second thoughts with regard to the American proposition. The European Community, in particular, for tactical reasons, was very much interested in negotiating the anti-counterfeiting code. But the United States now, because of procedural questions, debated the precedents of the anti-counterfeiting code, since now the United States had as its major goal the question of setting standards.

So it is no surprise that up until now we can say there is no substantive progress. And TRIPs together with agriculture, safeguards, textiles, and clothing were the stumbling blocks in the Montreal meeting last December. I would even suggest that TRIPs will continue to be a major point of contention in the negotiations. Why is that so? Because there is a lack of consensus.

Some people say that the debate until now has been a debate more in form rather than substance. It has been a debate on jurisdiction. It has been a debate on interpretation of the negotiating mandate. It has been a debate on the pace of negotiations. But I would suggest that if you try to go to the substantive issues, you will continue to have major points of contention. You will still have a lack of consensus.

At the legal level, you will have the problem of territoriality, a century

old issue since the Paris Convention, and we could interpret the United States attempt, as a new attempt to promote universality. But, as history shows, this is a very difficult goal to achieve, but this may be the only way to go ahead with this issue, which is becoming more and more important. But what is particularly disturbing, is the attempt of the United States to translate its domestic provisions into international standards. This is, of course, an issue that raises a lot of reaction.

At the political level, you can also say that there are many reasons for conflict. Actually, what we are discussing is the whole issue of international leadership. I am not suggesting that Brazil or India are competing for international leadership at the technological level. Actually, I would suggest that this is much more a North-North debate.

But you could also interpret the whole issue—I am not of this position, but there are some who have taken this position—to interpret the whole debate as an attempt of developed countries to control the diffusion of new technologies and to freeze the international division of labor. Particularly, if you go at the LDCs' level of the political debate, you have to recognize that what you are asking is to strengthen the power of multinationals in these countries. And this can be a very disturbing political domestic issue.

There are many reasons for conflict at the political level, and I would suggest there are even philosophical differences. There is a marvelous article by Michael Novak talking about natural rights, the fact that intellectual property rights could be considered as fundamental rights to physical property. This is the kind of analysis that is usually presented. The United States tries to put itself on high moral ground in presenting this idea, and I think it is a very interesting concept. But to present this as an argument in the Third World is bound to generate a lot of skepticism. For example, if you look at industrialized countries' intellectual property systems, you will see that many of these countries' systems evolved according to economic expediency. Thus, levels of protection and coverage evolved through the years according to specific national interests.

I would even suggest instead of using the word piracy, maybe nowadays we could use the word "corsoirs" because most pirates in Third World countries have all the legal mandates and abide by local laws to do what they do. I would also suggest that from a cultural point of view, it is important to remember that Sir Frances Drake is a hero from an Anglo-Saxon perspective, but he is a thief from a Spanish perspective.

Let's try to get away from these issues and instead, try to apply some kind of utilitarian approach to see if we can progress in the debate. So what are the economic issues? There is no doubt that intellectual prop-

erty rights are here to stay as a major issue in the debate, mainly because of the technological rivalry, but also because, as Mr. Gadbaw mentioned, new technologies dramatically increased the economic significance of "piracy."

The conventional economic reasons for intellectual property rights protection from a standard neoclassical economic perspective are well-known. One reason is basically to promote research and development (R&D) and we believe that by doing that, we will promote technological innovation. Another reason, of course, is to encourage the disclosure of new knowledge.

I would just like to mention the fact that from an economic point of view, there is no reason for using the proprietary approach to achieve these objectives. I am not saying that I am against it, I am actually completely in favor of the proprietary approach. But I am suggesting that from a rational economic point of view, there are other alternatives because the whole problem of the economics of knowledge is a problem of public goods. And those of you who took a public finance course know that there are other ways to deal with this problem, basically through government intervention. So government could produce technology and finance this through lump sum taxes applied over society as a whole. Government can subsidize private agents to produce technology, again, using lump sum taxes to finance such an undertaking without using the proprietary approach. I say this even though hindsight and questions of public choice theory suggest that the proprietary approach is much more efficient.

But then, if we look at intellectual property systems, we would have to balance benefits and costs. What would be the benefits? Well, basically, increased production of knowledge. What would be the costs? The possibility of underutilization of knowledge, because of the monopolization process, which is an inevitable by-product of the concession of intellectual property rights.

Most analyses tend to support the thesis that the benefits are higher than the costs. But these analyses tend to be made in a closed economy. When we begin to think of the problem in international terms, then the results are not so certain. Of course, a national government is bound to value the welfare of its own citizens or residents more heavily than that of foreigners, and that is the whole point. So if we look at LDCs, they are typically net importers of knowledge, of technology. Hence, if you apply the same models that have been developed in the First World to support the proprietary approach to LDCs, most analyses tends to recognize that there appears to be little reason for underdeveloped countries to adopt, for instance, a patent system if it takes into account only the wel-

fare of its own residents.

These kinds of analyses, I would suggest, however, are not good enough at this stage in the debate. Why is that so? Most of these models are very simplified models. They do not take into account, for example, that now the main problem in the North-South relationship is with respect to the so-called NICs, the newly industrialized countries. Some of those NICs already have a certain capacity to create knowledge and I would suggest that Brazil, for instance, has other reasons to implement its own patent system. Actually, if one looks in the area of weapons production, for example, he would be surprised to see that Brazil is one of the five largest weapons exporters in the world today and basically with Brazilian technology. Thus, if you talk about Brazil, if you talk about India, and if you talk about South Korea and Taiwan, you are talking about countries that already have domestic production; of course, very limited vis-à-vis First World countries, but the domestic production of technology nonetheless. So this would be the first qualification to these standard economic models. Another major qualification would be the possibility of trade retaliations, a thing that the models which I just suggested, do not take into account. And, also, the question that some of the benefits of intellectual property protection are not usually taken into account. Particularly, the question that is presently a major question is the idea that technology is what drives investment today. Hence, it will have a major impact on the path of development of these countries.

Now let's see what we can say in terms of costs and benefits for LDCs that are net importers of technology. I will try to use a very simplified model, on which I have tried to put the costs and benefits of an intellectual property system reform. So we are talking, first of all, about an LDC that is a net importer of technology, which decides in a certain moment to undergo an intellectual property reform enhancing intellectual property protection. At this point in time, we are not going to consider the possibility of retaliation. So it is still a small country, trying to decide in a rational way, only for its own good, to increase protection or not. What would be the cost for this country? The cost equation is a function basically of the following arguments. The first argument, d$R is basically the idea that if you increase protection, you are going to have an increase in royalty payments. So this is going to be a cost for this country, an increase in royalty payments to the rest of the world. Why is that so? Because, I am beginning with the assumption that this country is a net importer of technology, of knowledge. The second argument would be (d$P), which would be basically the cost of displacement of "piratical" activities. Of course, this would only be a social cost if piratical activities are displaced by foreigners. If you just have a shuffle among

nationals, this would not be a social cost. But let's assume that piratical activities will be substituted for imports of licensed products.

Two other aspects are not always taken into account. One is the opportunity costs of additional R & D. That is a very important point, because we tend to believe that additional R & D is always good. But a case can be made that some countries have very inelastic supplies of human capital. When you increase protection of property rights, if you are going to increase R & D, you are going to displace people from productive activities to R & D. Then comes the question of competence, the efficiency of the results. You must also take into account the opportunity costs of moving the factors of production from the other areas. And one major aspect of the costs, of course, would be the losses in terms of consumer surplus. What is that? Well, this is an economic term just to say that prices probably will go up and it entails the cost for local consumers. So this would be the main cost from the point of view of an LDC of improving protection. Of course, we can talk about the role of multinationals and other aspects like that. But I am not going into that—it is a simple model.

Now, let's talk about the benefits. What would be the main benefits? Well, you could say that the main benefits brought by additional R & D, would be cost savings, and you are going to be able to increase your pace of growth. Through enhanced intellectual property rights protection, you will be able to attract more technological transfers, and, again, you will have cost savings in the production structure, and you will enhance this economy's ability to grow. And, even, you can suggest that there is going to be more capital formation in these countries. In many countries, for instance in a country like Brazil where there are no trade secret laws, you can make a case that capital formation is hindered, because people are afraid of the aspect of nonappropriability of knowledge because of this failure of legal systems in this country.

So what would be the utilitarian, the economical, approach for a country to decide to adopt reform or not? This country would try to look over time at what would happen in terms of the costs and benefits of the reform.

What I have here NW is a proxy for the net social welfare of the country. So I am discounting the benefits and costs of the reform through time. To the initial moment after the reform, and T would be the time horizon to which we are making the analysis. So the standard conclusion would be to say that if NW is bigger than zero, then this country would be well advised to make this kind of reform for its own good. If NW is smaller than zero, then this country will not, in terms of self interest be advised to make this reform. Of course, this is a very simplified ap-

proach, but anyhow, it puts together the main aspects of the debate.

Well, a typical LDC is strictly in this position. If this country makes the reform, immediately after the reform the costs will be greater than the benefits. This is almost inevitable, because the first impact will be the increase in let's say, royalty payments. So the whole debate can then be framed in two situations. One would be the case against enhanced intellectual property rights protection.

How is this case framed? Well, first, there is the more politically-oriented approach, which says, it is just an imperialist attempt from the North to control diffusion of technology. I do not buy that, but we have to mention it. The radical argument[1] would not only say costs are higher than benefits at t_0, but over time, costs will increase faster than benefits. Why is that so? Well, because technological dependence will increase, and you are going to have to pay more royalties, and so on and so forth.

What would be the other arguments? The more relevant ones for our debate, would be the arguments which suggest that with respect to time, the first derivative of the function **g** is larger than the first derivative of function **f**. What does it mean? Simply, that the benefits will increase over time faster than the costs. So over time, this country, for its own good, should enhance intellectual property rights protection.

I am not going into the details of each argument, but just to make the case, assume that this is true. We then have a necessary, but not sufficient, condition. Would it be sufficient to say that NW is positive? No! Because, this country can have the costs concentrated in the beginning of the process, and the benefits will be in the future.[2] And as you know, many LDCs are very impatient societies because their policymakers are in very unstable environments. So they have very high social rates of discount. They tend to discount very heavily the benefits that will come up in the long run, against costs in the very short run. So even if G' is larger than F', the welfare impact of the reform would not necessarily be positive.

Then there is another argument, the so-called threshold argument. The idea that under a very low income per capita, the situation would not "support" intellectual property rights protection. But if a country reaches a higher level of development, then the benefits would be much greater, although in the future, and would make it, at a certain point in time, advisable to this country to enhance its intellectual property rights protection system.

So you can create a case against intellectual property rights protection

1. This argument is illustrated by Figure 1. *See* Figure 1, *infra* at 322.
2. This point is illustrated by Figure 2. *See* Figure 2, *infra* at 322.

along this side. First, the radical format that it makes no sense for an LDC. Second, the pragmatist's format saying that the costs are in the short run and the benefits in the long run with negative NW for the country. And then you can have the threshold format saying well, let's wait until we reach a level of development that makes sense for us to enhance intellectual property protection. All of these arguments are in the Uruguay Round debate.

I would suggest that it is important to recognize the so-called political economy of the debate. I am going to make a case that even if the situation is such that you have a strong case for enhancing intellectual property protection for the good of the country, this country may resist the process. Why is that so? Because the political economy of the process is such that the costs will be concentrated in those who have the so-called piratical activities, which will fight very strongly in the domestic arenas against any kind of enhancement of intellectual property rights protection. For those who would benefit—the society as a whole—the benefits are very diffuse. There is a free rider problem. People will not engage the process to defend enhancement of the intellectual property. So from a political standpoint, even if you can say that a country like Brazil or a country like South Korea has already passed the threshold where it makes sense to enhance its intellectual property rights, the political debate can be biased to an extent that is rational—I am not saying that it is right—to resist enhancement of intellectual property rights.

So, just to finish, I will advance this model, and go into the issue of trade retaliation. Up to now, I was working with a small country hypothesis, the idea that these countries can do anything they want, and this will not generate any kind of positive or negative reaction from the rest of the world. As we know, the whole problem today is exactly the possibility of unilateral actions. Let's assume that the country now has to take into account the possibility of retaliation. If this country does not enhance its system, it will see markets abroad being closed for its products. So what does it mean from the point of view of this model? It means that amid the benefits of enhanced protection, you have to take into account the possibility of losing export revenues because of retaliation of your trade partners. And how does this country decide when retaliation is brought into the picture? Well, then the country will have to look at the expected value of its social welfare. And what is this expected value? It is a weighted average between its social welfare in the case of retaliation and the social welfare without retaliation.

What I am trying to say to you is basically that, if, for example, the United States began to press Brazil, as it did in the case of pharmaceutical products, and the probability of retaliation goes to one, then it is

quite possible that this country, will face a change in the sign of the perceived value of NW, from negative to positive. So that is the whole rationale behind the reciprocity approach adopted by the United States. The whole problem is that retaliation is a very blunt mechanism. I would remind you that no country likes to act under external pressure.

Mr. Gadbaw mentioned, and I think it is quite interesting to see the results of the American approach with respect to enhancing intellectual property rights protection in countries like Taiwan, South Korea, and Singapore as an unqualified success. Actually, I was in Singapore when it happened, and I can tell you the Singaporeans were not happy at all, but they went along. And they were really dismayed with what happened after that, because immediately after, the United States withdrew the GSP benefits to Singapore. What I am trying to say to you is that the American trade policy is not really a John Wayne kind of trade policy, it is more of an Archie Bunker kind of trade policy.

And if you are going to apply retaliation, then you have a problem, because who are you going to retaliate against? The export-oriented sectors! It will be very difficult to retaliate against the pirates. Typically, you are going to retaliate against export sectors. And what happens then? Well, export-oriented sectors are exactly those sectors that have a better understanding of the importance of intellectual property rights. So the pressure on these various sectors is effective before you apply retaliation. But actually what you do is to damage the support for reform in this country, once retaliation has been applied.

So just to finish, I would say that there is no doubt that intellectual property rights are an important concern. They will grow in importance over the coming years. I think that as a long-term objective, all countries will be well served in increasing intellectual property rights protection. But I would suggest that gradualism is the only way that you can pursue this objective. More than that, I would suggest that the political economy of the debate has to be taken into account. Not for a moment should you think that these countries, when protecting "piratical" activities, are being irrational.

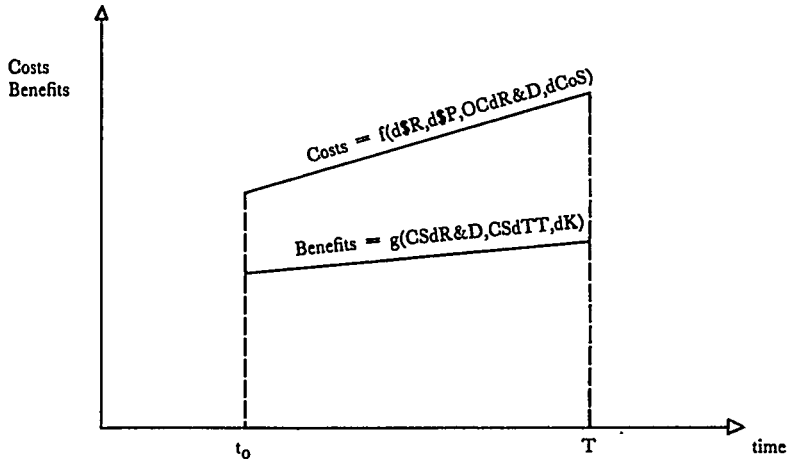

Figure 1

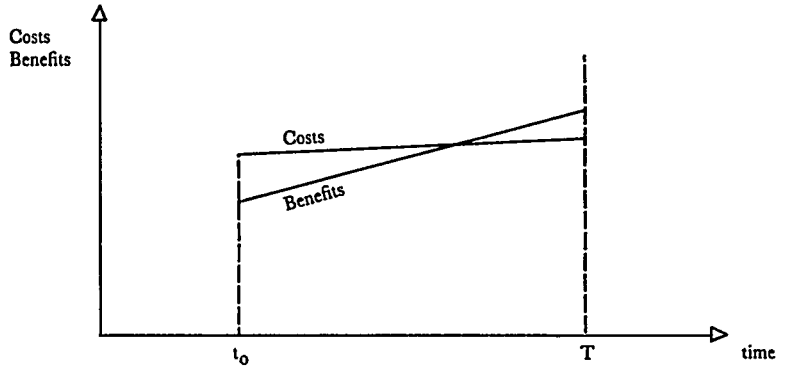

Figure 2

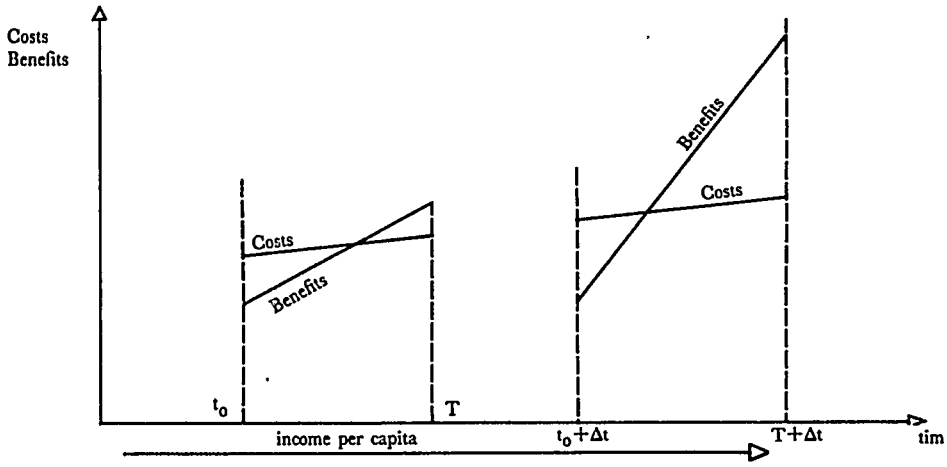

Figure 3

NOTE: The shapes of functions f — for Costs — and g — for Benefits — were assumed to be linear for illustrative purposes.

Remarks of Professor Robert Hudec*

I would like to focus on the United States demand in the GATT, and its characterization. The key element in the United States position is its attempt to use trade access and the possible denial of trade access as a bargaining chip to improve intellectual property protection, in two ways. First, to induce governments to accept a higher level of obligation, and second, as a sanction to enforce those obligations once accepted.

What is wrong, in the United States view, with pursuing the WIPO strategy is that there just are not enough bargaining chips in WIPO to accomplish the kind of improvement the United States wants. Higher standards of intellectual property protection for one's own nationals is not a kind of inducement that will move countries like India and Brazil.

I want to address the question of payment—of what the United States will have to pay for what it wants. There was a moment in Mike Gadbaw's paper where he briefly referred to the question of paying. I think the word he used was "problematic." The question of payment is problematic. That is the last we heard of it.

I see a large effort having been made as this debate has progressed, perhaps not consciously, to sidestep and avoid the issue of payment. We have heard various suggestions, often quite subtle, that what the United States is asking for is something that does not have to be paid for. First, we have a series of arguments, which have been dealt with already in the paper of Carlos Primo Braga, granting stronger protection for intellectual property rights is for the developing country's own benefit. We are telling them that they have to do this, but since the end result is for their own benefit, we should not have to pay anything for it.

Or we have the fundamental right approach. That is, if what you are asking for is something which is really a fundamental part of civilized behavior, you should not have to pay for it. Mike Gadbaw has already admitted that a large part of the world does not see it in those terms. Indeed, one might go on to say that a large part of the world views the United States use of this rhetoric as sort of typically self-righteous United States behavior. The United States always has high principals when it pursues its interests. Its interests are never just interests, they are always matters of high principal. And we also have a convenient way

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*Professor Hudec is the Mevlin C. Steen Professor of Law at the University of Minnesota School of Law.

of forgetting the instances in which our own behavior, when our interests were not so clear, deviated: The fact that we did not recognize foreign copyrights for a century; and the fact that our cherished section 337 remedy was not available this last year to foreign owners of intellectual property rights who did not have industries in the United States. I am suggesting that the claim of fundamental right is not and will not be well received around the rest of the world.

There is another interesting point in Mike Gadbaw's Article that I have also noticed, in the United States negotiating positions. The claim is made that GATT law itself may entitle governments to condition trade access on adequate protection of intellectual property rights. We should be clear in our mind that no such right exists. What the United States is presently doing to Brazil, an example of using trade access as a sanction, is a violation of the GATT. The United States has made a commitment to Brazil under the GATT Agreement that it will not impose trade barriers above a certain level on products if certain conditions are met. All of those conditions—that is to say, observance of GATT obligations—have been met. Having adequate intellectual property laws is not one of those conditions. Imposing a sanction for not having adequate intellectual property laws is not a justification that is accepted in the GATT — it is a violation of the GATT.

Now, there is the suggestion that we may have a remedy here called nonviolation nullification and impairment. If you do something that upsets the reasonable expectations I had going into this deal, then I am allowed to take part of my deal back. There is such an inequitable remedy in article 23 of the GATT.

Mike Gadbaw has said in his Article he does not think a GATT panel would buy this theory applied to inadequate intellectual property rights. No, a GATT panel would not. I do not think any other GATT country would buy this. The remedy of nonviolation nullification and impairment is based on the notion that a reasonable expectation you had at the time you made a concession has been frustrated by some unexpected action of the other government. We knew when we made these concessions that there was no intellectual property protection. We had no basis for expecting the contrary. We just do not have a leg to stand on in that case.

Now, in a larger sense—and I agree with Mike Gadbaw on this—we are talking about a change in situation that leads the United States to believe that it has the right to ask for changes in the basic deal. We did not realize when we made the deal, that intellectual property was as important as it is now. It is a familiar situation that arises in business, things change. Our original perspective was too narrow. Now, we find

that intellectual property rights are very important to our interests and we would like to bring them into the GATT.

The GATT is a living instrument. Situations change. All the participants of GATT are going to have to be satisfied with the basic workability of the GATT Agreement. I do not think there is anything wrong with saying, "Look, I am sorry. It once was a deal that we were satisfied with, but is not anymore, we'd like to change it. We would like to have our trade obligations now conditioned in addition, on satisfactory intellectual property rules."

There are lots of ways in which the present GATT does not satisfy the economic interest of certain participants or provide a balanced economic outcome for them. There is nothing unusual about intellectual property. There have been very long standing problems that are far more important to other countries, and are not covered well. The most outstanding example is agriculture. Countries for whom agriculture is massively more important than intellectual property protection is to us, have suffered a regime that is far less effective internationally in protecting those interests. So this is not an unusual move on the part of the United States, in fact, I think it is probably a right move. The point that I would make, however, is that it is not something we are doing as a matter of right, as a matter of moral right, as a matter of legal right, or even as a matter of altruism. We are doing it because we would like to have a better balance for ourselves.

Therefore, I think we have to face up to the fact that improved intellectual property protection is something that ought to be paid for—that we are going to have to pay something for it. That is the GATT tradition. The first thing I think we are going to have to pay is to clean up our own act in the intellectual property area particularly with the section 337 remedy. But I do not think that that is going to be enough. I think that if what we are saying to other governments is the agreement is out of balance for us, we would like to have some additional help on the intellectual property side, we should recognize and not be afraid of it, that there are going to have to be some trade concessions on the other side, whether those concessions are agriculture, or safeguards, or textiles or something else. That is a part of the deal that is going to have to be made.

Remarks of Yoichiro Yamaguchi*

I worked for the Japanese Patent Office for fourteen years and during that time I was in charge of international matters, and I would like to tell a story regarding one of my experiences. A gentleman who represents a French company came to see me to show how their goods are violated in Japan. He showed me two bags. One is an original, genuine bag, and the second one was a so-called counterfeit good. He explained how they are so alike and compared the bags. Some minutes passed and he mixed the two up—which one is the genuine bag and which one is just a fake? He compared both in detail for several minutes and finally said, "Look at this one. Look at this end of the zipper; it's very well-finished and look at the stitching; it is very beautiful. This bag is the fake."

I would like to talk about the Japanese position on the GATT negotiations. My personal view is reflected by the government position. In the last half of the nineteenth century, it was believed that industrial property laws must be unified internationally because of the progress that had been made in technology, transportation, and telecommunications. Efforts were made to establish internationally-unified laws, but these efforts were unsuccessful since industrial property laws were so different, country by country. In 1883, the Paris Convention for the Protection of Industrial Property was established for the purpose of establishing international rules for the protection of patents and trademarks while recognizing the differences in the laws of the contracting states. Since 1917, international trade has remarkably increased, technology has become more and more sophisticated, and world technology competition has become more keen. In addition, the production of counterfeit goods and the resulting international disputes have greatly increased due to the fact that intellectual property has not been properly protected. The negotiations regarding the trade-related aspects of intellectual property (TRIP) started after the determination was made in 1986 at the GATT meeting in Uruguay.

GATT has the following three characteristics: (1) it has a mechanism for resolving international disputes; (2) those countries that are not member countries of the Paris Union or Berne Union are members of

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* Mr. Yamaguchi is a specialist in Japanese Patent Law with Beveridge, DeGrandi & Weilacher.

the GATT; and (3) intellectual property such as industrial property and copyright can be handled in one forum. For example, among GATT member countries, Singapore and Thailand are not member countries of the Paris and Berne Unions. Among GATT member countries, Chile, Colombia, India, Pakistan, and Peru are not members of the Paris Union, and Dominica, Haiti, Hong Kong, Indonesia, Malaysia, and the Republic of Korea are not member countries of the Berne Union. All these countries are important United States trade partners.

During the recent meeting of the GATT TRIP negotiations, the United States proposed that the rules for the protection and enforcement of intellectual property rights should be on the basis of United States intellectual property laws. The United States has also conducted separate bilateral negotiations. The rules proposed by the United States are greatly appreciated because the level of intellectual property protection in the United States is very high. However, the level of standards required by the United States is too high even for some industrialized countries to follow; for example, standards for noncompulsory licenses or the need to grant pharmaceutical product patents.

As for bilateral negotiations, the United States in July 1986 required the Republic of Korea under section 301 of the Trade Act to: introduce patent protection for chemical products; enact a law for protecting computer software; and accede to the Universal Copyright Convention. At the same time, the United States required South Korea to protect the chemical product patents issued in the United States after 1980 even though the applications for such patents were not filed in South Korea. The United States also required that pending applications for patents filed by Americans must be allowed to include chemical product claims. All this occurred just before the initiation of the GATT TRIP negotiations in September 1986. The United States has also been conducting bilateral negotiations in relation to intellectual property with Singapore, Argentina, and Brazil under section 301 of the Trade Act.

On the other hand, the GATT panel reported in January 1989 to the GATT Council to the effect that section 337 of the United States Tariff Act does not comply with the GATT provisions. The United States has twice requested postponement of the final determination by the GATT Council this February and March. The United States has been the world leader in promoting the resolution of intellectual property-related disputes within the dispute resolution mechanism of the GATT. Attention must be paid to the further behavior of the United States because if the United States does not follow the final determination to be made by the GATT Council, assuming it is in line with the GATT panel report, it will be denying the GATT dispute resolution mechanism. This will

result in the breakdown of GATT TRIP negotiations. Even though the rules for the protection and enforcement of intellectual property are established, I believe the problems will not be resolved.

I would like to talk about the recent developments in the patent offices, particularly in Asian countries. Some of these patent offices receive several hundred or several thousand patent applications, filed mostly from foreign countries such as Japan and the United States. There are about ten examiners in each of these patent offices to examine this large number of patent applications, which cover various chemical, mechanical, and electrical fields. These patent offices have a large number of search materials such as patent publications, which are unclassified. What they need is not sophisticated computers, but rather human resources for examination, classification, and documentation. They also need copying machines and even paper for such machines. WIPO has been active in supporting the developing countries for the purpose of establishing effective intellectual property protection systems and in educating the personnel on how to run the patent offices. It is necessary for each developed country to assist the continuing activity of WIPO by providing funding and human resources.

Establishing rules for intellectual property protection and for its enforcement is one wheel that has to cooperate with another namely, establishing a practical and effective structure in the patent offices. Establishing rules under the GATT is important indeed, however, it is also important to establish practical structures in the developing countries for the effective protection of intellectual property under the new GATT rules.

One hundred years ago our predecessors began the efforts to establish universal intellectual property protection laws, but the territorial principle has remained. We are at the turning point for the next century. More and more multinational companies have been established, and various high quality intellectual property products are transported worldwide regardless of national borders. I believe it is our mission to make every effort and contribution toward establishing a universal intellectual property protection system in the coming century.

Remarks of Alice T. Zalik*

Several people this morning and this afternoon have given the impression that intellectual property in the GATT is a new idea. A number of other people have given an indication that this is not so by mentioning specific cases and Professor Jackson mentioned or discussed article 20(d) of the GATT. I wanted to point out that the GATT has been dealing with the trade-related aspects of intellectual property since it was first drafted. It does have several provisions in it that are designed to ensure that trade actions which countries take do not interfere with people's ability to exercise their intellectual property rights. Article 20(d) allows contracting parties to take certain actions to enforce intellectual property rights that might otherwise be inconsistent with the country's obligations under the GATT. The original agreement, therefore, does contain provisions in it that deal with the trade-related aspects of intellectual property.

There have also been three panels, three dispute settlements, if you will, that dealt with intellectual property issues and, interestingly enough, in each of those three, the United States was the defending party. The first of the disputes was based upon a section 337 case having to do with a product from Canada, an automotive product that the United States International Trade Commission had excluded because it was found to infringe a United States patent. The panel, in that instance, found that the action which the United States had taken, the exclusion of the product from the United States, was necessary to secure compliance with our patent law which the panel found to be consistent with our obligations under the GATT.

The second dispute had to do with a provision of our copyright law called the manufacturing clause, which required that writings of United States authors or domiciliaries be printed in the United States. The provision only allowed a very limited number of products to be imported from outside the country. When the United States amended the copyright law in 1976, it had unilaterally provided that the clause would expire in 1982. In 1981, legislation was introduced to extend the clause. The legislation was finally enacted, I believe, fourteen days after the clause had actually expired. The European communities requested dis-

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* Ms. Zalik is an Attorney Advisor with the Office of Legislation and International Affairs of the U.S. Department of Commerce Patent and Trademark Office.

pute settlement in the GATT and the United States was found to be in violation of its GATT obligations. Although the United States did not remove the provision from the law, it did include another expiration date, 1986. The second time around the clause was allowed to expire.

The third dispute involved another section 337 case and was just ruled on by a GATT panel. In that instance, the exclusion order is moot because the parties in the section 337 action, a European company and the DuPont Company, have settled their differences, making the whole question of the exclusion of the product moot. The panel, however, went on to review section 337 itself and said that it was inconsistent with the United States obligations under article III of the GATT because the United States was giving treatment less favorable to imported products than to domestically-produced products and that such treatment was not necessary. That panel report has not yet been adopted so it remains to be seen what will happen in that case. It is interesting, however, that in the three instances in which there has been a dispute based on intellectual property issues, the United States has been the defending party. GATT contracting parties have not hesitated to apply the GATT to actions involving intellectual property.

The other point I wanted to make, which Mr. Yamaguchi alluded to, is that, in Professor Primo Braga's discussion this morning in explaining his formula, he did not include the costs of maintaining an intellectual property system. Mr. Yamaguchi mentioned countries in the Far East that have only ten patent examiners to handle thousands and thousands of applications. In order to provide an effective patent system, a developed country has to have sufficient examiners who can examine the numerous, mostly foreign applications. Copyright is probably the least expensive in the sense that a copyright system does not require a registration system. Trademarks do require some form of registration, and, therefore, a country must maintain an office to handle that. In addition, judicial procedures always involve expenses. Many developing countries are faced with the prospect of spending a great deal of their resources to provide a system for protection which, at least initially, will be to the benefit of foreign intellectual property owners rather than domestic intellectual property owners.

Mr. Yamaguchi also suggested the possibility of an international system of some form. If an agreement under the GATT which would require that countries maintain a certain minimum level of protection is negotiated—and I expect it will be—it perhaps would be possible, using the Patent Cooperation Treaty for the developed countries, particularly the European Patent Office, the United States Patent Office, and the Japanese Patent Office, to perform the examination and search of patent

and trademark applications for people within a geographic area, so that developing countries would not have to maintain an expensive system. Developing countries would then perhaps need only a registration or recording system to show who owned a right. A system could be developed with a long range objective of having a single system where there would be a single right awarded one place in the world for an invention or a trademark, as is done now, under the international treaty for literary and artistic works. As Professor Reichman mentioned this morning about the cows crossing borders, a cow is a physical thing and can cross a border. If you had one international right that belonged to one party, that would be much more like the cow crossing the border, and perhaps it would be easier to make international rules apply.

In researching a question in some dusty volumes, I discovered that in 1965, President Johnson had suggested an international patent system and had a commission formed that studied the possibility. When they presented their report, there was a great deal of opposition in the United States to the idea of having a universal system. So, perhaps everything old is new again and now's the time to try the idea and see if over time it can be achieved.

Remarks of David Beier*

Briefly this afternoon, I hope to go through a couple of major points in terms of intellectual property and trade: some background on how we ended up focusing on intellectual property and trade in the current GATT talks; a brief history of the linkage between intellectual property and trade; some assessment of what the alleged or perceived benefits are to different industries or interest groups particularly in the United States; an assessment of what risks there are to the United States interest groups in terms of changing our own law; a brief look at the concerns expressed by the developing world; and then lastly, some description of criteria that could be applied by the United States Congress to evaluate whether the net results of this negotiating round are really sound.

First, how did we end up talking about intellectual property and trade? What are the motivations? I think essentially the motivations are outlined both in Mike Gadbaw's Article and in the Article that Congressman Kastenmeier and I co-authored. First, there has been an increase in the export of intellectual property-protected products from ten percent to well over twenty-five percent. There has also been a dramatic increase in the amount of money derived from the licensing of intellectual property to in excess of $8 billion in the most recent reported year. The second factor that has motivated interest in intellectual property and trade is in part generated from the ease of copying works protected by intellectual property: that is tape recorders or VCRs or a variety of other technical means for copying works that has produced a level of either nonenforcement or unauthorized copying or in the words of Mr. Gadbaw, "piracy" in the amount of upwards of $40 billion a year, a large sum of money.

The third factor is an increase in the cost for research and development necessary to generate protected products, and therefore, the United States companies (people who own intellectual property rights) have an increased interest in obtaining higher levels of return. If it costs $125 million to generate a new pharmaceutical product, obviously it is necessary to obtain a larger sum of money in terms of sales to recoup that investment than was true ten or twenty years ago. Finally, the motivation for linking intellectual property and trade has been a genuine dissat-

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* In addition to the presentation of his Article, Mr. Beier made the following remarks.

isfaction on the part of a number of private sector interests and United States Government interests in the activities of WIPO, particularly in the context of negotiations spanning the last twenty years with respect to the Paris Convention (relating to patent protection).

So, with that as a background, the private sector in the United States began to look at a linkage between intellectual property and trade. Some frustration emerged in the late 1970s in terms of the leverage that we would have with respect to certain countries where there were not, in the view of the private sector participants, sufficient tools to either change or coerce changes in the laws in other countries.

The current initiative in terms of linking intellectual property and trade is not new in the sense that beginning in the nineteenth century or earlier, there have been attempts to link trade and intellectual property. But the most dramatic linkage between intellectual property and trade, in the GATT context, occurred in the Tokyo Round in the context of the Anti-Counterfeiting Code, which is primarily a border measure or a trademark-oriented initiative. Having said that, the United States private sector began to look for new tools and one of the things that Congress did in the 1980s was respond by creating a whole series of new weapons, both for the United States Government and in turn for the private sector; first, with the Caribbean Basin Initiative and subsequently, with respect to triggering the denial or limitation of GSP benefits on the basis of whether a foreign country provided adequate and effective intellectual property protection. That finally culminated in 1988 in the trade bill with what is known euphemistically as special 301s. These 301s are like some kind of gasoline, there's regular, there's special, and there's super. The special 301s are intellectual property oriented, and they require action to be taken by the United States Government after a reporting process.

These initiatives by the private sector came at the same time virtually as a push by many private sector companies to include intellectual property within the GATT. The perception by some in the private sector was that the GATT would be a better forum in which to make trades across sectoral lines and that the GATT was seen as a more hospitable forum for the resolution of disputes between developed and developing countries.

The primary goal enunciated by the United States, the European Community, and the Japanese, largely motivated from pressure from their private sectors, has been the development of adequate and effective intellectual property standards; second, the evolution of enforcement mechanisms that are adequate and effective both internally and at the border; and then finally, the creation of some form of dispute resolution

mechanism either within the context of an intellectual property code or within the context of the GATT that would facilitate the judgment by some external body of the adequacy and effectiveness of the laws of a particular country.

The United States succeeded in including the intellectual property item on the agenda for the GATT in the Punta del Este Declaration, and, much of the debate since then has focused on tactics and strategy. I will not get into the positions of the different delegations because frankly, I do not think it is all that important in the long run. Whatever tactics people have used in the first two years, the end result is going to be measured two years from now in the end product.

The clear positions enunciated tactically, however, mask the substantive differences between the industrialized countries, the newly industrialized countries, and the lesser developed countries. Each has significantly different interests in terms of their economies, the relationship between their economies, and intellectual property.

The United States goals are set forth in my Article, and they represent a modification of largely private sector-driven initiatives. The first goal, in terms of the adequate and effective intellectual property standards, is the use of the Berne Convention plus some additional coverage for sound recordings, computer software, and databases: that is essentially the copyright goal of the United States in the context of these negotiations. Second, and most important, and probably most problematic, is an increase in the standards for intellectual property protection well above the standards enunciated in the Paris Convention for patents; *i.e.*, the protection of pharmaceutical products, chemicals, microorganisms, and the like, that constitutes expansion of the scope of patent protection to inventions which are not currently protected in much of the world. The third and fourth goals are the enunciation of adequate and effective standards for trademark protection, and trade secret protection. The fifth goal is the evolution of some adequate form of intellectual property protection for semiconductor chips. In addition to these standards, the United States has been seeking development of some form of mechanism that would allow rights holders to easily and quickly obtain remedies against infringers.

The difficulty in doing all these things, I think, has been pointed out by some of the previous speakers. The initiatives in the Paris Convention to change the standards for patents has been going on for twenty years, hotly contested, and each proposed change has produced heated arguments between the developed world and the developing world. Nonetheless, the United States continues, as do the Europeans and the Japanese, to advocate the use of these high standards of intellectual property

protection.

One of the difficulties in assessing the progress of these talks is what happens domestically if the United States gets what it wants? What are the risks to the United States if we had a harmonized system of intellectual property protection? What changes would be necessary in our own laws? Not a great amount of analysis has gone into that, at least not in a public forum. The United States may, as a result of these talks, have to enact a design protection statute. We may have to extend trademark protection to appellations of origin such as Bordeaux or Beaujolais. We may have to change our patent system away from a "first to invent" and go to a "first to file" system. We may have to eliminate the availability of utility patents on plants. We may have to enact a federal statutory moral rights statute. And finally, we may have to create a federal trade secrets statute, if we are to meet the general expectations of our major trading partners in Europe and Japan.

There are tactical differences between the GATT contracting parties about whether any changes in the law are necessary, but those are distinct risks to the United States. One of the difficulties that Congress is going to ultimately have is balancing the benefits that may be obtained in terms of trade or enhanced intellectual property protection overseas with the alleged costs to consumers or users in the United States by the enactment of these kinds of changes in our domestic law.

The final risk and perhaps the most politically relevant risk to the United States in proceeding in these negotiations is the exposure caused to trade instruments, national trade instruments, such as section 337 and section 301. As most of you know there is an outstanding GATT panel decision finding section 337 of the Tariff Act in violation or inconsistent with the GATT. That panel decision has not been adopted by the GATT Council, but this looms on the horizon as a major issue when we have a significant difference of opinion between ourselves and our European trading partners and the Japanese, the South Koreans, the Canadians, and others. Secondly, there is a panel decision pending on section 301 wherein the Brazilians have argued that section 301 is inconsistent with the GATT, and if we agree with Professor Hudec's comments this morning, the result is inevitable that the panel would find section 301 inconsistent with the GATT and that we would have basically the two major trade instruments that have been relied on by United States proprietors called into question, virtually at the same time the negotiations are going on regarding increased and improved intellectual property standards.

Balancing perceived benefits to United States industry that are currently obtained under section 337 and section 301 against the benefits of

improved intellectual property protection in Brazil or India or other countries is going to be a difficult task, both for the United States negotiators and for Congress. One of the challenges in making that assessment is determining where it is made. The United States has a very odd system of negotiating authority in which Congress has delegated negotiating authority to the USTR. Congress is supposed to oversee the activities of the USTR, but the process of overseeing them is somewhat difficult. The meetings and negotiations take place largely behind closed doors. There is consultation before and after the meetings, but the ultimate package presented to Congress is presented under a fast track authority mechanism that will force Congress to decide all of the negotiating results at the same time. Moreover, this process will no longer involve just the Ways and Means and Finance Committees, but a whole series of other committees: Agriculture, Judiciary, Ways and Means, Energy, and Commerce. There is a distinct risk that one sector's interests will be put at a disadvantage for another sector's gain. There is no mechanism for adjudicating or resolving those disputes within Congress that is at all effective because this has never occurred before.

The negotiating agenda in the GATT is the most ambitious in the history of the GATT, and the political and procedural problems produced by the absence of a central congressional forum, even assuming there is an agreement upon things like tropical products in agriculture and intellectual property, leaves the negotiators without clear and consistent signals. When Congress amended the trade law in 1988 it created greater authority for non-trade committees to be involved in the negotiating process so there is no congressional experience regarding how to do that. That will be, in the long run, very difficult.

Having said all that, I would like to make two other general points. One, really to echo in a more muted way the comments of Professor Primo Braga. What is in this negotiating process for the developing world? Essentially the United States has been making arguments much like Professor Hudec, articulating some higher moral plane argument, natural right theory of intellectual property protection, claiming that somehow improved intellectual property rights for developing countries is inherently in their interest and it is so obvious that eventually they will see it and come around. My own personal experience indicates that that argument will not fly.

The challenge for the United States, if it hopes to succeed in this round, is to develop some incentives. In my Article, I talk about three mechanisms, two of which are arguably incentives and one is more on stick. The first incentive is to offer some kind of financial benefits for the creation of intellectual property offices, be they patent offices, copyright

offices, some international registration and/or enforcement scheme that is largely paid for by the developed world. The transaction costs in terms of enforcement are paid for by only one side of the equation. The second suggestion is to encourage United States industry to invest in countries that have adequate and effective intellectual property protection to create the local political dynamic to support improved intellectual property protection. The Article lists a couple of examples. In Malaysia the recording industry decided to go to the pirates and say, "We'll give you the money and help you set up a business to sell legitimate records in Malaysia." Those people said, "that's not a bad deal but we need copyright protection." The recording industry turned them around. The same thing has been happening in Turkey. Arguably, there is another precedent from the developed world in terms of incentives. In Canada, patent protection was extended from three years to ten years based on two factors: increases in the base level of research and development to take place in Canada and some kind of price control mechanism in Canada. Some may view that model as having some application to the developing world where there is an incentive built-in for the United States industries to invest in that particular country in exchange for increased intellectual property protection.

The third item mentioned in the Article is really a variation on carrot and stick with heavy emphasis on stick. We could act to condition the availability of trade benefits and offer enhanced trade benefits (above and beyond those that are currently available) on enhanced intellectual property protection, including greater World Bank, IMF, and Inter-American Bank development activity in a particular country in exchange for enhanced intellectual property protection. Having said all that, whether these suggestions offer a sufficient set of incentives to encourage the developing world to agree to a very ambitious agenda by the Americans, the Europeans, and the Japanese remains to be seen.

The closing portion of the Article tries to assess what criteria Congress could use in assessing the results of any round of negotiations. And I will just list them, but not in any particular order of priority. First, the end product of the GATT negotiations should be evaluated sector by sector. That is, do the intellectual property results serve the interest of the United States by itself, not do they, in balance with a deal on agriculture, provide a net benefit to the United States.

Second, changes in the United States law motivated by the GATT round should meet the ordinary criteria that we would apply to legislation, to wit; largely a balancing of interests, an attempt to articulate some kind of public interest.

Third, the GATT round should not serve to displace the activities of

WIPO which continue to play a vital role in the evaluation of multilateral standards, patents, copyrights, and trademarks, and the GATT should not be seen as a surrogate intellectual property agency of the United Nations. The two agencies have distinct expertise.

Fourth, any changes in section 337 or section 301 that are motivated by the GATT round have to be balanced economically to determine whether it is in the long-term best interests of the United States to make those changes.

Fifth, the substantive standards that would be desirable within the GATT rounds on copyright is the Berne Convention on copyright; the proposed WIPO treaty on semiconductor chips; the extension of some form of protection to sound recording, be it copyright or neighboring rights; and similar recognition of protection to computer software and data bases, albeit with perhaps a shorter term.

Sixth, patent protection should be extended to chemicals, pharmaceuticals, and microorganisms. Compulsory licenses should be avoided at basically all costs, absent the finding of some kind of antitrust or anticompetitive violation by the intellectual property owner.

And lastly, some border mechanisms and internal enforcement mechanisms need to be encouraged in countries recognizing the different legal traditions of the nations that are contracting parties to the GATT.

The GATT round should not encourage the development of special and differential standards between developed and developing countries. Professor Reichman is going to take that question on more directly, but I have two sentences on it. I think Professor Reichman analyzes the history of the negotiations in Stockholm and elsewhere in terms of intellectual property conventions and tries to argue that a two-tier approach to intellectual property is desirable. From my own perspective I do not think it makes sense because it tends to lock in the lower level of protection for the developing countries and decreases the expectation of escaping from that status. I think there are more creative ways to graduate from a low level to a higher level through transition rules or time period agreements rather than a permanent protocol that differentiates between the developed world and the developing world.

Remarks of Professor Donald S. Chisum*

I speak really from the perspective of a scholar in intellectual property law, particularly patents. I am a total novice when it comes to GATT matters and international trade. But it seems that one of the purposes of this symposium is to try to get us all thinking alike. Now, whether we have achieved a merger or a marriage of convenience, I am not sure. I have done some thinking with regard to the potential obstacles to our making mutually helpful contributions to the world debate. I think one of them is simply a question of language—we tend to use different words. The international trade people seem to use a lot of acronyms, for example, "TRIP," (trade related aspects of intellectual property). I really had not heard that before and I wonder why they selected it. Why isn't it "TRAP," which might be more descriptive.

I think another problem is that particular persons in particular institutions who seem to be very interested in this area may have very different agendas that are not so much secret agendas; it is just that they are not evident to everyone else concerned. For example, intellectual property law scholars have been interested in the international aspects of their subject for years, for centuries, I suppose. But, our interest, I think, runs in other channels. We are more interested in making the world intellectual property system more efficient, more uniform, more manageable, and in wrestling with the question of providing minimal standards of protection. Indeed, I think we would say that it is an oversimplification to talk about levels of protection being on a single scale of high to low.

So, my basic comment would run along those lines—to be careful about being sure you know what the agenda of a particular person or institution is. I think that has come up in the activities over the so-called harmonization of patent law. Many of us are interested in the subject of harmonization of patent law for the purpose of making the major existing patent systems more harmonious, more uniform, more efficient, more manageable. We talk about subjects such as whether a "first to file" system or a "first to invent" system is better; whether you should measure the term of protection from the filing date or the issue date; and

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* Professor Chisum is Professor of Law at the University of Washington at Seattle.

how you treat prefiling date publications and the like. And all of those are in the context of existing patent systems which in some general sense provide more than an adequate minimum level of protection.

Intellectual property scholars are also, I think, more interested in a comparative exercise. I think we are also interested in using the comparative exercise as a springboard for reform of domestic laws. They get tied up with what you are doing in talking with other countries about harmonizing laws and I think there are some dangers and some traps in that. The United States position internationally, for example, is of course that other countries should provide a very broad definition of patentable subject matter. It should surely include pharmaceutical products and all manner of things. And yet, within our own country we have this tremendous debate about whether to issue patents on animal lives and living organisms and the like. So things get, for understandable reasons, very complex and you have different groups taking different positions without realizing the implications of those positions.

I have just one comment, particularly on the very interesting presentation and paper by Professor Primo Braga. I think that his analysis was very, very interesting and I welcome the greater level of activity by economists in the area of intellectual property. I think in this area, however, that his analysis would be made more helpful, in at least framing the issues, if you generalized on it. In other words, it seems to me you would need to develop a general model, not just one for a particular LDC on how it should go about deciding whether or not to provide patent protection safe for pharmaceuticals. You have to take into account, however, the possible economics of retaliation. Stated another way, you have to look at a country like the United States which has companies that invest heavily in the research and development of pharmaceuticals and see what the cost versus the benefits of taking retaliatory action against other countries would be. If the cost/benefit process indicates that a rather high level of retaliation would be justified in some way, then it is probably going to be taken. On the other hand, if it is a rather low level, perhaps we should direct our energies elsewhere.

Remarks of Professor John H. Jackson*

It is my task, somehow, to respond to all of the richness that has gone on so far today, and I despair of being able to do that with any sort of thoroughness or any great deal of organization. I tried to organize some of my thoughts about the morning session, and then all of a sudden I was hit with several blasts of additional ideas of all sorts coming at me from different directions and so I was scribbling quickly, but nevertheless I hope you will indulge me if I appear a little disjointed in a few places.

Something that Professor Reichman said towards the end of his talk reminded me a bit of the second joke that David Beier told. He said the intellectual property lawyers want to leave it to the trade lawyers to figure out how to reconcile all this with the GATT. Of course we trade lawyers would hope to leave many of these issues to the intellectual property lawyers. I feel very much outside of my territory in this area and I do not claim any intellectual property expertise, merely some interest.

Part of that interest has been occasioned by the rather surprising upsurge of importance with regard to this issue over the last two to three years. I think three years ago, although the issue clearly was discussed at Punta del Este and put on the agenda for the GATT, the feeling was that this was going to be sort of a side issue. It was kind of in the category of the counterfeiting code which had been developed after the Tokyo Round and really had not gotten very far, but looked like it was in a form that could be adopted. The politicians and the policy people could then exclaim, "Hooray, we're showing you we are doing something." The scenario turned out to be surprisingly different than that.

In fact, many of the domestic American intellectual property interests opposed the quick adoption of the counterfeiting code for the very reason that they thought if that happened, the trade policy people would simply leave intellectual property issues alone for the rest of the negotiation and they would not address what the intellectual property interests viewed as the more important and tougher issues. And so this is one particular issue that I think has manifested how very effective private interests in the United States can move the government and, indeed, basically move

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* Professor Jackson is the Hessel E. Yntema Professor of Law at the University of Michigan.

governments of the world, forward in such a way that as of last fall and going into the Montreal meeting we suddenly found intellectual property to be one of the two or three key issues of the negotiation. So indeed, that pricks the interest of trade policy specialists.

Now, let me deal with some of the points that were raised. First of all, we have seen an expression of a fundamental dichotomy of approach in this area of intellectual property. We saw it explicitly addressed this morning, and then we saw Professor Reichman very eloquently and with passion, come forth with, I think, one particular view of that. The dichotomy is whether you view intellectual property as some kind of a right, like a property right analogous to tangible property rights and all the rest; or whether, on the other hand, you view intellectual property as simply a subject for governmental policy that is based on a series of utilitarian notions that, particularly, the economists would address. In other words, the latter view is that there is no such thing as an inherent property right in intellectual property; there is only this question for the government: Why should we offer certain people monopoly privileges for certain periods of time with respect to certain kinds of creative activity? The reason usually given as an answer is that this provides an incentive for the production of these intellectual activities.

The reason why you need some special incentive is inherent in the whole public goods discourse that the economists have taught us. Namely, that once the creation of an intellectual property item has occurred, the barriers to entry for reproducing that are minimal. A movie, for example, might take $50 million to produce, and it is then reproduced on a cassette and can be reproduced and reproduced and reproduced for $5 to $10 each. This is the basic dilemma. If there is free reproduction, then the person that has spent $50 million doing that movie is not going to get much for his return, and therefore, he will not spend $50 million for that item. That is sort of the nub core of the utilitarian argument. Now, I am in the utilitarian camp.

I disagree with Professor Reichman and I do not think it is terribly helpful to talk about the analogies to tangible private property. Nor do I think that there is an inevitable trend in international law or domestic law that will require intangible property to be treated the same as tangible property. In fact, at least logically, the trend might be just the opposite. It might be that tangible property will become treated more like intangible property. That is, however, only a logical possibility. How the world will go is very, very hard to predict.

Obviously, there is a great deal of dispute about handling both kinds of property in different countries and different societies world-wide, and I think one of the things that we must do, particularly as trade special-

ists, when we move beyond our own borders, is to try and avoid being society bound. That is, we must try to avoid being tied in to the particular norms and philosophies of our own society in order to be able to deal with the different kinds of societies of the world, which have various religions, philosophies, property, and individual human endeavors, in general. I am told, for instance, in China, there has been an ancient tradition of producing works, literature and otherwise, as sort of a service to the public and that there were at least some points when individuals would deem it beneath their dignity to accept a return by way of royalties or fees or something of that nature. So we have to, I think, be aware of these vast differences.

Another aspect of the intersection of intellectual property and trade policy has to do with the fact that advocates of greater spread of intellectual property protection in the world covet, in a sense, the leverage that trade policy can give them in order to pressure other countries to better protect trade policy. This trade policy leverage or access to the United States market is coveted by individuals other than those in the intellectual property area. This leverage is very important; it is a very important sort of realpolitik or geopolitical consideration. The United States has had this advantage, particularly in the immediate post-World War II era when the United States market was really the only one that counted, and it was therefore the United States that was instrumental in designing the whole Bretton Woods system, post-World War II system, and so on.

As the years went on and many of the United States geopolitical policies became successful, other areas of economic endeavor began to rival the United States. Hence, today the United States leverage, because of its own market, both in terms of access and what it produces, is considerably less world-wide, comparatively, than it has been in the past. That leverage, in a sense, is waning and one can argue, in the long run, that this is good because it means that there is a rather healthy upsurge of economic prosperity around the rest of the world. In any event, there still is a lot of leverage there. The United States market is still one of the key markets. In fact, I think one of the reasons it is so key is that it is probably the most open of the world's large markets and that raises a whole series of trade policy issues.

The next question that arises is: Why should the leverage of that market be used for this particular venture, for intellectual property purposes? There are other people that would like the leverage of that market to be used for other purposes of various kinds—world peace and security; networks of alliances; to reduce poverty; and to address some of the very important environmental issues. Those are all issues, inciden-

tally, that have been raised in the government and all issues that have been raised with me by telephone calls from various people saying, "Gee, how can we get at the problem of cutting down trees in the Amazon through the entry of trade into the United States? Should we ban hardwoods that come in from that process or what have you?" So I think that is something to which some thought must be given.

So far the intellectual property interests have been very successful in capturing a large part of this trade access leverage for their particular interests. I think some of that is legitimate. That is, I think there are some very important utilitarian policy reasons that would favor such an approach. I am saying this as sort of a word of caution. At some point that path may run out. At some point, other interests in the United States may say, "Hey, why you? Why shouldn't we have that kind of access to the trade policy levers that have to do with access to the United States market?"

Now, I want to move on to another point. There were several points made during the day that had to do with dispute settlement. One of the things that is rather intriguing is the importance of dispute settlement to this whole question of intellectual property. One of the reasons which is intriguing is that for trade policy specialists who have been dealing with the GATT and living with this very odd beast there has been a lot of criticism of the dispute settlement process in the GATT and a lot of feeling that it is inadequate and that it needs a lot more attention. All of a sudden, another group comes along and says, "Gee, that's just what we want. That's such a marvelous tool and marvelous implement. Let's figure out how to capture that for the intellectual property area. We want that kind of dispute settlement."

So this is kind of curious and I think it is sort of instructive to the trade policy people as well, because, I think we have a device here that is better than we thought that we had. When you compare it to a lot of other dispute settlement mechanisms on the international scene, in fact, the system does work reasonably well, with certain exceptions. There are certain kinds of actions, however, that the United States is taking which further undermine that very same system, and some of those actions are particularly in the areas of intellectual property. The United States, for example, took retaliatory action against Brazil for what it perceived to be Brazil's inadequate intellectual property laws. The United States action is clearly a violation of the GATT. Incidentally, I do not think it will mean that the GATT panel will hold that section 301 is a violation of the GATT; that is a slightly different issue. I think what will likely happen is that the panel will hold that the United States action is a violation of the GATT. That does not necessarily mean that section 301

as a whole is a violation of the GATT; that is a separate issue. That may yet come up, I do not think it is going to come up in the Brazil case, but we will see. Now, that involves a whole set of different considerations. So what I am saying is the danger is not quite as great as posed, although the danger is still there. What I am getting at is what the United States did in terms of striking out at a foreign country for its supposed inadequate intellectual property laws when that foreign country, incidentally, has apparently not violated any international norm, treaty or otherwise. It simply has not performed with regard to its domestic intellectual property at a satisfactory level for the United States and the United States struck out with trade sanctions. It is the trade sanctions that are clearly a violation of the GATT.

Furthermore, the United States did that without going through a GATT process. It did not bring Brazil into the GATT or anything like that. And when Brazil brought the matter to the GATT, the United States initially resisted the procedure even being launched there. In a meeting in, I think it was January or early February, of the GATT Council on this, fifty-one GATT nations spoke against the United States in that regard. In other words, this whole process has not been designed to gain friends and influence people.

The further point is that that sort of response by the United States undermines the very process which has seemed to be so attractive to the intellectual property people. There is kind of an odd dilemma here. If you destroy the effectiveness of the dispute settlement process then, presumably, a couple of years from now, you will be sorry that you gave up anything in order to get it applied to the intellectual property area. So I think that is something that needs to be thought about.

There was also a statement in one of the discussions that the the GATT dispute settlement process, in order to work correctly and effectively, needs to have settled rules. That is, when there is no consensus on the rules, the GATT process does not work. We have to be very careful because it may be hard, with some of these intellectual property rules, to get the kind of consensus that will allow itself to work in the context of a dispute settlement process.

I think as so stated, that is largely correct, but I do not think it goes quite far enough. It is true that some of the toughest cases in the GATT—some of the cases that seem to have strayed from an efficient process of dispute settlement—have been in areas where there really was a lack of consensus between the nations on certain matters. That has been most prominently the case in connection with the subsidies issues and some of those have been under the subsidies code itself; however, there was also another case, the so-called disk case, where this was

raised. And so, in that sense I agree, that when there is a sort of language that is ambiguous or vague, often language which papered over substantive differences between negotiators about what the rules should be, the rules do not really give adequate guidance to a GATT panel. It is those kinds of cases that pose the greatest danger to a dispute settlement process. I do not agree, however, that you can then go the further step and say you cannot have a dispute settlement process for those kinds of issues that are not well agreed upon. You have to be more careful about it, I think. Remember we handle, in domestic court systems, a lot of issues that are extremely vague, extremely ambiguous, and on which there is not that well-settled of a consensus in the domestic society. Just think of some of the issues that are swirling around the United States Supreme Court. Think back several hundred years when the common law courts of England were evolving the common law, particularly in commercial cases, where there were enormous amounts of ambiguity. These courts nevertheless coped, one way or another.

So it is still possible and feasible, at least with the appropriate amount of due care, I think, to design a dispute settlement system that can, at least partially cope, even in the cases of a lack of understanding. By cope I mean, at least prevent the issues from getting out of hand in terms of foreign relations leading to further tensions of a variety of kinds, and so on. How do you cope? Well, one of the ways you cope is you obtain more agreement on the procedures. In other words, you have a better agreement as to what happens when the panel is faced with an issue on which there seems to be so much ambiguity and so little consensus. Are there cases where the panel should then just say: "We cannot rule. We have to pass that to a political body." The sovereign nations are very worried that they are finding themselves in a situation where a mere GATT panel of experts is going to be writing the international law for their activity. That is something they say they do not want.

There are a number of other issues on my list, some of which I will have to skip. One of them pertains to a very interesting analysis about the international law questions of competence vis-à-vis the GATT and WIPO and the Paris Conventions. The conclusion of our speaker was that there was nothing in that set of law that prevented GATT activity in the intellectual property area. I thought that was interesting. I do not entirely agree with the sequence of the logic although I am not sure that I have had a chance to study it enough to really be sure of that.

What is, I think, more interesting is why there is this turning away from the intellectual property conventions, the so-called great conventions, or from WIPO. Why this turning? What is the dissatisfaction with those kinds of apparatus, those kinds of organizations? Well, some of the

dissatisfaction is a dissatisfaction again that is broader than just the intellectual property issue. It is a dissatisfaction generally with the way international institutions are operating. There are a lot of problems there. Among these is a tendency to have a one nation, one vote system. A large group of nations which are sort of on one side of some of the issues (developing countries), constitute an overwhelming majority in a lot of these organizations. Whereas, then the industrial nations which feel that they in fact are, in realpolitik, more powerful, powerful enough to make many of their wishes stick if they are willing to really go ahead, find themselves facing what they think is kind of an artificial construct of an international organization that really tilts the whole international decision-making process in a way that is somewhat out of touch with reality. So I think what we are seeing in some of these instances, in some of the reactions to WIPO and the reactions to what is going on, is a feeling of unease about international organizations which is not unique to the intellectual property area that really carries over into other types of things.

I want to turn briefly to a couple of the points of the economic analysis approach, or what we might call a more utilitarian approach. Essentially, I think I need to remind you of a couple of points I made at the end of the morning. That is, I have had occasion over the last few months to have a considerable amount of discussion and discourse with economists about the economics of intellectual property and particularly the economics of intellectual property in international trade. I am struck with the feeling, confirmed by the economists that I have spoken with, and I think confirmed by our speaker this morning, that there is an awful lot yet undone. That is, the models that are set up make a series of assumptions, but we really do not know enough about those assumptions or know enough about the inputs to these models to be able to draw any sort of concrete conclusions as to the process. I raise the question, are the models useful at all? I think Professor Naresh appropriately pointed out that they at least have one use, and that is to sort of guide our thinking about our hunches. I think that is right. It does give us some sort of thinking about hunches, and it does enable us to say, "Well, I'm not sure what the fact A is, but if I believe that fact A exists, then B, C and D seem to follow." So in that sense I think it helps our thinking. I do think we need to be very, very careful about these models, and I do think we have to worry a little bit that they are going to be used and have been used in a process of advocacy in ways that go beyond what the actual science would permit.

Likewise, I think we need to have a world welfare perspective at least explored along with specific national perspectives, such as the national welfare perspective of the United States, which seems to strongly support

the spread of intellectual property protection world-wide so that the United States will become richer, so that the United States will get more royalties and more inputs and so on. Also you have to, I think, be a little wary of a one-country analysis involving other kinds of countries where those countries can establish and prove that they will become poorer too. I think we need, in addition, a world welfare perspective to think in terms of what this means for the betterment of the world as a whole. Is this really a zero sum game or are there some positive sum aspects whereby we could see how to construct a system where all countries, at least over the somewhat longer run, would come out better? And that, incidentally, is inherently the basis of the policy of international liberal trade. The liberal trade system is based on the belief that it is not a zero sum system, that it is a positive sum system. Liberal trade means a higher degree of welfare for the world — the pie getting larger rather than simply fighting over how to cut the pie up. And so I think there are elements of that in the intellectual property question.

Now, a couple of other points. There is the question about what the United States would have to give up if it pushed too heavily into this intellectual property idea that it wants. That immediately raised the question of section 337 and section 301 which I already touched upon. It also raises the question of the invalid sanction which I also have touched on, that is, what I think is basically the Brazilian case.

One thing that has been mentioned as part of the swap of an international intellectual property approach has been that the United States would give up its unilateral response activity. I just want to point out how curious this is, at least in some circumstances. The curiosity is that what the United States is saying is that, "We are going to go at it alone even if it's illegal; that is, we are going to violate the international law. But, if you agree to this particular kind of arrangement that we want, we will then agree not to violate the international law." So there are some problems there too, it seems to me, in the conception. I suppose one of the questions you can ask is, "Well, what good is your agreement?" I mean, look what happened the last time.

Now, let me turn a little but more directly to the GATT question now. There has been some discussion today sprinkled throughout various talks about the GATT ability of various kinds of arrangements, and I want to address that briefly and then suggest some models. I think I disagree with Professor Reichman because I do not think this is an easy GATT question. I do not think that the various kinds of proposals are easily reconcilable with the GATT. First of all, the basic proposition often for a country that wants to use trade leverage, as was the case with Brazil, for instance, and as with several other instances, is to deny access

to a market. Now the GATT has article II, which requires a limit on the amount of tariff that will be charged on imports, and article 11, which prohibits the use of quantitative restrictions, that is, complete bans on imports of any particular products. Those are obligations of the GATT, and they are not easily hurdled.

One of the possible opportunities to get over those is to go to article XX(d), a provision that is sort of an exceptional provision in the GATT that allows countries to utilize certain kinds of measures that would otherwise violate the GATT if they are necessary to the effective implementation of policy, such as, intellectual property policies, provided that they do not become disguised barriers to imports or disguised discriminations among countries. Now the word "necessary" is an absolutely critical word. Basically, you need to show that the country needs to depart from its other GATT operations in order to fulfill what the GATT has said is among the list of legitimate sort of health and safety type measures that it lists in article XX, including the intellectual property measures, competition measures, monopoly measures, and so on.

So then you really have to make your case on the basis of "necessary" and that was the core of the section 337 case, incidentally. The United States had to show that there was a necessity for some of the divergences between the treatment of imports as compared to domestic goods in the intellectual property area. Now, one of the problems with article XX(d) is again its ambiguity. One of the issues that is there is when article XX(d) gives an exception from other GATT obligations for country's to apply a necessary means to enforce intellectual property measures, does that mean intellectual property measures for the importing country's domestic society only? In general, I think it probably is against the implied practice and thinking of the GATT that you could use an article XX(d) exception for a country to apply GATT sanctions because some foreign country is not implementing intellectual property as it should. So that is a very critical question and not entirely clear.

In addition, it is not at all clear that article XX(d) even allows you to use measures regarding products other than the products that are directly concerned with the activities listed in article XX(d). In other words, article XX(d) talks about intellectual property protection. The protection might be on chips, therefore, the government might be allowed to ban the imports of chips. It is not clear that the government could ban the imports of oranges because of something that was happening in connection with intellectual property on chips.

So there are some important problems there. Now, what does this mean, generally, for a solution to some of these questions? Professor Reichman has talked about a two-tier system and I must say, he talks so

fast, I could not keep up with quite all of what he was saying, but I am pretty sympathetic to a two-tier system. But I doubt that it is for the same reasons that Professor Reichman mentioned. First of all, I do not think it is fair to say that the GATT has always depended on a two-tier system or that there is sort of an irresistible notion of a two-tier system in the GATT. I do think it is fair to say that there have always been different tiers in the GATT. There have always been some disparities of treatment for a variety of policy reasons among countries or among different products or what have you.

The one thing I think that is not useful in the GATT context that was mentioned is article XXIV. Article XXIV allows a free trade area, but a free trade area is further defined in article XXIV as the complete elimination of substantially all barriers between the countries concerned. That is not what we are talking about in the case of intellectual property because we are focused just on intellectual property-type barriers or intellectual property-type activity. There is no notion that twenty countries that are interested in intellectual property problems will join into a free trade area, such as that between the United States and Canada, eliminate all their tariffs and all their other barriers, and so on, simply to get at the intellectual property problem. So I do not think article XXIV helps us at all.

So, where are we? There are a couple of models and let's first talk about the situation where you would get a series of like-minded countries, that is, the industrial countries if you will, in the GATT, perhaps the OECD group in the GATT, to get together and come up with what seemed to be a meaningful kind of new treaty instrument to protect intellectual property. The question is how far could they go and still be consistent with the GATT? And assuming for the moment that they do not even try to get Third World countries into this, that is a later point, that is a second, third, fourth tier, or whatever you want to call it. We are just talking, trying to get a like-minded group of countries together. That is very comparable to a number of things that happened in the Tokyo Round. In the Tokyo Round we ended up with approximately eight side codes. One that addressed dumping matters, another that addressed subsidies, another that addressed aircraft standards, and so on. Varying groups of countries have joined those, and none of those has all ninety-six members of the GATT in it. In fact, the most extensive participation in one of these codes is in the Standards Code, and my last recollection is that there are somewhere between thirty-five and forty countries that have joined this code. The GATT is able to tolerate that, provided the provisions in the code are not inconsistent with the GATT—that is, provided, in essence, that the standards that are applied

in these side codes are an enhancement and go beyond what the GATT does and requires countries to do, at least among themselves.

There are a couple of little problems with respect to the Tokyo Round codes in relation to the GATT and to some other GATT obligations, but that is technical and I do not want to really get into it. I think it is perfectly appropriate and possible for the contracting parties that are interested in intellectual property to join together in an intellectual property code that they would deem to be consistent with the GATT, which could do a variety of things. That code, for instance, could set minimum standards. That code could dovetail in a variety of ways into the existing intellectual property rights conventions such as WIPO or Paris or Berne or what have you. It could go beyond them, however, and set minimum standards. I think the code could say, as among those countries, that each country agrees that any other member of the code could take trade action at the border to restrain the trade of another member of the code, which otherwise would be a violation of the GATT. But since the countries are members of the code, in essence, they are waiving their GATT rights on this point.

So these developed countries could make arrangements by which they would say, imports from any of the signatories of this code that violate the intellectual property standards, would allow the importing country that is a signatory of this code to exclude those goods. That is sort of an international section 337, if you will. The United States is doing it unilaterally under section 337 and I think you could design sort of an international section 337. You could ask: Is that necessary? Well, there might be some advantages to that. There are a whole bunch of wrinkles.

One of the advantages, incidentally, of that kind of an arrangement, is that if you had say twenty powerful industrial countries whose markets then became closed to certain kinds of goods that violated intellectual property, as among those countries, you might cut out a certain amount of the violation activity of intellectual property, at least with respect to producers in those countries. But, could you go a step further? Could these countries say (even when there is a product from a third country that has not signed this code but is a member of GATT): Can we exclude that country's product when it violates intellectual property? Well, there I think you would have to dovetail into article XX(d) of the GATT. In other words, I think it could be done, still, if you kept it within the confines of article XX(d).

You could say each of these countries now wants to harmonize its section 337-type reaction. We want to have a common set of standards, and we can establish factually that it is necessary to have this control at the border in order to make this effective. So products from Brazil

shipped to the United States or to Great Britain or to Japan and so on, that violate these intellectual property standards would not be admitted. I think that could have an interesting impact. It would, presumably, reduce some of the incentive world-wide for violation of intellectual property because it would narrow the amount of the market that would be available for aiming such goods. What you still have of course are two parts of the world not covered. One part is the GATT member countries production within their country for their own use. You still have not covered that, and I do not think you can get at that with a code of the type I have mentioned without violating the GATT. I think that is a tough question.

The second market that is not covered are third markets. For instance, Brazil produces goods that are sent to India. Neither of these countries are members of your intellectual property code. The United States, Europe, Japan, and so on, have entered the intellectual property code. Now, can they do something? Can they among themselves agree to some kind of reactive action, a sanction, a retaliation or something against Brazil for competing with German products in India when the Brazilian products that compete have violated an intellectual property right? I think, again, the answer under the existing GATT is that it is very unlikely that you can uphold that. Should the countries do it anyway, even if it is a violation of the GATT? Well, that is a very substantive and delicate policy question. I am one of those rare breed of academic international lawyers that thinks that there are some cases that justify a breach of international norms. I think they are very, very circumscribed and I am very dubious that this is one of those.

There is yet another possibility that is a little far out. That is you go ahead and you do this and you set it up. But you set it up with the explicit recognition that when some action done under the code with limited membership is in fact a violation of the GATT, there will be a price to pay. And you recognize that you are going to have to pay that price which may be in compensation, alternative compensation, alternative concessions to the countries concerned, and so on. You just sort of hope that the process will discourage violators, if you will.

A second model is to do something like that but then try to bring the LDCs in, and I think that has possibilities. You could argue it is a single tier. They should come in just like everybody else on the same status and so then you have to begin thinking through the incentives. How do you get them to come in? What are the possibilities? Or you could have a two-tier built into this or sort of a gradualist approach, a graduation approach, if you will. You could say that the developing countries that are willing to come in, will for ten years have one status, for the next ten

years another status, and then thirty years from now they will be required to fully conform to the rest of the obligations that you have.

So there are a variety of possibilities there. A key question, though, is: What is the incentive to get these countries to come in? And that is, again, the tough nut and we have already talked a little bit about it, incentives such as sanctions which otherwise violate the GATT. Is that appropriate? One of the real possibilities here, however, is the cross-sector negotiation in the context of a large trade round. For example, when Dr. Primo Braga was describing the lines which cross that show a short term cost that could lead, however, to a long term net benefit to a developing country for an enhanced standard of intellectual property, that offers some possibilities. Let's say you go to that country and say, "Look, we understand it is going to be in your own long run interest to arrive at this better position on intellectual property. However, we understand that you have got a short term net cost and that your governments are short term-oriented. So we will buy you out; we will buy your short term out." In other words, we will give you something in return that is beneficial enough in the short term that your governments will be able to argue to their constituencies that it offsets the detriment that is caused in the short term. Now, to some extent that may be what is happening right now in the negotiation in the linkage of agriculture in intellectual property. In other words, if the big industrial countries are really able to do something on agriculture, the benefits to some of the developing countries could be very, very significant. Maybe the return price would be that they are willing to take some of the difficulties of intellectual property discipline.

Remarks of Professor Suman Naresh*

Let me first say how honored I am to have been invited to this *Symposium*, on such a topical subject, attended by the pre-eminent figures on both the intellectual property and the international trade sides of the issue. I am very conscious indeed of their presence, and determined to be circumspect and cautious in every remark I make.

As Professor Reichman told you earlier, there are two things that I propose to do, provided time permits—I make that qualification with the knowledge that the good Professor has his gun ready, prepared to shoot anybody who goes over the allotted period. The first is to react to what was said this morning, and the second is to briefly outline my Article for this *Symposium*[1] on the dispute settlement mechanisms of a GATT intellectual property code. As Dr. Subramanian pointed out in his keynote address last night, these mechanisms are to be distinguished from enforcement procedures, that refer to methods by which the intellectual property rights granted by any country are actually enforced domestically, and in which the proposed drafts of a GATT Code are quite rich.

Dealing first, with this morning's session, the main difficulty is to pick out the highlights from a program so full of stimulation and provocation. I would like to focus on Dr. Primo Braga's presentation, which I found particularly interesting because it came from a perspective with which I am less familiar than that which I share with the other two morning panelists.[2] As is the case with so many economic analyses of legal questions, Dr. Primo Braga's approach is valuable, not because it provides any definitive answers (because it does not), but because it erects a framework within which it is possible to think systematically about the questions and issues involved. The mathematical functions constituting Dr. Primo Braga's model identify the variables that ought to influence every rational decision or calculation made by policymakers in both developed and less developed countries. That does not mean, of course, that the values to be assigned to these variables are known, or even knowable—Dr. Primo Braga recognizes this gap in our knowledge, and the

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* Professor Naresh is Associate Professor and Director of the Graduate Program of Tulane University Law School.

1. Professor Naresh's Article will appear in Part II of the *Symposium* to be published in Volume 22, No. 3.

2. The other panelists were Hans Peter Kunz-Hallstein and Michael Gadbaw.

resulting inconclusiveness of his analysis, at least as far as the provision of definite answers to policy questions is concerned.

Does it follow, however, as Professor Jackson suggested, that elaborate exercises of this kind are of no use at all? I do not believe so. I believe that they *are* useful, in several different ways. One of these, as I have said, is that they focus one's attention upon the relevant variables, and so disclose an agenda for research, telling us what information is needed in order to make important policy decisions. They are also useful in another way, one which is independent of the uncertainty regarding the values of some of the relevant variables: they help to guide the hunches upon which, for better or worse, most policies concerning complicated social and economic issues ultimately have to be based. In an uncertain and constantly shifting empirical setting, intuition is often, and perhaps usually, the only basis for action; undisciplined intuition, however, is a risky basis, and economic models, even when they cannot be made to yield more than a qualitative indication of the relevant factors, help to reduce this risk.

Turning now to the content of Dr. Primo Braga's Article, one conclusion that could be drawn from it—and one at which he was perhaps hinting when he advocated gradualism—is simply that we should wait for countries to reach the "threshold" stage, at which they will find that the benefits of intellectual property protection are no longer so remote and so begin to outweigh the costs. This would certainly be a legitimate view, in accord with historical experience. The countries that are on the high road of intellectual property protection today were the pirates of not even a century ago, and began to find a value in enhanced intellectual property protection only as their technological capabilities developed and their economic structures changed. I suggest, however, that simply waiting would not be a sensible policy at present, because we no longer live in a world where countries are free to develop at their own pace. What I have in mind, of course, is that dreaded phenomenon, "trade retaliation," about which we rarely talk explicitly but which appears like Banquo's ghost at most trade conferences these days. The reality is that with the growing pervasiveness of unilateral pressures, and deals done in response to such pressures, it is simply not realistic to suppose that the time that has traditionally been available for countries to modify their intellectual property systems will continue to be available in the future.

I proceed, therefore, on the political assumption that, over the next decade or so, we will have to move away from the existing system of international intellectual property protection based upon national treatment, with each country free to decide the substance of its own property rights and the manner of enforcement of those rights, towards a regime

in which these matters are internationally mandated to a much greater degree. The question is not whether this will happen, but how these new arrangements will be arrived at and what their substantive constraints will be. As to the latter, if we lived in an ideal world, with information available with respect to each of the variables identified by Dr. Primo Braga, we would be able to fashion an international intellectual property regime tailored more or less precisely to the needs of countries at different stages of development. Since this is not so, we have to proceed on the basis of our hunches, our sense of what appears to be right in view of the historical experience, guided (as I said earlier) by such theory as is available. In these circumstances, our judgments will necessarily be probabilistic, heavily circumscribed by uncertainties of all kinds.

What kinds of hunches are presently on the table? My own, to put it in terms of Sir Henry Maine's famous aphorism, is that the movement of progressive societies has been from less intellectual property protection towards more. While we cannot demonstrate in any satisfactorily rigorous way that enhanced intellectual property protection contributes to increased research and development, increased innovation, and growth over a long period of time, nevertheless there are sufficient data in the historical record to indicate that this would be a sensible policy for countries at lower stages of development to adopt today. It may be that, left to themselves, they would adopt it later; but this does not necessarily mean that it would not make sense for them to adopt it earlier, albeit in response to external pressures. Needless to say, not everyone shares this hunch. In the newly industrialized countries, in particular, a quite different hunch holds sway, according to which the movement to higher levels of intellectual property protection should come only in the fullness of time, and that in the meantime the quickest path to economic development, through the appropriation of valuable technological and commercial information, should be followed.

Notwithstanding the wide gulf between these two views, I believe that some common ground exists, if only we have the wit and perseverance to discover it. It is this common ground that will have to be the foundation of any new, substantively-oriented international regime, whether this regime is agreed under the aegis of the GATT or of any of other international organization.

A crucial part of any such new regime will be its dispute settlement mechanism, because upon this will depend the extent to which recalcitrant countries can be made to adhere to their substantive objections—in discussing this, I move now, away from Dr. Primo Braga's analysis, to give a brief resume of my Article for the *Symposium*. The mechanisms that have been discussed thus far are largely the ones contained in arti-

cles XXII and XXIII of the GATT—that is to say, the dispute settlement procedures of the basic treaty itself. There has not, however, been any serious discussion of how well or badly these procedures are likely to function, when transplanted into a very different environment from the ones in which they have operated so far. It is clearly crucial to the case for the new intellectual property regime being under the GATT that the GATT's dispute settlement procedures should hold out the promise of delivering the goods in a way in which the Paris and Berne Conventions have signally failed to do in the past. This failure is incontrovertible, notwithstanding Dr. Kunz-Hallstein's point that, in principle, powerful remedies are available under the Paris Convention; as Dr. Kunz-Hallstein grants, however, these have never been used in the past, and there is no real prospect that they will be used in the future.

Are the GATT procedures promising enough? At first blush, certainly, the answer must be "yes." While the Convention remedies of reprisal or retorsion are so exotic that recourse to them is likely to be treated as an unfriendly act, the GATT procedures are firmly institutionalized, with a forty year history of regular, matter-of-fact use. Further, they are transparent, in the sense that they produce not only decisions, but a more-or-less satisfactorily reasoned jurisprudence, which can be (and has been) used on occasion to fill in gaps and remove obscurities.

Having said all that, however, it must be admitted that closer inspection of the procedures begins to raise doubts, especially when one examines the various specialized codes under the GATT. In particular, the fairly extensive experience accumulated under the Subsidies Code demonstrates that the dispute settlement provisions do not function well when substantive consensus is lacking; that is, where there is a lack of agreement as to what precisely the obligation is that is imposed upon the parties. An elaborate and seemingly sophisticated dispute settlement mechanism cannot, as this experience shows, fill in a substantive void. I say this keeping in mind Professor Hudec's presence here today, but it seems to me that the record demonstrates conclusively that an essential condition of the successful functioning of the GATT dispute settlement procedures is the existence of at least a substratum of precise identifiable obligation.

In light of this, I must say that the prospects for the success of the articles XXII-XXIII procedures in a GATT intellectual property code do not seem, at present, to be good. It is true that we do not yet know for certain what such a code (if it comes about at all) will contain, but a general idea of its content can be gleaned from the proposals and drafts circulated thus far. The dominant impression from these is that of a remarkable preoccupation with general "standards," or levels, of intellec-

tual property protection, rather than with specific substantive intellectual property rights. Signatories to the code would not be required to enact, in their domestic laws, any particular substantive right, but merely to make their laws "consistent" with the agreed general levels of protection. It should be obvious from this that such a system would introduce substantial uncertainty at each of the relevant points—in deciding what the appropriate standard is, what consistency with this standard means, and whether the particular mix of laws and procedures chosen by a signatory is in fact in compliance with its obligations or in breach of them. Attempts to use the GATT dispute settlement procedures in a substantively uncertain setting of this kind would run into considerable difficulty in identifying causes of action, because it would be difficult to determine whether a breach had occurred or a nullification or impairment of expected benefits had taken place. The result would be a dispute settlement procedure that is not taken seriously, and that is used simply as a formality, or legitimation device, before recourse is had to the *real* remedy, namely, retaliation.

Can the dispute settlement provisions of a GATT intellectual property code be made to mean anything more than this? The answer, it seems to me must be "yes," but only if, instead of simply transplanting the articles XXII-XXIII procedures into the new setting, very careful consideration is given to the question of how this setting can be made more hospitable to them. Such a consideration would in my view demonstrate the great importance of striving for specificity in the code as far as possible, instead of being content with general standards. It would also indicate, I believe that the search for specificity would not be a hopeless one, for a certain measure of substantive agreement already exists and more is achievable.

The agreement that exists is in the area of trademark protection, and is evidenced by the Draft Anti-Counterfeiting Code that was all but signed during the Tokyo Round negotiations. It is true that the Anti-Counterfeiting Code is no more than an agreement to take border control measures against counterfeited products, and does not impose any obligations upon signatories to enact substantive changes in their domestic trademark regimes; but there is wide recognition of the common interest of countries in avoiding counterfeited products, and such a substantive consensus would probably not be difficult to reach. Similarly, there seems to be a reasonable prospect that agreement could be reached with regard to the need to give intellectual property protection to certain types of high technology goods. These are goods whose production involves substantial economies of scale, and requires heavy research and development expenditures which cannot be recouped unless world-wide markets

are available. I believe it to be quite likely that many of the less developed countries, particularly the newly industrialized ones, would be able to accept the need to provide some satisfactory incentive structure for the industries so that innovation in them may continue. Such an agreement might require the making of some concessions to these countries on non-patent questions—for example, the elimination of technological transfer practices that they find especially onerous— but none that vitiate the substantive consensus.

Looking, therefore, at the intellectual property field as a whole there seem to be at least some parts of it within which a serious effort might usefully be made to agree on some specifics for inclusion in a future GATT intellectual property code. Without such an effort, there would be very little for the dispute settlement procedures to operate upon; with it, on the other hand, the procedures could fasten upon a substratum of specific obligation, and gradually widen it by the usual methods of filling in gaps and creating a jurisprudence.

In conclusion, I can say that I am also an advocate of gradualism, not perhaps in Dr. Primo Braga's sense of waiting for countries to reach the threshold stage, but in the sense of focusing negotiation efforts upon the possibility of finding limited areas of specific agreement (rather than upon maximalist, but vague positions), and seeking progress over a long period of time. I see considerable danger in the approach frequently spoken above, and mentioned by Mr. Gadbaw this morning, that seeks a high content intellectual property code agreed to only by the developed countries. Apart from the possibility that any attempt to put pressure upon nonsignatory countries to join might itself be a GATT violation, such an approach would, I believe, divert attention away from the much more important (and ultimately, more rewarding) task of finding some specific areas of agreement now, and extending them slowly in the future. It would merely create the illusion of progress, and I believe its seductive charms should be firmly resisted.

Remarks of Professor Paul Goldstein*

I would like to frame my remarks around two points that were made this morning—one respecting a similarity, and the other, a difference, between intellectual property and trade law, specifically the GATT. Ironically, a point of similarity was characterized as a point of difference, and a very important point of difference was characterized as a point of similarity.

First, someone made the point that intellectual property and trade policy are at odds in the sense that the premise of intellectual property law is protectionist while the premise of trade policy is anti-protectionist. In fact, there really is far more similarity than difference between intellectual property and trade policy in this respect. Both bodies of law and policy are pro-competitive. Trade policy is, to be sure, concerned with taking down barriers while copyright and other intellectual property laws are designed to erect barriers. Trade barriers are indeed anti-competitive. But intellectual property barriers are pro-competitive in the sense that they create a vessel enabling firms to appropriate the value of their investment in information and thus create a market in which competition can exist on a level playing field.

The second point—that trade policy and intellectual property policy touch vitally different interests—is a far more important one, and constitutes the them that runs through the remainder of my remarks. It was observed this morning that intellectual property is not really all that different from other commercial objects of the GATT process. There is, for example, a common perception that, in dealing with agricultural products and intellectual property in the trade context, we are dealing with fungible items. I am not reacting here to the concern, expressed by some people, that in committing intellectual property to the GATT process, alongside the commercial products that are its more common objects, we are making a pact with the devil. I do not think we are. I think that the promise of GATT is far more positive than that. I also think, however, that it is a terrible mistake to say that there is no difference between intellectual property and these other objects.

I will limit my comments to copyright. The difference between copyright and the regulation of trade is that copyright law touches a society's

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* Professor Goldstein is the Stella W. and Ira S. Lillick Professor of Law at Stanford University School of Law.

cultural, moral, educational, and political aspirations to a greater extent than does any other subject matter within the trade process. If the GATT is to be effective in dealing with copyright, it must recognize this difference.

The balance that copyright and author's rights systems strike between exclusive rights, compulsory licenses, and no rights at all responds peculiarly to the aspirations—political, social, moral, and cultural—of any particularly country. One need only look at the U.S. Copyright Act for an example. Section 106 of the Act lays out the five exclusive rights that attach to copyrighted subject matter, and then sections 107-19 trim these rights down to respond to particular needs in this country. Section 108, for example, exempts photocopying for certain library or archival purposes in the interests of scholarship and research. Section 110 carves out a whole series of exemptions from the performance right to accommodate worthy educational uses. Section 107—the fair use provision—carves out a defense that is unmatched in scope by the fair dealing or private use defense in any other country, and responds to the unique utilization philosophy that underlies our copyright law as well as our political aspirations as embodied in the first amendment.

This suggests two points when we think about copyright in the GATT process, and particularly when we think about copyright in the economically lesser developed countries. First, any GATT standard or set of standards applied in the copyright area will have to be a standard that incorporates balances. Second, the balance employed will not be a uniquely American balance. There is no reason for it to be a uniquely American balance because there is no reason to believe that any other country has the same societal, cultural, moral, or economic aspirations as the United States.

Ideally, one would employ for each country a standard that responded to the optimal balance in that country consistent with certain generalized notions of minimum standards. That ideal is no doubt impracticable. It may be more practicable to rely on a two-tier approach that will roughly capture the two different congeries of aspirations that can be found among the economically developed and lesser developed countries. That is the direction suggested in Jerry Reichman's superb Article; for those of you who have not read it, I encourage you to do so.[1]

I will not attempt to describe here what a particular standard would look like. One could, however, imagine a standard for economically lesser developed countries that, on the one hand, outlawed unauthorized

1. Professor Reichman's Article will appear in Part II of the *Symposium*, to be published in Volume 22, No. 3.

uses that have no immediate and direct bearing upon the nation's educational welfare—for example, a standard that broadly outlawed the reproduction of motion pictures and phono-records. At the same time, the standard could be more tolerant of the kinds of uses—for example, educational photocopying and translation of works—that are necessary for the educational advancement of that country if the country is ever to shake itself of its economically lesser developed status. Any such differential standards should, of course, be accompanied by effective border controls that will prevent low-cost, unlicensed copies from travelling outside the country for whose benefit the lower standards were adopted.

There are, I think, two virtues to such an approach. One is such a two-tier or individualized approach to standards may very well revitalize the presently stalemated WIPO process. If the economically lesser developed countries can be effectively brought and kept within the international copyright fold, this approach could return WIPO to what it is so good at doing—bringing its expertise to bear upon drafting model laws and proposing applicable standards.

The second virtue is strictly a practical one, and is in the immediate interest of information-exporting countries; it has to do with enforcement. Enforcement of intellectual property rights is relatively far more complex than enforcement in other trade areas. To begin with, and unlike other areas governed by the GATT process, enforcement typically occurs—or does not occur—at a private level, rather than initially against the offending government. You may, to be sure, rely on states to direct public enforcement against private behavior. This behavior, however, is often covert and is against individuals with no assets that can be captured and who can elude the criminal sanction with disarming ease.

Second, since you must rely on the law enforcement system of a particular country, it seems to be particularly important to recognize that a national enforcement system will pursue any objects only to the extent that the standards that it is being asked to enforce conform to that country's aspirations and beliefs. To the extent that these standards substantially deviate from the country's own sense of its culture and aspirations, enforcement—and the whole purpose of the GATT initiative—seems destined to fail.

Remarks of Mr. Emory Simon*

I noted, I think, with some flattery, Professor Primo Braga's comment this morning about being Archie Bunker rather than John Wayne. The sad truth is, that while we may be Archie Bunkers, we have gotten a hold of John Wayne's six shooter, and it's loaded. Depending upon how things go, we may go out and have a few drinks, and then with a loaded gun, God knows what could happen.

I would like to make two general comments, and then, based upon how I perceive the negotiations to be proceeding, I would like to identify three classes of issues: (1) current issues, which I think are important in negotiations; (2) nonissues, which I do not think are important in the negotiations; and (3) future issues.

My first general comment is there has been a lot of discussion here about trade and GATT and intellectual property from a legal perspective. The reality is that we do not spend a lot of time thinking about legal issues when we negotiate agreements in the GATT. Sometimes that shows up and comes back to haunt us, perhaps as in the instance of the Brazil case; sometimes it does not. But the concerns that we have are with the commercial results of what a negotiator agreement is, rather than with the legal niceties of it. I do feel, however, that it is important for us to be periodically reminded of those legal issues.

The other comment I would like to make is that the multilateral approach that we have been discussing here for the past day and a half is really only one aspect of United States policy on intellectual property, and some would argue that it is not the more important aspect. Some would argue that the more important aspect is the bilateral negotiations that we have been pursuing, and it is worth remembering that a consequence of the failure of a multilateral process will be greater reliance on bilateralism. Now there are both good and bad things associated with that, and we can talk about them in an open forum. I just wanted, however, to leave you with the thought that if 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 conten-

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* Mr. Simon is the Director for Intellectual Property at the Office of the United States Trade Representative.

tious, and more confrontational than resolving these issues through the GATT. In that context, I want to also say that there are advantages to resolving these 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.

There are issues that are currently before the negotiating group, which I think are important, and I assume we will get passed. There is a meeting in about ten days in Geneva where we will attempt to clarify the negotiating mandate from the negotiation group concerning how the second half (it is about the last third of these negotiations) should proceed. Once we get through that meeting, we will hopefully be confronted with a number of tough issues.

The first, and most important, issue is how to engage in substantive negotiation. It is interesting that we have spent a whole day talking about all of this, and yet we have spent very little time discussing whether or not a 20 year term for a patent is a good or bad idea, or any number of substantive issues about levels of protection; for example, whether copyright protection for software is a good idea or whether sound recording should be protected under neighboring rights or under copyrights. Any number of issues like these will have to be discussed in a substantive negotiation. The trick for us is how to get past process and into substance—this is not easy. I think the first thing we will do is create a negotiating document. There is no way to better focus people's attention than by putting together the substance of what you want. We have come close to doing that in a document we put forward last October. That document lays out in some detail what the United States Government envisions as an agreement in intellectual property.

The second issue is what is the correct level of standards or protection for the five areas that we have outlined as the important ones: patents, trademarks, copyrights, trade secrets, and chips? The answer to that is, we have an idea about it, and that is what our proposal in October said; but this is a negotiation. Professor Reichman spoke of maximalist and minimalist approaches and dangers associated with them. He may be right; he may be wrong. I cannot be sure until we get into a situation where we are actually discussing the substance of what a maximalist approach is all about.

I can say with some certainty and definitiveness, that a two-tier system is unacceptable to the United States as a solution to these negotiations. By that, I mean something specific. A two-tier system, which institutionalizes lower levels of obligations for developing countries, is simply not something that we can bring home as negotiators and sell to our Con-

gress or our industry. So whether or not that is the realistic solution or unrealistic solution within the international environment, I think that it is simply an "unsellable" solution within the United States domestic environment. The whole objective of this exercise is to get rid of the two-tier system. We have industrial countries providing high levels of protection and others providing lower levels of protection. Correctly or incorrectly, there is a perception that creates distortions and we are trying to fix them. Why would we want to institutionalize those distortions, if our whole objective is to get rid of them—a two-tiered system is not going to fly. That does not mean that a partial participation agreement where only some countries participate may not fly. It may be a solution that some would argue is a variant on a two-tier solution, but that is a different set of issues.

The third issue we really have not talked very much about, is our enforcement. We talk about enforcement in two ways: border enforcement and internal enforcement. People talk about counterfeiting being easy, because that is a border enforcement agreement. I think border enforcement is the easier of the two variants.

Personally, I think the hardest issues to negotiate in this context will not be substantive standards. Rather, the hardest issues to negotiate, eventually, will be internal enforcement measures, which require a third discipline to be brought into this realm. We now have trade people and intellectual property people. We need practitioners. We need people who have been litigating, who actually know from the front lines what it means to go out and try to enforce a right. What it means to try to deal with a legal regime that does not have discovery rules, temporary restraining orders, or a whole variety of other things that we take for granted in this country and some other countries. Somehow, we need to fold those things in.

Again, I tell you that because of the pressure that we get from the United States interests that are affected by all this, obtaining a good law is fine, but if I cannot enforce my right, it is not valuable. As I said, I think perhaps the hardest thing to negotiate in all of this will be internal enforcement measures, and that is the thing in which we have gotten least far along, so good thoughts are welcome.

The fourth issue is dispute settlement. We have talked about dispute settlement in a variety of ways. There was, I think, a very constructive and good comment about how dispute settlement is becoming very difficult in the absence of specific standards. There is a different issue that goes along with dispute settlement, which I think is also critical to all of this. The reason why the dispute settlement of the GATT is valuable to us is because a violation of intellectual property rights will be subject to

trade retaliation on shoes, on textiles, on whatever. Somewhere in the negotiating process, there is going to be a fight about that. There is going to be a fight about how broad or narrow the dispute settlement mechanism should be. And, obviously, one of the principal reasons why the United States has come to the GATT is to get the broad trade leverage that Professor Jackson spoke about. That is what the United States wants. If it cannot get that again, this whole agreement becomes much less valuable to us. We are going to have to work out the legal niceties of that.

The fifth issue is national treatment. National treatment has two important elements to it. One is the reconciliation of national treatment with respect to goods about which the GATT speaks, and with respect to individuals, which intellectual property conventions discuss. Bringing those two together poses a number of difficult issues. I am very happy with Professor Kunz-Hallstein's Article which says that we can have an agreement that obligates certain countries to higher levels of protection, and we will not be required to provide those higher levels of protection to countries not participating in the agreement. Frankly, I hope he is right. That is going to be a very difficult issue, because whatever the legal niceties of that might be, the countries that have gotten free rides up until now, will look to that as a way to continue getting free rides. It will be difficult for us to apply an agreement between some countries in a way that excludes the benefits of that agreement to third countries.

Payment was talked about a lot earlier in the day. I am not sure what payment means. In negotiations of all kinds, there are trade-offs, I do not think of them as payments. Rather, I think of them as creative ways to get the resolution. The three principal issues on which people talk about payments are section 337, section 301, and reform of our patent law. David Beier mentioned others. There will be some discussion about that, and we will see where the negotiations go.

Another issue, and I really think this is the most important one: What happens if we fail? I think there are a number of consequences to failure. First, will be an increase in bilateralism. For those of you who think bilateralism is a bad thing, a bad thing will come about. Second, I think that progress in other international fora, for example, WIPO, will slow down. We have seen a recent increase—surge is too strong a term—in activity of the kind that the United States has wanted to see in WIPO. In large measure, I think there is a challenge posed by the GATT. If the GATT process fails, that pressure will diminish, and the reaction of WIPO may go one way or the other. I am not sure which way it could go, but at least the possibility of further multilateral action may also diminish. Third, I think there will be an increase in discrimi-

nations and limitations on how rights are applied. We have seen a number of things like this; for instance, Europeans are enacting certain kinds of royalties on videocassette rentals and sales, royalties which they then use to promote cultural industries. While we probably think that is a bad thing, I think in the absence of a more clearly stated modern set of rules, we will see more developments like that. Next is the economic arguments, which we talked about this morning, that there will be less investment in research and development, and maybe less trade. There will also possibly be slower dissemination of technology. And a danger which I see, that there may be more reliance on trade secrets, rather than a reliance upon patents and other kinds of protection which compel you to disclose in return for obtaining protection.

Last, and not least, there is an important future issue, which we have not discussed at all, either among ourselves or publicly as these negotiations proceed. I want to leave you with this thought which is that the United States has raised three new issues in the Uruguay Round. Intellectual property has important implications for both investment and services discussions. There is a lot of intellectual property that is not traded in the form of a good, but rather in the form of a license—this is the case in the record industry. Recordings do not flow across borders. Often what a record company will do is license a Japanese subsidiary, and the Japanese will actually do the pressing of the record and distribution. The only thing that flows, is a royalty payment, which spills over into the investment discussions. Some of that spills over into the services discussions, and somewhere along the line, some of those issues are going to have to be folded into the intellectual property discussions. Honestly, I have not, and I do not think anyone in government has thought through what that means. It is something, however, with which we are beginning to be confronted as the negotiations are becoming more complex, and as we are thinking of engaging in a broader set of discussions.

Remarks of Mr. Fred Koenigsberg*

I represent those who are out on the front lines, and who deal with the reality of the situation. I must share some random thoughts, about what has been said over the past couple of days. I found a peculiar lack of passion, perhaps because most of you are not there with the people whose works are being used. The creators who actually produce these works, think, and rightfully I believe, that they deserve recompense for the use of their property. It is that passion on their part that you have to take into account.

Let me talk about it in the context of ASCAP. For those of you who do not know what ASCAP does, it licenses one right, and only one right: the right of nondramatic public performance of copyrighted musical compositions. Music is performed by broadcasters, cable systems, bars, grills, taverns, and many others. ASCAP collects the money for those performances, and similar performing rights societies in foreign countries do the same thing. The license fees that are collected for those performances, are then distributed to the people who wrote and own the music performed. For your purposes, you could consider ASCAP to be a fifty/fifty partnership of music publishers and writers of music.

Now, how do we deal with the matter internationally? We have a system, set up over the course of many, many decades, of private bilateral and multinational agreements. First, we have affiliation agreements with foreign performing rights societies, for example, take the society in France. When French works are performed in the United States, we license those performances. When American works are performed in France, they license those performances. Then we exchange money. That is just what Emory Simon was talking about. Obviously, we get a lot more money than we give out, because American music is far more popular overseas than foreign works are in the United States. Multilaterally, there is an organization called CISAC, it is the french acronym for the International Confederation of Authors' Societies. Through frequent meetings of this group, multinational problems are resolved.

Is this a good paradigm to follow? Do we need the GATT? Well, on the one hand, it is useful because problems get worked out very easily and efficiently. But on the other hand, it may not work in other ar-

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* Mr. Koenigsberg serves as Assistant General Counsel of the American Society of Composers, Authors and Publishers (ASCAP).

eas—after all, it has taken us decades to establish this system. There are forty foreign performing right organizations, a number of them from developing countries, but nowhere near as many as there should be. Can anything be done about this? Can it be done through the context of the GATT?

That is just the starting point for a longer process. We must understand that we need to have countries that do not respect these rights establish national laws that do respect them. Then there has to be a local organization established in the field of performing rights, and that organization must convince its own national entities that it is wiser to require that users—for example, the indigenous broadcasters who perform music—pay that local performing rights organization, than not pay it. Are there benefits to the foreign nationals? Yes, I think so, because their own writers are now going to be paid, whereas they would not be paid otherwise. This process requires an application of national will on the part of those foreign countries, and whether they will do so, no one knows. So the question remains: Is the GATT useful in this context?

There are some other things that I heard which rather perturbed me, I must tell you. I heard it said that, if we apply GATT sanctions the United States is going to get richer. That is passionless. The United States is not going to get richer. And the use of the word "richer" implies something pejorative that should not be implied. What is going to happen is that, at least insofar as the United States goes, the people who *created* these works are going to realize the economic benefit that they are entitled to. The United States is not going to get richer. The individuals who created this property are going to benefit from the use of their property, and that is something good, I think.

Now, there is something else that bothered me: there is a thought, it seems, that "intellectual property" is some monolithic whole. It is not. Patents are very different from copyrights. Copyrights of one sort are very different from copyrights of another sort: Music is very different from books, and each is very different from computer programs. The same approach is not necessarily effective for each of these items. There has to be, perhaps, a more sophisticated view of the internal dynamics in this field.

Would use of the GATT be healthy for copyright? I think so. I think there is a positive fallout domestically, for example, that nobody has mentioned. If the United States stands up for copyright as a form of property that should be honored, that is good domestically as well as internationally. If the United States, for example, says compulsory licensing is an evil thing, that is good because maybe it will help us get rid of the domestic compulsory licenses. Now, I used the term evil, and I did

it deliberately. Because I think there is a certain moral relativism that has come into play here, and that must be avoided. Let me take an example that may strike home to many of you in this room. There is a country which forbids the importation of foreign textbooks unless a national of that country is also an author of that textbook. Without such a local author's name on the text, that country, I believe, permits the duplication and use, without authorization, of that textbook. What does that mean? It means that if the American publisher wants to sell textbooks in that country, he must go to some local academic and pay him off to put his name on the book. What does that constitute? Many people in this room have written textbooks. Are you happy with that? Wouldn't you characterize that at best, as extortion, and at worst, as theft? Is theft something that should be condoned, or is theft something that we should battle?

I have learned an immense amount in listening to everybody. I return to the basic questions: Is use of the GATT healthy for copyright? To tell you the truth, I do not know quite how to answer that question but with the story of Jacob Adler, who was the greatest actor of the Yiddish Theater. He was giving his farewell performance, and the place was packed. The time for his performance came and went, nothing happened, and the crowd got restless. Finally, the stage manager came out and said, "I have terrible news for you. Jacob Adler, the greatest actor of our time, has just died backstage. If you leave quietly, we'll refund your money." From high up in the balcony a voice called out, "Give him some chicken soup." The stage manager looked up and said, "Sir, I don't think you understand, Mr. Adler is dead, chicken soup will not help." And the voice yelled back, "It couldn't hurt."

Remarks of Mr. Harvey Schein*

I think it is appropriate that I am one of the last speakers, because I have something very basic to say. I am an anomaly here today, because I am neither an expert on GATT matters, nor am I an expert on international or domestic intellectual property law. What I am is a working stiff, who has spent thirty-seven years believing that the work product of artists, authors, and composers is precious and of great value, and that there should be laws to protect such individuals' property from being pirated away.

I must say that I have been very naive over the years, because this august and scholarly body assembled here today accepts the fact that intellectual property has no inherent value, which by its very being demands protection. I can tell you that the blue-collar workers of this area cannot and will never accept this. If a man has worked for ten years in his garrett on a novel, having his family go hungry—if I can dramatize it—and then he finally produces his work, only to find that it has been copied, then that is piracy. You had mentioned and talked about the difficulty in defining piracy. It may be very difficult to define it, but I promise you, when it has happened to you, you know it, and you need no definition.

I really do not have very much more to add to that. I find it very difficult to understand how the world community, and if you will, the world lawyers, can accept the situation. The British, in order to protect a few rocks in the South Atlantic sent thousands of troups to fight Argentina, when Argentina moved in to take over the Falkland Islands where several thousand sheep were grazing, but when someone pointed out to them that a law enacted to protect artistic design, which we had talked about, violated some of the treaties or the Berne Convention or the Paris Convention, Britain quickly backed off and changed its law, removing the protection for artists. It is truly hard for me to understand that. It is hard for me to understand how if someone were to steal your watch from the hotel, and run off to Europe, quickly Interpol would be called, all kinds of bells would be ringing, and efforts would be made to retrieve the watch, and to punish the person who perpetrated the crime. The use of the word "crime" to describe this act would be accepted. Whereas, when the wholesale taking and appropriation of these creative works,

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* Mr. Schein is the former chairman of Sony Corporation of America.

and works of the mind, occurs, you say, "well, we cannot do anything about that, because there are not any laws, and the only rights you have in this intellectual property are the rights that are given to you—there are no inherent rights to the property." Yet, there is an inherent right to the few rocks in the Atlantic, and there is an inherent right for you to keep your wrist watch. I repeat what I have said. It is very hard for those of us who are in the field everyday to accept this point of view. And it just never, never will be understood.

Remarks of Mr. Ralph Oman*

It is always difficult to get near the end and find that most of the things that you wanted to say have already been said, and I really feel sorry for Mike Remington who must follow closely on my heels.

In many respects, the debate today dealt more with trade and industrial property than trade and intellectual property, including copyright. In many ways, the copyright treaties, unlike the Paris Convention, do provide fairly high standards of protection. So while there are problems in this area, many of them mentioned today, they are not as profound as on the patent side of the shop. I think we should all bear that in mind as we proceed down this road.

In some ways I see some vulnerability on the copyright side because of the fact that we already have these existing high standards. If those high standards are put on the negotiating table along with agriculture, textiles, and automobiles, we might find a lowering of those standards, in an attempt to get compromises in the other areas. If we are ready to make concessions in those areas, perhaps we might be more likely to get some final agreement on intellectual property. From what I have been able to discern in Washington, there would be severe political problems if we tried to exchange the high level of intellectual property protection that we seek for a free access to our markets for textiles, the elimination of the voluntary agreements with Japan, and other automobile manufacturers. I think that we are not ready to make these concessions, and until we are, it is going to be hard to reach the overall accommodation that we are looking for.

Another problem I saw in the general discussion today was the loose talk about developing countries. Fred Koenigsberg used the word monolithic in another context. The developing countries are not a monolithic whole. They are countries wracked with hunger, illiteracy, and disease that are rightly worthy of our compassion, sympathy, and help. Countries like Brazil, do not fit into that category. Countries like Saudi Arabia do not fit into that category. Those countries are getting a free ride on the charitable instincts we feel toward the really worthy countries. And my question is why don't those truly deserving countries realize they can get far more from us in the way of concessions and special treatment if they would just throw Brazil over the side and let them

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* Mr. Oman is the Register of Copyrights for the United States Government.

swim for themselves? They are fully capable of doing that. They can then band together in a smaller group and ask for the consideration that they deserve. Maybe this will happen, maybe it will not.

There was some comment earlier about there being no examples for the Primo Braga curves. I wonder if history does not give us some examples, the United States being one of the pre-eminent ones. Perhaps there was some short-term economic loss at the outset, but I think all of us would recognize that the bottom curve soon overtook the upper curve, and we have been doing very well on that ever since, I think, the early 1900s.

The other point I would like to make is that the United States really should recognize the fact that we made a terrible mistake in our early history. We should try to lecture our developing country allies on that point. If we had given protection to foreign authors earlier in our history rather than waiting until the 1890s, we would have promoted the development of our own indigenous authors. We would have developed our own music to a far greater degree than we did. The United States market was dominated for its entire first century by works from Britain. This was unfair to United States authors, and it was the United States authors who got Congress to change this situation. We all know the results.

We should be ever mindful of the men and women, the individual creators that Mr. Koenigsberg was telling us about. I think that is the real issue here. We are talking about whether or not men and women can pay the rent and raise their families.

Another general comment, in concluding, is that the trade approach is perhaps too limited an approach. There are other larger issues at stake here, and some of them do rise to the level of idealism, in which Americans always like to cloak their activities. Freedom of expression and democracy, in many ways, are bound closely with copyrighting and I think Professor Goldstein was making reference to that in his comments. Copyrights allow authors to survive without relying on the largess of governments, or on the largess of wealthy patrons, or on the largess of the church, traditional supporters of the arts throughout the countries. They can write what they want, and the market will support them, if there is a market for their works. We should bear this larger purpose in mind, as we try to urge a strong copyright protection in the developing world. It is in their own interest and in the interest of their people—it is in the interest of democracy and freedom all over the world.

And, again, what I consider the loose talk about the developing countries as monoliths, in those countries, there are factions warring, just as there are factions warring within this countries. Mr. Koenigsberg has

made reference to them. We really should ally ourselves in our international dealings with those progressive forces within the developing countries, with the authors who are looking for protection, with the inventors who want their inventions protected around the world. What we are doing now in not insisting on this high level of protection as this is just strengthening the parasites within those societies, those that prey on the works of others. I think we should, instead, strengthen the hands of those most worthy of our support, the creative people.

Remarks of Mr. Michael Remington*

I really have been wondering why I was invited. I also feel a bit like Dean Costonis last night, I am the beneficiary of the largess of this meeting, and the wisdom and intelligence that has been imparted, and I have not had to do any of the work. I am very much appreciative of that.

My views are collective, and I only have several thoughts. I do not want to repeat some of the thoughts that have preceded me, but I would like to emphasize Paul Goldstein's point about balance. Not only does our domestic law under our constitutional provisions have to be balanced, but I think Professor Goldstein made a very important point about trade laws and our international laws being balanced as well. Congressman Kastenmeier asked me that question before I left. He was musing over the fact that he has to give a speech at Columbia on Thursday, and he asked David and me to think a little bit about the role of balance in trade. I was very much stimulated by that.

In politics, perspective is very important, as it is in litigation. I am reminded of Justice Frankfurter's statement that you come out of a case depending on how you go into it. So listening to Mike Gadbaw this morning talking about the Semiconductor Chip Protection Act; he was giving his perspective. Then hearing Emory Simon talk about there being more activity in WIPO because of the GATT, well, that is his perspective. I merely want to say that I have a different perspective. I could give you rationales for the passage of the Berne Convention and the Semiconductor Chip Protection Act that do not track what they say. I am not disagreeing with them. I am simply saying that when it comes time for the United States Congress to pass a public law, many things go into it. In fact, it is almost impossible to identify the single factor that contributes to the enactment of a law. After all, our laws do nothing more than reflect the society that we live in.

If I had any message for what we ought to do with the developing world, it is we ought to be tolerant of the fact that their laws must also reflect their societies. We have to work with them. Perhaps, if we can reach some mutual agreement about societal goals on an international level, we would be more successful at creating international standards. I agree with the statements that were made that we are not likely to see

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* Mr. Remington is the Chief Counsel of the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Administration of Justice.

radical and comprehensive changes in any society including our own. If we try to engage in such radical restructuring, that will not be without substantial risks. Our copyright law and our patent law are illustrations of incremental change over time. I think that will be done in other countries.

I have a couple of thoughts about dispute settlement. I am wondering why the Semiconductor Chip Treaty should be the stalking horse for dispute settlement in intellectual property. I think that is relatively risky in that, what if it does not succeed? Or what if the model of dispute settlement in the Treaty is not what would be envisioned for copyrights or patents? I merely put that one out on the table. Ralph Oman will be chairing our delegation at the diplomatic conference which will be occurring in a month and a half, or two months. I think the challenge on dispute settlements and chips is a very important one. I do not know how it will come out, but I wanted to raise that.

We have had a lot of talk about the role of the United States Government and the USTR. These decisions that are to be made about the intellectual property laws of foreign countries, are very serious decisions. They are analogous, as someone said earlier, to decisions that federal judges make. I wonder about the record, the finding of facts, the writing, the due process that will be given as these decisions are formulated. After all, the United States is a nation of laws, and we like to believe in procedural due process. USTR is going to have a very difficult job, and I do not know how it can do it with the resources it possesses.

Finally, an issue that bothers me is that there is an agenda over and above the merger of intellectual property and trade. Maybe we could finally get rid of our compulsory licenses. The many people in the intellectual property community, when approaching trade issues, formulate minimal standards that should be applied world-wide. Their proposals contain grandiose statements that we do not apply to ourselves. The statement about no compulsory licenses is one of them; retroactivity is another. Is it in our interest to go off in a multilateral trade setting, and say to other countries, "You cannot have a compulsory license"? I raise that as an issue. I do not have a solution to it; I am not a trade negotiator. I do think that they fully understand what the United States Congress has done, because it is available to them, and that we should be relatively discreet in terms of formulating our own negotiating objectives.