Vanderbilt Journal of Transnational Law

Volume 22
Issue 4 *Issue 4 - 1989*

Article 1

1989

Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework

Frederick M. Abbott

Vanderbilt Journal of
Transnational Law

VOLUME 22 1989 NUMBER 4

PART II
SYMPOSIUM: TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY

Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework

*Frederick M. Abbott**

ABSTRACT

This Article addresses industralized countries' growing concerns over technology transfer and their efforts to obtain protection of intellectual property rights under the General Agreement on Tariffs and Trade (GATT). Mr. Abbott analyzes the intellectual property problem in the context of the GATT framework and the weakness of current intellectual

* Assistant Professor of Law, IIT Chicago-Kent College of Law. LL.M., 1989, University of California, Berkeley; J.D., 1977, Yale Law School; B.A., 1974, University of California, Berkeley. The author thanks Professors Stefan Riesenfeld and David Caron for their assistance and advice during the preparation of this Article.

property protection. Developing countries do not accept the United States contention either that intellectual property is covered implicitly by the GATT or that the current lack of protection reflects a fundamental flaw in the General Agreement. Mr. Abbott focuses on this disagreement in laying out the framework for possible solutions, which include: 1) a separate GATT agreement or code; 2) a framework agreement by consensus decision; and 3) a formal amendment to the General Agreement. Mr. Abbott concludes that an amendment enacted through the GATT's article XXX(1) procedure, which would be effective upon two-thirds acceptance by the Contracting Parties on the Parties that accept it, would achieve the most realistic near-term solution to the intellectual property problem. Mr. Abbott also focuses on the issue of GATT reciprocity, considering whether the industrialized countries will be under a duty to compensate the developing countries in the event that an agreement on intellectual property is reached. Mr. Abbott concludes that the General Agrement should be analogized to a frustrated long-term commercial agreement, and suggests a compromise on the issue of compensation.

TABLE OF CONTENTS

I. INTRODUCTION

Industrialized countries are engaged in an effort to persuade developing countries to incorporate rules on the protection of intellectual property into the framework of the General Agreement on Tariffs and Trade (GATT).[1] Because proposed norms regarding the recognition of intellectual property rights would significantly affect wealth allocation between the developing and industrialized countries to the near-term detriment of the developing world, there has been consistent and intense developing country resistance to the program. In the face of resistance to the adoption of multilaterally agreed upon norms, the United States has threatened or imposed coercive economic measures on countries it re-

1. *Opened for signature*, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT] *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [GATT, BISD] (1969). The "GATT" is commonly used to refer both to an international organization and to the General Agreement on Tariffs and Trade, which is its charter document [hereinafter General Agreement]. The history of the GATT is so well chronicled and its operations so extensively analyzed that these undertakings will not be repeated in this Article in any detail except as specifically relevant to intellectual property issues. Primary sources for description and analysis of the GATT are J.H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) [hereinafter JACKSON]; J.H. JACKSON, J. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES (1984); O. LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM (1985); K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); 4 STUDIES IN TRANSNATIONAL ECONOMIC LAW: THE EUROPEAN COMMUNITY AND GATT (M. Hilf, F. Jacobs & E.U. Petersmann eds. 1986) [hereinafter EC AND GATT].

gards as not providing adequate protection. The United States has thereby sought to demonstrate its resolve to protect intellectual property rights, whether on a unilateral or multilateral basis. These measures have created widespread disaffection with United States trade policy. Yet behind United States policy is a reasonable belief, shared by other OECD countries,[2] that as intellectual property has become an increasingly important component of national wealth and article of international trade, it is properly the subject of trade protection, regardless of whether that was originally contemplated by the GATT. Driving developing country policy is the reasonable response that these countries are playing by an agreed upon set of rules that they are not obliged to alter to their detriment. Trade negotiators must reconcile these perspectives without unnecessarily destabilizing the international economic and political order.

This Article describes the "intellectual property problem" and how it came to be the focus of GATT attention. Although industrialized country data used to estimate intellectual property-related losses is almost certainly biased toward magnifying the extent of the problem, even a skeptical approach to the figures indicates that the situation is worthy of attention. Whether industrialized country trade negotiators will succeed in establishing a GATT-based program that will significantly ameliorate the problem will depend in large measure on the choice of an appropriate institutional arrangement within the GATT—one that addresses the unique characteristics of the problem. The intellectual property problem requires a relatively inclusive solution and is not suited to the code-making process used to conclude the GATT Tokyo Round negotiations. This Article will explore the alternatives to a code and propose a conventional amendment to the GATT.

Industrialized country trade negotiators must be prepared to accomodate developing country demands for trade concessions if an agreement comes within reach. In the ordinary course of GATT trade negotiations, countries that forego an existing right or assume an additional duty are entitled to a quid pro quo pursuant to the principle of reciprocity. The

---

2. The Organization for Economic Cooperation and Development (OECD) has 24 member countries—Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kindgom, and the United States (Yugoslavia has special status). OECD IN FIGURES: STATISTICS ON THE MEMBER COUNTRIES 1988 EDITION: SUPPLEMENT TO THE OECD OBSERVER No. 152, at 4-5 (June/July 1988). The OECD has as its objective the promotion of "growth, full employment, trade, . . . and financial stability." J.H. JACKSON & W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 278 (2d ed. 1986).

United States has taken the position in an intellectual property dispute with Brazil that the imposition of possibly GATT-illegal trade sanctions is justified by the GATT's failure to address the legitimate intellectual property concerns of the United States.[3] At least implicit in the United States position in this matter is the belief that Brazil's failure to provide adequate intellectual property rights protection nullifies or impairs benefits that the United States has previously secured from Brazil in the GATT, permitting the United States to withdraw concessions in return.[4] If, in broader multilateral intellectual property negotiations, the United States adopts a position either that the GATT is inherently defective or that intellectual property protection is implicit in the GATT (and needs only be made explicit), the United States presumably will be unreceptive

---

3. The statement of former United States Ambassador to the GATT, Michael Samuels, to the GATT council in connection with the United States decision to withdraw its objection to the formation of a panel to investigate the United States-Brazil pharmaceutical patent dispute, reflects the United States position that the imposition of trade sanctions against Brazil is legitimate because of an "imbalance" in the GATT itself. Samuels said:

> What's at issue here is an imbalance in rights and obligations that affords Brazil an opportunity in the GATT to address a trade dispute affecting Brazilian exports and denies the United States the right to address a practice by Brazil affecting the same amount of U.S. trade. . . . Where there are no rules to protect inventors in their commercial transactions, the legitimately aggrieved parties must necessarily take action.

GATT: U.S. Accepts Creation of GATT Panel to Study Sanctions on Brazilian Pharmaceutical Goods, 6 Int'l Trade Rep. (BNA) 238 (Feb. 22, 1989) [hereinafter Statement of Samuels].

4. Since the only plausible GATT-based defense to United States sanctions against Brazil in the pharmaceutical patent dispute is that Brazil's actions nullify or impair existing United States trade benefits under article XXIII of the GATT, GATT, art. XXIII, *supra* note 1, at A64, T.I.A.S. No. 1700, 55 U.N.T.S. at 266, 4 GATT, BISD, at 39-40, it seems logical to conclude that the United States will use this argument in its defense. United States trade negotiators, however, have appeared reluctant to state this position for the record to date.

Professor Hudec, in his remarks in volume I of this symposium, notes in the United States negotiating position in the dispute with Brazil "[t]he claim . . . that GATT law itself may entitle governments to condition trade access on adequate protection of intellectual property rights." *Remarks of Professor Robert Hudec*, 22 VAND. J. TRANSNAT'L L. 321, 322 (1989). Gadbaw notes, also in volume I of this symposium:

> The only possible United States defense [in the pharmaceutical patent dispute] appears in article XXIII of GATT, which permits a contracting party to claim a nullification or impairment of GATT rights as a result of either a violation of the GATT or any other measure that has the effect of denying the party rights for which it has bargained.

Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 231 (1989).

to demands for concessions based on adoption of remedial intellectual property rules.[5]

The developing countries, on the other hand, will claim that the GATT has not previously been concerned with intellectual property rights, that the protection of such rights has been the subject of a number of major treaties outside the GATT, and that an agreement to permit trade sanctions on the basis of failing to protect a newly elaborated set of protective norms constitutes a trade concession that gives rise to a reciprocity obligation.

---

5. In a recent New York Times interview, Deputy United States Trade Representative S. Linn Williams advanced the United States view that the absence of GATT coverage of intellectual property rights protection is out of touch with present international trade realities:

> Q. Most of the practices we are addressing here [with Super 301] are outside the GATT coverage. If we attack those practices by applying 100 percent duties, won't we become GATT outlaws.
>
> Mr. Williams: I don't think so.
>
> Q. We would be outlaws under GATT because we would be raising a trade barrier against countries that don't have a GATT-related trade barrier against us.
>
> Mr. Williams: That's not the way we look at it. We look at it as strengthening the GATT. You said that these were practices not covered by the GATT. That's right. We are trying to get the GATT to cover them. We are not the group that put those outside the realm of the GATT. If the GATT becomes in the Uruguay Round strong enough to deal with these kinds of practices, we might not need 301. But if the GATT does not effectively cover the problem, it is our policy that GATT cannot limit our ability to address the problem.
>
> Q. Brazil has raised objections to American sanctions against their alleged piracy of pharmaceutical patents, and if the GATT panel decides against the United States, won't that foreclose an option?
>
> Mr. Williams: Not necessarily. It depends on what the panel decides. Also we could consider other remedies against Brazil. The Brazilian case is not a bad example. It represented basically the theft of a product. We are trying to get that sort of problem covered by the GATT.
>
> Now what kind of sense does it make from a policy standpoint, not just ours but the world's, to say that this particular problem is out of bounds. In the 50's and 60's we made substantial unilateral tariff cuts in support of the GATT. If now we are unable to exercise the control of our market, there is something very wrong. Our answer is, that's not going to happen.
>
> Q. So this is a hard line the United States is going to take with the GATT if the panel decides against it?
>
> Mr. Williams: We have to. Because how can we justify an international system that does not allow a country an opportunity to exercise its influence in an obvious market-opening exercise. Logic is stood on its head. We didn't set out to close this market to Brazilian products. Everybody knows that.

Farnsworth, *Washington's Hard Line on Trade*, N.Y. Times, June 25, 1989, § 3, at 4, col. 1, 3-4 [hereinafter Statement of Williams].

Both perspectives hold merit. The task of the trade negotiator will be to establish a compromise perspective. To aid in this task, this Article suggests that the GATT be analogized to a long-term commercial agreement among sovereigns that requires equitable adjustment based on changed circumstances or frustration of purpose. The industrialized countries should provide trade concessions to the extent necessary to ameliorate short-term economic dislocations in the developing countries resulting from the adoption of new intellectual property rules. This is because the developing countries reasonably relied on previously agreed norms in the development of their internal policies. Over the long term, the full value of intellectual property should be recognized as a cost component of industrialized country exports, and appropriations or transfers of intellectual property at less than full value should be evaluated as any other below-value appropriations or transfers (whether prohibited, compensated for, or treated as other forms of economic aid).

Multilateral acceptance of enforceable ownership rights in intellectual property is necessary because the industrialized countries strongly perceive a need to protect their national wealth, not because natural law dictates protection, nor because such protection in itself will yield economic and social benefits to developing countries. Failure by the GATT to recognize and enforce such rights will only intensify pressures to achieve alternative solutions—through, for example, increased industralized country reliance on unilateral sanctions—that will most likely destabilize the liberal trading system.

II. THE INTELLECTUAL PROPERTY PROBLEM

A. *Treatment in the GATT*

The expanding significance of intellectual property as an element of national wealth might, in retrospect, have been apparent in the immediate post-World War II environment.[6] Certainly, the emergence of radar, radio field communications, rockets, and atomic weapons as pivotal components of military strategy pointed to an increasingly important role for science and technology in the postwar era. Nevertheless, if a glimmer of events to come was available to the 1940s statesman, the General Agree-

6. Scholars such as Professor Walter Hamilton, who wrote on the subject of patents for the Temporary National Economic Committee in 1941, emphasized the role of technology as a component of national wealth. SENATE TEMPORARY NATIONAL ECONOMIC COMM., 76TH CONG., 3D SESS., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: PATENTS AND FREE ENTERPRISE 164 (Comm. Print 1941) (W. Hamilton, Monograph No. 31) [hereinafter Hamilton].

ment did not reflect it. Reference to intellectual property in the text of the Agreement is essentially limited to a provision permitting the adoption by individual GATT member states of domestic legislation necessary to protect intellectual property (legislation that must be consistent with the GATT),[7] and to a provision aimed at preventing the use of trade names to misrepresent origin.[8] Professor Jackson observed in 1969 that the General Agreement was basically intended to apply only to goods.[9] The General Agreement does not address the extraterritorial protection of intellectual property rights in any explicit manner.

Two developments subsequent to the drafting of the General Agreement lent scope and intensity to what will be referred to as the "intellectual property problem." The first was the tremendous growth in the significance of technology to the industrialized countries. Constant innovation has become the hallmark of the economies of the OECD countries, and the technology/innovation component of exports—both tangible and intangible—has become a major factor in international economic competition.[10] The second development was the dramatic increase in the relative significance of international trade to the world gross economic product[11] and the concomitant intensification of international eco-

---

7. Article XX(d) authorizes each member country to adopt measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices." GATT, *supra* note 1, art. XX(d), at A61, T.I.A.S. No. 1700, 55 U.N.T.S. at 262, 4 GATT, BISD, at 37-38.

8. GATT, *supra* note 1, art. IX(6), at A30, T.I.A.S. No. 1700, 55 U.N.T.S. at 222-23, 4 GATT, BISD, *supra* note 1, at 15. Professor Jackson notes that the International Trade Organization (ITO) Draft Charter referred to intellectual property rights, but in the context of prohibiting the use of such rights for restrictive business purposes. JACKSON, *supra* note 1, at 511 n.1. Articles XII(3)(c)(iii) and XVIII(10) of the General Agreement provide, in addition, that balance of payments measures should not prevent compliance with the intellectual property rights laws. GATT, *supra* note 1, at 8 U.S.T. 1767, 1772, 1781 T.I.A.S. No. 3930, 278 U.N.T.S. 168, 176, 190, 4 GATT, BISD, at 19, 31.

9. JACKSON, *supra* note 1, at 511.

10. *See, e.g.*, U.S. INT'L TRADE COMMISSION, PUB. NO. 2065, FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE (1988) (Report to United States Trade Representative [USTR]) [hereinafter ITC REPORT]. Empirical verification of this observation hardly seems necessary with reference to computers, aerospace products, chemicals, pharmaceuticals, videorecorders, telecommunications equipment, weapons, software, fax machines, and special-effects-laden movies having assumed a central role in modern society.

11. According to the GATT, world merchandise trade in 1988 reached an estimated $2.84 trillion, reflecting a 14% increase over 1987, and substantially exceeding the increase in world gross economic product. *1988 World Trade Growth up Sharply, Strong*

nomic interdependence (no doubt reflecting to some extent the success of the GATT).[12] These two factors—technology as a major component of national wealth, and heightened economic interdependence—create a situation that demands attention.

B. *Defining the Intellectual Property Problem*

The intellectual property problem involves the unintended transfer of wealth from the industrialized country economies to the developing and newly industrialized country (NIC) economies. In this case, wealth takes the form of technology protected in the industrialized countries by patent and trade secret, goodwill protected by trademark and other indication of origin, expression protected by copyright, and design protected by design patent and semiconductor layout protection legislation. Intellectual property is intangible wealth, often easily appropriated and reproduced. Unlike tangible wealth, which must be mined, grown, or manufactured and is therefore subject to finite limitations of ownership or use, intellectual property wealth can be reproduced and used without depriving its creator/owner of possession or use and almost without practical limit. Once created, the marginal cost of reproduction is often near zero. The intellectual property problem therefore concerns devising a mechanism for protecting industrialized country intangible wealth, distinctly requiring the cooperation of developing countries and NICs, which by providing such protection forego a potential economic windfall.

Demands for protection of intellectual property are often based (implicitly or explicitly) on a theory of natural law or moral right—the idea that intellectual property is naturally owned by the person who creates it and that appropriation from that person without compensation is wrongful[13] (whether such appropriation is purely domestic or international).

1989 Possible, GATT Report Says, 6 Int'l Trade Rep. (BNA) 272 (Mar. 1, 1989).

12. Increasing global interaction and interdependence arising from more efficient means of communication and transportation are profoundly impacting the entire spectrum of human endeavor. *See* McDougal, Lasswell, & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188-94 (1968). The intensification of international economic interdependence following World War II is discussed in M. MCDOUGAL & D. HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 1166-203 (1948).

13. Fritz Machlup described the natural law theory with respect to the protection of patents as follows:

> The "natural-law" thesis assumes that man has a natural property right in his own ideas. Appropriation of his ideas by others, that is, their unauthorized use, must be condemned as stealing. Society is morally obligated to recognize and protect this property right. Property is, in essence, exclusive. Hence, enforcement of

However, national policies on the scope of legitimized intellectual property rights vary widely[14] depending on the results of a cost/benefit analysis balancing the immediate public welfare against long-term interests in private capital formation. National policy, as opposed to natural law, has shaped the grant of the intellectual property right. While a combination of self-interest and equity have given rise to a system in which states grant to foreign nationals intellectual property rights protection equivalent to that accorded to local entities,[15] the scope of local protection has not been intuitively derived from natural law.

C. *What the Intellectual Property Problem Is Not*

An influential segment of the United States intellectual property community is promoting developing country protection of intellectual property based on claimed benefits to those countries.[16] However, the intellec-

---

exclusivity in the use of a patented invention is the only appropriate way for society to recognize this property right.

SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, OF THE COMMITTEE ON THE JUDICIARY, 85TH CONG., 2D SESS., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 21 (Comm. Print 1958) [hereinafter Machlup]. Machlup emphatically rejected this natural law reasoning as a basis for the granting of patents.

14. *See* discussion of national systems, *infra* part III, section B.

15. *See* discussion of intellectual property treaties, *infra* part III, section A.

16. *See, e.g.,* INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 20-21 (R.M. Gadbaw & T. Richards eds. 1988) [hereinafter Gadbaw & Richards]. Proponents of enhanced intellectual property protection frequently refer to a paper by M.L. Burnstein in arguing that patent protection may play a positive role in the industrial development of developing countries. Burnstein, *Diffusion of Knowledge-Based Products: Applications to Developing Economies*, 22 ECON. INQUIRY 612, 615-18 (1984). *See, e.g.,* Gadbaw & Richards, *supra*, at 21 & n.21. This paper, however, does not claim an empirical basis and arrives at its conclusions regarding the positive impact of intellectual property protection on the basis of assumptions and predictions concerning economic behavior.

While not empirically substantiated, industrialized country economists argue that increased levels of intellectual property protection will produce a variety of short- and long-term benefits for developing countries. They suggest that increased levels of developing country patent protection will: (1) encourage technology transfers and investment from the industrialized economies to the developing economies by providing an hospitable environment; (2) stimulate local innovation and technology infrastructures (by providing an environment in which local innovators are encouraged both to create and share their creations); (3) encourage domestic investment in local technology-based industries; and (4) promote exports by opening markets otherwise closed to those manufacturing without authorization. In the trademark area they suggest that developing country protection will increase the local introduction of new foreign discoveries and the diffusion of information necessary to make consumer markets function efficiently by permitting consumers to make educated choices about goods of varying quality. In the copyright area they suggest

tual property problem is not a failure by the developing countries to recognize the social or economic utility of granting and protecting rights in intellectual property. In the industrialized countries themselves, the most well-reasoned studies of patent systems have been inconclusive with respect to the social or economic utility of those systems. Machlup, Hamilton, and Jewkes each concluded by different routes that continuation of the industrialized country patent systems is justified because they exist and do not appear to do any great harm.[17] No significant empirical study as yet has demonstrated the beneficial impact of the patent grant on economic growth or social development. A study yielding such results might indeed be possible, but it is in the realm of the future. Attempting to persuade developing countries that the industrialized countries are promoting enhanced intellectual property protection to accelerate the former's economic growth is neither necessary nor appropriate at this point. The intellectual property debate stands on firmer ground if premised on recognition that the industrialized countries are attempting to protect an increasingly important component of their national wealth.

D. *Quantifying the Intellectual Property Problem*

Quantifying the intellectual property problem in terms of financial losses to industrialized country business enterprises due to unintended (or unauthorized) appropriation of intellectual property by developing country enterprises is difficult because it involves several highly uncertain factors. First, losses to industrialized country enterprises take the form of lost revenue opportunities, and calculation of such losses requires

---

that enhanced intellectual property protection stimulates local innovation and the flow of ideas from abroad. Industrialized country economists recognize that there is a short-term loss from enhanced protection that will be absorbed by developing countries, in the form of lost pirate revenues and the reallocation of resources, but contend that these losses will be compensated for by the long-term benefits enumerated above. *See, e.g.*, MacLaughlin, Richards & Kenny, *The Economic Significance of Piracy,* in Gadbaw & Richards, *supra* note 16, at 89-91, 97-108; Sherwood, The Benefits Developing Countries Gain from Safeguarding Intellectual Property (June 1988) (unpublished, in author's files). A more evenhanded, if more limited, view of the potential ways in which national patent systems might stimulate growth in developing countries—primarily based on the capacity of such systems to disseminate technical information—is found in Lecture by Klaus Pfanner, WIPO Deputy Director General, The Usefulness of National and International Protection of Inventions, *reprinted in* WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], THE USE OF THE PATENT SYSTEM BY INDUSTRIAL ENTERPRISES IN DEVELOPING COUNTRIES 43, 51-54 (1982).

17. *See* Machlup, *supra* note 13, at 80; Hamilton, *supra* note 3, at 163; J. JEWKES, D. SAWERS & S. STILLERMAN, THE SOURCES OF INVENTION 25-54 (1958).

the hypothesis of unaffected revenues.[18] Second, because intellectual property is often easy to reproduce and difficult to trace, the extent of unauthorized appropriation and use involves speculation. Data collected from industrialized country enterprises by government agencies or trade organizations are not likely to be subject to the kind of rigorous examination required for a least-biased estimate of losses. Cautionary observations aside, several attempts to quantify intellectual property losses have been made,[19] the most recent and influential of which is a report produced by the United States International Trade Commission (ITC) in 1988 at the request of the United States Trade Representative (USTR) (ITC Report).[20]

The USTR asked the ITC to prepare a comprehensive study of "distortions in U.S. worldwide trade associated with deficiencies in the protection provided by foreign countries to U.S. intellectual property rights."[21] The ITC was requested to consider distortions caused by trademark counterfeiting, as well as infringement and misappropriation of copyrights, patents, semiconductor chip design, trade secrets, and other types of intellectual property.[22] The ITC compiled its data from a questionnaire sent to 736 United States companies, including all Fortune 500 companies, for the year 1986.[23]

The ITC estimated 1986 aggregate worldwide losses to United States companies responding to its questionnaire at $23.8 billion. Based on "reasonable" (but not statistically valid) assumptions, the ITC Report extrapolated this data to estimate that worldwide losses to United States industries in 1986 ranged from $43 billion to $61 billion.[24] The ITC

---

18. *See* USTR, 1989 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 2-4 (1989) [hereinafter FTB REPORT] (discussing difficulties in quantifying the impact of foreign trade barriers, particularly non-tariff barriers).

19. *See, e.g.,* Gadbaw & Richards, *supra* note 16, at 92-97 (approaching the problem by identifying significant "pirate" countries and then attempting to quantify estimated losses in the form of "pirate sales" in these countries). The European Communities have also produced a report estimating intellectual property losses. *Referred to in* INTELLECTUAL PROPERTY COMMITTEE (U.S.A.), KEIDANREN (Japan) & UNICE (Western Europe), BASIC FRAMEWORK OF GATT PROVISIONS ON INTELLECTUAL PROPERTY: STATEMENT OF THE VIEWS OF THE EUROPEAN, JAPANESE AND UNITED STATES BUSINESS COMMUNITIES 13 (1988) [hereinafter IPC FRAMEWORK].

20. ITC REPORT, *supra* note 10.

21. Letter from Clayton Yeutter to Susan Liebeler (Jan. 12, 1987), *reprinted in* ITC REPORT, *supra* note 10, app. A, A-2.

22. *Id.*

23. ITC REPORT, *supra* note 10, at vii. 431 firms responded to the questionnaire. *Id.*

24. For questionnaire respondents, losses were estimated at 1.9% of worldwide sales.

Report attributed a significant concentration of estimated losses to certain developing countries and NICs: Brazil, China, Hong Kong, India, Mexico, Nigeria, the Republic of Korea, and Taiwan.[25] Reporting firms accounting for eighty-four percent of aggregate losses in 1986 indicated that in the last fifteen years losses from inadequate intellectual property rights protection had grown moderately or greatly; the ITC Report attributed this phenomenon to two factors:

> First, the situation has undoubtedly deteriorated in the past 15 years; international trade has increased markedly; production capabilities in countries with less than adequate protection have increased; and U.S. firms have made increasing efforts to exploit foreign markets and use foreign production sites. All these factors increase the exposure of U.S. firms to intellectual-property violations. Concurrent with these developments, the overall awareness of the importance of intellectual property to profitability has increased substantially in U.S. business; thus the respondents are far more aware of losses stemming from inadequate intellectual property protection than they were 15 years ago.[26]

Quantifications of intellectual property losses, although subject to question over amount (and whether quasi-empirical or anecdotal), identify a relatively consistent list of countries whose lack of legislation or enforcement results in a significant level of unauthorized appropriation of industrialized country intellectual property. As a broad characterization, and with very limited exception, these states are either newly-industrialized or developing.[27] The industries that appear most affected are

---

Id. app. 4, at H-3.

25. *Id.* at 4-16, 4-18. Brazil (98), Mexico (95), Korea (84), Taiwan (78), and India (64) were most frequently identified as providing inadequate intellectual property protection. *Id.* at 3-3.

26. *Id.* at 5-1.

27. Japan's intellectual property policies appear to have undergone, or to be undergoing, a substantial shift toward enhanced protection as that country adapts to a new role as technology owner and innovator (as opposed to appropriator). M. Borrus, *The Developmental Perspective: Japan's Performance in Intellectual Property Protection*, in PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS (F. Rushing & C. Brown eds. 1990) (to be published by West View Press). As described in the FTB Report, current United States complaints concerning Japan do not involve the substance of Japanese patent laws, but rather inefficient procedures that arguably are used to discriminate against foreign patent applicants. *See* FTB REPORT, *supra* note 18, at 104-05. Concerns over Canada focus almost exclusively on lack of protection against unauthorized and uncompensated retransmission of television signals, a matter being addressed under the Canada-U.S. Free Trade Agreement. *Id.* at 29; Canada-U.S. Free Trade Agreement, *opened for signature* Jan. 2, 1988, art. 2006, H.R. DOC. NO. 100-216, 100th Cong., 2d

chemicals and pharmaceuticals, computer software, and entertainment (audio and video).[28]

III. THE CURRENT SYSTEM FOR THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY AND ITS SHORTCOMINGS

A. *The Treaty System*

The current international system for the protection of intellectual property consists of a variety of treaties administered by international organizations (primarily the World Intellectual Property Organization, or WIPO),[29] which essentially coordinate nation-state legal regimes that are relied upon to provide both substantive norms and enforcement procedures. The principal international treaty for the protection of patents, trademarks, and industrial designs is the Paris Convention for the Protection of Industrial Property (Paris Convention), which was concluded in 1883, was last revised in 1967, and has ninety-eight Member States.[30] WIPO administers the Paris Convention. The principal features of the Paris Convention are the obligation of states to extend national treatment to residents of other states and a right of priority to applicants of foreign Member States for their patent, trademark, and design filings. The Paris Convention permits Member States to take legislative measures providing for the grant of compulsory licenses for patents in, for example, cases

---

Sess., 534-36 (1988), ___ U.S.T. ___, T.I.A.S. No. ___, *reprinted in* 27 I.L.M. 281, 396-97 (1988).

28. For a more detailed discussion of allegedly inadequate national legislation as outlined in the FTB REPORT, *supra* note 15, see *infra* part III, section B (National Systems).

29. WIPO was established by multilateral convention in 1967 and administers various intellectual property treaties, studies intellectual property laws, renders intellectual property law assistance, and proposes model laws and treaties. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3.

30. Mar. 20, 1883, *as revised* at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305 [hereinafter Paris Covention], *reprinted in* 2A J.W. BAXTER & J.P. SINNOTT, WORLD PATENT LAW AND PRACTICE app. 3, at 22 (1989). *See generally* 1-3 S. LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION (1975); R. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS (1987); *see also Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property*, GATT Doc. MTN.GNG/MG11/W/24, at 3 (June 1988) [hereinafter *WIPO Report*]. This document was prepared for the GATT Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods. The discussion in this section relies largely on current information set forth in the *WIPO Report*.

of non-work.[31]

Proponents of enhanced intellectual property protection criticize the Paris Convention with respect to patents[32] because: (1) it does not adequately address the subject matter of technologies; (2) it does not set a minimum patent term;[33] (3) it does not expressly provide for payment of full compensation for compulsory licenses; (4) it is too permissive with respect to the granting of compulsory licenses; and (5) though providing for recourse to the International Court of Justice in disputes between Member States,[34] the Convention does not establish standards for national enforcement and cannot, in any event, be considered to provide a meaningful dispute settlement mechanism.[35] Critics express similar con-

---

31. This latter right is limited pursuant to the Lisbon (1958) Act, art. 5A(2), (4), 13 U.S.T. 1, 30, T.I.A.S. 4931, 828 U.N.T.S. 107, 123 and the Stockholm (1967) Act of the Paris Convention, *supra* note 30, 1636-37, T.I.A.S. No. 6923, 828 U.N.T.S. at 320-21, which set certain limits on the granting of compulsory licenses. According to the *WIPO Report*, under these Acts (which together bind 87 countries):

> a compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it must be refused if the patentee justifies his inaction by legitimate reasons; such a compulsory license must be non-exclusive and is not transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

WIPO Report, *supra* note 30, at 9.

32. *See* Dam, *The Growing Importance of International Protection of Intellectual Property*, 21 INT'L LAW. 627 (1987); *U.S. Framework Proposal to GATT Concerning Intellectual Property Rights*, 4 Int'l Trade Rep. (BNA) 1371 (Nov. 4, 1987) [hereinafter *U.S. Framework Proposal*]; IPC FRAMEWORK, *supra* note 19, at 34-40.

33. Annex VI of the *WIPO Report*, *supra* note 30, sets forth a wide range of prevailing patent terms (from 5 to 20 years) and a number of different dates from which such periods are calculated. Turkey, Colombia, Ecuador, and Peru grant five-year patent terms, although in Turkey the term may vary, and in the other three countries five-year extensions are available for working patents. *Id.*

34. This provision is applicable only to 72 of the 98 members. There is no dispute settlement provision in force with respect to the other 26 members. *WIPO Report*, *supra* note 30, at 13; Paris Convention, *supra* note 30, art. 28, at 1665-66, T.I.A.S. No. 6923, 828 U.N.T.S. at 364-65.

35. The problems with referral of disputes to the International Court of Justice (ICJ) are apparent. First, pursuant to the United Nations Charter, enforcement of ICJ judgments comes through either voluntary cooperation of the affected member state or referral to the Security Council (and possibly to the General Assembly). It seems unlikely that the United Nations Security Council would act to enforce an ICJ judgment protecting intellectual property rights. In addition, there has been only one attempt to enforce a PCIJ (predecessor to the ICJ) judgment in a municipal court, and in this case, Socobel v. Greek State, 1951 I.L.R. 3, the attempt was not successful. R. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 125-62 (1985); W.M. REISMAN,

cerns over the lack of substantive standards and enforcement mechanisms for trademarks.[36]

The most important international treaty for protecting copyright is the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[37] The Berne Convention is administered by WIPO. Major features of the Berne Convention, to which over seventy-five states are parties, are the extension of national treatment to foreign authors; the recognition of a minimum copyright term (generally the life of the author plus fifty years); the establishment of "moral rights" of authors (e.g., granting the right to authors to protect the integrity of artistic works after transfer of their economic interests); and the requirement of a lack of formalities for obtaining copyright protection.[38] Like the Paris Convention, the Berne Convention provides for the submission of disputes over its interpretation or application to the International Court of Justice.[39] On October 20, 1988, the United States Senate approved accession to the Berne Convention,[40] partly in an effort to allay international doubt as to the United States commitment to protect intellectual property.

The Berne Convention is primarily criticized for its lack of an effective dispute settlement mechanism.[41] The attitude of the United States copyright industries toward this treaty has been summarized as follows:

NULLITY AND REVISION 815-22 (1971).

36. *See, e.g.*, IPC FRAMEWORK, *supra* note 19, at 45-48.

37. Sept. 1886, *as revised* at Paris, July 24, 1971, ___ U.S.T. ___, T.I.A.S. No. ___, 3 WIPO & UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, Berne Conv. (Item H) (Supp. 1974) [hereinafter Berne Convention]. *See generally WIPO Report*, *supra* note 30, at 14-30; R. BENKO, *supra* note 30, at 5-7, 53-54.

38. Berne Convention, *supra* note 37, arts. 5(1), 7(1), 6bis(1).

39. *Id.* art. 33; Paris Convention, *supra* note 30, art. 28, at 1665-66, T.I.A.S. No. 6923, 828 U.N.T.S. at 364-65.

40. For the text of the Senate Resolution of Ratification, see 134 CONG. REC. S16,939 (daily ed. Oct. 20, 1988). Amendments to United States copyright legislation that followed United States adherence to the Berne Convention are found in the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (1988).

41. *See* INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, U.S. GOVERNMENT TRADE POLICY: VIEWS OF THE COPYRIGHT INDUSTRIES 13-14 (1985) [hereinafter IIPA]; Dam, *supra* note 32, at 631; *U.S. Framework Proposal*, *supra* note 32, at 1371.

A second treaty dealing with copyright is the Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, *as revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178, which, prior to the United States accession to Berne, was significant primarily because it was the most inclusive copyright treaty to which the United States was a party. *See* A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION (1964).

> The protection offered by these rules, however, cannot cure many of the intellectual property problems faced today by America's creative industries. First, national treatment becomes meaningless when the national laws of developing countries are inadequate, or not enforced. Second, the limited number of signatories and the Conventions' [referring also to the Universal Copyright Convention] lack of application to nonmember countries also diminish their effectiveness. Finally, the lack of mechanisms for consultations, for dispute settlement or for remedying violations limits their usefulness.[42]

In addition to its failure to provide adequate substantive norms and dispute settlement procedures, the current treaty system is criticized for its lack of attention to certain important subject matter areas. No international treaty exists regarding the protection of trade secrets (although most countries would appear to grant some form of local protection).[43] There is sufficient doubt as to the protection afforded to semiconductor layout under existing copyright law that a significant number of countries, including the United States and Japan,[44] have adopted sui generis legislation covering the protection of such designs. The Council of the European Communities adopted a 1986 directive obliging all European Communities Member States to adopt such laws.[45]

On May 26, 1989, a diplomatic conference in Washington, D.C., adopted a Treaty on Intellectual Property in Respect of Integrated Circuits, to be administered by WIPO.[46] The United States and Japan, however, opposed the treaty. Included in the provisions apparently objec-

---

42. IIPA, *supra* note 41, at 13.

43. IPC FRAMEWORK, *supra* note 19, at 88-89; *see generally* 1-5 A. WISE, TRADE SECRETS AND KNOW-HOW THROUGHOUT THE WORLD (1981).

44. These countries include Denmark, France, the Federal Republic of Germany, Japan, the Netherlands, Sweden, the United Kingdom and the United States. *WIPO Report*, *supra* note 30, at 40.

45. *Council Directive of 16 December 1986 on the Legal Protection of Topographies of Semiconductor Products (87/94/EEC)*, 30 O.J. EUR. COMM. (No. L24) 26 (1984).

46. World Intellectual Property Organization: Treaty on Intellectual Property in Respect of Integrated Circuits of May 26, 1989, *reprinted in* 28 I.L.M. 1477, 1484 (1989) [hereinafter Integrated Circuits Treaty]; *see* F. Abbott, Introductory Note regarding the Treaty on Intellectual Property in Respect of Integrated Circuits, 28 I.L.M. 1477 (1989) [hereinafter Introductory Note]; *see also U.S., Japan Refuse to Sign WIPO Treaty on Protection of Integrated Circuits*, 6 Int'l Trade Rep. (BNA) 742 (June 7, 1989) [hereinafter *Integrated Circuits*]. The treaty was approved by forty-nine states. The United States and Japan voted against the treaty (a statement of the U.S. delegation issued in connection with its vote is reprinted in 28 Pat. Trademark & Copyright J. (BNA) 123, 124 (June 1, 1989). Five countries, including Canada, Sweden and Switzerland, abstained from voting. Introductory Note, *supra*.

tionable to the United States are: (1) a minimum duration of protection of eight years;[47] (2) liberal rules with respect to compulsory licensing;[48] (3) a dispute settlement procedure that is too "politicized" (in the words of a United States official)[49] and that, unlike the GATT dispute settlement procedure, would not permit the imposition of meaningful sanctions;[50] and (4) the absence of compensation for innocent infringement following notice.[51]

B. *National Systems*

The international treaty system, while providing minimum substantive standards in a few intellectual property rights areas, does not presently operate as an effective substantive rule-making system, nor does it meaningfully address domestic enforcement procedures. These matters are presently reserved to the internal legal systems of individual states, and as such substantial disparities prevail in substantive rules, enforcement procedures, and enforcement practices. The scope of the basic substantive differences is apparent from a review of the WIPO Report to the GATT working group on trade-related aspects of intellectual property (TRIPs),[52] which provides a comprehensive, although general, current

---

47. Integrated Circuits Treaty, *supra* note 46, art. 8; *compare* Semiconductor Chip Protection Act of 1984, 17 U.S.C. § 904 (1988).

48. Integrated Circuits Treaty, *supra* note 46, art. 6(3). The treaty permits the granting of compulsory licenses in "circumstances that are not ordinary," subject to a number of qualifications, including that equitable remuneration be paid. *Compare* Paris Covention, *supra* note 30, arts. 5(A)(2), (4), at 1636-57, T.I.A.S. No. 6923, 828 U.N.T.S. at 320 (concerning compulsory licensing with respect to patents).

49. Statement of Michael Kirk, United States Patent Office, in *Integrated Circuits, supra* note 46. The reference to the political nature of the dispute settlement procedure is apparently based on the significant level of involvement of the treaty "Assembly" in the dispute settlement procedure.

50. Article 14 of the treaty provides for establishment of dispute settlement panels and for recommendations by the Assembly, but there is no provision which might confer power on the Assembly to impose remedial measures (even the suspension of treaty-related rights and obligations). Integrated Circuits Treaty, *supra* note 46, art. 14. Since the new treaty is, like the Paris and Berne Conventions, outside the scope of the GATT, it is clearly beyond the competence of the new treaty Assembly to vote trade-related sanctions against a treaty violator.

51. *Id.* art. 6(4). Although the United States is reported to be concerned with inadequate treatment of integrated circuits incorporated in articles, the treaty appears to provide protection against the importation of prohibited layouts in integrated circuits incorporated in articles. *Id.* art. 3(1)(b).

52. For discussion of the formation of the GATT Trade-Related Aspects of Intellectual Property Rights working group, see *infra* note 78 and accompanying text. Selecting as an example the scope of authority to grant compulsory patent licenses, the *WIPO*

survey of the intellectual property laws in force throughout the world (both in GATT and non-GATT countries).

In a 1989 Foreign Trade Barriers Report (FTB Report),[53] the USTR's office identified the most serious existing defects (from the standpoint of United States Government) in important foreign intellectual property legal regimes. The findings in the FTB Report were consistent with those in the earlier ITC Report, but were set out in terms of substantive law and enforcement deficiencies rather than as quantifications of losses. A summary of the USTR's country-by-country findings is set out as an Appendix to this Article. Taken together, the ITC and FTB Reports highlight in a significant number of developing countries and NICs a lack of patent subject matter coverage for chemicals and pharmaceuticals, short patent terms and overly permissive compulsory patent licensing, and inadequate copyright legislation and enforcement with respect to the audio, video, and software sectors.

C. *The United States Bilateral Approach*

While pronouncing GATT-based multilateral negotiations its preferred strategy for resolving trade problems,[54] the United States Govern-

---

Report cites several categories of grounds relied upon by a diverse collection of states, including licenses granted for non-working, the public interest, prevention of economic abuse or promoting economic development, public health, national defense, and relationship to atomic energy or pollution. *WIPO Report*, *supra* note 30, at 9-11.

53. *Supra* note 18.

54. Referring again to a recent New York Times interview of Deputy United States Trade Representative S. Linn Williams, the United States preference for multilateral solutions to trade problems not currently covered by the GATT was expressed as follows:

> Q. The United States has been accused of unilateralism, acting on its own without regard to international rules. Have we dramatically shifted our trade policy away from the multilateralism of an earlier day, symbolized by the General Agreement on Tariffs and Trade, the world's free-trade charter?
>
> Mr. Williams: No, we have not. Our trade policy is very much a market-opening trade policy. It is more aggressive in what it is doing to address the principles behind the policy. If you look at the policy, the policy isn't just multilateralism, the policy is market-opening. That's what the GATT does.
>
> Our preference for doing that is multilateral. We take second place to no country in our support of GATT. But the GATT doesn't do the job in a lot of areas [The GATT does not cover barriers to trade in services, for example, or technical standards that may have an impact on trade.]
>
> If you look at the areas that we cite in Super 301, that is where GATT is not effective, and where GATT is not effective, we take the position that we will use our domestic law to continue to open markets. Now we don't consider that unilateral at all. We consider that bilateral at a minimum and we consider it multilat-

ment has undertaken an intense program of direct bilateral negotiations, coupled with the threat and use of unilateral economic sanctions, to attempt to improve foreign protection for United States intellectual property rights owners. Although existing unfair foreign trading practices legislation already addressed inadequate protection of intellectual property rights and was used in several intellectual property disputes, Congress heightened the priority of the intellectual property issue in the enactment of the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act) by outlining an explicit program of executive action. Congressional action took the form of amendments to foreign unfair trading practices legislation (originally enacted as section 301 of the Trade Act of 1974).[55] These amendments, which generally give the appearance of limiting executive discretion with respect to trade barriers investigations and remedies,[56] require the USTR to (1) identify[57] countries that deny adequate and effective protection of intellectual property rights;[58] (2) identify "priority" countries that are the most egregious intellectual property rights transgressors and that do not undertake or make progress in negotiations with the USTR;[59] and (3) initiate accelerated section 301 investigations with regard to the practices of the identified priority countries (which may lead to the taking of remedial action).[60] On May 25, 1989, the Office of the USTR, using these newly-christened "Special 301" provisions of the 1988 Trade Act,[61] placed seventeen countries on an intellectual property "Watch List"[62] and eight countries on a "Prior-

---

eral because the purpose of the multilateral system is market-opening. Statement of Williams, *supra* note 5, at col. 3.

55. 19 U.S.C.A. §§ 2242, 2411-2420 (West Supp. 1989).

56. Although Section 301, as amended, imposes "mandatory" obligations on the executive branch, the escape clauses are rather broad, and it is not at all clear that the executive branch is effectively bound, *see, e.g., id.* § 2411(a)(2)(B)(iv). The USTR has broad discretion to determine whether to initiate investigations. *Id.* § 2412(c).

57. The results of an initial identification of intellectual property trade barriers is incorporated in the USTR's National Trade Estimate Report, *see, e.g.*, the FTB REPORT, *supra* note 18. *Id.* § 2241.

58. *Id.* § 2242(a)(1).

59. *Id.* § 2242(a)(2), (b), (c).

60. *Id.* §§ 2412(b)(2), (c); 2411(a), (b), (d)(3)(B)(i)(II), (d)(4)(B). The USTR is given significant latitude with respect to the imposition of sanctions regarding most intellectual property practices.

61. For a concise explanation of the new Special section 301 procedures, complete with a guide to updated USTR vernacular, see *USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property*, 6 Int'l Trade Rep. (BNA) 715-21 (May 31, 1989) [hereinafter *Fact Sheets*].

62. The seventeen countries on the Watch List are: Argentina, Malaysia, Canada, Pakistan, Chile, the Philippines, Colombia, Portugal, Egypt, Spain, Greece, Turkey, In-

ity Watch List."[63] The USTR did not identify any "priority" countries, because, while the eight Priority Watch List countries met some or all of the statutory criteria for priority country identification, they had made progress in recent bilateral or multilateral negotiations and therefore fell (at least temporarily) within a statutory exemption.[64] The USTR indicated her intention to review the Priority Watch List no later than November 1, 1989, to consider progress under an accelerated action plan for pursuing negotiations with each country named.[65] The USTR press release accompanying the Watch List and Priority Watch List identifications stated:

> —As a result of this extensive review, the USTR concluded that no foreign country currently meets every standard for adequate and effective intellectual property protection as set forth in the U.S. proposal on intellectual property tabled in the Uruguay Round.
> —Thus the USTR has determined that all countries are eligible for potential priority designation based on the standards of the U.S. Uruguay Round proposal, because all countries "deny adequate and effective protection of intellectual property rights" within the meaning of the statute.[66]

D. *The Brazilian Pharmaceutical Patent Dispute*

At the end of 1988, the USTR, acting on a complaint from the Pharmaceutical Manufacturers Association (PMA), imposed approximately $40 million in *ad valorem* tariffs on a variety of Brazilian imports as a consequence of Brazil's continuing refusal to extend product and process patent coverage to pharmaceuticals.[67] Brazil has contended that its pat-

---

donesia, Venezuela, Italy, Yugoslavia, and Japan. *Id.* at 719.

63. The eight Priority Watch List countries are: Brazil, the Republic of Korea, India, Saudi Arabia, Mexico, Taiwan, the People's Republic of China, and Thailand. *Id.*

64. *Id.* 19 U.S.C.A. § 2242(b)(1)(C).

65. *Fact Sheets, supra* note 61, at 719. On November 1, 1989, the USTR moved Saudi Arabia, South Korea and Taiwan from Priority Watch List status to Watch List status. *Intellectual Property: Hills Removes Taiwan, Korea, Saudi Arabia from Priority List, Five Countries Remain*, 6 Int'l Trade Rep. (BNA) 1436 (Nov. 8, 1989).

66. *Fact Sheets, supra* note 61, at 719.

67. For a complete history of the United States/Brazil pharmaceutical patent dispute, see 4 Int'l Trade Rep. (BNA) 787, 957 (1987); 5 Int'l Trade Rep. (BNA) 277, 976, 1056, 1078, 1091, 1163, 1247, 1310 (1988); 6 Int'l Trade Rep. (BNA) 23, 194, 238, 510 (1989). The imposition of retaliatory tariffs on Brazilian products is the first direct remedial action the USTR has taken against a foreign country under section 301 for lack of intellectual property rights protection. The United States initiated a section 301 action against Korea for lack of such protection, but the matter was settled on the basis of extensive Korean undertakings. *See* Bello & Holmer, *Significant Recent Devel-*

ent policies are fully consistent with its international legal obligations, both under the international intellectual property treaty system and the GATT.[68] The intellectual property treaty system does not mandate specific subject matter (e.g., pharmaceutical product or process) coverage, and Brazil's patent laws do not discriminate against foreign imports.[69] Brazil lodged a complaint with the GATT, charging that the retaliatory and discriminatory United States tariffs violate the latter's obligations under the General Agreement (including respect for the Most Favored Nation principle). After initial objection by the United States, a GATT panel formed to decide the dispute. According to a senior GATT official, Brazil's position has received the "most massive support we have ever seen in a panel dispute," accompanied by a complete absence of support for the United States position.[70]

United States actions under section 301 are evidence of a government and industry resolve to halt an unintended transfer of wealth from the United States.[71] No doubt exists, however, that this program meets with

---

opments in Section 301 Unfair Trade Cases, 21 INT'L LAW. 211, 221-23 (1987).

68. 6 Int'l Trade Rep. (BNA) 238 (Feb. 22, 1989).

69. Brazil's position in the pharmaceutical patent dispute with the United States is well summarized in the statement by President Sarney issued immediately following President Reagan's decision to impose sanctions against Brazil under section 301 of the Trade Act of 1974. As reported in BNA:

> Sarney . . . issued a toughly worded reply immediately after the White House announced the Section 301 decision expressing concern with this new "unjust and unreasonable threat procedure." He said that it represents a "violation of basic principle[s] of international law and GATT rules" and that it undermines broader bilateral relations interests.
>
> Sarney said that the United States could not question the legitimacy of Brazilian legislation that has been in place for 40 years, is in accordance with international conventions, and that . . . is intended to develop Brazil's industrial policy.

Administration Plans Hearings on Sanctions Against Brazil in Pharmaceutical Patent Case, 5 Int'l Trade Rep. (BNA) 1056, 1057 (July 27, 1988).

70. 6 Int'l Trade Rep. (BNA) 194 (Feb. 15, 1989). Again acting on a PMA petition, the USTR also initiated a section 301 investigation of Argentina concerning alleged pharmaceutical patent protection inadequacies. 5 Int'l Trade Rep. (BNA) 1310 (Sept. 28, 1988). The PMA subsequently withdrew its petition based on what USTR Carla Hills referred to as " 'satisfactory progress in bilateral consultations on Argentina's practices with respect to intellectual property protection for pharmaceuticals.' " *Pharmaceutical Manufacturers Association Withdraw, 301 Petition Against Argentina*, 6 Int'l Trade Rep. (BNA) 1226 (Sept. 26, 1989).

71. There are a number of bilateral strategies to achieve enhanced intellectual property protection that the United States is pursuing. Concern for the protection of intellectual property rights is prominent in the Bilateral Investment Treaty (BIT) program. *See generally* Comment, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 U. PA. J. INT'L BUS. L. 121 (1987); Recent Developments, *Devel-*

a high degree of foreign resistance, risks significant damage to United

---

oping a Model Bilateral Investment Treaty, 15 LAW & POL'Y INT'L BUS. 273 (1983). As of the end of 1987, the United States had signed 11 BITs with developing countries. These are Bangladesh, Cameroon, Costa Rica, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire. Negotiations were underway with at least seven other countries. *Id.* at 274. The model BIT protects investment associated activities including, among others, "the acquisition, maintenance, and protection of patents, copyrights, licenses and the like." *Id.* at 285 n.66. The United States BIT program is in its infancy, and implementation of the dispute settlement mechanism is untested.

The United States has taken additional steps to protect intellectual property rights in the treaty arena. Both the United States—Israel Free Trade Agreement and the Canada—United States Free Trade Agreement contain provisions regarding the recognition of intellectual property rights. *See* United States-Israel Free Trade Area Agreement, April 22, 1985, art. 14, ____ U.S.T. ____, T.I.A.S. No. ____, *reprinted in* 24 I.L.M. 653, 662 (1985); Canada-United States Free Trade Agreement, *supra* note 27, art. 2004, H.R. DOC. No. 100-216, 100th Cong., 2d Sess., at 229, ____ U.S.T. ____, T.I.A.S. No. ____, *reprinted in* 27 I.L.M., at 396; *see generally* Recent Development, *Recent United States Trade Arrangements: Implications for the Most-Favored-Nation Principle and United States Trade Policy*, 17 LAW & POL'Y INT'L BUS. 209 (1985).

The Caribbean Basin Initiative, enacted by Congress in 1983, offers preferential treatment to goods of Caribbean countries (i.e., the elimination of all duties and tariffs on certain products for an 11 year period) after the President designates such countries, on a case by case basis, as "beneficiary countries." 19 U.S.C.A. §§ 2701-2706 (West Supp. 1989). One basis for negating eligibility is the repudiation or nullification of any patent, trademark, or other intellectual property of a United States citizen. *Id.* § 2702(b)(2)(B). In determining eligibility for benefits, the President is to take into account the protection (including enforcement) of intellectual property rights. *Id.* § 2702(c)(9), (10).

Another mechanism by which the United States may seek to increase the level of intellectual property rights protection by developing countries is through the withdrawal or threatened withdrawal of preferential tariff treatment under the Generalized System of Preferences (GSP). *See* Gadbaw & Richards, *supra* note 16, at 5-8. The United States implemented the GSP Program in passing the Trade Act of 1974. *See* J.H. JACKSON & W. DAVY, *supra* note 2, at 1154-56. GSP legislation requires the President to take into account a country's protection of intellectual property when determining its eligibility for benefits. 19 U.S.C.A. § 2462(c)(5) (West Supp. 1989).

Trade-related legislation affecting intellectual property rights also includes section 337 of the Tariff Act of 1930. 19 U.S.C.A. § 1337 (West Supp. 1989). *See generally* Zeitler, *A Preventive Approach to Import-Related Disputes: Antidumping Countervailing Duty, and Section 337 Investigations*, 28 HARV. INT'L L.J. 69 (1987); Newman & Lipman, *Representing Respondents in a Section 337 Investigation of the United States International Trade Commission*, 20 INT'L LAW. 1187 (1986). Section 337 makes it unlawful to engage in unfair methods of competition and unfair acts in the importation of articles into the United States, and provides relief from specific intellectual property related practices. Section 337 has been used effectively to bar the importation of goods that infringe United States patents, trademarks, or copyrights, or that involve misappropriated trade secrets, trade dress, passing off, false advertising, false designation of origin, or grey markets. Zeitler, *supra*, at 90-93. In a notable case, Apple Computer was able to bar the entry of computers that contained ROM chips with code infringing Apple-copyrighted

States foreign policy interests, and is terribly inefficient. Moreover, gains achieved by United States negotiators are passed on at no cost to its major trade competitors in the European Communities and Japan, thus strengthening the argument for a multilateral approach.

III. THE GATT AS AN INTELLECTUAL PROPERTY FORUM

A. *The Intellectual Property Mandate*

As observed at the outset of this Article, the General Agreement is virtually silent on intellectual property matters. The first effort by the United States to heighten GATT sensitivity to intellectual property protection was a proposal for an anti-counterfeiting code made during the GATT Tokyo Round negotiations in the late 1970s.[72] The developing countries did not actively participate in these code negotiations, a final text was not agreed upon, and formal GATT action on the proposed code did not take place. As plans for the next round of GATT negotiations were laid, United States (and European Communities) objectives for GATT involvement in intellectual property matters expanded. The United States Congress, in the Trade and Tariff Act of 1984, empha-

---

software. INTERNATIONAL TRADE COMMISSION, PUB. NO. 1504, CERTAIN PERSONAL COMPUTERS AND COMPONENTS THEREOF (Mar. 1984) (Inv. No. 337-TA-140). The 1988 Trade Act amendments to section 337 make it easier to establish a claim by (1) explicitly recognizing a right of protection for United States patents, copyrights, trademarks, and semiconductor mask works, and (2) eliminating, with respect to such protected items, the requirement of showing injury to a domestic industry. 19 U.S.C.A. § 1337(a)(1) (West Supp. 1989).

A section 337 investigation is undertaken by the United States International Trade Commission (ITC) either on its own initiative or at the request of a complainant. The ITC procedure is streamlined by the 1988 amendments so as to require the Commission to act on a petition within 90 (or 150) days and by providing for an automatic presumption of entitlement to an order based upon failure of a person to appear. *Id.* § 1337(e)(2), (g). The 1988 amendments substantially increase the civil penalties that may be assessed for violation of an ITC order. Maximum civil penalties are increased from $10,000 per day or the value of the goods, to $100,000 per day or twice the value of the goods. *Id.* § 1337(f)(2). A GATT dispute settlement panel has found section 337 to be violative of article III (National Treatment) of the GATT because foreign importers are discriminated against by being subject to truncated patent proceedings before the ITC. 6 Int'l Trade Rep. (BNA) 148 (Feb. 1, 1989).

72. L. GLICK, MULTILATERAL TRADE NEGOTIATIONS 41, 126, 152 (1984). For a description of efforts to bring intellectual property protection into the GATT beginning with the anti-counterfeiting code negotiations, and continuing through the adoption of the Uruguay Round Ministerial Declaration, see Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57 (1987).

sized the importance it attached to negotiations on intellectual property protection.[73] Following highly contentious negotiations during much of 1985 and 1986, the United States, with support from the European Communities and other OECD countries, persuaded the full GATT membership to include in the September 20, 1986, Uruguay Round Ministerial Declaration a mandate for negotiations on trade-related aspects of intellectual property rights. The mandate provided:

> In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.[74]

This new mandate was controversial because both before and after its adoption, a significant number of developing countries insisted that the GATT should not and does not contemplate the negotiation of substantive intellectual property standards.[75] According to developing countries such as Brazil and India, WIPO is the appropriate forum for the negotiation of intellectual property standards.[76] As a result of the Uruguay

---

73. Bradley, *supra* note 72, at 73-74.

74. *Id.* at 59. The Ministerial Declaration also mandated negotiations specifically for international trade in counterfeit goods. The Ministerial Declaration, in its final paragraph, reserved for all Uruguay Round negotiations the appropriate institutional mechanisms for implementing results. *Id.* at 88-98 (appendix reprinting text of Declaration).

75. *See generally id.*; *see, e.g.*, 5 Int'l Trade Rep. (BNA) 1012, 1107 (July 13, Aug. 3, 1988).

76. The perspective of the developing countries in the intellectual property dialogue is set forth in considerable detail in a position paper submitted by India to the TRIPs working group in July 1989. Paper Presented by India in Uruguay Round Multilateral Talks: Standards and Principles Concerning the Availability, Scope and Use of Trade Related Aspects of Intellectual Property Rights (1989) [hereinafter Indian Paper] (in author's files); *see also GATT: Indian Proposal Says Developing Countries Should Get Patent, Trademark Concessions*, 6 Int'l Trade Rep. (BNA) 953 (July 19, 1989). In this paper, which focuses primarily (although by no means exclusively) on patents, India argues that patent protection is a mechanism for advancing certain industrial policies and that countries at different stages of economic development must have the flexibility in their patent systems to take into account disparities in economic development. *See* Indian Paper, *supra*, para. 4, at 2. India argues that exemptions from patent protection in areas such as pharmaceuticals, food products, chemicals, microorganisms, and agricultural machinery and methods must be permitted. *See id.* paras. 8, 17, at 3, 7. India says:

> Every country should . . . be free to determine both the general categories as well as the specific products sectors that it wishes to exclude from patentability under its national law taking into consideration its own socio-economic, developmental, technological and public interest needs. It would not be rational to stipulate any

Round mandate, a GATT working group on TRIPs was established. Not until April 1989[77] did the developing countries agree to let negotiations on substantive standards proceed, reserving the issue of the GATT's competence to promulgate new rules.

---

uniform criteria for non-patentable inventions applicable alike both to industrialized and developing countries or to restrict the freedom of developing countries to exclude any specific sector or product from patentability.

Id. para. 19, at 8.

India argues for permissive compulsory licensing, particularly in cases of non-work, and argues especially for "licenses of right" in areas such as food, pharmaceuticals, and chemicals, where the conduct of the patent owner will not be in issue (i.e., licenses will be automatically granted without judicial review). The law of the host country would be used with respect to licenses of right to determine fair compensation. *Id.* paras. 13-14, at 5-6. India further argues against a uniform patent term on grounds of developmental disparities. *Id.* para. 29, at 9.

With respect to trademarks, India argues that foreign trademarks may adversely affect the allocation of resources in developing countries and should be subject to regulation in accordance with national development objectives. *Id.* paras. 31-35, at 12-13. India argues that whether a trademark is "well known" should be determined on a country-by-country basis. *Id.* para. 38, at 14.

India argues that the Berne Convention is "more than adequate to deal with copyright protection." *Id.* para. 43, at 16. India asserts that trade secrets cannot be regarded as intellectual property and should be dealt with by contract and civil law. *Id.* para. 45, at 17.

Based on the adoption of the Integrated Circuits Treaty, *see supra* notes 46-51 and accompanying text, India concludes that the issue of protection of layouts has been dealt with and is now left for implementation by the signatores. *Id.* para. 44, at 16.

In view of the foregoing, India concludes that: "It would . . . not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights." Indian Paper, *supra*, para. 47, at 18.

On September 20, 1989, India accepted the principle of policing trade-related aspects of intellectual property within the GATT. *GATT: India Accepts Policing of Trade-Related Intellectual Property Rights in MTN Talks*, 6 Int'l Trade Rep. (BNA) 1176 (Sept. 20, 1989). However, India made clear that it was referring to measures that might be implemented at national borders, and not to the negotiation of uniform intellectual property norms. *Id.* Although this may be something of a negotiating concession from India, it does not appear to represent a basic modification of India's objection to the negotiation of host country substantive norms.

A report on informal GATT ministerial talks held in Tokyo in November 1989 included reference to an expression of optimism from Arthur Dunkel, GATT Director General, on improved developing country participation in the intellectual property negotiations. *GATT: Meeting in Tokyo Attempts to Lay Plans for Final Year of Uruguay Round Talks*, 6 Int'l Trade Rep. 1514 (Nov. 22, 1989).

77. *See infra* note 93.

B. *Draft Proposals*

On October 28, 1987, the United States presented to the TRIPs working group its initial proposal for a GATT intellectual property agreement.[78] The USTR's announcement accompanying the United States proposal, as well as the proposal itself, explicitly recognized that intellectual property was a new negotiating area for the GATT, which the announcement said "must evolve with changing economic conditions and confront new trade problems."[79] The United States proposal included specific recommendations on substantive standards in the areas of patent, trademark, copyright, trade secret, and semiconductor layout. These recommendations largely reflected United States substantive intellectual property standards. The United States proposal suggested that in any agreement a mechanism be included to encourage accommodation of changing technologies. The proposal contemplated the mandatory adoption of minimum national enforcement standards, including provisions for border measures (e.g., import blocking and seizure), provisional remedies, and the expeditious resolution of disputes. Under the United States proposal, an independent GATT dispute settlement mechanism would be established to resolve intellectual property disputes.[80]

The United States proposal specifically contemplated the use of a separate GATT agreement or "code" as the institutional mechanism for implementing the new intellectual property regime. In the words of the proposal, the code would provide a "discipline" as

> an incentive for all governments to join such an Agreement in order to resolve disputes under a multilateral dispute settlement mechanism.
>
> [The code would also] provide signatories with a strong basis for coordinating their efforts to encourage non-signatories to adopt intellectual property regimes in accord with the standards embodied in the Agreement.[81]

United States negotiators have articulated an unwillingness to negotiate a GATT agreement that establishes standards less protective than those generally in place in the OECD countries.[82] United States Government

---

78. *U.S. Framework Proposal, supra* note 32.

79. *Id.* at 1347.

80. Independent dispute settlement mechanisms are used in a number of existing GATT codes, including the codes on anti-dumping and subsidies. *See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* [*Anti-dumping*], GATT, BISD: TWENTY-SIXTH SUPP. art. 15, 171 (1980); *Agreement on Interpretation and Application of Articles VI, XVI and XXIII* [*Subsidies*]; *id.* arts. 13, 18, at 56.

81. *U.S. Framework Proposal, supra* note 32, at 1372.

82. Telephone interview with Michael Hathaway, Deputy General Counsel, Office of USTR (Sept. 1988).

trade negotiators and their industry constituency[83] have expressed preference for a GATT agreement in the form of a code that reflects OECD intellectual property standards over a more broadly based agreement that dilutes these standards. The United States Government apparently expects that a code establishing rigorous standards will not, at least initially, be adopted by a significant number of developing countries.

The European Communities also submitted a detailed proposal to the TRIPs working group.[84] The European Communities proposal is similar to the United States proposal in the elaboration of substantive standards. The European Communities reserved judgment on the preferred form of GATT institutional arrangement for implementation.[85] TRIPs working group participants have made several other proposals.

In June 1988 a broad-based and influential coalition of United States, European Communities, and Japanese industry groups published a detailed and carefully considered proposal entitled *Basic Framework of GATT Provisions on Intellectual Property, Statement of Views of the European, Japanese and United States Business Communities.*[86] This proposal recognized the difficulties inherent in achieving a GATT intellectual property consensus in view of the divergence in national interests between industrialized and developing countries and suggested that in-

---

83. *Id.*; *see, e.g.,* IPC FRAMEWORK, *supra* note 19, at 11-24. Perhaps the most significant players in the movement for enhanced intellectual property protection are private business enterprises in the United States, and to a lesser extent Europe and Japan, and organizations reflecting the views of these groups. The business groups most prominent in the overall effort for enhanced intellectual property protection in the United States arena have been the Intellectual Property Committee (IPC), the United States Chamber of Commerce, the United States Council on International Business, and the International Intellectual Property Alliance. The IPC is a group of 13 major United States corporations "dedicated to the negotiation of a comprehensive agreement on intellectual property in the current GATT round of multilateral trade negotiations." IPC FRAMEWORK, *supra* note 19, at 5. UNICE (the Union of Industrial and Employers Confederations of Europe, with 33 member federations) and Keidanren (Japan Federation of Economic Organizations, a private, non-profit economic organization representing virtually all branches of economic activity in Japan) participated with the IPC in preparing the IPC FRAMEWORK. *See supra* note 19.

84. Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/26 (July 1988).

85. A footnote at the beginning of the European Community proposal reads: "In the following, the term 'GATT Agreement' is used in its generic sense. It does not denote a preference for a 'code' approach." *Id.* at 2 n.1 (emphasis in original).

86. IPC FRAMEWORK, *supra* note 19.

centives might be required to induce developing country participation in a solution to the intellectual property problem.[87]

In late June 1988 the Swiss presented a proposal to the TRIPs working group[88] that called for adoption of an amendment to the General Agreement.[89] Under the proposed amendment GATT benefits may be nullified or impaired by the under-protection, over-protection, or absence of protection of intellectual property. GATT states would undertake to eliminate trade distortions resulting from derogations. Assurances would be given for prompt, effective, and non-discriminatory administrative and judicial procedures and enforcement. "Indicative lists" would be established to describe trade distortions resulting from under-protection, over-protection, or lack of protection of intellectual property, and from practices constituting inadequate procedures. Listed items would be presumed to nullify or impair GATT benefits. These lists would be evolutionary, and a committee would be established to offer proposals for adoption by the GATT. The parties would notify each other (through the GATT Secretariat) regarding proposed changes in intellectual property laws and would consult as requested prior to making such changes. Disputes would be settled in accordance with the procedures set forth in the General Agreement.

United States negotiators greeted the Swiss proposal unenthusiastically.[90] The United States took the view that an unacceptable level of compromise on substantive standards would be necessary to achieve the level of consensus required to amend the General Agreement.

C. *Montreal and Geneva—The Framework Text*

The Uruguay Round mid-term Ministerial Review took place in Montreal in December 1988. The purpose of the high-level review session was to reach agreement on broad framework texts in the fifteen areas that are the subject of negotiations; these texts would provide the

---

87. *Id.* at 25-28. The United States Chamber of Commerce has also prepared and distributed specific proposals with respect to the intellectual property negotiations.

88. *Proposition de la Suisse*, GATT TRIPs Doc. MTN.GNG/NG11/W/25 (June 29, 1988).

89. As opposed to a limited code. *See infra* part IV, section A (discussion on institutional arrangements).

90. According to industry sources close to the intellectual property negotiations, United States negotiators viewed the Swiss proposal as an unacceptable compromise because of its apparent lack of attention to elaborating specific substantive norms. This initial adverse reaction was probably due in part to a certain (seemingly deliberate) ambiguity in the Swiss proposal regarding the level of detail to be achieved by the indicative lists.

basis for subsequent and more specific negotiations on final agreements.[91] There was little expectation of reaching an intellectual property framework agreement in Montreal because the TRIPs working group had been unable to generate anything more than an entirely bracketed draft text that merely restated the fundamental disparity between industrialized and developing countries.[92] Pre-negotiation expectations were realized as the developing countries, led by Brazil and India, remained adamant that the GATT is not an appropriate forum for the negotiation of substantive intellectual property standards. The text[93] that emerged from the contentious and unsuccessful mid-term review session[94] included four separate and distinct intellectual property approaches highlighting a continuing divergence in viewpoints. The four approaches were:

1. A chairman's proposal that skirted the issue of promulgating substantive standards;[95]
2. A developing country proposal that strongly reiterated opposition to the negotiation of substantive standards;[96]
3. A reiteration of the United States proposal for negotiating norms of substance and enforcement that reserved, however, the eventual format for institutional implementation;[97] and
4. A proposal that appeared to reflect both European Communities and Swiss input[98] and provided for the negotiation of norms of substance and enforcement, without reference to a particular institutional arrangement.[99]

---

91. *See* Farnsworth, *U.S., Europe Still Split at GATT Talks*, N.Y. Times, Dec. 8, 1988, § D, at 1, col. 6; USTR, GATT URUGUAY ROUND MID-TERM AGREEMENTS ACHIEVED (Apr. 8, 1989) [hereinafter USTR PRESS RELEASE].

92. *See, e.g.*, 5 Int'l Trade Rep. (BNA) 1554 (Nov. 30, 1988).

93. *Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, GATT TNC Doc. MTN.TNC/7 (MIN), 21 (Dec. 9, 1988) [hereinafter *Montreal Text*].

94. The mid-term review was suspended by the GATT Trade Negotiations Committee because of a United States/European Communities impasse with respect to agricultural subsidies.

95. On substantive standards, the Chairman's proposal names, as a detail to be worked on, "the specification of reference points regarding the availability, scope and use of intellectual property rights, in the light of the need to reduce trade problems arising from excessive, discriminatory or inadequate protection of intellectual property." *Montreal Text*, *supra* note 93, para. 2(c), at 21. The chairman's proposal referred to transitional arrangements in favor of developing countries. *Id.* para. 5, at 21.

96. *Id.* paras. A.1-A.4, at 22.

97. *Id.* paras. B.1-B.4, at 22-23.

98. BNA's report on the pre-review draft text attributes this proposal to Switzerland, *see supra* note 92.

99. *Montreal Text*, *supra* note 93, paras. C.1-C.4, at 23-24. This proposal also pro-

The USTR's press release following the mid-term review attributed the lack of intellectual property agreement to a few developing country holdouts, notably Brazil and India, and stated that the United States would exert pressure to achieve an acceptable agreement at the April reconvening of the negotiations. It also indicated United States intentions to continue substantive negotiations in the TRIPs working group with receptive countries and to pursue further bilateral efforts.[100]

On April 8, 1989, following a week of negotiations at the Senior Official level, agreement was announced in Geneva on a framework text for continued intellectual property negotiations (Framework Agreement).[101] The United States and other industrialized countries perceived the Framework Agreement as a major step forward because of its mandate for negotiations on:

> [T]he provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights; [and] . . .
>
> The provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems."[102]

The Framework Agreement reserves the issue of the appropriate institutional arrangement and provides for negotiations with respect to GATT dispute settlement procedures and transitional arrangements "aiming at the fullest participation in the results of the negotiations."[103] The Agreement provides for consideration of national public policy objectives, including developmental and technological objectives,[104] and (in an apparent reference to United States section 301 actions) emphasizes the importance of dispute settlement through multilateral procedures.[105] The Agreement promotes a mutually supportive relationship between the GATT and WIPO.[106] The USTR press release regarding the Framework Agreement stated that United States insistence that intellectual property protection be addressed in the GATT "is now supported by a

---

vided for transitional arrangements.

100. USTR, GATT URUGUAY ROUND PROGRESS REPORT 6 (1988).

101. 6 Int'l Trade Rep. (BNA) 442 (Apr. 12, 1989); USTR PRESS RELEASE, *supra* note 91; *Framework Agreements Adopted April 8, 1989 at Midterm Review of Uruguay Round Negotiations Under General Agreement of Tariffs and Trade in Geneva*, 6 Int'l Trade Rep. (BNA) 469, 471 (Apr. 12, 1989) [hereinafter *Framework Agreement*].

102. *Framework Agreement*, *supra* note 101, paras. 4(b), (c), at 471.

103. *Id.* para. 4(e).

104. *Id.* para. 5.

105. *Id.* para. 6.

106. *Id.* para. 8.

significant number of its trading partners."[107]

The Framework Agreement overcomes an impasse that had kept substantive standards negotiations off the full TRIPs working group agenda.[108] However, while some evidence of an improving atmosphere has emerged, there is as yet no clear indication of a fundamental shift in developing country opposition to the industrialized country intellectual property protection program, and it is not clear that prospects for a satisfactory agreement have appreciably risen.[109]

V. INTELLECTUAL PROPERTY WITHIN THE GATT FRAMEWORK

As discussed at the outset of this Article, two major issues must be addressed in the process of incorporating intellectual property rights protection into the GATT framework. The first issue, which was expressly reserved in the Uruguay Round Ministerial Declaration and in the Framework Agreement, concerns the choice of an institutional arrangement or mechanism for incorporating intellectual property protection within the GATT. The second issue concerns the extent of the industrialized countries' duty to adhere to the GATT principle of reciprocity in the intellectual property negotiations.[110]

---

107. USTR PRESS RELEASE, *supra* note 91.

108. 6 Int'l Trade Rep. (BNA) 442, 443 (Apr. 12, 1989).

109. It is tempting to speculate that the aggressive United States posture in its pharmaceutical patent protection dispute with Brazil was effective in achieving the limited objective of a Framework Agreement. It may be that concrete enforcement action in the form of significant tariff penalties convinced the developing country bloc that the United States is serious about the intellectual property issue and that it is willing to place the liberal multilateral trading system at risk to protect its interests. Argentina's apparent willingness to engage in useful discussions on pharmaceuticals, *supra* note 70, and India's agreement to consider intellectual property border measures, *supra* note 76, signify an improved atmosphere of cooperation, but not (at least in the case of India) a shift from fundamental opposition to the negotiation of generally applicable internal norms.

110. In considering both of these issues, the central theme of Olivier Long's 1985 treatment of the state of the GATT—LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM, *supra* note 1—should not be overlooked. Long emphasized that the success of the GATT has been predicated upon its ability to evolve beyond the text of a written agreement and function as an organic entity. The General Agreement has served as a broad constitutional framework for the development of the institution, but it does not entirely reflect the practiced law of the GATT. Among the many changes that have evolved in GATT practice are new amendment mechanisms that supplement those found in the text, which recently have been found unsuitable. *Id.* at 16-19. Long neither is nor claims to be unique in observing the organic character of the GATT. He credits John Jackson and his 1969 book with stressing the interplay between rule and exception in the GATT. *Id.* at 7-8. For a recent discussion by Jackson of the unique characteristics of GATT law, see Jackson, *Strengthening the International Legal Framework of the*

A. *The Institutional Arrangement*

1. Matching Solutions to Problems

The institutional mechanism chosen to resolve the intellectual property problem must match the particular problem posed. Although attempting to characterize broadly the trade problems facing the GATT may be somewhat imprecise, the problems might usefully be separated into those of more and less inclusive dimension. Thus, for example, the excessive tariff structures in place at the end of the Second World War were of global dimension and required an inclusive solution if a liberal world-wide trading order—based on extensive most favored nation treatment—was to be established. On the other hand, the present existence of barriers to trade in services may significantly impair aggregate trade with respect to the more highly industrialized countries as a group, such that a non-inclusive (i.e., exclusive) remedy among a limited number of countries would have a high degree of present economic utility, so as to justify only limited participation, at least in the short term.

The intellectual property problem, while, in fact, distinct from most problems previously addressed by the GATT in that its cause lies within the developing countries and NICs, with adverse consequences affecting primarily the industrialized countries, must be categorized as an inclusive or global problem in that the remedy must apply outside those countries that have historically been parties to the exclusive GATT agreements referred to as codes.[111] New intellectual property norms must be effective in and regulate the conduct of the developing countries. The parties must therefore negotiate an inclusive remedy in some form of a generalized GATT amendment. This Article will consider the range of potential GATT alternatives in this context.

Three mechanisms have been used to amend the GATT. One of these is found in the text of the General Agreement. The others evolved in practice, and were used to conclude the Tokyo Round negotiations. These three mechanisms are the formal article XXX(1) amendment procedure, the "code," and the consensus decision.[112]

GATT-MTN System: Reform Proposals for the New GATT Round, in 5 STUDIES IN TRANSNATIONAL ECONOMIC LAW: THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 3, 11-15 (E.U. Petersmann & M. Hilf eds. 1988) [hereinafter NEW GATT ROUND].

111. It seems clear that having the industrialized (i.e., OECD) countries adopt a code of norms among themselves to regulate intra-OECD trade is no solution to the intellectual property problem because OECD intellectual property norms are by and large harmonized already, and inadequate enforcement is not a major issue.

112. Long also discusses the use of "waivers" and "evolution through 'tolerance,'"

2. The Exclusive Approach and its Unsuitability for Intellectual Property

One of the two GATT amendment mechanisms that came into use at the conclusion of the Tokyo Round in 1979 was the adoption by a limited group of countries of separate GATT agreements or codes.[113] The need for the code mechanism became apparent as the Tokyo Round progressed and it was clear that many of the projects undertaken in the round were of interest only to a limited number of the GATT Contracting Parties, primarily the OECD countries.[114] Codes are simply agreements between GATT Contracting Parties that choose to adopt them and are not applicable to countries that do not adopt them.[115] Thus, the Anti-dumping, Subsidies, Government Procurement, and Technical Standards Codes are each adopted by about thirty-five of the more than ninety GATT Contracting Parties, establishing norms among an exclusive group—primarily the OECD.[116]

In its intellectual property proposal, the United States expressed a preference for a code and noted that it would apply only among signatories.[117] The United States relied on a vague generalization—the creation of a "discipline"—and more concretely on the establishment of a mechanism for multilateral dispute settlement to demonstrate the potential utility of a code. Neither of these claims of utility is strong enough to support a code approach to the intellectual property problem. Although at some level a less than fully consensual intellectual property agreement

---

O. LONG, *supra* note 1, at 18-19, but neither of these mechanisms appears relevant to the establishment of new affirmative obligations such as would arise from an intellectual property related amendment.

113. The first code, on anti-dumping, was, however, negotiated and put into effect in 1968 at the conclusion of the Kennedy Round. *Id.* at 16.

114. *See generally* L. GLICK, *supra* note 72 (discussing the Tokyo Round code-making process and outcome). Nine codes were adopted at the end of the round. *Id.* at 43-111 (Results of the MTN).

115. This fundamental feature of the code—its inapplicability to non-signatories—is of such importance, particularly to the developing countries, that the Decision adopted by the Contracting Parties at the conclusion of the Tokyo Round, which assimilated codes into the GATT framework, explicitly codified this understanding. *See* O. LONG, *supra* note 1, at 26-27. While there is a general rule that treaties "cannot validly impose obligations upon States which are not parties to them," Lauterpacht notes that the United Nations Charter claims (though perhaps in an exceptional way) to regulate the conduct of non-members. 1 L. OPPENHEIM, INTERNATIONAL LAW 928-29 (H. Lauterpacht 8th ed. 1955) [hereinafter Lauterpacht].

116. *See Bodies Established Under the 1979 MTN and Arrangements*, GATT, BISD: THIRTY-THIRD SUPP. 186-223 (discussing status of codes).

117. *U.S. Framework Proposal*, *supra* note 32, at 1372.

may have a persuasive effect on non-participants, a code whose participants largely represent the OECD countries would have very little persuasive effect because: (1) the goal of the code is not to harmonize intellectual property laws; and (2) the rules in the OECD countries already are largely the same. A "discipline" therefore already exists. Similarly, establishment of a multilateral dispute settlement mechanism among the OECD countries is not a satisfactory objective of the Uruguay Round. While something arguably can be gained by bringing intellectual property disputes between the United States, Canada, and Japan, for example, into the GATT, this objective can hardly be worth six years of intensive and potentially counterproductive negotiations. A GATT solution that includes the developing countries and NICs is essential.[118]

The hidden agenda of the United States may be to make its current policy of pressuring developing countries and NICs into reforming their intellectual property regimes at least quasi-"GATT-legal." At present, no convincing justification exists within the GATT or the international treaty system for unilaterally imposed United States trade-related intellectual property sanctions (e.g., against Brazil in the pharmaceutical patent dispute), and the United States is under considerable pressure to halt the imposition of such sanctions. An exclusive intellectual property code could, in theory, establish a strong minority position that trade sanctions are an appropriate response to intellectual property disputes.

If this is United States policy, the question arises whether it will not merely intensify the schism between North and South by more clearly defining the opposing camps—with the position of the developing countries arguably enhanced because of the perceived need of the United States and other industrialized countries to negotiate a new code arrangement (perhaps conceding the present inapplicability of the GATT). The United States may be better served by foregoing a code and standing firm with its position that the GATT is inherently defective and or that failure to provide intellectual property protection nullifies or impairs existing GATT benefits[119]—and by acting on the basis of this position despite threatened counter-measures. Because of the prospects for intensifying the North/South schism without achieving any demonstrable end, the code is a poor, if not counterproductive, choice for resolving the inclusive intellectual property problem.

---

118. It may be that the United States can pressure enough NICs, such as Korea and Taiwan, into adopting a code so that its efforts will be economically, if not politically, justified, but even if this occurs a renewed effort to bring the rest of the developing world into the fold must follow.

119. *See* discussion *infra* part IV, section B(1) (reciprocity within the GATT).

The primary advantage of the code mechanism is, of course, that a limited or exclusive amendment may be achieved when a quasi-consensual or consensual amendment could not be. When there is a significant amount of affected trade among code signatories there may be a significant economic utility in the code's adoption. Once established, the code may provide an important framework for dispute settlement. The absence of the potential utility of an intellectual property code may be usefully contrasted with the potential utility of a code to eliminate barriers to trade in services.[120] A myriad of barriers stand against the establishment of service businesses throughout the OECD countries, and a great deal of potential trade may be created by an agreement solely among the OECD countries. It is in this context that an exclusive code has a high present utility and in which a lack of participation by the developing countries may have only a marginal adverse effect.[121]

3. Framework Agreement by Consensus Decision

The second institutional mechanism for amending the GATT legal arrangement, which like the code mechanism evolved into GATT practice at the end of the Tokyo Round, is the adoption of "framework

---

120. With respect generally to the potential benefits of a GATT multilateral services agreement (not specifically with respect to an institutional arrangement), including a thoughtful discussion of the complexities involved in the undertaking, see Krommenacker, *Multilateral Services Negotiations: From Interest-Lateralism to Reasoned Multilateralism in the Context of the Servicization of the Economy*, in NEW GATT ROUND, *supra* note 110, at 455.

121. A secondary advantage of the code mechanism is that an agreement can, if consented to, be put in place rapidly—as soon as the required number of signatories complete their internal ratification procedures. The Tokyo Round codes were generally put into force as of certain dates between those parties that had accepted or acceded to them by those dates. *See Legal Instruments, Multilateral Trade Negotiations*, GATT, BISD, TWENTY-SIXTH SUPP. 8-188 (1980) (Tokyo Round Codes). Since the codes established reciprocal obligations, it would appear that at least two acceptances were required to establish binding obligations. *Id.*

The formal GATT amendment procedure is necessarily more time-consuming, since at least two-thirds parliamentary approvals are required before such amendments formally enter into force. GATT, *supra* note 1, art. XXX(1), at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 50. However, this advantage of the code process does not overcome the lack of substantive utility. There will probably be a number of GATT amendments at the conclusion of the Uruguay Round that will require parliamentary approvals so that the attention of national legislatures will be focused on an expeditious conclusion of the GATT round. In addition, initial executive adherence pending parliamentary approvals should be adequate to initiate the internal legislative processes that will be necessary to complement an intellectual property agreement.

agreements" by consensus decision of the Contracting Parties.[122] Four framework agreements were adopted in November 1979, the most significant of which was a codification of the so-called "enabling clause."[123] The latter action institutionalized an exception to the GATT Most Favored Nation principle.[124] The developed country members of the GATT were authorized (i.e., "enabled") to grant the developing country members discriminatory trade preferences.[125] Under the terms of article XXX(1) of the General Agreement, any amendment to the Most Favored Nation principle will become effective only upon its acceptance by all Contracting Parties.[126] Nevertheless, the procedure used with respect to the "enabling clause" was the taking of a consensus (i.e., unanimous) decision by all Contracting Parties present at the November 1979 GATT session in Geneva, without sending absentee ballots to members not present.[127] This procedure, according to former GATT Director General Olivier Long, was used in order to avoid the delays that would have resulted from using the formal article XXX(1) procedure.[128] Long observed that the consensus decision process created legally binding rights and obligations within the GATT such that a new amendment procedure had evolved through GATT practice.[129]

---

122. *See, e.g.*, O. LONG, *supra* note 1, at 18, 56, 100-03, app. A.

123. *Id.* at 101.

124. GATT, *supra* note 1, art. I, at A13, T.I.A.S. No. 1700, 55 U.N.T.S. at 198, 4 GATT, BISD, at 2.

125. O. LONG, *supra* note 1, at 100-06. The three additional Tokyo Round framework agreements involved increasing flexibility with respect to government assistance to economic development, clarifying the application of GATT procedures to measures taken for balance of payments purposes, and strengthening the GATT dispute settlement mechanism. *Id.* at 18, app. A.

126. GATT, *supra* note 1, art. XXX(1), at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 50.

127. O. LONG, *supra* note 1, at 56.

128. *Id.* With respect to the "enabling clause," delays were anticipated through use of the formal amendment procedure, particularly since 100% approval would have been required. GATT, *supra* note 1, art. XXX(1), at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 50.

129. Long does not discuss whether a Contracting Party could in fact challenge the GATT-legality of the enabling clause, particularly if it was not present at the 1979 session, because the strict terms of the General Agreement were not followed. As a practical matter, the possibility of such a challenge is remote because of the presently noncontroversial nature of the amendment and the adverse political consequences of pursuing such a challenge.

Certain observations relating to the consensus decision mechanism are important. First, as a matter of practice the GATT now virtually always acts by consensus, both with respect to the taking of decisions and the adoption of amendments (the adoption of

Use of the consensus decision amendment mechanism would be the optimal solution to the intellectual property problem because it would create the most widely inclusive consensual norms, thereby reflecting a resolution of the North/South controversy. However, use of the consensus decision procedure to resolve the intellectual property problem is not realistic because of its singular disadvantage: at least in its existing formulation, it is subject to a single country veto. A blocking strategy on the part of the more aggressive opposition, e.g., Brazil and India, would require the industrialized countries to achieve a critical mass powerful enough to pressure the few holdouts into a consensual arrangement. While such a result is not beyond the realm of possibility, prudence suggests consideration of alternatives that do not require an absolute consensus.[130]

4. The Article XXX Amendment Process—Potential Variations on a Theme

a. Article XXX(1)

The General Agreement sets out both decision-making and amendment procedures. In general, decisions by the Contracting Parties are,

---

codes by less than a consensus does not affect this observation because the codes do not bind non-signatories). O. LONG, *supra* note 1, at 55. The generally applicable rules of the GATT have not been altered other than by consensus for at least the past 25 years. (Part IV of the GATT was adopted by use of the article XXX two-thirds acceptance procedure in 1964 and the next generally applicable amendments were made by consensus decision in the Tokyo Round, *see id.* at 16). The GATT Council, which proposes decisions for consensus approval by the Contracting Parties, has never formally voted—always itself acting by strict consensus. *Id.* at 55-56. Of the four "framework" agreements adopted in 1979, only the enabling clause, which amended article I of the General Agreement, would have required unanimous acceptance under the formal article XXX amendment procedure. GATT, *supra* note 1, art. XXX(1), at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 50 (requiring unanimous agreement for amendments to Part I of the GATT). The other framework agreements would have required only a two-thirds majority. O. LONG, *supra* note 1, at 56, 100-01.

130. A consensus decision also has the potential advantage of rapid implementation because, as was the case with the adoption of the enabling clause, countries with little or no interest in the process will not delay enactment by failing to act (for discussion of the enactment of the enabling clause, *see* O. LONG, *supra* note 1, at 56, 100-01). However, this advantage is significantly less important with respect to an intellectual property amendment than was the case with the enabling clause because a formal intellectual property amendment (discussed *infra* at part IV, section A(4)(a)) would require only a two-thirds majority, as opposed to the 100% approval required for the "enabling clause" (which modified the Most Favored Nation principle). O. LONG, *supra* note 1, at 56, 100-01.

pursuant to article XXV(4),[131] to be taken by a majority of the votes cast. Amendments to the General Agreement, pursuant to article XXX(1), with limited (although important) exception become effective with respect to the parties that accept them upon a two-thirds acceptance of the Contracting Parties.[132] The formal article XXX(1) amendment procedure was last used by the GATT in 1966, when Part IV of the General Agreement, that provides for non-reciprocity of concessions on the part of developing countries, was adopted as an addition to the text of the Agreement.[133]

The article XXX(1) amendment procedure may prove to provide the most realistic near-term GATT-based solution to the intellectual property problem. An article XXX(1) amendment is, to paraphrase Mercutio, neither so inclusive as a consensus decision nor so exclusive as a code, but may serve.[134] The two historic problems with the article XXX(1) procedure come into play with respect to intellectual property. The first is that a two-thirds acceptance by the Contracting Parties may be difficult to obtain.[135] While Contracting Parties anticipated this with respect to a number of Tokyo Round agreements that were relegated to codes, the fact of the obstacle does not in itself make the code a viable solution to the intellectual property problem. It is essential to a minimum resolution of the intellectual property problem that the industrialized countries provide sufficient inducements, in the form of reciprocity benefits[136] and threatened sanctions, that the sixty-five countries[137] needed to provide a two-thirds majority be persuaded to enlist in the program.

The major drawback of the article XXX(1) amendment mechanism is that an amendment adopted under article XXX(1) is not applicable to countries that do not accept it. Professor Jackson observed in 1969:

> It might . . . be suggested that Article XXX . . . is out of touch with

---

131. *See generally,* JACKSON, *supra* note 1, at 126-32. O. LONG, *supra* note 1, at 54.

132. *See* JACKSON, *supra* note 1, at 73-82.

133. O. LONG, *supra* note 1, at 12, 16.

134. W. SHAKESPEARE, *Romeo & Juliet,* III, i, 96-97, *reprinted in* THE ARDEN SHAKESPEARE: ROMEO AND JULIET 163 (B. Gibbons ed. 1980).

135. O. LONG, *supra* note 1, at 16. Long notes mildly that a "two-thirds majority cannot always be assured." *Id.*

136. *See* discussion *infra,* part IV, section A(3).

137. With the accession of Boliva to the GATT in July 1989 there are 97 Contracting Parties. *See GATT's Dunkel Sees U.S.-Japan Talks as Sign of Softening on U.S. Approach to Super 301,* 6 Int'l Trade Rep. (BNA) 977 (July 26, 1989). Sixty-five countries would slightly exceed the fraction necessary to achieve a two-thirds majority.

> present day reality. The unanimity requirement [for important limited cases involving the MFN principle and tariff schedules] and the requirement that an amendment can apply only to those contracting parties that have accepted it stem from days when trade relations were primarily bilateral and no obligations could be imposed on a nation without its consent . . . . At some future time, a more sensible relationship of the amending provisions of GATT should be established.[138]

Nonetheless, if the only viable options open to the industrialized countries are a code and article XXX(1), then the article XXX(1) mechanism is clearly preferable as a potential solution to the intellectual property problem because it is the more inclusive near-term solution and is more likely to create a long-term negotiating environment conducive to the protection of intellectual property.

A number of factors support the conclusion that an amendment adopted by a two-thirds majority would be worthwhile for both immediate municipal implementation and long-term persuasive effect. First, a sixty-five country majority will include more than thirty developing countries,[139] constituting a significant segment of that community. These thirty countries will have an economic, and perhaps political, interest in persuading holdout countries to adhere.[140] Second, implementation of new standards by this group of countries will be of economic utility to the industralized countries, as their enterprises enjoy a higher level of intellectual property protection in a significant group of states. Third, a GATT two-thirds majority may provide the industrialized countries with acceptable justification for conditioning access to future economic concessions to developing countries on adherence to a significant majority position. Finally, in terms of orchestrating public opinion within the developing countries, local political leaders will be able to point to the fact that most of the world community has agreed to certain standards of protection, thereby deflecting internal disaffection with such a move on their own part.[141]

---

138. JACKSON, *supra* note 1, at 81.

139. Of the 97 GATT members, *supra* note 137, 24 are OECD countries, *supra* note 2. Using 11 as an estimate of other industralized countries and NICs, at least 30 developing countries would be required to establish a two-thirds majority.

140. An economic interest will exist because signatories will not wish to become targets of low-priced exports that might prevent the development of local industry, and will not wish to compete in third country markets against exports or locally produced goods priced artificially low.

141. Industrialized country trade negotiators may also more effectively condition acceptance of new GATT members—e.g., the Soviet Union and the People's Republic of China—on acceptance of the majority position.

A larger group of countries may be persuaded to adhere to the initial agreement if industrialized country trade negotiators set a high bargaining target—foregoing an intellectual property agreement and proceeding with bilateral negotiations (and potential sanctions) unless a two-thirds amendment (as opposed to a code) is achieved.[142] Industralized country negotiators should make clear that reciprocity benefits will be withheld from non-participants.[143] Once an amendment is successfully negotiated, it may be useful to promote acceptance of the intellectual property amendment as symbolic of full membership in the international trade community.

An article XXX(1) amendment is not the optimal mechanism for resolving the intellectual property problem, and the arguments in its favor are based on a pragmatic expectation that this may be the best outcome available in the current Uruguay Round negotiations. Even as a compromise objective, two-thirds majority acceptance is certainly not assured.

b. Article XXX(2)

Article XXX(2) of the General Agreement permits a two-thirds majority of the GATT Contracting Parties to adopt an amendment that is applicable to all GATT members, requiring those countries that have not accepted it to withdraw from the GATT or remain with the consent of the members. The article XXX(2) amendment mechanism has never been used.

While not a long-term solution to GATT constitutional issues, the article XXX(2) procedure could be employed with minor variation to provide an effective remedy to the intellectual property problem in light of its relatively unique nature. Under article XXX(2), two-thirds of the GATT Contracting Parties could adopt intellectual property norms applicable to all GATT members.[144] If all GATT members did not voluntarily accept the amendment, the Contracting Parties could adopt a blanket waiver permitting those countries that did not accept the amendment

142. Public announcement of an inflexible target position would place significant pressure on both sides to achieve the objective. *See* Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE J. INT'L L. & COMM. 319, 329 (1975) (describing this strategy in bargaining theory).

143. *See infra*, part IV, section B.

144. "The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it . . . shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES." GATT, *supra* note 1, art. XXX(2), at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 51-52.

to remain GATT members, although subject to the withdrawal of previously negotiated GATT benefits based on their failure to conform to the new intellectual property norms. An option to accept the amendment could remain open indefinitely.[145] As an incentive to acceptance of the new norms, only those countries that agreed to participate would be entitled to negotiated reciprocity benefits.

The advantage of this procedure is that it is widely inclusive, and to distinguish the consensus decision mechanism, not subject to a single country veto. Thirty or more developing countries might refuse to accept the new intellectual property amendment without impeding its adoption. The critical disadvantage is the element of coercion, and to date the GATT has been reluctant to act in an overtly coercive manner. The impact of a coercive amendment on non-signatories would be unpredictable and potentially destabilizing.[146] The potential for alienating the developing nations, and consequently for damaging world economic and political order, should be carefully weighed against the positive economic impact of enhanced intellectual property rights protection on the industrialized countries. In such a cost/benefit analysis, the value of stability is likely to exceed the potential economic gain from enhanced protection. Thus, an overtly coercive strategy will probably be rejected.

While superficially attractive, the article XXX(2) mechanism is not a viable long-term solution to the constitutional infirmities of the GATT,[147] because it does not contain checks and balances that would take into account the relative economic significance of the participants. By contrast, the United Nations Charter, through the separation of power between the Security Council and the General Assembly, seeks to create a check against the potential tyranny of a relatively powerless but numerically superior group of states.[148] If the GATT is to become a more effective democracy, it will require a new array of constitutional

145. *Id.* (allowing the Contracting Parties to set the period for acceptance).

146. The notion that treaties (and amendments to them) are applicable only to parties to them, in Lauterpacht's words, "follows clearly from the sovereignty of States and from the resulting principle that International Law does not as yet recognise anything in the nature of a legislative process by which rules of law are imposed upon a dissenting minority of States." Lauterpacht, *supra* note 115, at 928; *but see* discussion of the United Nations Charter, *supra* note 115.

147. For a more detailed discussion of constitutional issues facing the GATT, see Jackson, *supra* note 110.

148. U.N. CHARTER art. 27, para. 3. For discussion of the respective (and somewhat fluid) roles of the Security Council and General Assembly, see S. BAILEY, THE PROCEDURE OF THE UN SECURITY COUNCIL 254-70 (2d ed. 1988); E. LUARD, THE UNITED NATIONS: HOW IT WORKS AND WHAT IT DOES 9-54 (1979).

safeguards including, for example, trade-weighted voting.

It seems most likely that GATT solutions involving democratic coercion will need to be preceded by a constitutional convention in which the parties openly consent to a restructuring of their GATT rights and duties. At such a convention the parties would be able to express and address their concerns with a new order and decide whether participation in such a structure makes sense. Prior to the convening of such a forum, the attempted imposition of coercive rules would likely destabilize and damage the currently functional—if imperfect—system.[149]

In conclusion, the optimal solutions to the intellectual property problem—consensus decision or article XXX(2) amendment—are probably not feasible due to the intensity of foreseeable developing country opposition. The code solution, with its exclusive scope, is not suitable because of its failure to target adequately the locus of the problem. The best feasible solution, constituting a middle ground on the spectrum of relative inclusivity, is the article XXX(1) two-thirds majority mechanism with the expectation of persuasive long-term effect.

5. Transitional Arrangements

Whichever institutional mechanism implements the intellectual property amendment, it should incorporate transitional arrangements that will minimize economic dislocations for the developing countries. Transitional procedures are a common feature of changed trading arrangements,[150] and transitional procedures that give special relief to less eco-

---

149. Even if a worst case scenario (i.e., a complete disintegration of the GATT) is not realized, the GATT, which historically has operated on the basis of consensus, may have difficulty adjusting to the strains of a new coercive environment, regardless of how laudable are the goals of the change. Nominal consent remains a feature of the international economic community. Although it may be persuasively demonstrated that coercion is a fact of global trading relations, and that use of the article XXX(2) procedure would merely reflect that reality, it is doubtful that the GATT is ready to make such a formal acknowledgment. For example, Japan's acquiescence in limiting its automobile exports to the United States may be labeled "voluntary," but is can hardly be doubted that Japan accepts this constraint voluntarily in order to avoid the imposition of mandatory quotas. On a less subtle level, Hufbauer and Schott discuss 103 cases of economic sanctions beginning with the blockade of Germany in World War I. G. HUFBAUER & J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 2 (1985).

150. *See, e.g.*, the transition periods for implementing the European Communities' internal tariff programs in: Treaty of Rome, Treaty Establishing the European Economic Community, Mar. 25, 1967, arts. 14, 15, 298 U.N.T.S. 11, 20-21. The Treaty of Rome provided that the common market would be progressively established during a transitional period of 12 years. *Id.* art. 8(1), 298 U.N.T.S. at 17. It also provided timetables for the progressive reduction of intra-community tariffs, *id.* art. 14, 298 U.N.T.S. at

nomically developed countries are not uncommon.[151] As evidenced by the intellectual property Framework Agreement, the concept of a transitional arrangement has become a formal part of the TRIPs agenda.

In concrete terms, an intellectual property amendment could consist of three sets of norms of substance and enforcement procedure. The "final" set would apply to the industrialized countries and select NICs. A second set would apply to most NICs and developing countries. A third set would apply to the least developed countries. A maximum period of ten years might, for example, be established for movement upward through each set of standards. Transitional standards might well differentiate between areas in which more compelling developing country and NIC public interests are involved (pharmaceuticals and foodstuffs), justifying longer compliance deadlines, and areas in which less compelling interests are involved (unauthorized appropriation of video copyright), where rapid adherence would be expected. Standards governing the granting of and compensation for compulsory licenses could be tightened during the transitional periods. Transitional sets of norms would provide a limited incentive to the developing countries by limiting immediate economic and social dislocations. The interests of the industrialized countries would be served by an effective, if perhaps longer-term, solution to the intellectual property problem.

20-21, and for the establishment of the common external tariff. *Id.* arts. 18-29, 298 U.N.T.S. at 22-26.

151. *See, e.g.*, The Treaty of Montevideo Establishing the Latin American Integration Association [LAIA], Aug. 12, 1980, *reprinted in* 20 I.L.M. 672 (1981) established the general principle that member countries would be entitled to differential treatment depending on their stage of economic development (with countries segregated into three developmental stages). *See, e.g., id.* arts. 3(d), 9(d), 20 I.L.M. at 673-74. It also established that markets would be open preferentially to the relatively less economically developed countries. *Id.* arts. 15-17, 20 I.L.M. at 675-76. Pursuant to these treaty provisions, the LAIA member countries have concluded Regional Accords Nos. 4 and 5, which lower tariffs among the member countries on a differential basis in accordance with the developmental stage of the reducing and benefitting countries. S. RIESENFELD, 1 INTERNATIONAL TRADE LAW MATERIALS: NOTES TO ALADI, para. 4 (1989) (sources cited) (unpublished and in author's files).

Agreement on Andean Subregional Integration, May 26, 1969, *reprinted in* 8 I.L.M. 910 (1969), which established the Andean Common Market or Andean Pact, contained a number of transitional provisions favoring Bolivia and Ecuador. These provisions aimed at liberalizing access of the products of these countries to the common market more rapidly, *id.* arts. 96-98, 8 I.L.M. at 933-34, and extending the period for these countries to open their own markets. *Compare id.* arts. 55, 102, 8 I.L.M. at 924, 935. The common external tariff was to be fully operative generally by December 31, 1980, *id.* art. 62, 8 I.L.M. at 926, while Bolivia and Ecuador were not required to adopt the common external tariff until December 31, 1985. *Id.* art. 104, 8 I.L.M. at 936.

B. *Reciprocity of Concessions*

1. Reciprocity Within the GATT

The concept of "reciprocity" is firmly imbedded in the GATT. Long observes that "although reciprocity as a legal concept has not been defined by the Contracting Parties, it is a fundamental principle occupying a central position in the General Agreement."[152] Jackson, while noting several significant obstacles to practical implementation of the reciprocity principle, describes reciprocity as one of the "three major premises underlying present procedures for trade negotiations in GATT."[153] The preamble to the General Agreement refers to the principle in stating that the parties desire to enter "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."[154] Part IV of the General Agreement, as previously discussed,[155] was added in 1966 to provide that developed countries do not expect to receive reciprocal benefits from developing countries in trade negotiations. Reciprocity, as accepted in GATT practice, means that a country need not make a trade concession unless it receives something in return—a quid pro quo.[156] Likewise, a country deprived of benefits previously negotiated in the GATT is entitled to withdraw concessions previously granted by it. There is no accepted formula for calculating the value of a trade concession,[157] and no reciprocity formula exists. The vast array of intangibles involved in the multilateral trade

---

152. O. LONG, *supra* note 1, at 10.

153. JACKSON, *supra* note 1, at 240. Jackson criticizes the reciprocity principle on a number of grounds, including its tendency to favor countries that enter into negotiations with more significant tariffs and other barriers, the insusceptibility to quantification of the effects of tariff (let alone non-tariff) barriers, and its tendency to impair the negotiating process because of the pressure it places on participants to demonstrate benefits they have secured to their domestic constituencies. *Id.* at 241-45, 519.

154. GATT, *supra* note 1, at A11 (preamble), T.I.A.S. No. 1700, 55 U.N.T.S. at 188, 4 GATT, BISD, at 1.

155. *See supra* text accompanying note 133.

156. *See* JACKSON, *supra* note 1, at 240-45; O. LONG, *supra* note 1, at 10-11. Long observes that one of the advantages of conducting multilateral trade negotiations in "rounds" is that an overall balance can be achieved with respect to several areas under negotiation. *Id.* at 26. An Argentine representative to the Montreal Mid-term Review provided an example of the quid pro quo negotiating that typifies the "round" process. In putting forward the position that unless a farm accord was reached, the Latin American delegations would not stand by their concessions on trade in services, he said, "We don't like to pay and have nothing to receive." Farnsworth, *Freer Trade, Not Yet, Maybe Later*, N.Y. Times, Dec. 12, 1988, § D, at 1, col. 3, § D, at 2, col. 4.

157. JACKSON, *supra* note 1, at 241.

negotiating process (e.g., the calculation of anticipated changes in demand based on the removal of a trade barrier) do not lend much support to the development of a formula. Nevertheless, all other things being equal, GATT Contracting Parties that make a trade concession are as a matter of GATT law and practice entitled to receive a concession in return. As a corollary, the use of "brute" economic bargaining power (e.g., in the form of a threatened denial of access to an already opened market) is not condoned. With respect to the intellectual property problem, the question arises whether agreement by the developing countries to provide enhanced intellectual property rights protection would constitute a trade concession within the bounds of the reciprocity principle on the one hand, or would constitute the remedy of a defect inherent in the GATT arrangement or explicit agreement to preexisting (though implicit) GATT obligations on the other.

2. "Nullification or Impairment" and Changed Circumstances

Although the issue of entitlement to concessions has not yet been addressed in the intellectual property negotiations, the highly visible United States position in the pharmaceutical patent dispute with Brazil and the public pronouncements of senior United States trade officials suggest that the United States will not be receptive to a demand for trade concessions in favor of developing countries. The United States has adopted the position that if its measures against Brazil do not appear to be GATT-legal, this is due to a defect in the General Agreement that fails to address intellectual property rights and therefore requires rectification.[158] Moreover, the United States has expressed the view that the GATT's lack of intellectual property rights coverage should not be understood to limit its freedom to address the problem, because it would be illogical for the international trading system to deny it this freedom.[159] Although not expressly put in these terms, both the specific United States position in its dispute with Brazil and its more general perspective concerning its freedom to act on intellectual property reflects the view that failure by the developing countries to protect intellectual property rights "nullifies or impairs" existing United States GATT benefits[160]

158. *See* Statement of Samuels, *supra* note 3.

159. *See* Statement of Williams, *supra* note 5. In Deputy USTR Williams' words, "logic [would be] stood on its head" if the United States could not exercise the right to open markets. *Id.* at col. 4.

160. Article XXIII of the General Agreement authorizes each member country to withdraw trade concessions from another member (following in theory, but not necessarily in practice, a GATT adjudication) if the member country considers that any benefit

and that an obligation to protect such rights is implicit in the GATT. The notion that the developing countries are under an obligation to protect industralized country intellectual property rights implies that the United States and other industralized countries are not obligated to provide reciprocal trade concessions in the event that a GATT intellectual property agreement is achieved.

This perspective may not be unreasonable when viewed in the context of the changes the international trading system has undergone since the GATT was formed. As intellectual property has become an increasingly valuable component of industralized country exports, it seems appropriate that the GATT acknowledge that intellectual property is no more subject to unauthorized appropriation than commodities themselves. To the extent that intellectual property is routinely traded separate and apart from goods, this is the natural consequence of more highly developed information technologies. Since change must be assumed as a central component of global economic development, the GATT should be prepared to adapt to such change without requiring case-by-case compensation for an explicit agreement to adapt. Pursuing this reasoning, the developing countries would not be entitled to trade concessions for agreeing to protect industralized country intellectual property.

The United States might be seen as invoking changed circumstances not as a grounds for terminating its involvement in the GATT, but rather as a basis for denying a reciprocity obligation.[161] Veiled threats

---

accruing to it, directly or indirectly under the Agreement, is being "nullified or impaired" by, among others, "the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement" or "the existence of any other situation." GATT, *supra* note 1, art. XXIII, at A54, T.I.A.S. No. 1700, 55 U.N.T.S. at 266-68, 4 GATT, BISD, at 39.

161. The United States would not technically be attempting to invoke the *rebus sic stantibus* doctrine because that doctrine provides grounds only for withdrawal from a treaty or for its termination. *See* The Vienna Convention on the Law of Treaties, May 23, 1969, art. 62, 1155 U.N.T.S. 331, 347 [hereinafter Vienna Convention] *reprinted in* 8 I.L.M. 679, 702 (1969) *and in* S. ROSENNE, DEVELOPMENTS IN THE LAW OF THE TREATIES 1945-1986, app. I, 488, 467-68 (1989). Since Contracting Parties are free to withdraw from the GATT under article XXXI, the doctrine is not directly applicable. GATT, *supra* note 1, art. XXXI, at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 51. However, the United States has contended that it may breach the terms of the GATT in order to bring about a necessary reform. *See* Statement of Williams, *supra* note 5. The United States appears to argue that changes in the global economy, unforeseen at the time the General Agreement was signed, have materially, if not "radically" in the terms of article 62 of the Vienna Convention, altered the United States obligations under the GATT by requiring it to maintain a certain level of trade concessions while leaving its own interests unprotected. The United States would presumably argue that if it has the right to withdraw from the GATT because of these

from the United States regarding the collapse of the GATT if intellectual property negotiations do not succeed, and of a new bilateral approach to international trade relations, could conceivably be seen as the invocation of changed circumstances to justify a threatened withdrawal from the international agreement (although no such justification is needed, as any Contracting Party is free to withdraw from the GATT under article XXXI).[162] It is possible, though not likely, that failed intellectual property negotiations could result in two entirely distinct international trade regimes—one comprising the OECD countries, and the other the developing world. From the industralized country perspective, however, this would not likely yield overall economic gains, so threats to precipitate the collapse of the GATT should be given limited credence. Changed circumstances arguments are more likely to emerge and are more realistically evaluated in the context of a determination whether the industralized countries are under an obligation to provide compensatory trade benefits.

3. *Pacta Sunt Servanda*

Strong counter-arguments arise in favor of providing trade concessions (or compensation) in return for enhanced intellectual property protection. As the United States conceded when presenting its intellectual property proposal to the TRIPs working group, intellectual property rights protection is a new area of negotiation within the GATT.[163] The GATT expressly covers trade in goods, not services, and much less trade in intangible technologies. The subjects of patent, trademark, and copyright were not unknown to the GATT draftsmen, who had the power to include respect for the intellectual property rights component of exports as a condition of membership in the GATT.[164] Because the GATT has

---

changed circumstances, then it need not grant trade concessions as a consequence of actions it takes in response to these circumstances. Of course, in electing not to withdraw from the GATT the United States may be tacitly submitting itself to the existing norms. Because of the critical role the United States plays in the useful functioning of the GATT, it would be unfortunate if the United States were left in the take-it-or-leave it position of either foregoing enhanced intellectual property protection or withdrawing from the GATT and thereby gaining its freedom to impose trade-related sanctions. The United States Congress, which historically has been skeptical of the GATT, needs little added reason to forego multilateral trade policy in favor of bilateralism.

162. No such justification is needed, as any Contracting Party is free to withdraw from the GATT. GATT, *supra* note 1, art. XXXI, at A74, T.I.A.S. No. 1700, 55 U.N.T.S. at 282, 4 GATT, BISD, at 51.

163. *See U.S. Framework Proposal, supra* note 32, at 1371.

164. Of course, to accomplish present purposes of GATT-wide minimum substantive

not addressed the intellectual property issue, member countries have been free to adopt national policies that do not favor intellectual property protection so long as they provide for non-discriminatory treatment. If this freedom is now impaired, there is an economic cost to be absorbed. Because the developing countries have a right to rely on the bargain they entered into,[165] they should be compensated for agreeing to a change that adversely affects their economic interests. The developing countries have abided by their international legal obligations within the intellectual property treaty system by providing "national treatment" to foreign owners of intellectual property. In GATT parlance, the developing countries are entitled to a reciprocal trade concession for agreeing to provide enhanced protection for intellectual property.

4. Renegotiation of a Long-Term Agreement

Between the bounds of the agreement whose terms must be performed and the agreement as to which circumstances have changed (so as to justify withdrawal or termination) lies the middle ground of the frustrated long-term commercial agreement adjusted by the consent of the parties.[166] A long-term commercial agreement involving multiple parties and complex issues cannot realistically address each potential new development and its affect on the parties (even if it can anticipate changes and

---

and enforcement standards, such a proviso would have represented a substantial departure from the then (and currently) existing international treaty system because countries may have been obligating themselves to protect foreign intellectual property on a level exceeding the protection accorded domestically (i.e., then, as now, a national treatment standard would not have been adequate). *See supra* part III, section A.

165. This right of reliance on the terms of the General Agreement is based on the *pacta sunt servanda* doctrine. As codified in the Vienna Convention, article 26, this doctrine provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 161, art. 26, 1155 U.N.T.S. at 339, 8 I.L.M. at 690, S. ROSENNE, *supra* note 161, at 456.

As stated by Lauterpacht: "A treaty concerns in the first place the contracting parties. The effect of the treaty upon them is that they are bound by its provisions, and that they must execute it in all its parts." Lauterpacht, *supra* note 115, at 923.

For a discussion of the role of "good faith" in the *pacta sunt servanda* doctrine, see S. ROSENNE, *supra* note 161, at 135-79. Under the *pacta sunt servanda* doctrine, the developing countries are presumably entitled to rely on performance by the industralized countries in accordance with their bargain.

166. H. Lauterpact observed with favor the trend toward analogizing to general principles of contract law in investigation of treaties and questioned why this essential analogy should ever have been challenged. *See* 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF H. LAUTERPACHT 351 (E. Lauterpacht ed. 1970) (The General Works).

include a general provision on frustration); a new development may leave each party with a good faith belief that its conduct is justified under the letter or spirit of the agreement. The transformation of the post-Second World War global economy from a system dominated by the trade of goods to one heavily dependent on trade in intangibles and services may constitute a new and unforeseen development that has resulted in good faith disagreement as to its appropriate treatment under the General Agreement. Although there has been a heated debate among scholars, and a divergence of opinion among jurists, as to whether courts should be empowered to adjust contract terms when there has been a frustration of purpose,[167] in the world of commerce parties to frustrated contracts frequently consent to adjustment (without resorting to the courts) to preserve mutually advantageous long term relationships.[168]

The GATT does establish a very limited number of "timeless" principles: Most Favored Nation treatment, nondiscrimination, and reciprocity. These principles provide the foundation for an open or "liberal" international trading system (though each of these principles has, of course, its exceptions based on necessity). Yet, within the framework of these fundamental principles of the liberal economic trading order, the GATT remains in the nature of a complex commercial agreement among sovereigns, an agreement that may not survive unless the parties accept the necessity for good faith renegotiation to account for new developments. If parties are not concerned with preserving a long-term rela-

---

167. *Compare* Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U.L. REV. 1039 (1983) *and* Dawson *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984) [hereinafter Dawson, *United States*] *with* Hillman, *Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law*, 1987 DUKE L.J. 1 (1987). Dawson describes the development under German law, principally arising from the hyperinflation following World War I, of a willingness on the part of the courts to adjust contract terms based on the doctrine of "good faith." Dawson, *United States, supra* at 29. He is categorically opposed to this behavior as an abrogation of the freedom to contract. Hillman, on the other hand, supports the introduction of the good faith bargaining requirement into the United States legal system and approves of court adjustment "to preserve the parties' purposes and to avoid unbargained-for gains by one party or losses by the other." Hillman, *supra* at 20-21. Both scholars observe that United States courts have not been receptive to the notion of court adjustment of contract.

168. This fact was reported (perplexingly as somewhat of a revelation) by Macauley in a 1963 article. Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), and was revisited and elaborated on in Macauley, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 (1985). While good faith and the preservation of business relationships may be the major factors supporting consensual adjustment of contracts, there is little doubt that avoidance of costly and unpredictable dispute settlement procedures also plays a major role in such undertakings.

tionship (e.g., because of a lack of mutual advantage), there may not be an incentive to adjust the agreement, and the parties may proceed to perform the frustrated bargain or suffer a breach and resort to the dispute settlement process. The GATT, however, appears to provide the kind of mutual long-term advantage that would establish a premium for preserving the relationship.

In the case of intellectual property, both North and South have a good faith, albeit differing, perspective concerning the spirit (if not the letter) of the General Agreement. Absolute acceptance of each perspective yields a significantly different result both with respect to the norms to be observed and the obligation to compensate for changes. In such circumstances, a compromise is appropriate. Intellectual property should be protected because it is now an essential component of industrialized country national wealth and because the need for such protection resulted from evolutionary forces. However, immediate and strict compliance with new intellectual property standards would result in painful dislocations that should be ameliorated through a transitional approach. Compensation or reciprocal trade concessions should be paid because an existing bargain is being altered, but strict reciprocity is not appropriate because the bargain must have contemplated the incorporation of economic progress. As a compromise, compensation might take the form of concessions adequate to ameliorate short-term economic dislocations in the developing countries (i.e., in traditional contract terms, to protect developing country reliance interests)—as opposed to concessions that would compensate for the long-term costs of payment for foreign intellectual property (i.e., not compensating for the expectation interests the developing countries may consider themselves to hold based on the letter of the General Agreement). Over the long term, intellectual property should be treated on the same basis as other traded commodities, and appropriations or transfers of intellectual property at less than full value should be subject to the same considerations as any other below-value appropriations or transfers, whether prohibited, compensated for, or treated as other forms of economic aid. As discussed in Part I of this Article, such long-term protection is necessary to satisfy industralized country interests in the protection of an increasingly important component of national wealth and to preserve the liberal trading system.

5. The Available Package of Concessions

There are variety of concessions that the industrialized countries might grant to the developing countries in exchange for a GATT agreement on the protection of intellectual property. These range from concessions with respect to compensation due for intellectual property itself, to

concessions in other trade areas, to concessions not technically within the international trade regime. As a practical matter, a package of concessions may be most suitable.

As discussed earlier, one way to encourage participation in the intellectual property program would be to provide for transitional compliance with progressively more restrictive norms. This type of program is concessionary in that it ameliorates short-term dislocations to developing economies.

The next most "direct" form of concession would be the grant of certain short-term privileges with respect to industrialized country intellectual property. This might include temporary rules on compulsory licensing that permit developing country industries to continue current activities without interruption while providing for less than fully compensatory royalty payments. This would achieve the goal of intellectual property rights recognition for the industrialized countries while again ameliorating economic dislocations in the developing countries. A similar approach might involve the granting of reductions by industrialized country industries on standard royalty rates for some period. The burden of reduced royalties could be spread out on a national level by providing compensating tax benefits (so that the effects would be distributed throughout each industrialized country economy). Such a proposal appears more feasible than the creation of some form of global technology center that could act as a developing country resource. The latter proposal would require a new international bureaucracy and would likely meet with opposition from industry interests (because it would lead to a loss of control over technology). An arrangement in which the intellectual property industries are compensated for wealth transfers by national tax incentives would help to channel the energies of the market into the creation of a viable concessionary structure.

The next most direct method for granting industrialized country concessions would involve granting more favorable terms in a GATT negotiating area other than intellectual property. One of the primary reasons for the negotiation of GATT agreements and amendments in "rounds" is to facilitate the trading of concessions among various areas under negotiation.[169] There is no formula for concession trading, and speculation as to what may be traded as a GATT negotiating round nears its end may be futile. Nevertheless, within the fifteen areas under negotiation in the current round, there will doubtless be a number of areas in which the developing countries seek concessions.[170] Because of the high visibil-

169. O. LONG, *supra* note 1, at 98.

170. Agriculture, trade in services, and government procurement reforms appear to

ity of the intellectual property problem for the developing countries, hard bargaining by the developing countries to obtain politically adequate concessions should be expected.

Similar to Uruguay Round concessions, the industrialized countries (particularly the United States) may continue to condition the grant of tariff concessions to developing countries under the Generalized System of Preferences[171] on adherence to an intellectual property agreement. GSP benefits are granted by individual countries on a case-by-case basis and are not easily used as part of a global package (unless, of course, the industrialized countries threaten to eliminate the GSP system in its entirety).

An area not specifically "trade-related" but offering considerable promise is that of developing country debt reduction.[172] Among the conditions of debt relief, which of course have already included substantial economic restructuring programs, might usefully be included a commitment to enhanced protection for intellectual property.[173] Advantages of this approach are that the debt reduction program potentially affects a broad spectrum of both industrialized and developing countries so that a relatively large number of countries could be included in a program that involved the trading of debt for enhanced intellectual property protection.

---

be the most logical candidates for a package of reciprocal concessions. Concessions with respect to agricultural products in favor of developing countries have already been made, and, given the greater reliance of developing countries on exports of primary products, preferences with respect to these products are a logical target for concessions. In light of the vulnerability of many developing country services industries, concessions favoring the protection of these industries should continue to be in high demand. Similarly, because of the considerable dependence of many developing country economies on the public sector industry, concessions that permit the favoring of local suppliers to the public sector may also provide a ready avenue for industralized country concessions.

171. *See supra* note 71.

172. Under the so-called "Brady Plan," the industralized countries had made over $30 billion in pledges to developing country debt reduction programs as of June 1989. Japan alone had pledged a contribution of $4.5 billion to the IMF and $2.05 billion to the World Bank as of that date. *Japan Pledges $2 Billion for Debt Crisis: Country has Already Committed to $4.5 Billion to Brady Plan Initiative*, Wash. Post, June 14, 1989, at 2, col. 4.

173. Although the issues do not appear to have been explicitly tied, it may be indicative of the goodwill value of debt relief that within days of a recent restructuring of Mexico's external debt, the United States and Mexico agreed to accelerate bilateral negotiation of intellectual property issues. *Steel Trade, Intellectual Property Rights Top Agenda Items for U.S.-Mexico Discussions*, 6 Int'l Trade Rep. (BNA) 1045 (Aug. 9, 1989). USTR Carla Hills has now apparently signalled a willingness to condition debt relief for Brazil on improved intellectual property protection. *Hills Backs Using Brazil Debt in Bargaining on Patents*, Chi. Trib., Aug. 12, 1989, § C, at 3 (Business).

This may be a relatively low cost proposal from the standpoint of the industrialized countries because debt reduction will occur—whether or not on a consensual basis. A commitment by the developing countries to intellectual property rights protection would provide some return on investments otherwise to be written off. The foreign aid programs of the United States, the European Community, and Japan might similarly be used as compensation for intellectual property rights protection.

A variety of instruments are available to the industrialized countries for granting concessions to secure an intellectual property rights agreement. An approach using multiple instruments may have the greatest prospect for success by allocating the costs among industrialized country interest groups.

VI. CONCLUSION

Because the intellectual property problem involves important, but divergent, national policies in both the industrialized and developing countries, it will not be easily solved. The problem arose as a consequence of global economic development and more intense interdependencies. It is a problem that demands the attention of government, industry, and academia. This Article suggests that a GATT-based solution to the intellectual property problem must be sufficiently inclusive to address the heart of the problem—unauthorized appropriation of industrialized country intellectual property by the developing countries and NICs. On a pragmatic level, a two-thirds amendment to the General Agreement should provide the critical mass necessary to achieve a long-term solution, while avoiding the destabilizing impact of a coercive (though theoretically preferable) arrangement. The code approach must be rejected because its effect is too limited.

On the issue of reciprocity, the General Agreement should be analogized to a long-term commercial agreement among sovereigns that requires equitable adjustment based on changed circumstances or frustration of purpose. Both North and South have a good faith basis for their negotiating positions on the issue of enhanced intellectual property protection in the GATT, and a compromise that provides long-term protection for industralized country interests while mitigating short-term economic dislocations in the developing countries is an appropriate and realistic objective for each side in the intellectual property negotiations.

APPENDIX

The FTB Report, *supra* note 13, catalogues the following intellectual property trade barriers on a country-by-country basis:

1. Argentina's lack of pharmaceutical product coverage, weak computer software protection, and permissive compulsory licensing; *id.* at 6-7;
2. Brazil's lack of pharmaceutical process and product patent coverage, permissive compulsory licensing, short effective patent duration, and weak copyright enforcement; *id.* at 19-20;
3. Canada's permissive broadcast retransmission policies and compulsory licensing, and price controls for patented pharmaceuticals; *id.* at 29-30;
4. Chile's lack of patent coverage for chemicals, pharmaceuticals, and foodstuffs; *id.* at 36-37;
5. China's lack of copyright protection for software and lack of patent protection for pharmaceutical products and substances obtained by means of chemical processes; *id.* at 41-43;
6. Colombia's lack of patent coverage in various areas, short patent duration, permissive compulsory licensing, trademark restrictions, and gaps in copyright coverage (no explicit mention of software) and enforcement (virtually 100 percent video cassette appropriation); *id.* at 49-51;
7. Egypt's lack of copyright coverage and enforcement in a variety of areas (including audio/video and software), lack of pharmaceutical and foodstuff patent coverage, inadequate patent term, and permissive compulsory licensing; *id.* at 55-56;
8. Inadequate audio/video copyright enforcement in Belgium and the Netherlands (European Communities intellectual property concerns are addressed with respect to specific countries); *id.* at 60-61;
9. Finland's lack of pharmaceutical product patent coverage; *id.* at 71;
10. Greece's lack of service mark protection, copyright enforcement regarding video cassettes, and software coverage; *id.* at 77;
11. The Gulf Cooperation Council's (Saudi Arabia, Kuwait, Bahrain, Qatar, the UAE and Oman) lack of copyright legislation and extensive audio/video and software appropriation, lack of adequate patent protection, and lack of trademark law enforcement; *id.* at 79-81;
12. India's lack of patent coverage for chemicals, pharmaceuticals and foodstuffs, short patent term, permissive compulsory licensing and royalty restrictions, inadequate copyright enforcement (primarily software and books), obstacles to registering and protecting trademarks, and limited trade secret protection; *id.* at 86-87;
13. Indonesia's lack of patent legislation and copyright and trademark

enforcement; *id.* at 93;

14. Italy's lack of copyright enforcement with respect to audio, video, television broadcasts, and computer software; *id.* at 95;
15. Japan's inefficient patent and trademark system and relatively short copyright term; *id.* at 104-105;
16. Korea's inadequate enforcement of new copyright legislation (audio, video and software), counterfeiting of sporting goods, and discriminatory patent procedures; *id.* at 120;
17. Malaysia's permissive copyright compulsory licensing and video appropriation; *id.* at 126;
18. Mexico's lack of biotechnology and foodstuff patent coverage and permissive compulsory licensing, permissive trademark compulsory licensing, limited trade secret protection, disclosure of pharmaceutical and agricultural chemical testing information, restrictions on technology transfers (including royalties), and uncompensated television retransmission; *id.* at 131-32;
19. Nigeria's inadequate copyright (audio and video) enforcement; *id.* at 139-40;
20. Norway's lack of pharmaceutical product patent coverage; *id.* at 141-42;
21. Pakistan's lack of pharmaceutical product patent coverage, inadequate pharmaceutical process patent enforcement, permissive compulsory patent licensing, ineffective copyright enforcement (books and video), and inadequate trade and service mark protection; *id.* at 145-46;
22. The Philippines' permissive compulsory licensing and royalty restrictions regarding patents, inadequate trademark enforcement, and permissive cancellation, significant copyright limitations and audio/video appropriation, and royalty limitations on unpatented technology transfers; *id.* at 150-51;
23. Portugal's weak copyright (audio, video, and television) enforcement; *id.* at 153-54;
24. Spain's inadequate copyright (software and video) enforcement and transitionally inadequate pharmaceutical and chemical product patent protection; *id.* at 156-57;
25. Taiwan's inadequate copyright (books, software, and video) and trademark enforcement, and lack of biotechnology and foodstuff coverage; *id.* at 165-67;
26. Thailand's lack of patent coverage for pharmaceuticals, foodstuffs, and agricultural machinery, short patent term, permissive compulsory licensing, inadequate trade and service mark protection, and inadequate copyright coverage (computer software) and enforcement;

id. at 171-72;

27. Turkey's lack of pharmaceutical and biotechnology patent coverage and inadequate copyright (books, audio/video, and software) enforcement; *id.* at 177;
28. Venezuela's lack of patent subject matter coverage (unspecified), short patent term and patent licensing restrictions, inadequate trademark registration system and enforcement, and inadequate copyright (video) enforcement; *id.* at 183-84;
29. Yugoslavia's lack of pharmaceutical, alloy, and chemical product patent coverage and short patent term; *id* at 187-88.