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## TRIPS and Its Achilles' Heel

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# TRIPS AND ITS ACHILLES' HEEL

Peter K. Yu\*

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\* Copyright © 2011 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor, Centre for International Intellectual Property Studies, University of Strasbourg. An earlier version of this Article was presented at the “15 Years of TRIPS Implementation: Intellectual Property Protection from a Global Perspective” Symposium at the University of Georgia School of Law, the 2010 International Law Weekend in New York, and as a public lecture at the Centre for International Intellectual Property Studies at the University of Strasbourg. The Author would like to thank Christophe Geiger for his kind invitation and hospitality and Irene Calboli, Patricia Judd, Janewa OseiTutu, Henning Grosse Ruse-Khan, and the participants of these events for their valuable comments and suggestions. He is also grateful to Paul Heald and the *Journal of Intellectual Property Law* for their kind invitation to help organize this symposium and to Jennifer Pridgeon, Jason Sheppard, other members of the *Journal*, Donald Johnson, and the Dean Rusk Center at the University of Georgia School of Law for making the event possible.

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## I. INTRODUCTION

Shortly after the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>1</sup> (TRIPS Agreement), commentators widely praised the Agreement for transforming the international intellectual property system. While some considered the extension of the mandatory dispute settlement process of the World Trade Organization (WTO) to intellectual property disputes a crowning achievement of the Uruguay Round of Trade Negotiations (Uruguay Round),<sup>2</sup> others extolled the unprecedented benefits of having a set of multilateral enforcement norms built into the international intellectual property system.<sup>3</sup> With twenty-one provisions on obligations that range from border measures to criminal sanctions, the TRIPS Agreement, for the first time,

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<sup>1</sup> Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

<sup>2</sup> See William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 32 (2005) ("Dispute settlement is one of the great successes of the WTO."); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 275 (1997) (noting that the two achievements of the Uruguay Round are, as the title suggests, "Putting TRIPS and Dispute Settlement Together"); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 149–50 (2000) ("One of the most celebrated accomplishments of the WTO system is the dispute resolution mechanism which adds legitimacy to the overall design of the new trading system." (footnote omitted)).

<sup>3</sup> See Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998* ¶ 8.97, WT/DS176/R (Aug. 6, 2001) [hereinafter Section 211 Panel Report] ("The inclusion of [Part III] on enforcement in the TRIPS Agreement was one of the major accomplishments of the Uruguay Round negotiations as it expanded the scope of enforcement aspect of intellectual property rights. Prior to the TRIPS Agreement, provisions related to enforcement were limited to general obligations to provide legal remedies and seizure of infringing goods."); DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 440 (3d ed. 2008) ("The enforcement section of the TRIPS Agreement is clearly one of the major achievements of the negotiation."); U.N. CONFERENCE ON TRADE & DEV.—INT'L CTR. FOR TRADE & SUSTAINABLE DEV. [UNCTAD-ICTSD], *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* 629 (2005) [hereinafter TRIPS RESOURCE BOOK] ("The introduction of a detailed set of enforcement rules as part of TRIPS has been . . . one of the major innovations of this Agreement."); Carlos M. Correa, *The Push for Stronger Enforcement Rules: Implications for Developing Countries*, in ICTSD, *THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES* 27, 34 (2009) [hereinafter GLOBAL DEBATE] ("The TRIPS Agreement is the first international treaty on IPRs that has included specific norms on the enforcement of IPRs." (footnote omitted)); Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 403 (1996) ("[The enforcement] rules constitute the first time in any area of international law that such rules on domestic enforcement procedures and remedies have been negotiated."); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 366 (2004) ("Part III of the TRIPS Agreement delineated international standards for the enforcement of intellectual property rights for the first time, including civil, administrative, and criminal procedures and remedies and measures related to border control." (footnote omitted)).

provides comprehensive international minimum standards on the enforcement of intellectual property rights.<sup>4</sup>

Notwithstanding these quick praises, some commentators provided more measured assessments. For example, in a prescient, and still highly relevant, article published shortly after the adoption of the TRIPS Agreement, Jerome Reichman and David Lange described the Agreement's enforcement provisions as its "Achilles' heel."<sup>5</sup> As they observed:

[T]he enforcement provisions are crafted as broad legal standards, rather than as narrow rules, and their inherent ambiguity will make it harder for mediators or dispute-settlement panels to pin down clear-cut violations of international law. . . . [W]e predict that the level of enforcement under the TRIPS Agreement will greatly disappoint rightsholders in the developed countries, and that recourse to coercive measures will not appreciably improve the situation in the short and medium terms.<sup>6</sup>

In an earlier piece, Ruth Okediji also noted that the TRIPS Agreement's marriage of intellectual property to trade can either provide promising prospects for global enforcement of intellectual property rights or become the Achilles' heel of the international trading system.<sup>7</sup>

With more than fifteen years of TRIPS developments, including the release of the recent WTO panel report on intellectual property enforcement,<sup>8</sup> it is time to reevaluate the TRIPS Agreement's strengths and weaknesses in the enforcement area. This Article focuses primarily on its weaknesses. It points out that, although the Agreement fails to induce stronger global enforcement of intellectual property rights, such failure is neither a surprise nor a disappointment. Rather, that outcome is *expected* in view of the many challenges confronting the development of international intellectual property enforcement norms. In fact, it would be highly unrealistic to expect all of these challenges to

<sup>4</sup> See TRIPS Agreement arts. 41–61.

<sup>5</sup> J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 34–40 (1998) (explaining why the enforcement provisions are the "Achilles' heel of the TRIPS Agreement").

<sup>6</sup> *Id.* at 35, 38–39.

<sup>7</sup> See Ruth L. Gana [Okediji], *Prospects for Developing Countries Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 775 (1996) ("[I]t is important to observe that the protection of intellectual property rights within the auspices of the WTO effectively links the well-being of the entire system of world trade to the success of the TRIPs Agreement and vice versa. This perhaps is the greatest source of enforcement prospects for the TRIPs Agreement. History suggests, however, that this may also be its Achilles heel.").

<sup>8</sup> Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter TRIPS Enforcement Panel Report].

be successfully tackled by a single multilateral agreement in such a short period of time.

Part II examines why the TRIPS Agreement fails to provide effective global enforcement of intellectual property rights. In doing so, it identifies five sets of challenges: historical, economic, tactical, disciplinary, and technological. Part III outlines the various actions taken by both developed and less developed countries<sup>9</sup> to steer the TRIPS Agreement and the larger international intellectual property system toward their preferred positions. While developed countries push for the development of stronger enforcement norms, less developed countries resist those demands and complain about the use of bilateral, plurilateral, and regional trade and investment agreements to establish TRIPS-plus standards. Part IV concludes with four lessons that can be drawn from the continuous battle between developed and less developed countries over international intellectual property enforcement norms. Given the significance of effective enforcement to both developed and less developed countries, it is the hope of this Article that a better understanding of these four lessons will lead to a more balanced, robust, and sustainable global intellectual property enforcement regime.

## II. CHALLENGES

Although the TRIPS Agreement ushered in new and higher standards on international intellectual property enforcement, these standards have yet to strengthen intellectual property enforcement to the satisfaction of the *demandeur* countries in the developed world. Thus, many developed countries and their supportive industries consider these standards primitive, constrained, inadequate, and ineffective.<sup>10</sup> These deficiencies were indeed a primary reason

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<sup>9</sup> The TRIPS Agreement distinguishes between developing and least developed countries. This Article uses “less developed countries” to denote both developing and least developed countries. When referring specifically to the TRIPS Agreement itself, however, this Article may return to use of the terms “developing countries” and “least developed countries.”

<sup>10</sup> See, e.g., EUROPEAN COMM'N, DIRECTORATE GENERAL FOR TRADE, STRATEGY FOR THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES 3 (2005), available at [http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122636.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf) (“Violations of intellectual property rights . . . continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement.”); TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 4 (2008) (noting that “it has become apparent to some national governments, and regional organizations that the ‘aggressive’ enforcement provisions of TRIPS, particularly the border measures, have fallen short of expectations of providing an effective system of thwarting international movement of infringing goods”); Timothy P. Trainer, *Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. MARSHALL REV. INTELL. PROP. L. 47 (2008–2009) (discussing the inadequacies of the enforcement provisions of the TRIPS Agreement and explaining the need for TRIPS-plus bilateral and regional free trade agreements in the area of

for the developed countries' aggressive push for the establishment of new and higher international benchmarks through the Anti-Counterfeiting Trade Agreement (ACTA)<sup>11</sup> and other bilateral, plurilateral, or regional trade and investment agreements.<sup>12</sup>

The TRIPS Agreement's lack of success in the enforcement area is, indeed, interesting. After all, developed countries, by most accounts, have imposed their higher intellectual property protection standards on their less developed trading partners.<sup>13</sup> As Jacques Gorlin observed in retrospect, the Intellectual Property Committee—an ad hoc coalition of major U.S. corporations he directed in an effort to push for the establishment of the TRIPS Agreement<sup>14</sup>—got ninety-five percent of what it wanted and was particularly pleased with the enforcement provisions.<sup>15</sup>

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border enforcement).

<sup>11</sup> Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, *opened for signature* May 1, 2011, available at [http://trad.eec.europa.eu/doclib/docs/2011/may/tradoc\\_147937.pdf](http://trad.eec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf) [hereinafter ACTA]. See generally Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) (discussing the serious concerns about ACTA).

<sup>12</sup> See, e.g., INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing free trade agreements in the intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.–Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259 (criticizing the U.S.–Australia Free Trade Agreement); Jean-Frédéric Morin, *Multilateralizing TRIPS-Plus Agreements: Is the US Strategy a Failure?*, 12 J. WORLD INTELL. PROP. 175 (2009) (examining the United States' free trade agreement strategy); Pedro Roffe et al., *Intellectual Property Rights in Free Trade Agreements: Moving Beyond TRIPS Minimum Standards*, in 1 RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 266 (Carlos M. Correa ed., 2010) (discussing free trade agreements in relation to the TRIPS framework); Yu, *supra* note 3, at 392–400 (discussing the growing use of bilateral, plurilateral and regional trade agreements to push for higher intellectual property standards); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953 (2011) (critically examining the strengths and weaknesses of bilateral and plurilateral trade agreements).

<sup>13</sup> See generally GERVAIS, *supra* note 3, at 3–27 (describing the origins and development of the TRIPS Agreement); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–79 (2006) (examining four different accounts of the origins of the TRIPS Agreement).

<sup>14</sup> Formed in March 1986, the Intellectual Property Committee brought together top corporate executives from about a dozen U.S.-based multinational firms. In addition to coordinating industry positions on intellectual property policies with the U.S. government, the Committee was instrumental in “forging an industry consensus with its Japanese [Keidanren] and European industry counterparts [UNICE (Union of Industrial and Employers' Confederations of Europe)], who agreed to work on [a trade-based approach to protecting intellectual property] and pledged to present these views to their respective governments in time for the launching of the Uruguay Round.” SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 106 (2003). See generally *id.* at 96–120 (discussing the role of the Intellectual Property Committee in pushing for the adoption of high intellectual property standards in the TRIPS Agreement).

<sup>15</sup> *Id.* at 115 (citing interview with Jacques Gorlin).

To help us better understand why the TRIPS Agreement fails to provide effective global enforcement of intellectual property rights, this Part identifies five challenges: historical, economic, tactical, disciplinary, and technological. It explains why the development of international intellectual property enforcement norms remains a work in progress to which the TRIPS Agreement has made only modest contributions.

#### A. HISTORICAL CHALLENGES: PATH DEPENDENCY

The TRIPS Agreement's failure to develop strong international intellectual property enforcement norms can largely be seen as a problem of historical legacy. The problem owes its origin to, first, a lack of development of enforcement norms in the international intellectual property system in the past two centuries and, more recently, the developed countries' constraints and misguided tactics in the TRIPS negotiation process. This section discusses the lack of historical developments, while Part II.C will discuss the negotiation challenges. Taken together, these two sections show that the development of the international intellectual property system is highly path-dependent.<sup>16</sup>

Although commentators widely use international harmonization as the justification for the development of the international intellectual property system, this system focuses more on the development of international minimum standards than on the creation of a uniform universal code.<sup>17</sup> In the

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<sup>16</sup> As Professor Okediji observed:

Assimilating [developing and least developed countries] into the global copyright system is a familiar component of the path dependency characteristic of global copyright lawmaking. Since the Stockholm Protocol, which first formally acknowledged special needs of [developing countries], no other revision of the Berne Convention or associated special treaty has purposively sought to identify the impact of new provisions on the development needs and aspirations of the global South beyond general statements regarding the "balance" evidenced by the formal language of the treaties. Instead, the justifications for "globalizing copyright" have sought to impute benefits deeply linked to and dependent on the existence of capital markets and institutional actors to copyright regulation in the impoverished and unstable economies of much of the Southern Hemisphere.

Ruth L. Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 *FORDHAM L. REV.* 2379, 2405 (2009) (footnotes omitted).

<sup>17</sup> See Panel Report, *Canada—Term of Patent Protection* ¶ 6.87, WT/DS170/R (May 5, 2000) ("Article 1.1 confirms that the TRIPS Agreement is a minimum standards agreement in respect of intellectual property rights."); Graeme B. Dinwoodie, *The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA* 61, 66–67 (Daniel J. Gervais ed., 2007) [hereinafter *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT*] (noting that "national treatment plus substantive minima . . . remains the dominant approach in current intellectual property treaties"); Yu, *supra* note 3, at 339 (noting that "in lieu of reciprocity, the [original Berne] Convention adopted the principle of national treatment, which requires member states to grant to foreigners the same rights they grant to their



enforcement area, the development of such minimum standards was particularly limited, and countries continue to have wide and deep disagreements over how intellectual property rights are to be enforced.<sup>18</sup>

Although the Paris Convention for the Protection of Industrial Property<sup>19</sup> (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works<sup>20</sup> (Berne Convention)—two key international intellectual property conventions—include many substantive provisions, they contain very few provisions concerning intellectual property enforcement.<sup>21</sup> For example, Article 9 of the Paris Convention provides detailed provisions on the seizure on importation of goods bearing an infringing trademark or trade name.<sup>22</sup> Article 10(1) applies those seizure provisions to the “direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.”<sup>23</sup> Article 10*bis* requires members to provide “effective protection against unfair competition.”<sup>24</sup> Article 10*ter* further requires members to provide “appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10*bis*.”<sup>25</sup> Similarly, in the Berne Convention, Article 13(3) allows for the seizure on importation of infringing copies of protected sound recordings.<sup>26</sup> Article 15 stipulates who is entitled to institute infringement proceedings to enforce protected rights under the Convention.<sup>27</sup> Article 16 governs the seizure of infringing copies of a protected work.<sup>28</sup>

In short, intellectual property enforcement provisions in the Paris and Berne Conventions were rare and piecemeal. Not until the adoption of the TRIPS

own nationals”); *id.* at 349 (noting that the drafters of the original Paris Convention settled on only “minimal unification,” as compared to full harmonization); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 863–66 (2007) (discussing the flexibilities in the TRIPS Agreement).

<sup>18</sup> See TRIPS RESOURCE BOOK, *supra* note 3, at 575 (noting the existence of “wide differences . . . in national laws with regard to enforcement rules”); Li Xuan & Carlos M. Correa, *Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 207, 207 (Li Xuan & Carlos M. Correa eds., 2009) [hereinafter INTELLECTUAL PROPERTY ENFORCEMENT] (noting “the great variation in enforcement measures in national law”).

<sup>19</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

<sup>20</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>21</sup> See TRIPS RESOURCE BOOK, *supra* note 3, at 629–30 (noting the few intellectual property enforcement provisions in the international intellectual property system).

<sup>22</sup> Paris Convention, *supra* note 19, art. 9.

<sup>23</sup> *Id.* art. 10(1).

<sup>24</sup> *Id.* art. 10*bis*(1).

<sup>25</sup> *Id.* art. 10*ter*(1).

<sup>26</sup> Berne Convention, *supra* note 20, art. 13(3).

<sup>27</sup> *Id.* art. 15.

<sup>28</sup> *Id.* art. 16.

Agreement did the international intellectual property system include comprehensive multilateral norms on the enforcement of intellectual property rights. In light of their recent origin, international intellectual property enforcement norms have been largely underdeveloped, and their effectiveness and clarity do not compare well with the substantive provisions of the Paris and Berne Conventions, many of which have existed for more than a century.

#### B. ECONOMIC CHALLENGES: RESOURCE AND CAPACITY CONSTRAINTS

While the lack of historical development of enforcement norms in the international intellectual property system explains why such norms are underdeveloped, it does not explain why the delegates from the *demandeur* countries did not push harder to strengthen those norms through the TRIPS negotiations. Instead, the delegates' reluctance needs to be attributed to other reasons. For example, high enforcement standards often come with a hefty price tag, difficult tradeoffs, and serious intrusions upon a country's sovereignty.<sup>29</sup> The introduction of these standards, therefore, is highly controversial.

In addition, the TRIPS delegates might have more negotiation items on hand than they could handle satisfactorily within the confines of the negotiation process. Some delegates might also have assumed wrongly that countries could translate treaty language easily into effective enforcement after the TRIPS Agreement entered into effect.<sup>30</sup> This section focuses on the hefty price tag and difficult tradeoffs, and the next section will explore the negotiation challenges confronting the *demandeur* countries.

Strong intellectual property enforcement requires a substantial investment of resources, the development of supporting institutional infrastructures, and the introduction of complementary policy reforms. Although the challenge of obtaining resources to strengthen intellectual property enforcement exists in both developed and less developed countries,<sup>31</sup> this challenge is particularly

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<sup>29</sup> As China noted in its first written submission to the DSB:

International organizations accord great deference to national authorities in criminal law matters. A review of international law shows that states have traditionally regarded criminal law as the exclusive domain of sovereign jurisdiction; where sovereign governments are subject to international commitments concerning criminal law, these commitments afford significant discretion to governments regarding implementation; and international courts have been exceedingly reluctant to impose specific criminal standards on states.

TRIPS Enforcement Panel Report, *supra* note 8, Annex B-1, ¶ 12; *see also id.* ¶ 7.501 (acknowledging the "sensitive nature of criminal matters and attendant concerns regarding sovereignty").

<sup>30</sup> *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (noting the distinction between law in books and law in action).

<sup>31</sup> While discussions of capacity and resource constraints often focus on less developed countries, these constraints affect developed countries as well. *See, e.g., Intellectual Property Rights*

acute in less developed countries. Even worse, many of the world's least developed countries continue to struggle just to meet basic needs, such as the provision of clean drinking water, food, shelter, electricity, schools, and basic health care. It is therefore understandable why enforcement is a highly sensitive issue in international intellectual property negotiations.

From an economic standpoint, the strengthening of intellectual property enforcement standards incurs a wide variety of costs. Of primary concern to less developed countries are the administrative costs of a strong intellectual property enforcement regime: the costs incurred in building new institutional infrastructures; restructuring existing agencies; developing specialized expertise through training or other means; and staffing courts, police forces, customs offices, and prisons.<sup>32</sup> While, in the past, private rights holders funded enforcement costs through civil litigation, the growing demands for criminalization and public enforcement have led to a gradual shift of responsibility from private rights holders to national governments.<sup>33</sup>

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*Issues and Imported Counterfeit Goods: Hearing Before the U.S.—China Econ. and Sec. Review Comm'n*, 109th Cong. 9 (2006) (written testimony of Chris Israel, Int'l IPR Enforcement Coordinator, U.S. Dep't of Commerce) ("With finite resources and seemingly infinite concerns, how [the United States] focus[es its] efforts is crucial."); *Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.—China Econ. and Sec. Review Comm'n*, 109th Cong. 183 (2006) (oral testimony of Peter Pitts, President, Center for Medicine in the Public Interest, New York) ("When I was at the [Food and Drug Administration], people asked me why don't you stop people at the border and arrest them coming in from Canada? The answer is that's not the best bang for the regulatory dollar. What government needs to do is go after the big time criminals."); TIM PHILLIPS, *KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS* 36 (2005) (acknowledging the impossibility for the New York Police Department "to raid all the warehouses all of the time without swallowing the entire NYPD anti-counterfeiting budget and taking officers off other duties"); Trainer, *supra* note 10, at 58 (lamenting how "the staff dedicated solely to IPR enforcement [in the U.S. government] could be counted on two hands").

<sup>32</sup> See TRAINER & ALLUMS, *supra* note 10, at 705–06 (noting that "the upgrading of the border enforcement system to a more aggressive and proactive system will entail significant change in agency structure and legal authority"); Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, in *GLOBAL DEBATE*, *supra* note 3, at xiii, 15 ("[E]nforcement actions take real resources. Courts, police forces, customs offices, and other competent authorities need to be adequately staffed and equipped to respond to complaints by right holders and to act on their own. In addition, governments face the costs of maintaining prisons and, possibly, destroying seized pirated and counterfeit products that cannot be auctioned off as generic goods.").

<sup>33</sup> As Carlos Correa noted:

Criminalization is regarded by its proponents as a stronger deterrent than civil remedies. For right holders there are some significant advantages: actions can or must be initiated *ex officio* and the cost of procedures is fully borne by the states. However, it is clear that IPRs are private rights and that states' only obligation under the TRIPS Agreement is to ensure that enforcement procedures are available, and not to enforce IPRs themselves on its own cost and responsibility.

Correa, *supra* note 3, at 27, 42; see also Li Xuan, *Ten General Misconceptions About the Enforcement of Intellectual Property Rights*, in *INTELLECTUAL PROPERTY ENFORCEMENT*, *supra* note 18, at 28 ("[R]esponsibility of enforcement has cost implications. . . . [B]y shifting responsibility, it would

More problematically, such a shift has brought with it significant risks that may ultimately backfire on a country's goal to use intellectual property protection to attract foreign investment. For instance, strengthening border control requires the development of specialized expertise and sophistication on the part of customs authorities. If these authorities fail to develop the requisite expertise and sophistication, their inconsistent—and at times wrongful—application of new, and usually tougher, border measures may lead to uncertainty and other concerns that eventually frighten away foreign investors.<sup>34</sup> Even worse, irregularities in the application of these measures may become the subject of complaints that firms file with their governments. These complaints, in turn, may lead to greater pressure from foreign governments—for example, through the United States' notorious Section 301 process.<sup>35</sup> In the end, what started as a country's means of attracting foreign investment and promoting economic development ends up being a heavy burden on an already resource-deficient country.

Of bigger concern among human rights groups, civil libertarians, consumer advocates, and academic commentators are the high opportunity costs incurred by strengthened intellectual property enforcement. Given the limited resources in many less developed countries, an increase in the commitment of resources in the enforcement area inevitably will lead to the withdrawal of resources from other competing, and at times more important, public needs. These public needs include purification of water; generation of power; improvement of public health; reduction of child mortality; provision of education; promotion of public security; building of basic infrastructure; reduction of violent crimes; relief of poverty; elimination of hunger; promotion of gender equality;

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shift the cost of enforcement from private parties to the government and ensure right-holders are beneficiaries without asking responsibility.”); Henning Grosse Ruse-Khan, *Re-Delineation of the Role of Stakeholders: IP Enforcement Beyond Exclusive Rights*, in INTELLECTUAL PROPERTY ENFORCEMENT, *supra* note 18, at 43, 51–52 (noting the trend of “externalizing the risks and resources to enforce IP rights away from the originally responsible rights-holders towards state authorities”); Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* 9 (IQsensato, Occasional Papers No. 1, 2008), available at [http://www.iqsensato.org/wp-content/uploads/Sel1\\_IP\\_Enforcement\\_State\\_of\\_Play-OPs\\_1\\_June\\_2008.pdf](http://www.iqsensato.org/wp-content/uploads/Sel1_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf) (“The opportunity costs of switching scarce resources for border enforcement of IP ‘crimes’ is huge. There surely are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms.”).

<sup>34</sup> See Grosse Ruse-Khan, *supra* note 18, at 52 (stating that, because *ex officio* actions do not require rights holders to post bond or other forms of security that could be used to defray any potential damages, these actions “not only shift the initiative and costs for taking action to the state but also entail significant risks of damaging claims by affected importers whenever the goods suspended in the end are not IP infringing”).

<sup>35</sup> See Yu, *supra* note 11 (noting the interplay between the USTR's Section 301 process and heightened border measures as required by ACTA and other TRIPS-plus bilateral, plurilateral, or regional trade agreements).

protection of the environment; and responses to terrorism, illegal arms sales, human and drug trafficking, illegal immigration, and corruption.<sup>36</sup>

The competition between intellectual property enforcement and these public needs is rather ill-timed given the acute shortage of resources created by the recent global economic crisis. Such competition is also disturbing considering the fact that “global investment in areas of poverty, hunger, health and education is [still] less than half of what is needed to reach the Millennium Development Goals.”<sup>37</sup> The strengthening of intellectual property enforcement, therefore, not only has had an adverse impact on some individual countries, but it has also undermined the ability of the global community to achieve development goals.

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<sup>36</sup> See, e.g., Frederick M. Abbott & Carlos M. Correa, *World Trade Organization Accession Agreements: Intellectual Property Issues* 31 (Quaker United Nations Office, Global Economic Issues Paper No. 6, 2007), available at <http://www.uno.org/geneva/pdf/economic/Issues/WTO-IP-English.pdf> (“For many developing countries, protection of IPRs is not, nor should it be, a national priority. Financial resources are better invested in public infrastructure projects, such as water purification and power generation.”); Correa, *supra* note 3, at 43 (“[I]n developing countries that suffer from high levels of street crime and other forms of criminality that put at risk the life, integrity, or freedom of persons on a daily basis, it seems reasonable that fighting such crimes should receive higher priority than IP-related crimes where protected interests are essentially of a commercial nature (except when associated with adulteration of health and other risky products).” (footnote omitted)); Fink, *supra* note 32, at 2 (“Governments need to make choices about how many resources to spend on combating piracy, as opposed to enforcing other areas of law, building roads and bridges, protecting national security, and providing other public goods. Such choices are usually not stated in explicit terms, but they underlie every budgetary decision by federal and local governments.”); IP Justice, *ACTA’s Misguided Effort to Increase Govt Spying and Ratchet-Up IPR Enforcement at Public Expense*, IP JUSTICE, <http://ipjustice.org/wp/2008/03/21/act-a-ipj-comments-ustr-2008march/> (Mar. 21, 2008) (“The financial expense to tax-payers to fund ACTA would be enormous and steal scarce resources away from programs that deal with genuine public needs like providing education and eliminating hunger. ACTA would burden the judicial system and divert badly needed law enforcement and customs resources away from public security and towards private profit.”); Li & Correa, *supra* note 18, at 210 (noting that the demands for strengthened intellectual property enforcement “seem to overlook the cost of the required actions, the different priorities that exist in developing countries regarding the use of public funds (health and education would normally be regarded as more urgent than IP enforcement) and the crucial fact that IPRs are *private rights* and, hence, the burden and cost of their enforcement is to be borne by the right-holder, not the public at large”); Ermias Tekeste Biadgleng & Viviana Muñoz Tellez, *The Changing Structure and Governance of Intellectual Property Enforcement* 4 (South Centre, Research Paper No. 15, 2008), available at [http://www.southcentre.org/index.php?option=com\\_docman&task=doc\\_download&gid=714&Itemid=&lang=en](http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=714&Itemid=&lang=en) (“Police raids and the use of criminal law enforcement mechanisms . . . require extensive use of public funds and in developing countries may entail pulling resources away from other law enforcement efforts when there are other means, particularly via civil law, that may be strengthened to allow private parties to enforce their rights and which do not require extensive use of public funds.”); Xue Hong, *Enforcement for Development: Why Not an Agenda for the Developing World*, in *INTELLECTUAL PROPERTY ENFORCEMENT*, *supra* note 18, at 133, 143 (“Increment and strength of public enforcement measures will inevitably impose an economic burden on the developing countries and divert the priorities of these countries, such as prosecution of violent crimes or relief of poverty.”).

<sup>37</sup> Li, *supra* note 33, at 29.

In addition to administrative and opportunity costs, economists and commentators have identified many other costs, such as adjustment costs due to labor displacement, social costs associated with monopoly pricing, higher imitation and innovation costs, potential costs resulting from the abuse of intellectual property rights, and costs of litigation and litigation error.<sup>38</sup> Although these costs are alarming, how high these and other costs will be depends ultimately on whether the intellectual property system is appropriately designed. The more the system is tailored to the needs, interests, conditions, and priorities of an individual country, the lower the costs will be.

In sum, the high costs incurred by the strengthening of international intellectual property enforcement standards have raised many sensitive issues. There are also additional issues concerning whether these costs would increase needlessly with the adoption of inappropriate global intellectual property standards—for example, those based on the super-size-fits-all template enshrined in the TRIPS Agreement. Unless developed countries are willing to provide considerable and substantive financial and technical assistance<sup>39</sup>—other than the routine support of capacity-building programs<sup>40</sup>—these constraints are unlikely to disappear. It is, therefore, no surprise that some commentators have suggested that the significant national divergences in enforcement costs, available resources, and public policy priorities might warrant special and differential treatment for at least some less developed countries.<sup>41</sup>

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<sup>38</sup> See *id.* (listing litigation costs and costs of litigation error among the direct costs of TRIPS enforcement); Keith E. Maskus et al., *Intellectual Property Rights and Economic Development in China*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 295, 302–06 (Carsten Fink & Keith E. Maskus eds., 2005) (noting that stronger intellectual property protection would incur significant costs, such as administrative and enforcement costs, adjustment costs due to labor displacement, social costs associated with monopoly pricing, higher imitation and innovation costs and potential costs resulting from the abuse of intellectual property rights).

<sup>39</sup> See discussion *infra* Part IV.C; see also Trainer, *supra* note 10, at 74 (“If ACTA is to be meaningful and welcoming to developing countries (or developed countries that are having implementation problems) that voluntarily agree to new and higher standards, there must be an assistance program that is better developed than what has been available in the past.”).

<sup>40</sup> See, e.g., COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 149–52 (2002), available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CI\\_PRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CI_PRfullfinal.pdf) [hereinafter IPR COMMISSION REPORT] (discussing technical assistance and capacity-building programs); CAROLYN DEERE, THE IMPLEMENTATION GAME 180–86 (2009) (discussing the use of technical assistance and capacity-building programs to advance agendas in TRIPS-related policy debates); CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA 61–66 (2007) (discussing WIPO’s technical assistance and capacity-building efforts).

<sup>41</sup> See Fink, *supra* note 32, at 16 (“Given other demands on public expenditure and diminishing returns to enforcement actions, society ‘tolerates’ to some extent violations of laws . . . . In addition, ‘tolerable’ levels of IPRs-infringements may well differ from country to country, depending, *inter alia*, on societies’ preferences for different public goods.” (citation omitted)); Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Right Regimes*, in

## C. NEGOTIATION CHALLENGES: THE TRIPS NEGOTIATIONS

Added to the difficult and highly sensitive resource and capacity questions were the *demandeur* countries' goals for the TRIPS Agreement. As stated in the Punta del Este Declaration, which set out the negotiating objectives of the TRIPS Agreement in a section subtitled "Trade-related aspects of intellectual property rights, including trade in counterfeit goods":

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 [General Agreement on Tariffs and Trade] provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.<sup>42</sup>

Because the TRIPS negotiating mandate included the dual goals of "promot[ing] effective and adequate protection of intellectual property rights, and . . . ensur[ing] that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade,"<sup>43</sup> TRIPS delegates inevitably had to focus on those negotiation items they believed would lead to the most satisfactory outcome. Thus, even though intellectual property enforcement provisions represent slightly more than a quarter of the seventy-three provisions in the TRIPS Agreement, more than two-thirds of the provisions sought to introduce, in a single undertaking, new substantive minimum standards on which there was no prior international consensus.

For example, Article 10.1 states that "computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention."<sup>44</sup> Article 23 offers special protection to geographical indications for wines and spirits.<sup>45</sup> Article 27.1 stipulates that "patents shall be available

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GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 89, 98 (Mitchel B. Wallerstein et al. eds., 1993) ("[I]t can be argued that cross-country differences in protection levels are justified in view of differences in enforcement costs and available resources.").

<sup>42</sup> Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Sept. 20, 1986, 25 I.L.M. 1623, 1626 (1986) [hereinafter Punta del Este Declaration].

<sup>43</sup> *Id.*

<sup>44</sup> TRIPS Agreement art. 10.1.

<sup>45</sup> *Id.* art. 23.

and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”<sup>46</sup> Article 27.3(b) requires members to “provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.”<sup>47</sup> Article 31 delineates the conditions under which members can issue a compulsory license.<sup>48</sup> Article 35 offers protection to integrated circuit topographies through a reference to the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, which has never entered into force.<sup>49</sup> Article 39.3 mandates protection against the unfair commercial use of clinical trial data that have been submitted to regulatory agencies for the approval of pharmaceutical or agricultural chemical products that utilize new chemical entities.<sup>50</sup>

Moreover, even though developed countries successfully obtained their preferred terms in the TRIPS enforcement provisions,<sup>51</sup> their success might have been curtailed by the skillful yet subtle attempt by negotiators from less developed countries to inject ambiguities, flexibilities, limitations, and exceptions into the TRIPS Agreement.<sup>52</sup> Although commentators have recounted the limited knowledge of intellectual property rights in less developed

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<sup>46</sup> *Id.* art. 27.1.

<sup>47</sup> *Id.* art. 27.3(b); *see also* WATAL, *supra* note 13, at 4 (noting that plant variety protection was “geographically limited”).

<sup>48</sup> TRIPS Agreement art. 31.

<sup>49</sup> *Id.* art. 35; *see also* WATAL, *supra* note 13, at 4 (noting that the protection of integrated circuit designs “had no effective international treaty”).

<sup>50</sup> TRIPS Agreement art. 39.3; *see also* WATAL, *supra* note 13, at 4 (noting that undisclosed information “has never been the subject of any multilateral agreement before”).

<sup>51</sup> As Carlos Correa noted:

Unlike other sections of TRIPS, and notwithstanding their importance and far reaching implications, the enforcement and maintenance provisions were subject to much less discussion and controversy than the substantive rules contained in the Agreement. This was reflected in the fact that most provisions on the enforcement, acquisition and maintenance of IPRs in the final version of TRIPS are essentially identical to those in the Brussels Draft.

TRIPS RESOURCE BOOK, *supra* note 3, at 578 (footnote omitted); *see also* SELL, *supra* note 14, at 115 (“The [Intellectual Property Committee] was particularly pleased with the enforcement provisions. The industry representatives’ demands are reflected clearly in the final agreement.”).

<sup>52</sup> *See* CHRISTOPHER ARUP, THE WORLD TRADE ORGANIZATION KNOWLEDGE AGREEMENTS 95 (2d ed. 2008) (noting that “the language that finds its way into the WTO Agreements is likely to be vague and pliable”); DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT 66 (2002) (“[I]t should be stated at the outset that it is widely perceived that while the TRIPS Agreement is an extremely good document in terms of defining international norms for intellectual property protection, its provisions relating to enforcement clearly display the characteristics of a difficult compromise reached during the Uruguay Round negotiations.”); WATAL, *supra* note 13, at 7 (noting the “ambiguities” that have been built into the TRIPS Agreement to provide less developed countries with a bulwark against the continuous expansion of intellectual property rights and to “‘claw[.]’ back much of what was lost in the negotiating battles in TRIPS”); Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1022–23 (2009) (discussing ambiguous language in the TRIPS Agreement).



countries at the time of the TRIPS negotiations, such knowledge was clearly possessed by *some* delegates, especially those from the powerful developing countries.<sup>53</sup> Only a decade or two before, representatives from these countries were actively—though unsuccessfully—negotiating the Stockholm Protocol for Developing Countries<sup>54</sup> and the International Code of Conduct on the Transfer of Technology.<sup>55</sup> The latter actually provided the language for the draft treaty text advanced by less developed countries, the so-called “B text.”<sup>56</sup>

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<sup>53</sup> As Peter Drahos observed:

Developing countries do not lack an understanding of intellectual property. In the 1950s and 1960s India and Brazil developed critiques of Western patent regimes and African states pushed for the recognition of folklore as a proper subject matter of copyright protection. It is precisely because developing countries have shown they have the capacity to develop models that threaten the hegemony of current Anglo-American-German intellectual property models that their efforts have been crushed.

Peter Drahos, *Introduction in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 1, 7–8 (Peter Drahos & Ruth Mayne eds., 2002) [hereinafter GLOBAL INTELLECTUAL PROPERTY RIGHTS]; see also DEERE, *supra* note 40, at 8 (“Hamstrung by limited negotiating capacity and inadequate knowledge of the technical issues under negotiation, no more than twenty developing countries had the resources and expertise to follow the IP negotiations and their implications closely.” (footnote omitted)); Yu, *supra* note 13, at 375 (“[I]t is factually incorrect to assume that less developed countries did not understand any importance of intellectual property protection.”). But see Lars Anell, *Foreword to GERVAIS*, *supra* note 3, at ix, ix (“Most of the participants in the ‘Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods’ were experienced and skilled trade negotiators well versed in the details of GATT provisions. However, intellectual property legislation was new to most of the Members, including the Chairman. Some of the delegations also had limited resources in their capitals.”).

It is worth noting, however, that political dynamics in the capital and the heightened international pressure these countries received might have severely curtailed the ability of their delegates to achieve their preferred negotiating positions, especially toward the end of the negotiations. As with all international matters, the relationships between capitals and diplomatic outposts (usually Brussels, Geneva, New York, or Washington) are often complicated. The negotiation of the TRIPS Agreement was no exception. See, e.g., DEERE, *supra* note 40, at 214 (noting the “[w]eak coordination and communication between delegates stationed in Geneva (with whom the greatest political technical expertise about TRIPS often resided) and their counterparts in capitals”); Anell, *supra*, at ix (recounting that “intellectual property legislation was new to most of the resources in their capitals” during the TRIPS negotiations); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 365 (2008) (suggesting that internal economic problems led to the collapse of India’s position toward the end of the TRIPS negotiations).

<sup>54</sup> See generally Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 471–84 (2009) (discussing the drafting of the Protocol Regarding Developing Countries).

<sup>55</sup> For discussions of the negotiation of the International Code of Conduct on the Transfer of Technology under the auspices of UNCTAD, see generally *id.* at 493–505; INTERNATIONAL TECHNOLOGY TRANSFER: THE ORIGINS AND AFTERMATH OF THE UNITED NATIONS NEGOTIATIONS ON A DRAFT CODE OF CONDUCT (Surendra J. Patel et al. eds., 2001).

<sup>56</sup> See Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 3, 10 n.18 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008) [hereinafter *INTELLECTUAL PROPERTY AND*

As a result of the negotiation tactics deployed by Brazil, India, and other developing countries, the TRIPS Agreement now contains many result-oriented terms that are vague, broad, and undefined. Examples of these terms are “‘effective’, ‘reasonable’, ‘undue’, ‘unwarranted’, ‘fair and equitable’, and ‘not . . . unnecessarily complicated or costly.’”<sup>57</sup> For example, Article 61, which sets forth the first-ever multilateral norm on criminal sanctions, does not define the term “commercial scale” at all.<sup>58</sup> The lack of such definition eventually posed a fatal challenge to the United States’ complaint against China over its failure to extend criminal sanctions to “wilful trademark counterfeiting or copyright piracy on a commercial scale.”<sup>59</sup> The undefined term also opened the door for the WTO panel to interpret the TRIPS language by focusing on local market conditions, noting that commercial activities may “vary by product and market.”<sup>60</sup>

Equally important is the inclusion in Part III of the TRIPS Agreement of provisions that contain only empowerment norms, as compared to norms that mandate specific actions.<sup>61</sup> For instance, Article 59—the provision at issue in the U.S.–China dispute—states that “competent authorities shall have the authority to order the destruction or disposal of infringing goods” seized at the border.<sup>62</sup> Because this provision requires only the provision of authority, as compared to the exercise of such authority in a specified way,<sup>63</sup> the United States could not argue that the Chinese customs authorities had failed to destroy infringing goods seized at the border—the action preferred by the United States administration and its supportive rights holders. Instead, the United States had to advance a much weaker, and rather academic, claim that China introduced a “compulsory scheme” that took away the authorities’ “scope of authority to order the destruction or disposal of infringing goods.”<sup>64</sup>

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INTERNATIONAL TRADE] (recounting that some of the provisions in the B text advanced by less developed countries “were either directly based on or inspired by those of the Draft International Code of Conduct on the Transfer of Technology which was negotiated under the auspices of UNCTAD but was never adopted as an international instrument” (citation omitted)).

<sup>57</sup> TRIPS RESOURCE BOOK, *supra* note 3, at 576; *see also* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE*, *supra* note 56, at 23, 71 (“[The TRIPS] enforcement provisions—unlike the substantive standards set out in the agreement—are truly *minimum* standards, as attested by the loose and open-ended language in which they are cast.”).

<sup>58</sup> TRIPS Agreement art. 61.

<sup>59</sup> *Id.*

<sup>60</sup> TRIPS Enforcement Panel Report, *supra* note 8, ¶ 7.604; *see also* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT’L L. REV. (forthcoming 2011) (discussing the need for WTO panels to consider local conditions).

<sup>61</sup> *See* TRIPS Agreement arts. 43–48, 50, 53, 56, 57, 59.

<sup>62</sup> *Id.* art. 59.

<sup>63</sup> *See* TRIPS Enforcement Panel Report, *supra* note 8, ¶ 7.238 (noting that a WTO member is not required to “exercise [the stipulated] authority in a particular way, unless otherwise specified”).

<sup>64</sup> *Id.* ¶ 7.197.

If the weakening of TRIPS language was not enough, less developed countries successfully demanded the inclusion of limitations and exceptions in the TRIPS Agreement. The most notable exception in the enforcement area is Article 41.5 of the TRIPS Agreement, which states explicitly that a WTO member is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement.<sup>65</sup> Led by India, less developed countries specifically demanded this provision to alleviate concerns about the lack of resources needed to set up specialized intellectual property courts or to strengthen intellectual property enforcement.<sup>66</sup> Even today, less developed countries continue to insist that Article 41.5, along with Article 1.1, represents the key concessions they won through the TRIPS negotiation process.<sup>67</sup>

In addition, the TRIPS negotiators from the *demandeur* countries seemed to have made a conscious choice to delay the negotiation of some of the highly challenging enforcement issues. Such delay could be attributed to concerns over the controversial nature of enforcement standards, which, as discussed, come with a hefty price tag, difficult tradeoffs, and serious intrusion on a country's sovereignty. The delay could also be due to the delegates' negotiation priorities and tactics. At the time of the negotiations, countries remained in disagreement over the scope and extent of many substantive standards. This disagreement continues today, with many countries complaining about the standards' unfair and biased nature.<sup>68</sup>

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<sup>65</sup> See TRIPS Agreement art. 41.5 ("Nothing in [Part III of the Agreement] creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.").

<sup>66</sup> See CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 417 (2007); TRIPS RESOURCE BOOK, *supra* note 3, at 585 (2005).

<sup>67</sup> For example, China made this claim in the recent TRIPS enforcement dispute. See TRIPS Enforcement Panel Report, *supra* note 8, Annex B-4, ¶ 33 ("Articles 1.1 and 41.5 were key concessions to the developing world, which the United States and other developed third parties seek now to dismiss and disregard.").

<sup>68</sup> As Pakistan declared:

Inadequate protection of the assets in which developing countries have comparative advantage undermines confidence in the IP system. The continued misappropriation and lack of progress towards an international legal framework on the protection of the genetic resources, traditional knowledge and folklore has especially led to the perception that the current IP system is *neither fair nor effective in protecting the interests of the developing countries*.

*Creating an Enabling Environment to Build Respect for IP: Concept Paper by Pakistan* ¶ 3(iv), in Advisory Comm. on Enforcement [ACE], World Intellectual Prop. Org. [WIPO], *Conclusions by the Chair*, annex 1, WIPO/ACE/5/11, Nov. 4, 2009, available at [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_5/wipo\\_ace\\_5\\_11-annex1.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_11-annex1.pdf) [hereinafter *Pakistan's Concept Paper*] (emphasis added); Yu, *supra* note 52, at 1024 ("[T]he TRIPS Agreement is now in a deepening crisis. Its legitimacy has been called into question by the high standards of protection and enforcement that ignore the needs, interests, and goals of the less-developed member states.").

Finally, the delegates might have had a misguided optimism about a country's ability to translate treaty language into effective enforcement. As Jacques Gorlin recounted candidly: "We had assumed that most countries would accept the TRIPS obligations, and dispute settlement would fix a few . . . problems. What has happened, however, is that we are starting to see dispute settlement cases that cover the wholesale failure to implement TRIPS."<sup>69</sup> In fact, according to Sylvia Ostry, the evolution of the WTO and its many agreements surprised the developed countries' negotiators just as much as their counterparts from less developed countries:

The notion that only the southern countries did not understand what was going on was quite false. Those of us that had been involved throughout could not anticipate how complex the new system would be and what effects on North-South relations would result from the Bum Deal [created by the Uruguay Round].<sup>70</sup>

Regardless of the reasons, the delegates' delay in negotiating these difficult enforcement issues has curtailed greatly the development of international intellectual property enforcement norms. To be certain, the delegates' focus on the comparatively easier task of negotiating substantive standards is defensible. Such negotiation, after all, was instrumental in breaking the deadlock between developed and less developed countries, thereby resulting in the successful conclusion of the TRIPS Agreement.<sup>71</sup> If the TRIPS delegates were given the same negotiation choices again, they still might have come to the same conclusion that having a new multilateral agreement without robust enforcement standards is more important than having no agreement at all.

Nevertheless, by leaving the more difficult enforcement issues for later discussions, these delegates merely postponed the inevitable challenges. As Professor Okediji aptly observed, in game theory terms, the negotiation and enforcement of the TRIPS Agreement can be seen as a two-stage game.<sup>72</sup>

<sup>69</sup> Symposium, *U.S. Industries, Trade Associations, and Intellectual Property Lawmaking*, 10 CARDOZO J. INT'L & COMP. L. 5, 10 (2002) (remarks of Jacques J. Gorlin, Director, Intellectual Property Committee).

<sup>70</sup> Sylvia Ostry, *Asymmetry in the Uruguay Round and in the Doha Round*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 105 (Chantal Thomas & Joel P. Trachtman eds., 2009) [hereinafter *DEVELOPING COUNTRIES IN THE WTO*].

<sup>71</sup> See SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 123–30 (1998) (discussing the famous stalemate between developed and less developed countries over the Nairobi text of the Paris Convention).

<sup>72</sup> See Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 823 (2003). Unlike Professor Okediji, this Author considers the game played by the WTO member states as a three-stage game, with stages in negotiation, implementation, and enforcement. Accord MATTHEWS, *supra* note 52, at 117 (also noting implementation and enforcement as two different levels). Nevertheless, the difference over the

Although policymakers in less developed countries, economists, and commentators continue to question the fairness and expediency of the TRIPS Agreement, there is no doubt that developed countries won the first-stage negotiation game decisively. The strategies used to complete this first-stage game,<sup>73</sup> however, left developed countries with a much harder enforcement game to play—both among themselves and vis-à-vis less developed countries. As Professor Okediji reasoned:

Having accomplished the primary goal of binding developing countries to high standards of intellectual property protection, developed countries must now deal with the costs of “winning” the first stage game. These include constraints on sovereign discretion in the area of policy development, and battles over extant policy differences between the member states.<sup>74</sup>

Even worse for the *demandeur* countries, less developed countries have acquired more sophisticated knowledge about innovation and intellectual property since the completion of the TRIPS Agreement. They also have received more support from intergovernmental and nongovernmental players in both the North and the South.<sup>75</sup> In addition, some leading developing countries, like China and India, have become significantly more economically developed and technologically proficient than they were two decades ago.<sup>76</sup> If developed countries had a difficult time obtaining their preferred enforcement

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number of stages will not affect the implications of Professor Okediji's important insight into the multi-stage game the WTO members have to play when they move from negotiation to enforcement.

<sup>73</sup> There are many explanations why less developed countries agreed to join the TRIPS Agreement. See generally Yu, *supra* note 3, at 325–26 (discussing the various reasons why less developed countries joined the TRIPS Agreement); Yu, *supra* note 13, at 371–79 (outlining the four different narratives commonly used to account for the establishment of the TRIPS Agreement).

<sup>74</sup> Okediji, *supra* note 72, at 823.

<sup>75</sup> See Yu, *supra* note 53, at 376–78 (discussing the need for less developed countries to work with nongovernmental organizations, academics, and the media in both the North and the South); see also SELL, *supra* note 14, at 181 (“When I asked some public-regarding copyright activists ‘where they had been’ during TRIPS, they told me they had been ‘sleeping’ but that *because* of TRIPS they had ‘woken up.’”); Keith E. Maskus, *The WIPO Development Agenda: A Cautionary Note*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 163, 164 (Neil Weinstock Netanel ed., 2009) (“Policymakers, non-governmental organizations, the media, and even many legal scholars have awakened to the fact that IP regulations have rather fundamental implications for the processes of economic development.”).

<sup>76</sup> For recent discussions on the rise of China and India, see generally CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS (Pete Engardio ed., 2006); DANCING WITH GIANTS: CHINA, INDIA, AND THE GLOBAL ECONOMY (L. Alan Winters & Shahid Yusuf eds., 2007); ROBYN MEREDITH, *THE ELEPHANT AND THE DRAGON: THE RISE OF INDIA AND CHINA AND WHAT IT MEANS FOR ALL OF US* (2007).

terms during the TRIPS negotiations, they are likely to have even greater difficulty today.

In sum, even though developed countries dominated the TRIPS negotiation process, their tactical constraints and misguided beliefs might have significantly curtailed their ability to use the TRIPS Agreement to shape international intellectual property enforcement norms. As Professors Reichman and Lange rightly observed, the Agreement's enforcement provisions "on closer inspection appear to constitute a set of truly minimum standards of due process on which future legislation will have to build."<sup>77</sup> While the adoption of Articles 41 to 61 of the TRIPS Agreement undeniably has helped the *demandeur* countries to begin the norm-setting process, greater norm development, unfortunately, will have to await future negotiations.

#### D. DISCIPLINARY CHALLENGES: NON-IP, NON-TRADE FACTORS

By design, the international intellectual property system has a rather narrow focus. Even when the TRIPS Agreement expanded this focus to cover international trade, the focus covers only some of the issues implicated by the enforcement of intellectual property rights.<sup>78</sup> In fact, with the growing spillover of issues from intellectual property and international trade to other policy areas, such as agriculture, health, the environment, education, culture, competition, free speech, privacy, democracy, and the rule of law,<sup>79</sup> a TRIPS-based

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<sup>77</sup> Reichman & Lange, *supra* note 5, at 34.

<sup>78</sup> As Bernt Hugenholtz and Ruth Okediji observed:

[T]he WTO is primarily a *trade* regime. It does not have the primary responsibility for the development of IP norms *qua* IP norms; instead, IP protection is viewed through its impact on free trade, which provides a distinct gloss on the interpretation of TRIPS obligations that often disregards cultural and other relevant criteria central to both national and international copyright systems.

P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT 39 (2008), *available at* <http://www.ivir.nl/publicaties/hughholtz/finalreport2008.pdf>.

<sup>79</sup> See Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 2; see also CORREA, *supra* note 66, at 12 ("[I]ntellectual property cannot be regarded in isolation from broader national policies, such as competition and development policies. In order to contribute to national objectives, the intellectual property system must be integrated into such policies."); Graeme W. Austin, *Valuing "Domestic Self-Determination" in International Intellectual Property Jurisprudence*, 77 CHI.-KENT L. REV. 1155, 1193 (2002) ("To the extent that intellectual property policies and values can be identified, it might be more helpful to regard them as aspects of much broader issues of public policy. Policies that help ensure that populations get fed, enjoy the benefits of literacy, are healthy, have viable agricultural bases, and can participate in technological and cultural development—these seem to be the kinds of policies that should have priority in any analysis of the values that intellectual property laws are meant to serve." (footnote omitted)).

enforcement regime that focuses primarily on the trade bottom line is unsurprisingly inadequate.

As I have pointed out elsewhere, a well-functioning intellectual property regime depends on the existence of an “enabling environment” for the effective protection and enforcement of intellectual property rights.<sup>80</sup> The key preconditions for successful intellectual property reforms include a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, sufficiently-developed basic infrastructure, a critical mass of local stakeholders, and established business practices. As Robert Sherwood reminded us in an aptly titled article, *Some Things Cannot Be Legislated*, “until judicial systems in developing and transition countries are upgraded, it will matter little what intellectual property laws and treaties provide.”<sup>81</sup> Likewise, Keith Maskus, Sean Dougherty, and Andrew Mertha noted:

Upgrading protection for IPRs [intellectual property rights] alone is a necessary but not sufficient condition for this purpose [of maximizing the competitive gains from additional innovation and technology acquisition over time, with particular emphasis on raising innovative activity by domestic entrepreneurs and enterprises]. Rather, the system needs to be strengthened within a comprehensive and coherent set of policy initiatives that optimize the effectiveness of IPRs. Among such initiatives are further structural reform of enterprises, trade and investment liberalization, promotion of financial and innovation systems to commercialize new technologies, expansion of educational opportunities to build human capital for absorbing and developing technology, and specification of rules for maintaining effective competition in [local] markets.<sup>82</sup>

To some extent, *enforcement facilitation*—that is, to provide for measures that help facilitate enforcement—is just as important as enforcement. Unfortunately, many of the preconditions needed for such facilitation were

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<sup>80</sup> See Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT, *supra* note 17, at 173, 213–16 (discussing the importance of an “enabling environment” for effective intellectual property protection).

<sup>81</sup> Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT’L & COMP. L. 37, 42 (2002); see also ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES: LAW AND POLICY IN THE POST-TRIPS ERA 198 (2010) (“In the end, any lapse in the enforcement of IP merges with the general problem of the establishment of the rule of law, of the recognition of civil rights and their implementation in practice. In societies where civil rights have yet to become part of the body politic, it should not make one wonder why IP enforcement is deficient . . .”).

<sup>82</sup> Maskus et al., *supra* note 38, at 297.

outside the areas of both intellectual property and trade. Without the needed support, the TRIPS Agreement understandably cannot fully address the challenging intellectual property enforcement problems confronting the WTO members in both the developed and less developed worlds. Even worse, while the WTO members have explored the need for greater trade facilitation to support trade,<sup>83</sup> they have yet to fully understand the importance of enforcement facilitation. Many of these countries—whether developed or less developed—simply do not have the needed political will to push for measures to make such facilitation possible.<sup>84</sup>

In fact, the idea of developing an enabling environment for effective intellectual property protection was not explored until recently, and such exploration took place outside the WTO. In the fifth session of the Advisory Committee on Enforcement of the World Intellectual Property Organization (WIPO), WIPO members worked together to “[i]dentify[] elements for creating an enabling environment for promoting respect for intellectual property in a sustainable manner and future work.”<sup>85</sup> As Pakistan noted in a submission entitled “Creating an Enabling Environment to Build Respect for IP”:

[A] very limited approach to combating infringement of IP rights, in which, in essence, stricter laws and capacity building of enforcement agencies is seen as the primary means to ensure enforcement . . . can temporarily reduce IPR infringements levels, but cannot address the challenge in a sustainable manner. A broader strategy is urgently needed to allow the establishment of conditions in which all countries would have shared understanding of the socio-economic implications of enforcement measures, and direct economic interest in taking such measures. In such an environment, countries’ choice to

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<sup>83</sup> Some commentators have also noted the need for development facilitation. See, e.g., Lee Yong-Shik, *Economic Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO*, in DEVELOPING COUNTRIES IN THE WTO, *supra* note 70, at 291.

<sup>84</sup> See MOISÉS NAÍM, *ILLCIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 257–58 (2005) (noting the lack of political will to adopt measures required for combating illicit trade); Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 413 (2008) (observing that both developed and less developed countries lack the needed political will to put intellectual property protection at the very top of the policy agenda).

<sup>85</sup> ACE, *Draft Agenda*, WIPO/ACE/5/1 Prov. Rev, Sept. 28, 2009, available at [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_5/wipo\\_ace\\_5\\_1\\_prov\\_rev.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_1_prov_rev.pdf).



enforce IPRs will be derived from their internal rather than external factors.<sup>86</sup>

In another paper, which heavily criticized the one-size-fits-all model of intellectual property enforcement, Brazil declared: "Violations of intellectual property rights do not take place in the void. They are not disconnected from concrete political and social variables."<sup>87</sup> That paper called for a change in the focus of the WIPO advisory committee: from enforcement to respect for intellectual property.<sup>88</sup> It remains to be seen whether the TRIPS Agreement and the larger WTO reforms will benefit from a more holistic perspective of intellectual property enforcement advanced in these papers.

#### E. TECHNOLOGICAL CHALLENGES: NEW INTERNET-RELATED ISSUES

The level of enforcement in the TRIPS Agreement depends on the scope and extent of its substantive provisions. Although the Agreement was established in the mid-1990s, shortly before the internet and electronic commerce entered the mainstream, its substantive standards were set at what Daniel Gervais described as "the highest common denominator among major industrialized countries as of 1991."<sup>89</sup> As a result, the Agreement failed to address challenges created by new technologies that emerged after the completion of its primary draft.<sup>90</sup>

One of the most significant challenges in the enforcement area to date concerned the protection of intellectual property rights in the digital environment. Today, the internet, new communications technologies, and file-sharing networks have caused serious and widespread problems of unauthorized copying throughout the world. Since 2003, the U.S. recording industry alone has filed lawsuits against more than 35,000 individuals for illegal distribution of copyrighted works via peer-to-peer networks.<sup>91</sup> Courts in the developed world, such as Australia, Canada, and the United States, have also been inundated with cases addressing secondary copyright liability.<sup>92</sup>

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<sup>86</sup> *Pakistan's Concept Paper*, *supra* note 68, ¶ 2.

<sup>87</sup> *Future Work Proposal by Brazil*, pt. C, in ACE, *Conclusions by the Chair*, Annex 2, WIPO/ACE/5/11, Nov. 4, 2009, available at [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_5/wipo\\_ace\\_5\\_11-annex2.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_11-annex2.pdf).

<sup>88</sup> *See id.*

<sup>89</sup> Daniel J. Gervais, *The TRIPS Agreement and the Doha Round: History and Impact on Economic Development*, in 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 23, 43 (Peter K. Yu ed., 2007).

<sup>90</sup> *See id.* at 29 ("The 1992 text was not extensively modified and became the basis for the TRIPS Agreement adopted at Marrakesh on April 15, 1994.").

<sup>91</sup> Fred von Lohmann, *RLAA v. The People Turns from Lawsuits to 3 Strikes*, ELEC. FRONTIER FOUND. (Dec. 19, 2008), <http://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes>.

<sup>92</sup> *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (holding

In retrospect, the existence of these internet-related enforcement problems is no surprise. After all, the TRIPS negotiators from the *demandeur* countries did not anticipate the technological change brought about by the information revolution. Even if they had anticipated such a change, they likely would not have succeeded in introducing new norms in this area. Article 27, for example, provides very limited coverage of biotechnology-related issues,<sup>93</sup> even though the biotechnology revolution had already raised many difficult policy and ethical questions at the time of the TRIPS negotiations.<sup>94</sup>

To some extent, the advent of the internet and new communications technologies had rendered the TRIPS Agreement obsolete even before it entered into effect. As Marci Hamilton aptly observed:

Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.<sup>95</sup>

Given the novelty of the internet-related challenges and the limited coverage of TRIPS substantive standards, it is easy to explain why the Agreement failed to provide effective enforcement of intellectual property rights in the digital environment—an issue that countries recently tackled in the ACTA negotiations.<sup>96</sup>

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that the distributors of peer-to-peer file-sharing technologies could be liable for copyright infringement committed by individuals using their products if they had “induced” their users to undertake infringing activities); *BMG Canada Inc. v. John Doe*, [2004] F.C. 488, *aff’d*, [2005] F.C.A. 193 (Can.) (addressing the issue of whether setting up the facilities to allow copying amounts to authorizing infringement); *Universal Music Austl. Pty Ltd v. Sharman License Holdings Ltd.* (2005) 65 I.P.R. 289 (Austl.) (holding the defendant liable for authorizing users to infringe on music copyrights and directing it to modify the software application to reduce infringement).

<sup>93</sup> See TRIPS Agreement art. 27.2 (allowing each WTO member state to “exclude from patentability inventions, the prevention . . . of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment”); *id.* art. 27.3(b) (permitting each member to exclude from patentability “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”).

<sup>94</sup> See Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 933 (2008) (noting that the biotechnology revolution “not only has resulted in the creation of new protectable subject matters, but has also sparked many novel ethical debates and controversies”).

<sup>95</sup> Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 614–15 (1996).

<sup>96</sup> See ACTA, *supra* note 11, pmbl. (noting the desires to “address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment” and

## F. SUMMARY

While commentators are correct that the TRIPS Agreement has transformed the international intellectual property system by providing comprehensive international minimum standards on the enforcement of intellectual property rights for the first time, the Agreement's major strength, paradoxically, is also its major weakness. Because the Agreement fails to achieve a global consensus on international intellectual property enforcement, WTO members continue to face widespread enforcement problems throughout the world. They also remain in deep disagreement with each other over the appropriate standards for intellectual property enforcement. It is therefore appropriate for developed countries to continue to view the enforcement provisions as the Achilles' heel of the TRIPS Agreement.

From the standpoint of less developed countries, however, the picture is a little more complicated. In middle-income countries, some economic sectors are likely to find the TRIPS enforcement provisions weak—a view shared by those in the developed world.<sup>97</sup> Other sectors in these middle-income countries, however, may take a different view. Instead, these sectors may join low-income countries in rejoicing in the TRIPS Agreement's failure to incorporate strong international intellectual property enforcement norms. To them, the weak enforcement provisions do not constitute the Achilles' Heel of the TRIPS Agreement. Rather, they are a blessing in disguise!

## III. POST-TRIPS RESPONSES

Given the TRIPS Agreement's failure to achieve a global consensus on international intellectual property enforcement norms, countries have actively pushed for the acceptance of their preferred norms in the international intellectual property system since the adoption of the Agreement. The recent developments in the enforcement area range from the negotiation of ACTA among developed and like-minded countries to the staunch resistance of TRIPS-plus standards by less developed countries in meetings at the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council). This Part highlights some of these developments.

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to "promote cooperation between service providers and right holders to address relevant infringements in the digital environment"); *id.* art. 27 (stipulating provisions for the enforcement of intellectual property rights in the digital environment).

<sup>97</sup> See Yu, *supra* note 79, at 23–27 (highlighting the regional and sectoral disparities in intellectual property protection and enforcement within China).

## A. DEVELOPED COUNTRIES

1. *TRIPS Council*. Although developed countries were well aware of the fact that they did not get all of their preferred enforcement terms in the TRIPS Agreement, and they remained deeply dissatisfied with the continuous piracy and counterfeiting problems in less developed countries, they did not push for stronger international intellectual property enforcement norms until the mid-2000s. The reasons were twofold. First, while the TRIPS Agreement requires WTO members to fully implement the Agreement within a year after its entering into force on January 1, 1995, Article 65 delays such implementation in less developed and transition countries for another four years.<sup>98</sup> As a result, these countries did not need to comply with the TRIPS enforcement standards until January 1, 2000.

Second, the Doha Development Round of Trade Negotiations was launched during the fourth WTO ministerial meeting in Qatar in November 2001.<sup>99</sup> Amid post-September 11 sentiments and in the wake of the growing need for cooperation between the United States and the less developed world, the WTO members adopted the Doha Declaration on the TRIPS Agreement and Public Health<sup>100</sup> (Doha Declaration). In that climate, the European Union, Japan, the United States, and other *demandeur* countries understandably were reluctant to push for higher intellectual property enforcement standards in the WTO.

In the mid-2000s, however, the landscape changed. During the TRIPS Council meeting in June 2006, the European Union called for an “in-depth discussion” of enforcement issues.<sup>101</sup> Together with two earlier proposals,<sup>102</sup> the Union’s effort to push for greater discussion of intellectual property enforcement in the TRIPS Council represented the first attempts by a WTO member to revive such discussion since a flurry of exchanges among WTO

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<sup>98</sup> TRIPS Agreement art. 65.2–3. In addition to developing countries, Article 66.1 of the TRIPS Agreement also granted less developed countries a transitional period of ten years. *See id.* art. 66.1. That transition period has now been further extended for another seven and a half years to July 1, 2013 for those countries that have yet to meet the TRIPS requirements. Press Release, World Trade Org. [WTO], Poorest Countries Given More Time to Apply Intellectual Property Rules (Nov. 29, 2005), [http://www.wto.org/english/news\\_e/pres05\\_e/pr4\\_24\\_e.htm](http://www.wto.org/english/news_e/pres05_e/pr4_24_e.htm). The deadline for the formal introduction of patent protection for pharmaceuticals and of the protection of undisclosed regulatory data has been further extended to January 1, 2016. World Trade Organization, Declaration on the TRIPS Agreement and Public Health ¶ 7, WT/MIN(01)/DEC/2 (2001), 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

<sup>99</sup> *See Yu, supra* note 54, at 512–15 (discussing the Doha Round).

<sup>100</sup> Doha Declaration, *supra* note 98.

<sup>101</sup> Council for Trade-Related Aspects of Intellectual Prop. Rights [TRIPS Council], Communication from the European Communities, *Enforcing Intellectual Property Rights: Border Measures*, IP/C/W/471 (June 9, 2006).

<sup>102</sup> TRIPS Council, Communication from the European Communities, *Enforcement of Intellectual Property Rights*, IP/C/W/468 (Mar. 10, 2006); TRIPS Council, Communication from the European Communities, *Enforcement of Intellectual Property Rights*, IP/C/W/448 (June 9, 2005).

members in 1997,<sup>103</sup> during the Council's review of TRIPS-related laws and regulations from developed countries.<sup>104</sup> The European Union proposals, unsurprisingly, were strongly opposed by less developed countries.

In the follow-up TRIPS Council meeting in October 2006, the European Union, with formal support from Japan, Switzerland, and the United States, tabled a joint communication seeking to strengthen the implementation of the TRIPS enforcement provisions.<sup>105</sup> As the document declared: "The TRIPS Council is an appropriate forum to examine and assist Members in the implementation of enforcement provisions of the TRIPS Agreement. The work of the TRIPS Council in this regard should complement Members' efforts to use other cooperative mechanisms to address IPR enforcement."<sup>106</sup> Citing ongoing challenges in the area, the European Union and the paper's cosponsors:

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<sup>103</sup> See TRIPS Council, Questions Posed by Hong Kong, China, *Review of Legislation on Enforcement*, IP/C/W/81 (Sept. 29, 1997); TRIPS Council, Questions Posed by the European Communities and Their Member States, *Review of Legislation on Enforcement*, IP/C/W/80 (Oct. 1, 1997); TRIPS Council, Questions Posed by Japan, *Review of Legislation on Enforcement*, IP/C/W/82 (Oct. 8, 1997); TRIPS Council, Questions Posed by the United States, *Review of Legislation on Enforcement*, IP/C/W/83 (Oct. 21, 1997); TRIPS Council, Questions Posed by New Zealand, *Review of Legislation on Enforcement*, IP/C/W/84 (Oct. 23, 1997); TRIPS Council, Replies from the European Communities and Their Member States to Questions from Hong Kong China and Japan, *Review of Legislation on Enforcement*, IP/C/W/87 (Nov. 6, 1997); TRIPS Council, Replies from Hungary to Questions from the European Communities and their Member States, Japan and the United States, *Review of Legislation on Enforcement*, IP/C/W/88 (Nov. 12, 1997); TRIPS Council, Replies from Japan to Questions from the European Communities and their Member States, Hong Kong-China and the United States, *Review of Legislation on Enforcement*, IP/C/W/89 (Nov. 13, 1997); TRIPS Council, Replies from Bulgaria to Questions Posed by Japan, *Review of Legislation on Enforcement*, IP/C/W/91 (Nov. 13, 1997); TRIPS Council, Replies from the United States to Questions from the European Communities and their Member States, Hong Kong and Japan, *Review of Legislation on Enforcement*, IP/C/W/90 (Nov. 14, 1997).

<sup>104</sup> As Duncan Matthews recounted the process in the TRIPS Council:

Once the transitional period for each category of countries has come to an end, each Member is required to submit two documents for scrutiny by the TRIPs Council. The first document is a notification attesting to how the national laws of that country comply with the TRIPS Agreement. This is known as an 'Article 63.2 notification'. The second document is a checklist of issues on enforcement of intellectual property rights, which is a response by each Member to a questionnaire sent to it by the TRIPs Council in order to monitor enforcement. Once these documents have been submitted, that Member is subject to a scrutiny process, during which all WTO Members (not only those that have already reached the end of the transitional period) are able to ask additional questions to ascertain how the national laws of the country under scrutiny are in accordance with the Agreement.

MATTHEWS, *supra* note 52, at 80 (footnotes omitted).

<sup>105</sup> TRIPS Council, Joint Communication from the European Communities, Japan, Switzerland, and the United States, *Enforcement of Intellectual Property Rights* ¶ 4, IP/C/W/485 (Nov. 2, 2006) [hereinafter Joint Communication].

<sup>106</sup> *Id.*

- Invite other Members to engage in a constructive discussion of how to implement the enforcement provisions of TRIPS in a more effective manner.
- Invite other Members to engage in a constructive discussion of accompanying measures which could enhance the effectiveness of national implementing legislation and enforcement efforts, such as for example promoting interagency co-operation, fostering a higher public awareness, and reinforcing institutional frameworks.
- Ask the Secretariat to prepare a synopsis of Members' contributions to the Checklist of Issues on Enforcement<sup>107</sup> that would serve as a basis for the above-mentioned discussion.
- Stand ready, in cooperation with recipients of technical assistance and with relevant international organizations, to better focus the technical assistance they provide in favour of developing countries in order to facilitate the implementation of enforcement provisions.<sup>108</sup>

Although the EU proposal again met with strong opposition from less developed countries, developed countries refused to give up. During the next TRIPS Council meeting in January 2007, the United States took its turn to circulate another paper, sharing its experience on the border enforcement of intellectual property rights.<sup>109</sup> The document discussed the various techniques that the United States found helpful in addressing intellectual property infringement. The United States also called on the TRIPS Council to “make a positive contribution to addressing [intellectual property enforcement] problems through a constructive exchange of views and experiences.”<sup>110</sup> Although less developed countries found the United States' approach procedurally acceptable, they insisted that their position “had not changed, and they still [did] not believe [the enforcement issue] belongs in the TRIPS Council.”<sup>111</sup> China, with the support of Argentina, Brazil, Cuba, India, and

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<sup>107</sup> TRIPS Council, *Checklist of Issues on Enforcement: First Draft: Note by the Secretariat*, IP/C/W/9 (July 28, 1995).

<sup>108</sup> Joint Communication, *supra* note 105, ¶ 7.

<sup>109</sup> See TRIPS Council, Communication from the United States, *Enforcement of Intellectual Property Rights (Part III of the TRIPS Agreement): Experiences of Border Enforcement*, IP/C/W/488 (Jan. 30, 2007).

<sup>110</sup> *Id.* ¶ 1.

<sup>111</sup> Tove Iren S. Gerhardsen, *TRIPS Meeting: Boost to IP Issues as Part of Resumed Trade Talks, US Submits Enforcement Proposal*, INTELL. PROP. WATCH (Feb. 14, 2007), <http://www.ip-watch.org/weblog/2007/02/14/trips-meeting-boost-to-ip-issues-as-part-of-resumed-trade-talks-us-submits-enforcement-proposal/>.

South Africa, stated specifically that “enforcement could not be a permanent agenda item in the council.”<sup>112</sup>

In June 2007, Switzerland introduced another paper on enforcement, suggesting ways to implement the TRIPS enforcement provisions and to improve the overall enforcement of intellectual property rights.<sup>113</sup> The paper underscored the need to develop well-functioning communication and coordination structures in the area of border measures. A few months later, Japan introduced its own paper, sharing its experiences in the border enforcement of intellectual property rights while outlining the recent trends in intellectual property infringements.<sup>114</sup> Shortly after the release of these papers, the ACTA negotiations were announced, and developed countries did not table any new papers on enforcement in the TRIPS Council.

2. *Dispute Settlement Body.* At the WTO, developed countries have also explored the use of the dispute settlement process to shape TRIPS enforcement standards. In the first few years of the organization’s existence, there were very few disputes in the area. In fact, most of the TRIPS disputes—enforcement-related or otherwise—were disputes between the United States and the European Communities.<sup>115</sup> TRIPS enforcement disputes were no exception. In May 1998, the United States filed complaints against Greece and, by extension, the European Communities for Greece’s failure to provide effective enforcement of intellectual property rights under Part III of the TRIPS Agreement.<sup>116</sup> Those complaints were quickly settled.

The lack of developing country targets for WTO disputes over inadequate intellectual property enforcement, however, changed when China joined the WTO in December 2001.<sup>117</sup> Although the United States had repeated disputes with China over piracy and counterfeiting since the mid-1980s,<sup>118</sup> the United

<sup>112</sup> *Id.*

<sup>113</sup> TRIPS Council, Communication from Switzerland, *Enforcement of Intellectual Property Rights: Communication and Coordination as a Key to Effective Border Measures*, IP/C/W/492 (May 31, 2007); see also Tove Iren S. Gerhardsen, *Quiet TRIPS Council Meeting Expected; Enforcement Push Continues*, INTELL. PROP. WATCH (June 1, 2007), <http://www.ip-watch.org/weblog/2007/06/01/quiet-trips-council-meeting-expected-enforcement-push-continues/> (reporting Switzerland’s proposal).

<sup>114</sup> TRIPS Council, Communication from Japan, *Enforcement of Intellectual Property Rights*, IP/C/W/501 (Oct. 11, 2007).

<sup>115</sup> See Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 932–34 (2006) (listing the TRIPS disputes from 1995 to March 2006).

<sup>116</sup> Request for Consultations by the United States, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/1 (May 7, 1998); Request for Consultations by the United States, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/1 (May 7, 1998).

<sup>117</sup> On December 11, 2001, China formally became the 143rd member of the international trading body. See Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 2 (2003) (remarks of the Author).

<sup>118</sup> For discussions of ongoing disputes between China and the United States over the protection and enforcement of intellectual property rights, see generally Peter K. Yu, *From Pirates*

States Trade Representative (USTR) did not seriously consider the filing of a WTO complaint against China until the mid-2000s.<sup>119</sup> There were several reasons. First, the USTR, and, to some extent, the United States intellectual property industries, were willing to be patient in the first few years following China's accession to the WTO. Indeed, the USTR did not put China back on to the priority watch list until April 2005 after its out-of-cycle review.<sup>120</sup> Moreover, the USTR was busy collecting evidence on inadequate intellectual property protection and enforcement in China while exploring the best strategy to challenge China's noncompliance with the TRIPS Agreement.<sup>121</sup> The existence of Article 41.5,<sup>122</sup> the many ambiguities that have been built into the TRIPS enforcement provisions,<sup>123</sup> and the repeatedly-extended moratorium on non-violation complaints<sup>124</sup> certainly did not help the United States' case.

In April 2007, the United States finally requested consultations with China concerning the latter's failure to protect and enforce intellectual property rights pursuant to the TRIPS Agreement.<sup>125</sup> The complaint focused on four particular issues: (1) the high thresholds for criminal procedures and penalties in the intellectual property area; (2) the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border; (3) the denial of

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to Partners: *Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131 (2000); Yu, *supra* note 115; Yu, *supra* note 80.

<sup>119</sup> See Yu, *supra* note 115, at 923–46; see also Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment on Out-of-Cycle Review of the People's Republic of China, 69 Fed. Reg. 74561 (Dec. 14, 2004) (providing a notice that requested public comments in the USTR's Section 301 review of countries); Request for Comments and Notice of Public Hearing Concerning China's Compliance with WTO Commitments, 70 Fed. Reg. 44714 (Aug. 3, 2005) (providing another notice requesting for public comments concerning China's compliance with its WTO commitments).

<sup>120</sup> Office of the U.S. Trade Rep. [USTR], *Out-Of-Cycle Review Results* 8 (2005), [http://ustraderep.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file835\\_7647.pdf](http://ustraderep.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file835_7647.pdf).

<sup>121</sup> See Yu, *supra* note 115, at 923–46.

<sup>122</sup> See *id.* at 935 (discussing the challenges posed by Article 41.5 of the TRIPS Agreement to the United States' WTO case against China).

<sup>123</sup> See WATAL, *supra* note 13, at 385 (noting that “the USTR has openly admitted to difficulties in litigating the enforcement provisions of TRIPS on account of their ambiguity”).

<sup>124</sup> See TRIPS Agreement art. 64 (providing a moratorium on nonviolation complaints); see also Yu, *supra* note 52, at 1029–30 (discussing the extension of this moratorium). But see Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT'L L. 549, 549 (2009) (noting that the WTO panel's analysis in China may have “blurred both the traditional distinction between ‘as such’ and ‘as applied’ claims and the line separating TRIPS violations from non-violations”); Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L ECON. L. 1023, 1059 (2009) (“Given the lack of detail in the enforcement provisions the US argument was really more of a non-violation complaint. The essence of what the USA was really complaining about was that a benefit it expected from the TRIPS Agreement was better levels of enforcement.”).

<sup>125</sup> Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007).



copyright protection to works that have not been authorized for publication or dissemination within China; and (4) the unavailability of criminal procedures and penalties for infringing activities that involved either reproduction or distribution, but not both.<sup>126</sup>

After consultations between the two parties failed to resolve the dispute, leading to the resolution of only the last claim, the Dispute Settlement Body (DSB) established a panel to examine the three unresolved claims.<sup>127</sup> In January 2009, the DSB released its long-awaited panel report on *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.<sup>128</sup> While China prevailed on the claim on criminal thresholds, the United States won the censorship claim. The remaining customs claim was somewhat divided between the two parties, with each side declaring victory.<sup>129</sup>

The limited length and scope of this Article do not allow me to address in full the key arguments made by both parties and the panel report's major findings—a task I have already undertaken elsewhere.<sup>130</sup> Nevertheless, it is fair to view the dispute's outcome as a tie between the two parties. It is also worth noting that none of the parties appealed the report. Thus, the dispute effectively ended after China amended its copyright law and customs regulations in spring 2010.<sup>131</sup>

From the standpoint of WTO jurisprudence, this dispute is important; it represents the first time a WTO panel focused primarily on the interpretation and implementation of the TRIPS enforcement provisions.<sup>132</sup> The report not

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<sup>126</sup> See *id.*

<sup>127</sup> Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007). The only claim that had been resolved concerned the unavailability of criminal procedures and penalties for infringing activities that involved either reproduction or distribution, but not both.

<sup>128</sup> TRIPS Enforcement Panel Report, *supra* note 8.

<sup>129</sup> Compare Press Release, USTR, United States Wins WTO Dispute Over Deficiencies in China's Intellectual Property Rights Laws (Jan. 26, 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c> ("These findings are an important victory, because they confirm the importance of IPR protection and enforcement, and clarify key enforcement provisions of the TRIPS Agreement."), with ICTSD, *Ruling in US-China Piracy Dispute Raises Controversy*, BRIDGES WKLY., Jan. 28, 2009, at 7, available at <http://ictsd.org/i/news/bridgeweekly/38830/> (reporting that Yao Jian, the spokesperson of the Chinese Ministry of Commerce, "welcomed" the verdict on criminal thresholds, but expressed "regret" about the unfavorable aspects of the ruling and maintained that his government was "making a further assessment of the Dispute Settlement Body panel report").

<sup>130</sup> See Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. (forthcoming 2011); Yu, *supra* note 60.

<sup>131</sup> See Yu, *supra* note 130.

<sup>132</sup> This panel report, however, is not the first one involving a TRIPS provision concerning the enforcement of intellectual property rights. In *United States—Section 211 Omnibus Appropriations Act of 1998*, the WTO panel and subsequently the Appellate Body examined Section 211 of the U.S. Omnibus Appropriations Act of 1998 in relation to Article 42 of the TRIPS Agreement. Section 211 Panel Report, *supra* note 3; Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002).

only provides certainty and clarity to a WTO member's TRIPS enforcement obligations, but also enables the United States to receive redress of some of its complaints over inadequate intellectual property protection and enforcement in China. Nevertheless, the panel's narrow focus and the limited scope of its findings clearly revealed the TRIPS Agreement's shortcomings in the enforcement area.<sup>133</sup> Such revelation, in turn, provided the momentum needed for developed countries to push for stronger international intellectual property enforcement norms both within and without the WTO. While the negotiation of ACTA had already begun more than a year before the release of this panel report, the outcome of the dispute most certainly has strengthened the ACTA *demandeurs'* resolve to develop higher international benchmarks for the enforcement of intellectual property rights.

3. *ACTA*. For the first fifteen years of the WTO's existence, developed countries have had very limited success in pushing for higher international intellectual property enforcement standards within the organization—through either the TRIPS Council or the mandatory dispute settlement process. Although WTO members sought to make a similar push in WIPO,<sup>134</sup> the other traditional forum for setting international intellectual property norms, that forum was equally hostile. With the establishment of the WIPO Development Agenda in October 2004<sup>135</sup> and the adoption of forty-five recommendations for the agenda three years later,<sup>136</sup> WIPO does not provide an ideal forum for developing new and higher international intellectual property enforcement norms.<sup>137</sup>

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<sup>133</sup> See Henning Grosse Ruse-Khan, *China—Intellectual Property Rights: Implications for the TRIPS-Plus Border Measures*, 13 J. WORLD INTELL. PROP. 620, 626 (2010) (noting that the panel's clarifications on the limited scope of the TRIPS Agreement have hinted at the "rationale for several TRIPS-plus initiatives in the field of border measures").

<sup>134</sup> See Yu, *supra* note 11 (discussing the developed countries' push for the development of stronger international intellectual property enforcement norms at WIPO).

<sup>135</sup> WIPO, *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document, WO/GA/31/11, IIM/1/4* (Apr. 6, 2005), available at <http://www.wipo.int/edocs/mdocs/cs/mdocs/en/iim1/iim14.pdf>.

<sup>136</sup> Press Release, WIPO, Member States Adopt a Development Agenda for WIPO (Oct. 1, 2007), <http://www.wipo.int/pressroom/en/articles/2007/article0071.html>; see also *The 45 Adopted Recommendations Under the WIPO Development Agenda*, WIPO, <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited July 6, 2008) (listing the forty-five recommendations for actions).

<sup>137</sup> See Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT'L L. ONLINE 24, 26 (1999) ("The decision to use a plurilateral coalition to create new global standards reflects increasing disillusion with WIPO as a norm-setting venue because of its lack of enforcement power."); Michael Geist, *The ACTA Threat to the Future of WIPO*, INTELL. PROP. WATCH (Apr. 14, 2009), <http://www.ip-watch.org/weblog/2009/04/14/the-acta-threat-to-the-future-of-wipo/> (relating the Canadian officials' suggestion that the establishment of ACTA may be attributable to the "the perceived stalemate at WIPO, where the growing emphasis on the Development Agenda and the

On October 23, 2007, two weeks after the adoption of these recommendations, USTR Susan Schwab formally announced the United States' intent to negotiate a new Anti-Counterfeiting Trade Agreement with its key trading partners.<sup>138</sup> The European Union and Japan made similar but independent announcements. In addition to Japan, the United States, and the European Union—the usual trilateral alliance for heightened intellectual property protection—the initial negotiating parties included Canada, Mexico, New Zealand, South Korea, and Switzerland. As the USTR press release declared: “[T]he goal [of the agreement] is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis. . . . The envisioned ACTA will include commitments in three areas: (1) strengthening international cooperation, (2) improving enforcement practices, and (3) providing a strong legal framework for IPR enforcement.”<sup>139</sup>

Since the announcement, eleven rounds of negotiations have been held.<sup>140</sup> Thirty-seven countries participated in the negotiations for close to four years,<sup>141</sup> with Jordan and the United Arab Emirates joining them initially in the first round of negotiations. Although the ACTA negotiation process was unprecedentedly secret, leading to widespread criticism by policymakers, academic commentators, consumer advocates, and civil liberty groups, the negotiation documents slowly leaked onto the internet.<sup>142</sup> In April 2010, the negotiating governments finally agreed to release a mutually-vetted draft agreement text.<sup>143</sup>

As shown in this draft text, as well as other texts that have since been officially released, ACTA contains six different chapters: (1) initial provisions and definitions; (2) legal framework for enforcement of intellectual property rights; (3) enforcement practices; (4) international cooperation; (5) institutional arrangements; and (6) final provisions.<sup>144</sup> Chapter II, which is the most

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heightened participation of developing countries and non-governmental organisations have stymied attempts by countries such as the United States to bull their way toward new treaties with little resistance”).

<sup>138</sup> Press Release, USTR, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), [http://ustraderep.gov/Document\\_Library/Press\\_Releases/2007/October/Ambassador\\_Schwab\\_Announces\\_US\\_Will\\_Seek\\_New\\_Trade\\_Agreement\\_to\\_Fight\\_Fakes.html](http://ustraderep.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_Announces_US_Will_Seek_New_Trade_Agreement_to_Fight_Fakes.html).

<sup>139</sup> *Id.*

<sup>140</sup> These eleven rounds of negotiations were held in Geneva, Washington, Tokyo, Paris, Rabat, Seoul, Guadalajara, Wellington, Lucerne, Washington, and Tokyo.

<sup>141</sup> In addition to Japan, the United States, Switzerland, and members of the European Union, the thirty-seven participants include Australia, Canada, Mexico, Morocco, New Zealand, Singapore, and South Korea.

<sup>142</sup> See Yu, *supra* note 11.

<sup>143</sup> Press Release, USTR, The Office of the U.S. Trade Representative Releases Draft Text of ACTA (Apr. 21, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/of-fice-us-trade-representative-releases-draft-text-a>.

<sup>144</sup> ACTA, *supra* note 11.

controversial and longest part of the agreement, is subdivided into five different sections: (a) general obligations; (b) civil enforcement; (c) border measures; (d) criminal enforcement; and (e) enforcement of intellectual property rights in the digital environment.<sup>145</sup> While countries continue to explore ACTA's consistency with their existing domestic laws and international treaty obligations, the agreement was finally adopted on April 15, 2011, and is now open for signature.<sup>146</sup>

To a great extent, the ACTA negotiations make salient the TRIPS Agreement's failure to meet the enforcement needs of developed countries, which already existed before the beginning of the Uruguay Round. Toward the end of the Tokyo Round of Trade Negotiations, the previous round of GATT talks, the United States, with strong support from Levi Strauss, pushed for the development of an anti-counterfeiting code.<sup>147</sup> Although the United States' late-developing effort failed in the end, earning support from only the European Communities, Canada, Japan, and Switzerland, it led to the negotiation of the TRIPS Agreement in the Uruguay Round. The Punta del Este Declaration stated specifically that "[n]egotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with *international trade in counterfeit goods*."<sup>148</sup>

Interestingly, despite the *demandeur* countries' success in establishing the TRIPS Agreement, the Agreement has failed to satisfactorily address those issues that precipitated the negotiations in the first place. As a result, countries now need to develop ACTA in part to address some of those challenging issues. This time, the *demandeur* countries opted for a plurilateral Anti-Counterfeiting Trade Agreement among like-minded countries, in lieu of a multilateral anti-counterfeiting code within the GATT/WTO framework. The use of this "country club" approach<sup>149</sup> has been particularly controversial; it has raised difficult questions concerning the future efforts by less developed countries to shape international intellectual property enforcement norms. It has also instilled doubts about the legitimacy of many of the new norms created through

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<sup>145</sup> *Id.* arts. 6–27.

<sup>146</sup> Press Release, Jp. Ministry of Foreign Aff., Anti-Counterfeiting Trade Agreement (ACTA) (Opening for Signature) (May 1, 2011), *available at* [http://www.mofa.go.jp/announce/announce/2011/5/0501\\_01.html](http://www.mofa.go.jp/announce/announce/2011/5/0501_01.html).

<sup>147</sup> See MATTHEWS, *supra* note 52, at 9 (discussing the push for an anti-counterfeiting code during the Tokyo Round); SELL, *supra* note 14, at 40–41 (same). The draft code was circulated in 1982 as the draft Agreement on Measures to Discourage the Importation of Counterfeit Goods (document L/5382). See Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [TRIPS Negotiating Group], *Meeting of 25 March 1987: Note by the Secretariat* ¶ 15, MTN.GNG/NG11/1 (Apr. 10, 1987), *available at* [http://www.wto.org/gatt\\_docs/English/sulpdf/92020076.pdf](http://www.wto.org/gatt_docs/English/sulpdf/92020076.pdf).

<sup>148</sup> Punta del Este Declaration, *supra* note 42, at 1626 (emphasis added).

<sup>149</sup> See Yu, *supra* note 11 (discussing this "country club" approach).

ACTA or other bilateral, plurilateral, or regional trade and investment agreements.

To be certain, the ACTA negotiating parties did not sidestep the WTO without trying to strengthen enforcement norms within the forum. As Part III.A has shown, at one time or another, all the key ACTA negotiating parties—Japan, the United States, the European Union, and Switzerland—tabled their own papers on enforcement in the TRIPS Council. Nevertheless, the willingness of these countries to negotiate outside this traditional multilateral forum when they did not achieve their preferred outcome does raise challenging questions about the WTO's future role in the development of international intellectual property enforcement norms.

#### B. LESS DEVELOPED COUNTRIES

1. *TRIPS Council.* Although less developed countries have always preferred enforcement standards that are better tailored to their resource-deficient environments, until recently they were reluctant to take proactive efforts in pushing for their preferred international intellectual property enforcement norms.<sup>150</sup> Instead, they merely registered their concerns over high enforcement norms while resisting the developed countries' attempt to push for the establishment of these standards in the TRIPS Council.

For example, at the June 2006 TRIPS Council meeting discussed earlier, leading developing countries, such as Argentina, Brazil, China, and India, responded by strongly opposing the EU proposal, citing distractions from the WTO trade talks, which they claimed were "supposed to focus on development."<sup>151</sup> As noted by a Chinese official, the TRIPS Council is "not the right time or right place" to discuss enforcement.<sup>152</sup> In China's view, the DSB should handle intellectual property enforcement issues at the WTO instead.<sup>153</sup>

In the follow-up meeting in October 2006, less developed countries again noted their strong opposition to the European Union's joint communication with Japan, Switzerland, and the United States—this time, largely on procedural grounds.<sup>154</sup> As a result, the European Union did not have an opportunity to

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<sup>150</sup> There were many different reasons for a lack of a proactive approach. For example, less developed countries did not have sufficient bargaining power. Except for a rare few—like Brazil, India, and most recently China—many of these countries were not sufficiently organized to articulate their preferred positions. Even more complicated, the positions of the leading developed countries slowly evolved, due largely to the countries' rapid economic growth and changing economic structure.

<sup>151</sup> *EU Gets Little Support for Enforcement Proposal at WTO; CBD Issue Unresolved*, INTELL. PROP. WATCH (June 16, 2006), <http://www.ip-watch.org/weblog/2006/06/16/eu-gets-little-support-for-enforcement-proposal-at-wto-cbd-issue-unresolved/>.

<sup>152</sup> *Id.*

<sup>153</sup> *See TRIPS Council Issues Still Alive for WTO Ministerial*, INTELL. PROP. WATCH (Oct. 28, 2005), <http://www.ip-watch.org/weblog/2005/10/28/trips-council-issues-still-alive-for-wto-ministerial/>.

<sup>154</sup> *See Tove Iren S. Gerhardsen, WTO TRIPS Council Stumbles Over Inclusion of Enforcement*, INTELL.

make a formal presentation of its proposal. Instead, it made a statement, and its proposal was subsequently rejected.

The negative reactions to the EU proposals from less developed countries were understandable. These countries already had great difficulty in complying with the high standards required by the TRIPS Agreement following the expiration of the transitional periods.<sup>155</sup> In effect, they were dealing with what Bernard Hoekman and Petros Mavroidis described as the “Uruguay Round ‘hangover’”<sup>156</sup>—or, more specifically in the intellectual property context, “TRIPS Veisalgia.”<sup>157</sup> It is, therefore, understandable why these countries were very concerned when developed countries sought to push for the establishment of new and higher TRIPS-plus and TRIPS-extra standards through ACTA and other bilateral, plurilateral, or regional trade and investment agreements.<sup>158</sup>

Less developed countries also feared that a greater discussion of the implementation of the TRIPS Agreement would eventually open them up to future challenges over non-compliance in the enforcement area.<sup>159</sup> To many of these countries, compliance issues should be addressed only through the use of the mandatory WTO dispute settlement process. Some less developed countries also feared that a greater discussion of enforcement issues in the TRIPS Council would lead to unconstructive “finger pointing” that would slow down the Council’s work while creating unnecessary distractions.<sup>160</sup>

2. *Dispute Settlement Body.* Similar to the disappointing stance taken by less developed countries in the TRIPS Council, their participation in the WTO dispute settlement process has been largely on the defensive end. The first TRIPS dispute that led to the establishment of a WTO panel, for example, involved India as a respondent. In this dispute, the United States and later the European Communities successfully challenged, through parallel proceedings, India’s failure to establish a mailbox system in its patent law pursuant to Article

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PROP. WATCH (Oct. 27, 2006), <http://www.ip-watch.org/weblog/2006/10/27/wto-trips-council-stumbles-over-inclusion-of-enforcement/> (recounting the disagreement between developed and less developed countries over how to address intellectual property enforcement in the TRIPS Council).

<sup>155</sup> See Yu, *supra* note 13, at 379–86 (discussing the impact of the TRIPS Agreement on less developed countries).

<sup>156</sup> BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* 111 (2007).

<sup>157</sup> Coined by the Author.

<sup>158</sup> See Yu, *supra* note 17, at 867–69 (noting the distinction between TRIPS-plus and TRIPS-extra obligations).

<sup>159</sup> See Tove Iren S. Gerhardsen, *Developed Countries Seek to Elevate Enforcement Measures in TRIPS Council*, INTELL. PROP. WATCH (Oct. 25, 2006), <http://www.ip-watch.org/weblog/2006/10/25/developed-countries-seek-to-elevate-enforcement-measures-in-trips-council/> (noting that “the paper carries the implied threat [by developed countries] that countries failing to provide ‘adequate’ protection of intellectual property rights ultimately could be found not to be in compliance with TRIPS”).

<sup>160</sup> Gerhardsen, *supra* note 154.

70.8 of the TRIPS Agreement.<sup>161</sup> The result was a clear-cut victory for the United States and the European Communities.

Similarly, in *Brazil—Measures Affecting Patent Protection*, a case concerning the local working requirement in patent law, Brazil served as a respondent.<sup>162</sup> This complaint, however, was settled a year later, shortly after Brazil filed a retaliatory complaint challenging United States patent law for violations of Articles 27 and 28 of the TRIPS Agreement.<sup>163</sup> Brazil's complaint marked the first time a less developed country filed a TRIPS complaint against a developed country. Nevertheless, the two disputes were quickly settled, and Brazil lost its opportunity to use the WTO dispute settlement process to shape the interpretation and implementation of the TRIPS Agreement.

Apart from Brazil and India, Argentina, China, Indonesia, and Pakistan all have appeared on the respondent side of the TRIPS-related complaints in the WTO's first fifteen years of existence.<sup>164</sup> Although all of these complaints were filed by either the United States or the European Union, developing countries in recent years have made more frequent use of the WTO dispute settlement process to resolve non-TRIPS disputes.<sup>165</sup> Their ability to take advantage of the process also has improved greatly.

<sup>161</sup> Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998).

<sup>162</sup> Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/1 (June 8, 2000).

<sup>163</sup> Request for Consultations by Brazil, *United States—U.S. Patents Code*, WT/DS224/1 (Feb. 7, 2001).

<sup>164</sup> These complaints, in chronological order, were: Request for Consultations by the United States, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/1 (May 6, 1996); Request for Consultations by the United States, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS59/1 (Oct. 15, 1996); Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171/1 (May 10, 1999); Request for Consultations by the United States, *Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS196/1 (June 6, 2000); Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007). See generally Viviana Muñoz Tellez, *Dispute Settlement Under the TRIPS Agreement: The United States—Brazil (2000) and United States—Argentina (2002) Patent Disputes*, in 2 RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 215 (Carlos M. Correa ed., 2010) (discussing the United States' WTO complaints against Argentina and Brazil).

<sup>165</sup> See Davey, *supra* note 2, at 24 (noting that “the US and the EC no longer were as dominant as complainants in the system” and that “developing country use of the system increased dramatically” in the second half of the first decade of operation of the WTO dispute settlement process); see also David Evans & Gregory C. Shaffer, *Introduction in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* 1, 2 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) (noting that “no African country has ever initiated a [WTO] dispute” and that “only one Least Developed Country . . . initiated a dispute, and that dispute did not progress beyond the consultation phase (Bangladesh)”).

For example, in the U.S.–China dispute, although China was still a respondent, it was able to defend its position admirably before the DSB. Given the dispute's serious ramifications for the less developed world, six developing countries—Argentina, Brazil, India, Mexico, Thailand, and Turkey—also participated in the panel proceedings as third parties.<sup>166</sup> Except for India and Turkey, all of them either provided a written submission to or made an oral statement before the WTO panel. Perhaps because of their more active participation, less developed countries seemed to have had greater success in this dispute than in the earlier ones.

As the panel report has shown, less developed countries were able to score some important points that are likely to influence the future interpretation and implementation of the TRIPS Agreement.<sup>167</sup> For example, the panel report underscores both the importance of having minimum standards and flexibilities in the TRIPS Agreement and the longstanding treatment of intellectual property rights as private rights. It also rejects the use of bilateral, plurilateral, or regional trade agreements to divine meaning in the TRIPS language. In addition, the report demonstrates an appreciation of the divergent local market conditions in each WTO member while continuing the use of an evidence-based approach for resolving WTO disputes. The panel's discussion of Article 41.5 also hints at its willingness to consider evidence in cases where resource demands in the area of intellectual property enforcement have exceeded those in other areas of law enforcement. Thus, as I observed in another article, although policymakers, industries, and commentators have largely focused on the gains and losses of China and the United States, the less developed world—whether intended or not—may very well have become the dispute's ultimate winner.<sup>168</sup>

A year after the release of this panel report, India and Brazil filed complaints against the European Union and the Netherlands over the repeated seizure of in-transit generic drugs.<sup>169</sup> These complaints marked the second time less developed countries used the WTO dispute settlement process to address

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<sup>166</sup> TRIPS Enforcement Panel Report, *supra* note 8, ¶ 1.6. For discussions of third party participation in the WTO dispute settlement process, see generally Chad P. Bown, *MFN and the Third-Party Economic Interests of Developing Countries in GATT/WTO Dispute Settlement*, in *DEVELOPING COUNTRIES IN THE WTO*, *supra* note 70, at 265; Marc L. Busch & Eric Reinhardt, *With a Little Help from Our Friends? Developing Country Complaints and Third-Party Participation*, in *DEVELOPING COUNTRIES IN THE WTO*, *supra* note 70, at 247.

<sup>167</sup> For a more detailed discussion of points raised in this paragraph, see Yu, *supra* note 60.

<sup>168</sup> *See id.*

<sup>169</sup> Request for Consultations by India, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS408/1 (May 19, 2010); Request for Consultations by Brazil, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS409/1 (May 19, 2010). *See generally* Frederick M. Abbott, *Seizure of Generic Pharmaceuticals in Transit Based on Allegations of Patent Infringement: A Threat to International Trade, Development and Public Welfare*, 1 WIPO J. 43 (2009) (discussing issues concerning the seizure of in-transit generic drugs in Europe).



TRIPS concerns. They also represent the first attempt by less developed countries to challenge TRIPS-plus standards—enforcement or otherwise.

It remains to be seen whether any of these complaints will lead to the establishment of a WTO panel, and therefore further interpretation and implementation of the TRIPS Agreement. However, the European Union's recent agreement with India<sup>170</sup> to amend its regulation on customs border measures<sup>171</sup> already suggests the growing ability of less developed countries to take advantage of the WTO dispute settlement process—and in this case, to negotiate in the shadow of a WTO complaint.<sup>172</sup> Even if India ultimately settles with the European Union, the dispute between Brazil and the European Union could still remain.

3. *TRIPS Council: Part Deux.* Although less developed countries initially were rather defensive in the TRIPS Council and before the DSB, their positions changed significantly last year. In addition to the complaints India and Brazil filed against the European Union and the Netherlands, both China and India made important interventions at the TRIPS Council meeting in June 2010, largely in response to the release of the draft ACTA text, as well as the highly disturbing trend concerning TRIPS-plus enforcement standards.<sup>173</sup>

As China explained, TRIPS-plus enforcement standards could cause a wide variety of systemic problems within the international trading system.<sup>174</sup> For example, they could raise potential legal conflicts with the TRIPS Agreement as well as other agreements within the WTO.<sup>175</sup> By increasing the complexity of intellectual property rules, they could also make the international legal framework highly unpredictable, thus posing barriers to legitimate trade.<sup>176</sup> In addition, the TRIPS-plus standards may upset the delicate balance struck in the

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<sup>170</sup> See *India–EU Generic Drug Row “Resolved” at Brussels Summit*, BBC NEWS (Dec. 10, 2010), <http://www.bbc.co.uk/news/world-europe-11971568>.

<sup>171</sup> Council Regulation 1383/2003, Concerning Customs Actions Against Goods Suspected of Infringing Certain Intellectual Property Rights, 2003 O.J. (L 196) 7.

<sup>172</sup> See Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 476–77 (2004) (noting the importance of negotiation “in the shadow of” the WTO dispute settlement process); see also Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 219, 220 (John S. Odell ed., 2006) (arguing that “the use of legal adjudication allows developing countries to gain better outcomes in negotiations with their powerful trade partners than they could in a bilateral negotiation outside of the institution”); Yu, *supra* note 13, at 392–96 (noting the importance for less developed countries to take advantage of the WTO dispute settlement process).

<sup>173</sup> See TRIPS Council, *Minutes of Meeting* ¶¶ 250, 264, IP/C/M/63 (Oct. 4, 2010) [hereinafter TRIPS Council Minutes].

<sup>174</sup> See *id.* ¶¶ 248–263. China's June 9 statement was reprinted as *The Problems with the “TRIPS plus” Enforcement Trend: China's View*, S. BULL., July 28, 2010, at 13.

<sup>175</sup> See TRIPS Council Minutes, *supra* note 173, ¶¶ 252–253.

<sup>176</sup> See *id.* ¶ 254.

TRIPS Agreement through an arduous multiyear negotiation process.<sup>177</sup> The standards could also build harmful technological barriers while raising concerns about resource misallocation,<sup>178</sup> an issue that was raised in the U.S.–China TRIPS enforcement dispute.<sup>179</sup> China concluded its intervention by advancing a proposal on specific safeguard principles against the ongoing push for TRIPS-plus enforcement standards.<sup>180</sup>

Supporting China's position, India followed up by drawing attention to these and other systemic problems created by TRIPS-plus standards.<sup>181</sup> Of primary concern to India was the push for ACTA and other TRIPS-plus standards, which it claimed would upset the balance in the TRIPS Agreement.<sup>182</sup> The second sentence of Article 1.1 of the TRIPS Agreement states specifically that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."<sup>183</sup> To India, as well as other policymakers and commentators, this particular sentence delineates one of the Agreement's maximum standards, or the so-called "ceilings."<sup>184</sup> Article 1.1 therefore prohibits members from

<sup>177</sup> See *id.* ¶ 255.

<sup>178</sup> See *id.* ¶¶ 256–258.

<sup>179</sup> See Yu, *supra* note 60 (discussing China's arguments in relations to Article 41.5).

<sup>180</sup> See TRIPS Council Minutes, *supra* note 173, ¶ 259.

<sup>181</sup> See *id.* ¶¶ 264–273; see also TRIPS Council, *Communication from India, Intervention on TRIPS Plus Enforcement Trends* (June 9, 2010), reprinted as *Why "TPR Enforcement" in ACTA & FTAs Harm the South*, S. BULL., July 28, 2010, at 10 [hereinafter India's TRIPS Council Intervention] (collecting the speech for India's intervention).

<sup>182</sup> As the Indian delegate lamented:

[The] higher levels of protection are likely to disturb the balance of rights and obligations in the Agreement enshrined, inter alia [sic], in the Preamble, the Objectives and Principles (Art 7–8) and have the potential to constrain the flexibilities and policy space provided by the TRIPS Agreement to developing country Members like India particularly in areas such as public health, technology transfer, socio-economic development, promotion of innovation and access to knowledge. They could also potentially negate decisions taken multilaterally such as the Doha Declaration on Public Health in WTO and the Development Agenda in WIPO.

India's TRIPS Council Intervention, *supra* note 181, at 10.

<sup>183</sup> TRIPS Agreement art. 1.

<sup>184</sup> As India declared:

Although TRIPS Agreement is usually considered to be a minimum levels agreement, *enforcement levels cannot be raised to the extent that they contravene TRIPS Agreement*. TRIPS plus measures cannot be justified on the basis of Art 1:1 since the same provision also states that more extensive protection may only be granted "provided that such protection does not contravene the provisions of this Agreement".

In addition to laying certain minimum standards, TRIPS Agreement also provides "ceilings", some of which are mandatory and clearly specified in the TRIPS Agreement. Moreover, the TRIPS Agreement has achieved a very careful balance of the interests of the right holders on the one hand, and societal

implementing more extensive protection than required by the Agreement if such additional protection contravenes the Agreement.<sup>185</sup>

India further claimed that the introduction of TRIPS-plus standards “could short-change legal processes, impede legitimate competition and shift the escalated costs of enforcing private commercial right to governments, consumers and tax payers.”<sup>186</sup> In its view, the standards represent “a systemic threat to the rights of legitimate traders and producers of goods and fundamental rights of due process for individuals.”<sup>187</sup> These standards may also upset resource allocation while having strong trade-distorting effects.<sup>188</sup>

In addition, India lamented the fact that “IPR negotiations in [regional trade agreements] and plurilateral processes like ACTA completely bypassed the existing multilateral processes.”<sup>189</sup> These negotiations have harmed multilateral trade by undermining the “systemic checks” against trade protectionism that had been built into the WTO framework.<sup>190</sup> Through cross referencing, the resulting bilateral and plurilateral trade agreements may also implicate non-signatory members of the WTO.<sup>191</sup> India concluded its intervention with a trenchant critique of ACTA, covering issues that ranged from customs seizure of in-transit generic drugs to the restriction of TRIPS flexibilities to the inconsistencies between ACTA and the Doha Declaration.<sup>192</sup>

Compared to the earlier passive resistance put up by less developed countries in the TRIPS Council, the interventions recently made by China and India signaled a more active agenda on the enforcement front. Their positions were not only well-conceived, but also strongly supported by both the text and the negotiating history of the TRIPS Agreement. For example, the Punta del Este Declaration stated clearly that the goal of the TRIPS negotiations was to “ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”<sup>193</sup> During the TRIPS negotiations, Brazil registered concern over three sets of issues that it believed “should receive priority attention in the discussions”:<sup>194</sup>

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interests, including development-oriented concerns on the other. Enforcement measures cannot be viewed in isolation of the Objectives contained in Art 7 . . . .

India’s TRIPS Council Intervention, *supra* note 181, at 10–11 (emphasis added); *see also* TRIPS Council Minutes, *supra* note 173, ¶¶ 265, 272.

<sup>185</sup> *See, e.g.*, Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit*, 26 AM. U. INT’L L. REV. (forthcoming 2011).

<sup>186</sup> TRIPS Council Minutes, *supra* note 173, ¶ 265.

<sup>187</sup> *Id.*

<sup>188</sup> *See id.* ¶ 266.

<sup>189</sup> *Id.* ¶ 267.

<sup>190</sup> *Id.*

<sup>191</sup> *See id.* ¶ 268.

<sup>192</sup> *See id.* ¶¶ 269–271.

<sup>193</sup> Punta del Este Declaration, *supra* note 42.

<sup>194</sup> TRIPS Negotiating Group, *Submission from Brazil* ¶ 12, MTN.GNG/NG11/W/30 (Oct. 31,

- (1) The extent to which rigid and excessive protection of IPRs impedes the access to latest technological developments, restricting, therefore, the participation of developing countries to international trade?
- (2) The extent to which abusive use of IPRs gives rise to restrictions and distortions in international trade?
- (3) The risks that a rigid system of IPRs protection implies for international trade.<sup>195</sup>

A year later, India reminded the delegates that “it was only the restrictive and anti-competitive practices of the owners of the IPRs that could be considered to be trade-related because they alone distorted or impeded international trade.”<sup>196</sup>

In the end, the first recital of the preamble of the TRIPS Agreement echoes the negotiating mandate outlined in the Punta del Este Declaration. It states explicitly that the drafters desired “to reduce distortions and impediments to international trade, and taking into account the need to . . . ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”<sup>197</sup> As Carlos Correa reminded us, “higher levels of IPR protection may create barriers to legitimate trade”—a key concern of both the WTO and the TRIPS Agreement.<sup>198</sup>

In sum, the TRIPS Council interventions from China and India, along with the WTO complaints that India and Brazil filed against the European Union and the Netherlands, have suggested a more proactive approach on the part of less developed countries to shaping the development of international intellectual property enforcement norms. This approach is highly promising, considering the fact that Brazil, China, and India represent the three leading voices in the less developed world. As their economic strengths—and therefore political leverage—grow,<sup>199</sup> the evolution of the international intellectual property regime is likely to be more dynamic and multidirectional. Such evolution will become even more intriguing if these countries are willing to establish a united front that negotiates on behalf of the less developed world.<sup>200</sup>

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1988) [hereinafter *Submission from Brazil*].

<sup>195</sup> *Id.*

<sup>196</sup> TRIPS Negotiating Group, *Meeting of Negotiating Group of 12–14 July 1989: Note by the Secretariat* ¶ 5, MTN.GNG/NG11/14 (Sept. 12, 1989).

<sup>197</sup> TRIPS Agreement pmb., recital 1.

<sup>198</sup> CORREA, *supra* note 66, at 25.

<sup>199</sup> See Yu, *supra* note 53, at 358–62 (discussing the emerging strength of these BRIC countries).

<sup>200</sup> See generally Peter K. Yu, *Building Intellectual Property Coalitions for Development*, in IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA 79 (Jeremy de Beer ed., 2009) (discussing how the development of “intellectual property coalitions for development” can help less developed countries strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decision-making in the

## IV. LESSONS

The TRIPS Agreement's limited success in achieving a consensus on international intellectual property enforcement norms has led to great uncertainty over the future evolution of the global intellectual property system. Nevertheless, the continuous battle between developed and less developed countries in the norm-setting area provides policymakers, commentators, and rights holders with four important lessons. The first two focus on the TRIPS Agreement, and the last two concern either developed or less developed countries.

## A. LESSON 1: TRIPS AND CONTINUITY

Commentators have described how the TRIPS Agreement brought about a "sea change" or a "tectonic shift" in international intellectual property law.<sup>201</sup> However, as Professor Okediji cautioned us in her discussion of the recent trends of establishing TRIPS-plus bilateral agreements:

[T]he TRIPS Agreement should never have been understood as a crowning point of international intellectual property regulation. . . . [It] remains an important hallmark of international intellectual property law, but it very well may just have been a pause—albeit a significant one—in the historical progress of bilateral commercial treaties used as instruments of foreign relations by the United States.<sup>202</sup>

Indeed, as Part III has shown, the TRIPS negotiations and post-TRIPS developments represent an ongoing contest between developed and less developed countries over their preferred international intellectual property standards.<sup>203</sup> While developed countries successfully pushed for the inclusion

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international intellectual property regime).

<sup>201</sup> See, e.g., FREDERICK M. ABBOTT ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY* 3 (2007) (stating that "the TRIPS Agreement represented a sea change in the international regulation of IPRs"); WATAL, *supra* note 13, at 2 ("TRIPS is, by far, the most wide-ranging and far reaching international treaty on the subject of intellectual property to date and marks the most important milestone in the development of international law in this area."); Charles R. McManis, *Teaching Current Trends and Future Developments in Intellectual Property*, 52 ST. LOUIS U. L.J. 855, 856 (2008) (noting that "the field of international intellectual property law underwent a tectonic shift with the promulgation of the [TRIPS Agreement]").

<sup>202</sup> Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 130, 146–47 (2003–2004).

<sup>203</sup> See Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267 (2004) (discussing the repeated process of contestation and settlement in the intellectual property arena); Yu, *supra* note 3, at 328 (noting that the international intellectual property regime is the product of repeated interactions between an evolving set of

of their preferred standards in the TRIPS Agreement, less developed countries were able to inject ambiguities, flexibilities, limitations, and exceptions into the Agreement. Among the important TRIPS safeguards less developed countries succeeded in introducing are Articles 1.1, 7, 8, 40, and 41.5 (in addition to the transitional provisions). All of these provisions—in particular Articles 7 and 8, which lay down the Agreement's overarching objectives and normative principles—may provide opportunities for less developed countries to push for a recalibration of the balance in the existing international intellectual property system.<sup>204</sup>

Given the ongoing contest between developed and less developed countries, it is no surprise that commentators have viewed the TRIPS Agreement as a work in progress. As Carolyn Deere reminded us: “After a decade of tense North-South debates, TRIPS emerged a contested agreement. It was quickly apparent that far from a final deal, TRIPS was rather the starting point for further negotiations . . . .”<sup>205</sup> Susan Sell concurred: “The TRIPS agreement is hardly the end of the story. In many ways, it is just the beginning.”<sup>206</sup> Whether the balance in the international intellectual property system will be further adjusted will depend on whether these countries and their supporters can sufficiently mobilize to recalibrate such a balance.<sup>207</sup>

#### B. LESSON 2: ENFORCEMENT AS A MUTUAL BENEFIT

A country's interest in setting new and higher international intellectual property enforcement norms depends largely on the overall structure of the global intellectual property system and the substantive benefits that country can derive from reforming the system. As less developed countries continue to push for greater protection of traditional knowledge and cultural expressions<sup>208</sup>—and to some extent, geographical indications<sup>209</sup>—they

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currents and crosscurrents).

<sup>204</sup> For a detailed discussion of Articles 7 and 8 of the TRIPS Agreement, see generally Yu, *supra* note 52.

<sup>205</sup> DEERE, *supra* note 40, at 304.

<sup>206</sup> SELL, *supra* note 14, at 121.

<sup>207</sup> See Sell, *supra* note 203, at 319–21.

<sup>208</sup> For the Author's earlier views on the protection of traditional knowledge and cultural expressions, see generally Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433 (2008).

<sup>209</sup> See, e.g., PHILIPPE CULLET, INTELLECTUAL PROPERTY PROTECTION AND SUSTAINABLE DEVELOPMENT 333–37 (2005) (discussing how geographical indications can serve as a tool for protecting traditional knowledge); Dwijen Rangnekar, *Indications of Geographical Origin in Asia: Legal and Policy Issues to Resolve*, in INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD 273, 273 (Ricardo Meléndez-Ortiz & Pedro Roffe eds., 2009) (noting that geographical indications “are increasingly being seen as useful intellectual property rights for developing countries”); Madhavi Sunder, *The Invention of Traditional Knowledge*, LAW & CONTEMP. PROBS., Spring 2007, at 97, 110 (“Mysore silk *sarees* . . . ha[ve] had a

eventually will reach a point where the existing system will provide them with some attractive benefits.<sup>210</sup> At that point, they may begin to value the effective enforcement of intellectual property rights as highly as their developed counterparts.<sup>211</sup> After all, the successful protection of intellectual property rights depends on the existence of effective enforcement.

Moreover, although developed and less developed countries continue to disagree over the scope and extent of their TRIPS obligations, they do share some important common interests in the effective enforcement of intellectual property rights. While developed countries will certainly benefit from tougher enforcement, less developed countries would also obtain benefits if strengthened enforcement eventually could lead developed countries to refrain from pushing for TRIPS-plus enforcement standards.

There remains, of course, an important but difficult question about whether and how developed countries could convince their less developed counterparts of their intention to refrain from such a push. After all, many less developed countries agreed to the new TRIPS standards with the expectation that the United States would finally stop taking unilateral actions against them.<sup>212</sup> Unfortunately, their expectations turned out to be unfounded,<sup>213</sup> and the push

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makeover since obtaining a geographical indication, updating [their] look with trendy new (but interestingly, *natural*) colors . . . and 'contemporary' designs inspired by temple architecture and tribal jewelry.'"). Nevertheless, the protection of geographical indications within the TRIPS Agreement remains limited, with many less developed countries complaining about its bias toward developed countries. See KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 239 (2000) ("[T]he evolving language in TRIPS on geographical indications remains largely . . . confined to wines and spirits, while many developing countries point to food products that could be protected to their advantage, such as Basmati rice and Darjeeling tea.").

<sup>210</sup> See generally Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 10–15 (2009) (discussing the existence of a crossover point where countries consider their self-interest to move from a pirating nation to one that strongly respects intellectual property rights).

<sup>211</sup> As I noted earlier:

[B]ecause of the importance of enforcement in both areas, enforcement issues may provide a promising opportunity for both developed and less-developed countries to cooperate. Although each country group is likely to seek protection for very different objects—developed countries for stronger intellectual property protection and less-developed countries for stronger protection of cultural relics—both of them are likely to be interested in building a stronger enforcement environment that will protect their interests. Such cooperation would enable these countries to work together, sharing with each other experience, knowledge, and best practices about law enforcement in general.

Yu, *supra* note 208, at 453.

<sup>212</sup> See David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 909 (1989) (suggesting that states might not accept new multilateral commitments in intellectual property area if they are going to be vulnerable to unilateral actions); Yu, *supra* note 13, at 372 (noting that "many less developed countries claimed that it would have been pointless for them to join the WTO had the United States been able to continue imposing unilateral sanctions despite their membership").

<sup>213</sup> See Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in *GLOBAL*

for TRIPS-plus standards has greatly accelerated since the mid-2000s. Less developed countries, therefore, received not only a bad bargain, but also a failed bargain.<sup>214</sup> In the words of Sylvia Ostry, what many considered the “Grand Bargain” was, in effect, a “Bum Deal!”<sup>215</sup>

### C. LESSON 3: DEVELOPED COUNTRIES

If developed countries want to convince their less developed counterparts to support the establishment of stronger international intellectual property enforcement norms, they need to devise strategies to reconcile their differences while emphasizing their common interests in effective enforcement of intellectual property rights. Indeed, if resource and capacity constraints in less developed countries constitute the main barrier to greater cooperation between developed and less developed countries in the area of international intellectual property enforcement, developed countries may want to look harder for solutions that may help remove this barrier.

For example, developed countries can take seriously those TRIPS obligations that call for the promotion of technology transfer, technical cooperation, and legal assistance in developing and least-developed countries. Article 66.2 of the TRIPS Agreement states that “[d]eveloped country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”<sup>216</sup> Article 67, which is entitled “Technical Cooperation,” further provides:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.<sup>217</sup>

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INTELLECTUAL PROPERTY RIGHTS, *supra* note 53, at 161, 172 (“The 301 process . . . grew bigger, better and stronger after TRIPS was concluded.”).

<sup>214</sup> Yu, *supra* note 13, at 379.

<sup>215</sup> Ostry, *supra* note 70, at 105.

<sup>216</sup> TRIPS Agreement art. 66.

<sup>217</sup> *Id.* art. 67.



Sadly, despite the explicit language in these two provisions and the WTO's recent affirmation of the mandatory nature of the technology transfer obligations under Article 66.2,<sup>218</sup> developed countries thus far have only paid lip service to these obligations, with some undoubtedly subscribing to the view that these obligations are merely aspirational.

Developed countries also can consider some of the many innovative proposals commentators have advanced to address the resource and capacity constraints encountered by less developed countries. For instance, Carsten Fink, in a paper written before he became WIPO's first-ever Chief Economist, called on either developed country governments or intellectual property rights holders to bear the costs of intellectual property enforcement in less developed countries.<sup>219</sup> As he explained:

Since developed country firms derive a direct benefit from stronger IPRs enforcement, it may be in the interest of their governments to subsidize IPRs enforcement activities in developing countries. Thus, the question of whether stepped-up IPRs enforcement in less developed countries should not be financed by developed country governments is a matter for reflection.

Another approach would be to have enforcement costs borne directly by private rights holders. Arguably, at least some consumers benefit from stronger enforcement action and should therefore share the costs of the public good represented by law enforcement activities. However, private rights holders are the most direct beneficiary of better enforcement and they can therefore be expected to make a substantial contribution to the financing of underlying costs.<sup>220</sup>

Likewise, Mark Liang, in a recently-published student comment, suggested the need to create an "IPR Enforcement Fund" that draws on the WTO's annual membership dues.<sup>221</sup> According to him:

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<sup>218</sup> Paragraph 11.2 of the Doha Ministerial Decision of 14 November 2001, which covers implementation-related issues and concerns, states: "[T]he provisions of Article 66.2 of the TRIPS Agreement are mandatory." World Trade Organization, *Implementation-Related Issues and Concerns: Decision of 14 November 2001*, ¶ 11.2, WT/MIN(01)/17 (Nov. 20, 2001). The decision further required the TRIPS Council to "put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question." *Id.*

<sup>219</sup> Fink, *supra* note 32, at 19.

<sup>220</sup> *Id.* at 17.

<sup>221</sup> Mark Liang, Comment, *A Three-Pronged Approach: How the United States Can Use WTO Disclosure Requirements to Curb Intellectual Property Infringement in China*, 11 CHI. J. INT'L L. 285, 300–02 (2010).

The WTO could require member states to pay into an “IPR enforcement fund” through annual membership fees. The fund’s proceeds would then be distributed to China and other member states that have poor IPR enforcement records. The distribution of funds would be conditioned on their use for IPR enforcement purposes. For example, the money could be used for increasing seizure and confiscation efforts, hiring and training judicial and administrative agency personnel to handle IPR cases, and defraying the costs of judicial and administrative proceedings.<sup>222</sup>

Liang’s proposal builds on not only the technical and financial assistance obligations in the WTO and under the TRIPS Agreement, but also the GATT/WTO’s longstanding practice of providing such assistance.<sup>223</sup>

#### D. LESSON 4: LESS DEVELOPED COUNTRIES

If less developed countries want international intellectual property enforcement norms to be shaped in a way that takes their interests into account and that shows a greater appreciation of their significantly different socio-economic conditions, they need to be more proactive.<sup>224</sup> Until recently, less developed countries have been rather passive. As Part IV.B has shown, most of the efforts by less developed countries in the TRIPS Council and the WTO dispute settlement process have remained on the defensive end. Although these initial efforts succeeded in resisting the adoption of new TRIPS-plus enforcement standards in the WTO, developed countries remain in the driver’s seat of the international intellectual property enforcement debate.

The limited involvement of less developed countries in this debate, however, has changed recently. The complaints India and Brazil filed against the European Union and the Netherlands in May 2010 and the interventions China and India made in the TRIPS Council meeting a month later have opened up many new possibilities for less developed countries to shape international intellectual property enforcement norms.<sup>225</sup> As Professor Sell reminded us: “Each new round of contestation and settlement produces new winners and losers. History has shown that depending on how well mobilized and badly threatened the losers are, they can rise up to challenge the settlement.”<sup>226</sup> If the TRIPS Agreement is, indeed, a work in progress, these countries will have their

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<sup>222</sup> *Id.* at 300–01 (footnotes omitted).

<sup>223</sup> *Id.* at 301–02.

<sup>224</sup> Xue Hong made a similar point. *See* Xue, *supra* note 36, at 145 (“The developing countries, despite their tremendous diversity, must set up a united front, develop a series of practical strategies and proactively initiate a pro-development enforcement agenda.”).

<sup>225</sup> *See* discussion *supra* text accompanying notes 169–200.

<sup>226</sup> Sell, *supra* note 203, at 321.

opportunities. Whether they can succeed, however, will depend on whether they can rise up to the challenge of pushing for the adoption of their preferred norms.

To help get these norms accepted, they need to think harder about not only their strategies, but also about whether and how to redefine the concept of intellectual property enforcement.<sup>227</sup> To redefine this concept, they may want to explore whether enforcement should be reconceptualized by taking both rights *and* responsibilities into account—for example, by focusing on the abuse of rights or restraints on trade in addition to the protection of rights holders. Such a reconceptualization would be consistent with the positions long held by less developed countries, most notably Brazil and India.<sup>228</sup> The proposed reconceptualization would also be strongly supported by the text of the TRIPS Agreement, which already includes many provisions targeting the abuse of rights or process and restraints on trade or competition.<sup>229</sup>

In addition, less developed countries can explore what type of enforcement standards will be cost-effective and socially optimal under local conditions.<sup>230</sup> They can further seek standards that are appropriate for stimulating creativity and innovation in countries with limited resources and a small market. They can even take into account the many innovative ways that now exist to spur creativity and innovation (including those that are not enshrined in the TRIPS Agreement or other international treaties, or those that rights holders in the developed world have ignored or rejected). As Carolyn Deere pointed out, “the debate on IP policy reform ought not to rely solely on assessments of the past, but also on scenarios for the future.”<sup>231</sup>

In its final report, the U.K. Commission on Intellectual Property Rights reminded us that the protection and enforcement of intellectual property rights is “a means to an end, not an end in itself.”<sup>232</sup> This reminder is important because such protection and enforcement should not be based on a mere leap

<sup>227</sup> See Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 17 (2010).

<sup>228</sup> As Brazil declared in a submission to the TRIPS Negotiating Group:

[W]hen one speaks of “rights” of intellectual property owners, one is automatically bound to deal with the subject of “obligations” of these owners.

The objective of such obligations which deserves priority attention is to allow greater access to technological innovation for IPR users. If the whole attention of the discussions is centered on the interests of IPR owners, the balance of the entire IPR system is not taken into account.

*Submission from Brazil*, *supra* note 194, ¶¶ 16–17.

<sup>229</sup> See, e.g., TRIPS Agreement pmb., recital 1; *id.* arts. 8.2, 40.1, 40.2, 41.1, 48.1, 50.3, 53, 63.1, 67.

<sup>230</sup> See Li Xuan, *WCO SECURE: Legal and Economic Assessments of the TRIPS-plus-plus IP Enforcement*, in *INTELLECTUAL PROPERTY ENFORCEMENT*, *supra* note 18, at 62, 74–75 (underscoring the importance of developing a socially optimal intellectual property enforcement regime).

<sup>231</sup> DEERE, *supra* note 40, at 323.

<sup>232</sup> IPR COMMISSION REPORT, *supra* note 40, at 6.

of faith. After all, an intellectual property system should be “viewed as forming part of a broader set of measures designed to optimize knowledge development and utilization . . . [which, in turn,] enhance economic growth, cultural prosperity, and human development.”<sup>233</sup>

Finally, if less developed countries want to drive the discussions on international intellectual property enforcement norms, they need to learn to frame the public debate better.<sup>234</sup> As Amy Kapczynski reminded us:

Frames affect what the players understand to be their interests, whom they believe to be their allies, and how they justify the change they seek. These frames direct as well as reflect material circumstances, and as a result, the domain of the political cannot be mathematically reduced to the domain of the material.<sup>235</sup>

For example, John Braithwaite and Peter Drahos pointed out insightfully, “[h]ad TRIPS been framed as a public health issue, the anxiety of mass publics in the US and other Western states might have become a factor in destabilizing the consensus that US business elites had built around TRIPS.”<sup>236</sup> Likewise, Susan Sell favored “grants talk” over “rights talk.”<sup>237</sup> As she explained, from the standpoint of international development, grants talk “highlights the fact that what may be granted may be taken away when such grants conflict with other

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<sup>233</sup> Daniel J. Gervais, *TRIPS and Development*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT*, *supra* note 17, at 3, 4; *see also* Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 15 (stating that intellectual property laws and policies “constitute only one of the many components of the information ecosystem”).

<sup>234</sup> *See, e.g.*, DEERE, *supra* note 40, at 172–73; John S. Odell & Susan K. Sell, *Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health*, 2001, in *NEGOTIATING TRADE*, *supra* note 172, at 85–87; Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 809 (2008); Yu, *supra* note 54, at 552.

<sup>235</sup> Kapczynski, *supra* note 234, at 809. Likewise, Carolyn Deere observed:

Frames were . . . used by a range of stakeholders to influence, distort, and alter communications to their advantage with the hope of setting and dominating the terms of debate and determining what stakeholders should be arguing about. Framing was used to fix meanings, build shared understandings, and influence how challenges were defined and represented. This in turn served to legitimate and motivate particular kinds of collective action and impact what kinds of solutions were adopted in particular policy debates.

DEERE, *supra* note 40, at 169; *see also* JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 528 (2000) (“Rhetoric, ‘the art of persuasive communication’, has a place in international negotiations and lobbying affecting business regulation.” (citation omitted)); Yu, *supra* note 13, at 389 (“Like interpretation, how one frames the intellectual property debate is equally important, because such framing might affect the receptiveness of the WTO member states to the demands, or perhaps pleas, of the less developed world.”).

<sup>236</sup> BRAITHWAITE & DRAHOS, *supra* note 235, at 576.

<sup>237</sup> SELL, *supra* note 14, at 146.

important goals” and is likely to discourage policymakers from focusing on the entitlement of the rights holders.<sup>238</sup>

Like public health issues and grants talk, the international enforcement debate can be better framed. The fact that less developed countries prefer weaker intellectual property enforcement and stronger protection against the abuse of rights and restraints on trade does not mean that these countries favor piracy and counterfeiting. Whether they can get their points across and earn support in the public debate, however, will depend on whether they can properly frame the debate to articulate positions that developed countries may find counterintuitive.<sup>239</sup> Such framing and articulation are particularly important in light of the fact that the intellectual property enforcement debate has been highly polarized and often clouded by misconceptions and unverifiable data.<sup>240</sup>

## V. CONCLUSION

Although developed countries and their supportive intellectual property industries had high hopes that the Agreement would provide effective enforcement of intellectual property rights shortly after the inception of the TRIPS Agreement, the Agreement has yet to fulfill these expectations. Thus, from the standpoint of developed countries and selected sectors in middle-income countries, the TRIPS enforcement provisions can be largely considered as the Agreement’s Achilles’ heel. From the standpoint of others, however, the existence of weak TRIPS enforcement provisions may very well be a blessing in disguise.

Thus, if the global intellectual property enforcement regime is to become more balanced, robust, and sustainable, countries need to be more appreciative of the positions taken by their trading partners—whether developed or less developed. They also need to pay greater attention to the many challenges that confronted the TRIPS delegates two decades ago. Until developed and less developed countries can work together to achieve a global consensus on international intellectual property enforcement norms, the battle over these norms will continue, and the uproar caused by the developed countries’ push for ACTA and other TRIPS-plus bilateral and plurilateral standards is only the beginning.

Fortunately, fifteen years is a very short time in the age of international law development. For reference purposes, the international human rights system, though young, has already celebrated its sixtieth anniversary.<sup>241</sup> With more than

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<sup>238</sup> *Id.*

<sup>239</sup> See generally Yu, *supra* note 54, at 568–73 (discussing the importance of rhetoric in the international intellectual property debate).

<sup>240</sup> See generally Li, *supra* note 33 (discussing these misconceptions and unreliable data).

<sup>241</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993

a decade of interpretation and implementation, the TRIPS Agreement, therefore, can only be described as an immature teenager, with much room to grow and prosper. Because the enforcement provisions constitute an integral part of the TRIPS Agreement, they will grow alongside the Agreement. Whether they can prosper, however, will depend on whether they are given the right conditions and nourishment.

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U.N.T.S. 3; Universal Declaration of Human Rights, G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

