

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES

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I. INTRODUCTION

THE trade-related aspects of intellectual property rights (TRIPS) are a relatively new field to most developing countries. Formerly society in developing countries did not consider intellectual property as an important aspect which had a substantial impact either on society itself or on development.¹ This is also the reason why most developing countries did not see it as important to enact laws in this field (Hughes 1988). The stance of these countries is generally clear. They were against every initiative to discuss further stricter controls and more effective enforcement of intellectual property rights.

The main argument put forward by developing countries is that intellectual property rights should be accessible at a low cost to any country to improve their economic growth.² They aspired to be able to obtain technology by way of transfer in an inexpensive way or to seek to avail themselves of the intellectual property rights granted in their territories.³ This policy is needed due to lack of innovation in developing countries and their small-scale industries (Pacón 1996, p. 327). Above all, most governments in developing countries did not deem it important to protect or enforce the law on intellectual property since there were not many intellectual property holders in their countries.

Developed countries, on the other hand, argue that intellectual property rights must be protected so that the private investors who have taken the considerable

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¹ For example, in Balinese culture and society in Indonesia, the artists or sculptors whose famous works were copied by others, felt proud and honored since the copying was akin to the recognition of their work. In addition, the sculptor believed that the work that was copied would also provide benefit to more people in society. This cultural aspect towards intellectual property was also found in China and India. See further, Gana (1996, pp. 766–67). For a history of intellectual property in China, see Alfred (1995).

² See for example, D'Amato and Long (1997, p. 448) and Mansfield (1993, p. 110).

³ For further analysis on the view of developing countries on intellectual property rights protection, see Irish (1994), especially on developing countries' view during the 1970s. These countries' view during the Uruguay Round negotiation, see Giunta and Shang (1994).

venture involved in developing and applying a new technology may get a fair return. In addition, these countries argued that the establishment of stronger intellectual property rights would, in the end, help developing countries in terms of promoting indigenous technological and innovative activities (Mansfield 1993, p. 110).

There are a number of reasons why developed countries chose the General Agreement on Tariffs and Trade (GATT) as the forum for the negotiation of TRIPS. First, developed countries regarded GATT as the proper venue in which to negotiate intellectual property rights, since they could use GATT as the negotiation forum for the access of developing countries' products to their markets "in return for the protection of intellectual property rights" (Correa and Yusuf 1998, p. 8). Second, developed countries may be able to use the GATT dispute settlement procedures when a dispute on intellectual property rights arose (Croome 1995, p. 134).⁴ Third, the negotiation of TRIPS under GATT is more effective in terms of the number of participants compared to other international institutions, in particular the World Intellectual Property Organization (WIPO).⁵

Although its main objective was to regulate trade order, GATT, from its initial establishment, has also recognized the relationship between trade and intellectual property rights. In essence, GATT incorporated a number of articles which may be related to intellectual property rights. They include:

- (a) Article III.4 of GATT states that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use (national treatment).
- (b) Article IX stipulates that the marking requirements (trade names, geographical indications, etc.) should not be used in such a way as to hamper international trade or to discriminate between contracting parties.
- (c) Article XII.3 (c) (iii) stipulates that the restrictions used to protect the balance of payments must not be applied so as to prevent compliance with patent, trademark, copyright, or similar procedures.
- (d) Article XVIII.10 stipulates that trade restrictions imposed in the context of balance-of-payments difficulties should not be inconsistent with patent, trademark, copyright, or similar procedures (Primo Braga 1995, p. 382).
- (e) Article XX (d) provides for the exceptions to the GATT rules which is necessary for "the protection of patents, trademarks, and copyrights and the prevention of deceptive practices."

⁴ See also South Centre (1997, p. 7) and Patry (1995, p. 2).

⁵ Although the membership of WIPO is as much as GATT, the membership of the WIPO's convention depended on its willingness to ratify, accede, or to be bound by it.

- (f) Article II (d) places the adoption or enforcement of measures necessary to secure “the protection of patents, trademarks, and copyrights and the prevention of deceptive practices” among the general exceptions in GATT (Primo Braga 1995).

The lack of standards of intellectual property rights protection under GATT was understandable in the light of its historical background when the international community (the original members of GATT) drafted GATT in the 1940s. From the beginning, the drafters of GATT realized that its main objective in formulating rules (that would be embodied in GATT) was to facilitate trade and to reduce tariff rates among its members.

In addition to the articles of GATT above, GATT has also handled some international trade cases related to intellectual property rights. They include:

(i) “U.S. Imports of Certain Automotive Spring Assemblies.”⁶ In 1981, Canada brought the United States to the GATT panel, arguing that the U.S. law, Section 337 of the U.S. Tariff Act of 1930, which barred Canada as supplier of automotive spring assemblies, was against the national treatment principle contained in Article III of GATT. Section 337 of the U.S. Tariff Act of 1930 provided a special administrative agency “procedure” for litigating claims of patent infringement against imported goods and special border remedies to keep infringing goods from entering the United States.

Canada maintained that both special procedures and remedies violated the national treatment obligation under Article III of GATT. The United States argued that both remedies (the litigating procedure and border remedies) were necessary to cope with special cases such as patent infringement from imported goods. In its decision, the GATT panel concluded that the “exclusion order issued by the USITC [U.S. International Trade Commission] against the importation of automotive spring assemblies fell within the provisions of Article XX (d), and was therefore consistent with GATT.”⁷

(ii) “Japan—Custom Duties, Taxes and Labeling Practices on Imported Wines and Alcohol Beverages.”⁸ The Japanese government from the 1940s to the 1970s enacted various laws on the tax system for imported beverages. For this purpose, the Japanese government differentiated between and categorized various kinds and qualities of alcoholic beverages that were subject to different laws and tax rates. In addition Japanese bottles of wines, whiskies, and brandies currently bear labels using English, French, or German terms, such as “château,” “reverse,” or “village.”

The European Community (EC) brought the Japanese law on the above policies before the GATT panel, arguing that the various taxes imposed by Japan on im-

⁶ Adopted on May 26, 1983, BISD 36S/315.

⁷ Paragraph 61 of the panel report on “Japan—Custom Duties, Taxes and Labelling Practices on Imported Wines and Alcohol Beverages,” adopted on November 10, 1987, BISD 34S/83, 85.

⁸ Report of the panel adopted on November 10, 1987, BISD 34S/83, 85.

ported wines and alcoholic beverages from the EC was inconsistent with Article III.2 of GATT.

The panel found that whiskies, brandies, other distilled spirits, liqueurs, wines, and sparkling wines imported into Japan were subject to discriminatory or protective Japanese taxes. The panel concluded that these discriminatory or protective taxes had to be presumed to cause nullification or impairment of benefits accruing to the EC under the General Agreement. Therefore the panel concluded that the Japanese laws were inconsistent with Article III.2 of GATT (par. 5.16).

The panel also noted that Article XI.6 of GATT was designed to protect distinctive regional or geographical names of products of the territory of a contracting party as are protected by legislation. The panel was unable to find that the use by Japanese manufacturers of labels written partly in English or French, etc., had actually been to the detriment of distinctive or geographical names of products produced and legally protected in the European Economic Community (EEC). The panel could not either find that Japan had failed to meet its obligation to cooperate pursuant to GATT Article IX.6 (par. 5.15).

(iii) “EC—U.S. Section 337” (November 7, 1989, BISD 36S/345). The subject matter of this case is very similar to the “U.S. Imports of Certain Automotive Spring Assemblies”⁹ above. In this case the complainant, the EC, applied a different approach by arguing that Section 337 of the U.S. Tariff Act of 1930 did discriminate; EC Section 337 states that unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale, are unlawful if these unfair acts or methods of competition tend to (1) destroy or to substantially injure an industry recently and economically operating in the United States, (2) prevent the establishment of such an industry, or (3) restrain or monopolize trade and commerce in the United States (par. 2.2).

The EC put forward its arguments, among others, based on the nature of the intellectual property rights proceedings by the USITC in addition to the U.S. federal courts. It contended that the proceedings conducted by the USITC and the federal courts are different. This indicated that the treatment accorded imported products is less favorable than that accorded like products of U.S. origin. Consequently, it is inconsistent with Article III.4 of GATT and cannot be justified under Article XX (d) of GATT (par. 5.4).

In its deliberation, the panel underscored the differences between the proceedings of the USITC and the U.S. federal courts. The court found that there has been different treatment between the imported products which the complainant accorded. Here the panel found that the different treatment is itself less favorable to imported products and is therefore inconsistent with Article III.4 (par. 5.18).

⁹ Adopted on May 26, 1983, BISD 36S/315 (see footnote 6).

In its conclusion, the panel stated that Section 337 of the United States Tariff Act of 1930 is inconsistent with Article III.4, in that it accords imported products challenged as infringing the U.S. patents less favorable treatment than that accorded products of U.S. origin similarly challenged, and that these inconsistencies cannot be justified in any respect under Article XX (d) (par. 6.3).¹⁰ The panel “recommends” that the contracting parties request the United States to bring its procedures applied in patent infringement cases bearing on imported products into conformity with its obligations under the General Agreement (par. 6.4).¹¹

The case above, despite their limited scope for intellectual property rights regulation, has demonstrated that there is a considerable link between intellectual property rights and international trade. The merit of the dispute is not substantive law of intellectual property rights, but it demonstrates the impact of intellectual property regulation on international trade and how the principles of international trade embedded in GATT, in particular the principle of national treatment, have to be observed by its members.

II. THE TRIPS NEGOTIATION

The proposal for the negotiation on intellectual property rights in GATT was for the first time launched during the Tokyo Round in 1978, as a response to the explosion of counterfeiting trademarked goods and the dissatisfaction of the creators and users of intellectual property on the issue of enforcement of the existing international regime at that time (the 1970s and 1980s) (Yambrusic 1992, p. 85; Ross and Wasserman 1993, p. 15). The United States and the EC, the proponents of the negotiation of this issue and supported by Japan and Canada, proposed a draft agreement on the regulation on anti-counterfeiting measures.¹² The main purpose of the draft agreement was to seek legal means in an international forum for anti-counterfeiting measures. The efforts failed to reach agreement among the contracting parties of GATT (UNCTAD 1994, p. 186; Primo Braga 1995, p. 382).

The significant step on the possible negotiation of TRIPS under GATT took place in November 1985 when the contracting parties of GATT established a Preparatory Committee to discuss a new round of multilateral negotiations. The Preparatory Committee was given a broad mandate to examine any possible agenda in the new round including the issue of intellectual property rights (Primo Braga 1995, p. 384).

During the negotiation, the United States with its economic power threatened to

¹⁰ The report of this case has also overruled the Canada–United States dispute concerning “U.S. Imports of Certain Automotive Spring Assemblies,” Panel Report adopted on May 26, 1983, BISD 30S/107.

¹¹ For further discussion on this case, see Hudec (1993, pp. 219–21).

¹² “Agreement on Measures to Discourage the Importation of Counterfeit Goods,” GATT Document L/4817, July 1979.

impose trade sanctions on the states, mostly developing countries, that were allegedly to have infringed or to have given lack of protection to the U.S. intellectual property rights in their countries. The United States promulgated the Trade Act of 1984 to protect the intellectual property rights under Section 301 of the Trade Act of 1974. The act provides that the president of the United States may impose trade sanction upon states who allegedly had not provided protection to the U.S. intellectual property.¹³

In 1988, the United States enacted the Omnibus Trade and Competitive Act to further strengthen the U.S. intellectual property protection in foreign markets. One of the provisions of the act, the “Special 301” provides for stronger power to the U.S. president to enforce stringent economic sanctions upon states that have failed to give protection of the U.S. intellectual property.¹⁴ Under Special 301 of the 1988 U.S. Omnibus Trade and Competitiveness Act, the United States investigated the alleged infringement of U.S. intellectual property laws upon the People’s Republic of China, Brazil, India, Taiwan, the Republic of Korea, Mexico, Saudi Arabia, and Thailand.¹⁵ Similarly developing countries in Latin America faced the same threat with trade sanctions in order that they might change or improve their intellectual property laws.¹⁶ Special 301, among others, stipulates that lack of U.S. intellectual property protection is deemed to be an unfair trade practice.

The victims of this act were not only developing countries but also developed countries. The EC, for example, asserted that with Special 301, the United States in effect possessed an atomic bomb, and therefore had negotiating advantage over all GATT members (*GATT Focus*, no. 63, 1989, p. 8). Japan maintained that a GATT member could not on its own discretion violate GATT rules. Special 301, according to Japan, “disregarded the GATT dispute settlement procedures on retaliation” (*GATT Focus*, no. 63, 1989, pp. 7–8). In a similar vein, Canada has also expressed its concern that the use of unilateral action as sanctioned by Section 301 undermines GATT rules and GATT dispute settlement procedures (Dworkin 1996, p. 327).

The arguments put forward above are plausible. Under GATT rules, any problem or dispute concerning trade between the contracting parties of GATT should be settled within GATT. Unilateral trade sanction is inimical to the international trade rules. First, it violates Article XXIII which stipulates that every member is required to seek multilateral solutions to bilateral conflicts. Second, GATT is a forum for the negotiation of trade of all contracting parties of GATT.¹⁷ Third, it violates Article

¹³ For further elaboration on the impact of Section 301 on intellectual property rights, see Yambrusic (1992, pp.194–201), Burrell (1998, pp.197–224), and Ryan (1998, especially pp. 542, 563).

¹⁴ For further elaboration on Special 301, see Ross and Wasserman (1993, p. 13).

¹⁵ See *World Intellectual Property Report*, vol. 3 (1989), pp. 3, 64, and vol. 5 (1991), p. 1. See also McDorman (1992).

¹⁶ See further Newby (1995), discussing the impact of Special 301 on the developing countries’ intellectual property rights law reform and the response of the world toward the act and the issue of jurisdiction.

¹⁷ “Statement of Arthur Dunkel at the Council’s Meeting,” *GATT Focus*, no. 63 (1989), p. 8.

XVI.4 of the WTO Agreement which states that “Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements.”¹⁸

Significant progress of the negotiation took place in 1986 when the contracting parties of GATT agreed to launch the Uruguay Round negotiations in 1986, which stipulated that TRIPS was one of the issues on the agenda of the negotiation. The 1986 Ministerial Declaration on the Uruguay Round laid down guidelines for the subject matters of the negotiations, which, among others, covered TRIPS (including trade in counterfeit goods). For the negotiations on TRIPS, it put forward the following objectives:

- (1) 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’s provisions and elaborate as appropriate new rules and disciplines.
- (2) 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 GATT.
- (3) These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

The cleavage of opinions between developed and developing countries began with a different interpretation of the mandate of the 1986 Ministerial Declaration. Developed countries, predominantly the United States, took a broad view of the mandate, by expressing three elements for the intellectual property rights negotiation, namely, dispute settlement, domestic enforcement, and standards of protection (Preeg 1995, pp. 64–65).

Despite the limited mandate contained in the 1986 Ministerial Declaration, developed countries had unilaterally “expanded” the scope of the mandate and intended that the negotiation should also include the standards in “all” fields of intellectual property rights (South Centre 1997, p. 8). The main reason of this extension was that developed countries maintained that the main issues of the need of the negotiation on intellectual property were not merely the problem of counterfeiting. In practice, however, developed countries’ companies operating abroad had found that issues affecting TRIPS were also attributable to inadequate and ineffective protection of intellectual property rights (GATT 1989, p. 49).

At the meeting at the Mid-Term Review in December 1989 at Montreal and at the senior officials’ meeting in April 1989 in Geneva, the contracting parties reached

¹⁸ See further, Palmetier (1998, pp. 123–28).

a compromise agreement concerning the objective or the mandate of the 1986 Ministerial Declaration. They agreed to elaborate adequate standards of intellectual property rights, including relevant international agreements, dispute settlements, and transitional period arrangements (UNCTAD 1994, p. 186; Croome 1995, p. 251).

To follow up the agreement, twenty-six national proposals were submitted by the end of 1989 (GATT 1990, p. 63). Some participants put forward detailed written submissions about the international minimum standard for the protection of intellectual property, the basic principle of GATT (to be applied in the TRIPS Agreement), the transitional arrangement, and dispute settlement.¹⁹ The international minimum standards intended to strengthen the intellectual property protection covered all areas of all categories of intellectual property, including copyright and related rights, patents, trademarks, geographical indications, industrial designs, and layout designs for integrated circuits and trade secrets (Croome 1995, p. 253).

During the negotiation, strenuous debate occurred between developed and developing countries over the status of patent protection for pharmaceuticals. Some developed countries which endeavored to pursue the needs of their public health, took out a strong policy to prevent the provision of patents for pharmaceuticals to ensure the capital and investment to develop it were well protected (Croome 1995, p. 253). In contrast, developing countries that pursued social and development needs in every intellectual property negotiation contended that the protection of patents for pharmaceuticals should take into account the need for community health.²⁰ Neither developed nor developing countries disputed the issue of the enforcement of intellectual property protection. This was mainly because the various proposals on this issue did not require significant alteration to their legal systems (Croome 1995, p. 254).

By May 1990, the Negotiating Group received five draft legal texts, consisting of four from developed countries (European Community, Japan, Switzerland, and the United States) and one draft text from developing countries (representing thirteen developing countries) entitled "Group of Negotiations on Goods (GATT) Negotiating Group on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods" (hereafter called "Draft Agreement").²¹

¹⁹ The EEC tabled the first draft proposal, followed by the United States, Switzerland, and Japan. See, "Draft Agreement on Trade-Related Aspects of Intellectual Property," Communication from the European Community, GATT Document MTN.GNG/NG11/W/68, March 29, 1990; "Draft Agreement on Trade-Related Aspects of Intellectual Property Rights." Communication from the United States, GATT Document MTN.GNG/NG11/W/70, May 11, 1990; "Draft Amendment to the General Agreement on Tariffs and Trade on the Protection of Trade-Related of Intellectual Property," Communication from Switzerland, GATT Document MTN.GNG/NG11/W/73, May 14, 1990; "Main Elements of a Legal Text for TRIPs," Communication from Japan, GATT Document MTN.GNG/NG11/W/74, May 15, 1990.

²⁰ See also GATT (1989, p. 50).

²¹ "Group of Negotiations on Goods (GATT) Negotiating Group on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods," Communication from Argentina,

The Draft Agreement consisted of two parts. Part I, entitled “Intellectual Property and International Trade,” laid down the need for protection of intellectual property and its relation to the flow of international trade in legitimate goods (hereafter called “Draft Agreement Part I”). Part II, entitled “Standard and Principles concerning the Availability, Scope, and Rights of Intellectual Property Rights,” set out the importance of intellectual property rights for promoting innovation and creativity which took into account the developmental, technological, and public-interest objectives of developing countries (hereafter called “Draft Agreement Part II”).

To begin with, the content of the Draft Agreement largely represented the special interest of developing countries in intellectual property rights. These interests were embodied in the preamble of the Draft Agreement which stipulated as follows:

- (1) Developing countries recognize the importance of protection of intellectual property rights for promoting innovation and creativity.
- (2) Such a protection (above) should be in accordance with the public policy objectives of the developing countries’ “national system” for the protection of intellectual property, including developmental and technological objectives.
- (3) Most importantly, developing countries desire to have “maximum flexibility” in the use of intellectual property rights in order to enable them to create a sound and visible technological base.

The interest of developing countries was further elaborated in articles of the Draft Agreement, including for example, Article 1 of the Draft Agreement Part II. In this article, developing countries accentuate, among others, the sovereign rights of all countries to enact national legislation on the availability, scope, and level of the protection of intellectual property rights, especially in sectors of special public concern, such as health, nutrition, agriculture, and national security.²²

It is obvious that the developing countries’ interest in the intellectual property rights is actually the need of these countries to regulate intellectual property on the basis of their own national standards. Additionally, developing countries strongly emphasized the need of the recognition that it is a matter of sovereign rights (of all countries) to regulate, use, and apply the scope and level of the protection of intellectual property rights. On the face of it, developing countries did not want the application of the national treatment or most-favored-national or nondiscriminatory principles in the regulation (including the protection) of intellectual property rights.

It is safe to argue that the principles of national treatment and most favored nations (MFN) are the indispensable principles in international trade. They are the principles that ensure predictability and stability in the flow of international trade.

Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, Uruguay, and Pakistan, GATT Document MTN.GNG/NG11/W71, May 14, 1990.

²² Article 1.1 of the Draft Agreement Part II.

Nevertheless, it should also be underlined that these principles must not be applied to “all” countries on the same basis. The application of these principles, however, should take into account the special circumstances of every country, especially those who are weak or developing countries, and countries in transition. Special treatment or provisions for these countries are necessary. It is also right to maintain that this special treatment or provisions must always exist in “every” international trade agreement, whose member countries include developing countries. The lack of special treatment or provisions will only undermine the application and the effectiveness of the international agreements concerned.

The Draft Agreement raised as well the issue of unilateral measures. Article 4 of the Draft Agreement Part I states that parties should not threaten or have recourse to unilaterally decide economic measures of any kind at ensuring the enforcement of intellectual property rights.²³ The objective of this article was to curb the unilateral measures that have been invoked by developed countries. As widely known, in their efforts to protect their intellectual property rights from infringement, a number of developed countries have resorted to unilateral measures to protect their intellectual property. A famous example of this measure is the U.S. Section 301 of the Trade Act 1974 which threatens to impose trade sanctions against developing countries who allegedly fail to provide proper protection of the U.S. intellectual property rights.

The other important proposal from developing countries was the regulation on the balanced provision of rights and obligations of the patent owner. Article 5 of the Draft Agreement Part II states as follows:

- (1) Once a patent has been granted, the owner of the patent shall have the following:
 - (i) The right to prevent others from working the patented product or the patented process for commercial or industrial purposes;
 - (ii) The right to assign, or transfer by succession, the patent and to conclude license contract;
 - (iii) The right to *a reasonable remuneration*²⁴ when the competent authorities of a Party to the present agreement use a patent for government purposes or provide the granting of a license of right or a compulsory license.
- (2) The owner of the patent shall have the following obligations:
 - (i) *To disclose the invention in a clear and complete manner to permit a person versed in the technical field to put the invention into practice* and in particular to indicate the best mode for carrying out the invention;

²³ Article 4 of the Draft Agreement Part I.

²⁴ Such reasonable remuneration will be determined having regard to the economic situation of the party, the nature of the invention, the cost involved in developing the patent and other relevant factors (footnote in original).

- (ii) *To give information concerning corresponding foreign application and grants;*
- (iii) *To work the patented invention in the territory of the Party granting it within the time limits fixed by national legislation and subject to the sanctions provided for in Chapter VI;*
- (iv) In respect of license contracts and contracts assigning patents, to refrain from engaging in abusive or anti-competitive practices adversely affecting the transfer of technology subject to the sanctions provided for in Chapters VI and VII. (Emphasis added)

The special need to transfer technology²⁵ and pursue development had also been raised by developing countries in the regulation of intellectual property. These countries demanded special treatment for not applying the same standard of protection to intellectual protection. This, they argued, might be helpful for the sake of its national development and put more weight on the need to discourage restrictive business practices, and to prohibit licensing agreements that place limitations on trade and development (Croome 1995, p. 253).

Responding to this, developed countries contended that foreign investors might be only interested in investing in a country where its intellectual property protection was guaranteed. Thus, the better intellectual property is protected, the more foreign direct investment would come to that country (Peterson 1992; Deardoff 1990; Siebeck 1990).²⁶

On the issue of dispute settlement of intellectual property, the participants could not reach any solution, since they could not yet find the institutional framework of the TRIPS Agreement. Several approaches were introduced. One would suggest adopting the settlement of disputes as has existed under GATT. Another was to seek procedures on the settlement of disputes as available in other forums such as the WIPO (GATT 1990, p. 64).

In the midst of many unresolved issues, in December 1991, the Director General of GATT initiated to table a Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation, which included the TRIPS Agreement. The (draft) TRIPS Agreement contained a compromise provision seeking to “rec-

²⁵ See, for example, “Communication from the Republic of Korea, Standards and Enforcement of Intellectual Property Rights,” GATT Document MTN.NG11/W/48, October 26, 1989, arguing that “procedures of transfer of technology should be allowed for the adjustment of each participating country’s domestic regulation.” See also “Group of Negotiations on Goods (GATT) Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods”; and Communication from Brazil (see footnote 21), arguing that the (Negotiating) Group should “conduct such examination of intellectual property rights guided by . . . the maintenance of an intellectual property system which fosters technological development of all countries, especially developing countries” (par. 10).

²⁶ Peterson (1992) noted that the availability of intellectual property protection in a developed countries may encourage foreign firms to invest in a product development to the countries’ needs.

oncile” developed and developing countries. The compromise solution is as follows. First, it provides for the strengthening of intellectual property rights on a global scale accommodating the interests of developed countries. Second, it provides for a generous transition period for the interests of developing countries. Third, it grandfathered some practices of developed countries, for example, the rejection of an another’s “moral rights” in the United States under copyright law and the mixed rental rights system of Japan. Fourth, it provides for special and differential treatment for the least developed countries (Primo Braga 1995, p. 386).

The so-called compromise solution was eventually accepted with very minor changes and it became an integral part of the WTO Treaty. As the historical background of the negotiation on TRIPS shows, the economic pressure by developed countries has to a great extent contributed to the acceptance of the agreement by developing countries.²⁷

III. THE TRIPS AGREEMENT

The preamble of the TRIPS Agreement contains the objective of the agreement. Essentially, it reiterates the objective of the Uruguay Round negotiation under the Punta del Este Declaration of 1986. These objectives, among others, are to reduce the distortions and impediments to international trade, to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to improve intellectual property rights do not themselves become barriers to legitimate trade. It is worth noting that the preamble should be regarded as an integral part of the agreement. It means that, for example, in interpreting the provisions of the agreement, one should also consider the principles embodied in the preamble (Gervais 1998, p. 37).²⁸

The important provisions embedded in the preamble catering to the needs of developing countries are paragraphs 5 and 6 of the preamble. Paragraph 5 recognizes the underlying public policy objectives of national systems for the protection of intellectual property, including development and technological bases. Paragraph 6 recognizes the special needs of the least developed countries in respect of maximum flexibility in the domestic implementation of laws and regulations, in order to enable them to create a sound and viable technological base. The TRIPS Agree-

²⁷ For example, the threat of trade sanction of the U.S. Section 301. Some authors maintained that the acceptance of the TRIPS Agreement by developing countries was because there are certain advantages developing countries can expect from the agreement. See for example, Kitch, (1994).

²⁸ For further discussion on the interpretation of the TRIPS Agreement, see Netanel (1998, pp. 308–12) and Watal (1998, especially pp. 305–7). Netanel referred to the Vienna Convention on the Law of Treaties which stipulates a number of factors to be considered in treaty interpretation and to Article 3.2 of the Dispute Settlement Understanding of the WTO Agreement. Watal referred to the first TRIPS Panel Decision, “India Patent Protection for Pharmaceutical and Agricultural Chemical Products,” WT/DS50/5, November 19, 1997.

ment also, for the first time, lays down minimum standards of protection and guidelines for enforcement. Member countries may decide how to implement these standards in their territory (Primo Braga 1995, p. 388).

The objectives of the TRIPS Agreement are also contained in Article 7 of the agreement. It states that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Article 8 upholds the rights of the members to “adopt measures necessary to protect public health and nutrition, and to promote public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of this agreement.”

Despite its impressive formulation, its wordings are not necessarily beneficial, especially for developing countries.²⁹ For example, no definition or description of what “sectors of vital importance to their socioeconomic and technological” development are. In addition, there is no authoritative interpretation of this provision or implementing provisions in the subsequent articles in the TRIPS Agreement.³⁰ The effectiveness of the provision remains to be seen since there is no case where this provision has become the subject matter of a dispute, or where developing countries have availed themselves of this article (Watal 1998; Ryan 1998, pp. 569–70).

The last sentence requiring that such measures be consistent with the provisions of the agreement makes the objectives meaningless for developing countries.³¹ Since the agreement does not provide special treatment or provision supporting and providing certain “freedom” where developing countries may make use of such measures in their national laws. This “freedom” is needed to enable developing countries to adopt measures necessary to protect public health and nutrition, as well as to promote public interest in sectors of vital importance to their socioeconomic and technological development.

The general terms used in the objectives of the TRIPS Agreement have always been outweighed by the commercial interests of the affected countries. It is there-

²⁹ Reichman (1995, p. 257), for example, argued that those articles [Article 7, Articles 8 (1) and 8 (2)] “arm developing countries and the least developed countries with legal grounds for maintaining a considerate degree of domestic control over intellectual property policies in a post-TRIPS environment.”

³⁰ See also UNCTAD (1996, p. 32), arguing that “the meaning off those provisions will depend on evolving national practice and future discussions within the framework of the Council for TRIPS Agreement.”

³¹ See also Gervais (1998, pp. 68–69), noting that the phrase “consistent with the TRIPS Agreement” added in the last stages of the negotiation, would make it difficult for developing countries to justify an exception.

fore understood that the meaning of promoting “public interest in sectors of vital importance to their socioeconomic . . . development” seemed weak.³² A recent dispute between the United States and South Africa concerning the price of AIDS drugs revealed that the developed countries’ pharmaceutical companies paid little attention, if any, to the social needs (or health needs) of developing countries. This case occurred when South Africa, 3 million of whose population are HIV-positive, under its Medicine and Related Substance Control Act 1997, wanted to import AIDS medicines from countries where they are sold more cheaply under patent agreements or license production than in South Africa. As a reaction to this policy, about forty pharmaceutical companies worldwide are challenging the law, fearing that it may be used in a way that violates patent rights (*Japan Times*, July 7, 1999, p. 3).

The TRIPS Agreement imposes an obligation upon its members to comply with some provisions of the international agreements, irrespective of whether the members are the contracting parties to the international agreements.

In order to monitor the operation of the agreement and the compliance with the agreement, as well as to formulate further regulations of the agreement,³³ the WTO set up a council for TRIPS for the purpose.³⁴ The council shall also afford the members the opportunity of consulting on matters relating to TRIPS.³⁵

A. *Substantive Provisions*

The TRIPS Agreement also requires the members to comply with certain substantive obligations of the WIPO conventions. They include the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).³⁶

1. *Copyright and related rights*

Copyright law protects the work of authorship from the time that it is created (Primo Braga 1995, p. 389). The negotiators in the Uruguay Round negotiations did not encounter any significant difficulties in reaching the agreement on this field.³⁷ They agreed that the provisions on copyright as embodied in the Berne Convention

³² Article 8 of the TRIPS Agreement.

³³ Article 72 of the agreement: “The Council for Trade-Related Aspects shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65.”

³⁴ Article IV of the WTO Treaty.

³⁵ Article 68 of the TRIPS Agreement.

³⁶ See Articles 2.1 and 9.1 of the TRIPS Agreement. For further elaboration about the relation between the TRIPS Agreement and the WIPO treaties, especially discussing Article 30.4 of the Vienna Convention on the Law of Treaties.

³⁷ This area contemplates no such difficulties partly because this area is mainly the interest of developed countries and partly because “it does not table new issues on the negotiation agenda of copyright law, such as copyrights in cyberspace” (Primo Braga 1995, p. 393).

were still relevant and adequate. They contended that the convention provided adequate basic standards of copyright protection.³⁸

Despite some commentators criticizing the TRIPS Agreement for not responding to the new technologies, there are two provisions that anticipate this development.³⁹ First, the convention specifies that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.⁴⁰ This provision was proposed by developed countries, in particular the United States (Samuelson 1993, p. 310). Others, like Japan and the EC, proposed the *sui generis* form protection for this field (Samuelson 1993, pp. 312–13). It also confirms that the general term of protection for computer programs shall be no less than fifty years.

Second, Article 10.2 of the TRIPS Agreement clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright. Databases are eligible for copyright protection, provided that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are in, whether machine-readable or in other forms.

There are a number of implications of copyright regulation for the interests of developing countries: first is the recognition of rental rights by the cinematographic authors (UNCTAD 1996, p. 39). But this may only benefit developing countries that have been able to develop strong film industries (UNCTAD 1996, p. 37) like India and Hong Kong. Second, developing countries may also be able to benefit from the reverse engineering of software programs. This issue was not settled during the TRIPS negotiations (South Centre 1997, p. 26). Third, another implication is that developing countries must now protect software as literary works (Primo Braga 1995, p. 396).

2. *Trademarks*

To date, however, there is no acceptable definition of this area of intellectual property. Hence, it is then understandable that the TRIPS Agreement provides broad definition on trademarks. It states that trademarks are any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings. Such signs, in particular words, including personal names, letters, numerals, figurative elements, and combinations of colors as well as any combination of such signs, must be eligible for registration as trademarks.⁴¹

³⁸ Article 9.1, requiring the members to comply with Articles 1–21 and the Appendix of the Berne Convention of 1971.

³⁹ See for example, Otten and Wager (1996).

⁴⁰ Article 10.1 of the TRIPS Agreement.

⁴¹ Article 15 of the TRIPS Agreement.

This broad definition, in particular the second paragraph, generates two interpretations. Professor Paul J. Heald takes the view that this definition embedded in Article 15 excludes the product shape or packaging in its definition (Heald 1996, pp. 635, 639).

Conversely, some commentators such as Daniel Gervais (1998) or John Worthy (1994, p. 196) are of the opinion that this definition would also cover “shapes, personal names, combinations of color, and containers.”⁴² Given the loose definition provided by the agreement, the second opinion advocating a broad meaning of the definition seems to be more acceptable.

The agreement grants no less than seven years of protection since its initial registration. The agreement also requires that the registration of a trademark shall be renewed indefinitely.⁴³ The agreement also provides that the licensing and assignment of trademark is a private issue and compulsory licensing of trademarks shall not be permitted. This provision has been a customary practice of states (Pacón 1996, p. 346). The owner of a registered mark shall have the right to assign his trademark with or without the transfer of the business to which the trademark belongs.⁴⁴

This provision may have implications for transfer of technology to developing countries. This is mainly because the trademarks cannot be separated from the manufactured or produced goods. Hence, it may be seen that the transfer of goods without the transfer of technology to produce such goods creates “dependency relationships” (Ringo 1994).

3. *Geographical indications*

At the outset, the TRIPS Agreement provides for a legal definition using geographical indications as those which “identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”⁴⁵ This definition clearly specifies two elements of the goods to be attributable to their geographic origin: (1) the geographical location from where the goods originate and (2) the recognized quality of the goods that originate from this geographical location.⁴⁶

Article 23 of the TRIPS Agreement lays down new rules that increase the stan-

⁴² Gervais (1998) noted that the definition does not limit the types of signs that may be considered a trademark.

⁴³ Article 18 of the TRIPS Agreement.

⁴⁴ Article 21 of the TRIPS Agreement.

⁴⁵ Article 22.1 of the TRIPS Agreement.

⁴⁶ Under French law, Appellation d’Origine Contrôlée (AOC) guarantees that a product belongs to a certain category and conforms to tradition but it does not guarantee a high product quality. See Lorvellec (1996).

dard of protection of “geographical indications” for wine and spirits.⁴⁷ It provides that interested parties must have legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication.

Article 24 provides for a number of exceptions to the protection of geographical indications: First, the uses of geographical indications that have lasted at least ten years before the coming into force of the agreement are exempted from the agreement.⁴⁸ Second, measures to implement these provisions shall not prejudice prior trademark rights that have been acquired in good faith.⁴⁹ Third, the members are not obliged to bring a geographical indication under protection, where it has become a generic term for describing the product in question.⁵⁰

4. *Industrial designs*

The TRIPS Agreement obliges the members to provide for the protection of independently created industrial designs that are new or original.⁵¹ The members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features.⁵²

Article 25.2 contains a special provision for new designs in the textile sector. It provides that requirements for securing protection of such designs, in particular in regard to any cost, examination, or publication, must not unreasonably impair the opportunity to seek and obtain such protection. To meet this obligation, the members are free to regulate it through industrial design law or through copyright law.⁵³

The TRIPS Agreement also requires the members to grant the owner of a protected industrial design the right to prevent third parties not requiring the owner’s consent to make, sell, or import articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.⁵⁴

5. *Patents*

The provision for patent contained in the TRIPS Agreement is basically derived from the Paris Convention.⁵⁵ As a basic rule of patentability, the TRIPS Agreement

⁴⁷ See further Lockert (1998). For the analysis on the practice of the United States and EC, see Lindquist (1999).

⁴⁸ Article 24.4 of the TRIPS Agreement.

⁴⁹ Article 24.5 of the TRIPS Agreement.

⁵⁰ Article 24.6 of the TRIPS Agreement.

⁵¹ For industrial designs, see Lange (1993).

⁵² Article 25.1 of the TRIPS Agreement.

⁵³ The TRIPS Agreement negotiations could not reach any agreement concerning the proper means of protecting industrial designs (Reichman 1998, p. 61).

⁵⁴ Article 26.1 of the TRIPS Agreement.

⁵⁵ Paris Convention for the Protection of Industrial Property, Stockholm Act of July 14, 1967.

requires the member countries to make patents available for “any invention, whether products or processes, in all fields of technology” without discrimination, subject to the normal tests of patentability, which includes novelty, inventiveness, and industrial applicability.⁵⁶ Based on this broad definition, patentability may also include pharmaceuticals, a sector which is of importance for developing countries.⁵⁷

It is also required that patents shall be available and patent rights shall be enjoyed without discrimination as to the place of invention and whether products are imported or locally produced.⁵⁸ The normal test criteria for the patentability reflects to a large extent the provisions of the European Patent Convention. It requires that the invention must be new, involve an inventive step, and be capable of industrial application (Worthy 1994, p. 195). It may then be seen that developed countries have successfully introduced their own laws and its legal values into the TRIPS Agreement (Shiva 1993, p. 113). Article 33 provides that the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.

The issue on compulsory licensing had been a controversial issue between developed and developing countries. Developing countries viewed this issue as a tool to prevent the patent holders from abusing its patent. Aside from that, it also ensures competition in international markets (Pacón 1996, p. 339). The TRIPS Agreement states that compulsory licensing and government use without the authorization of the right-holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right-holders. The conditions are mainly contained in Articles 27.1 and 31. There are nine conditions altogether. Notable among these are the obligation, as a general rule, to grant such licenses only if an unsuccessful attempt has been made to acquire a voluntary license on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the license; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority.

It seems that the requirements of compulsory licensing above are exceedingly stringent.⁵⁹ It appears that it is hardly possible for developing countries to fulfill them. Apparently, all of these requirements may only bar developing countries from being able to make use of the patent for the benefits of their social and economic development or even transfer of technology (Blakeney 1996, p. 166).⁶⁰ The require-

⁵⁶ Article 27.1 of the TRIPS Agreement.

⁵⁷ See also Pacón (1996, p. 338).

⁵⁸ Article 27.1 (last sentence) of the TRIPS Agreement.

⁵⁹ See also Primo Braga (1995, p. 391), noting that the exceptions are broad and also noted that the condition is strict.

⁶⁰ The South Centre argued that developing countries have succeeded in preserving some latitude for

ments imposed for compulsory licensing are more extensive than the requirements available under preexisting international conventions.⁶¹ In addition, the conditions as stipulated in Article 31 are rather obscure. They lack clarification and are hence subject to interpretation of the parties concerned. For example, it may be difficult to determine when the period of time is reasonable, or when the requirements of terms and conditions are considered reasonable.⁶²

The protection of patents may have major economic implications for developing countries (UNCTAD 1996, p. 30). First, there is the implication for economic costs the consumers bear in particular in the rise of drug prices in developing countries after product patents are introduced to comply with the TRIPS Agreement (*Japan Times*, July 7, 1999).⁶³ Next to these is the long protection that the agreement gives to the product that is no less than twenty years old. This amounts to a long monopoly the patent holders may have and it also amounts to a long period of waiting for developing countries being able to use the technology (Dworkin 1996, p. 312). Another implication is that developing countries may no longer be free to refuse to give protection to pharmaceuticals, foods, and sometimes chemical processes, the freedom that these countries used to have before the TRIPS Agreement came into force.⁶⁴ This treaty obligation will mean as well that people in developing countries will have to buy more expensive foods or medicines than before.⁶⁵ Conversely it is the patent owners (generally multinationals) who will get more profit from the pro-

implementing their own solutions, including the possibility of regulating some key aspects such as compulsory licensing and the scope of the patentability of biotechnological inventions (South Centre 1997, p. 10 [*sic*]). Also UNCTAD (1997, p. 34) argued that “both public interest clause and measures to prevent abuse [stipulated in Article 8 of the TRIPS Agreement] can justify resort to use without the authorization of the right-holder [compulsory licensing].”

⁶¹ Article 5A of the Paris Convention. See also Oddi (1996, p. 456), arguing that “patent TRIPS weaken the ability of Members to use compulsory license in order to insure local workings of inventions.”

⁶² This situation is further undermining the nature of the TRIPS negotiations which was, in South Centre’s words, “the most non-transparent negotiations” (South Centre 1997, p. 9). By which the contracting parties do not have “background information necessary for interpreting the proposed rules or for understanding better the background, premises and intent of the adopted text” (South Centre 1997, p. 9).

⁶³ For a discussion on the pros and cons of the patent products, see South Centre (1997, pp. 30–31). The cons argued that compliance with the TRIPS Agreement will mean the increase of royalty payment to foreigners, the loss of investment opportunities in research, higher prices for consumer products and greater dependence on import in general. The pros for patent protection contend that patent protection will create a better innovation worldwide and this will stimulate economic activity (South Centre 1997, p. 31). It appears that among these two arguments the South Centre took the first view. In its work published in 1997, the South Centre noted that “there is an evidence that the patent system has a detrimental impact on pharmaceutical prices, particularly if the product itself is protectable” (South Centre 1997, p. 38). See also Raghavan (1990, p. 124), providing an example on the impact of drugs being patented.

⁶⁴ See Dworkin (1996, p. 312).

⁶⁵ See the case of AIDS drugs in South Africa (*Japan Times*, July 7, 1999).

tection.⁶⁶ The patent owners will also get strong protection and enforcement from the member countries of the WTO. On the other side of the coin, this provision will discourage other members, especially those who are in a weak economic condition, to create new inventions. This is mainly because the law provides stronger protection either to process or to product.⁶⁷

Second, there is the impact on the administration and registration of patent applications. These countries will have to cope with increasing administrative costs stemming from a larger number of applications predominantly from developed countries (Raghavan 1990).⁶⁸ In relation to this, most developing countries encounter a lack of patent examiners to examine the patent applications. This shortage of experts will in turn affect the process of application and registration of patent (Sherwood 1997).

The requirement to provide an effective *sui generis* system may also be beneficial to developing countries. These countries that do not have any kind of protection for plant varieties may be able to propose a *sui generis* system which corresponds to their own needs (South Centre 1997, p. 7), and should not follow the International Convention for the Protection of New Varieties of Plants (UPOV Convention).⁶⁹ However, the introduction of intellectual property rights to broader areas such as biodiversity may have adverse impact on developing countries, especially in affecting their traditional farmers and indigenous peoples. According to Gurdial Singh Nijar, the application of the TRIPS Agreement on patent, especially Article 27.1, in the area of biodiversity may destroy the “knowledge system” and their innovations. This is simply due to the fact that the patent system under the TRIPS Agreement underlines individual innovations with commercial value in them, while farmers or indigenous people emphasize more the social aspect of innovations (Nijar 1996, p. 13). As Nijar puts it:

Article 27 of the TRIPS agreement states that the criteria for a patent claim for an invention are: it must be new, involve an inventive step, and it must be capable of industrial application. Implicit in these requirements is that there must be an identifiable inventor.

⁶⁶ See among others, Oddi (1996, p. 456) and Bibek (1996, p. 158). Oddi noted that “the big winners under TRIPS would clearly be those enterprises [read multinational corporations] in developed countries that create inventions and are heavily engaged in international trade.”

⁶⁷ For further analysis on this issue, see Das (1998, p. 86), Nijar (1996, p. 12), and Sahai (1994, p. 155).

⁶⁸ Raghavan (1990) noted that developing countries only share less than 20 per cent of the patent application.

⁶⁹ TRIPS Agreement does not make any reference to the UPOV Convention. The UPOV Convention adopted on December 2, 1961 has been revised subsequently in November 10, 1972; October 23, 1978; and March 19, 1991. For the text of the UPOV Convention, see Website at: <http://www.upov.org/convntns/1991/content.html>. Despite being criticized for granting more powerful monopoly rights to breeders or companies and not to farmers, there are, however, a few developing countries adhered to the 1991 UPOV Convention. They include: Belarus, Bolivia, Brazil, China, Kenya, Morocco, Nicaragua, Panama, and Venezuela.

This definition almost immediately dismisses the knowledge systems and innovations of indigenous people and farmers because they innovate communally, accretionally over time, sometimes intergenerationally. (Emphasis added) (Nijar 1996, p. 13)

6. *Layout-designs of integrated circuits*

The provision for this area is practically alien to most developing countries. The provisions for layout-designs of integrated circuits under the TRIPS Agreement principally follow the provisions of the unratified Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) of 1989 with a number of changes with a view to strengthening the protection of layout designs (Dworkin 1996, p. 311; Primo Braga 1995, p. 392; Worthy 1994, p. 197).⁷⁰ These changes include: (1) TRIPS imposing stronger minimum protection of integrated circuit layouts from eight years as contained in the IPIC Treaty to ten years⁷¹ and (2) the applicability of the protection to articles containing infringing integrated circuits.

7. *Trade secrets (protection of undisclosed information)*

The issue of trade secrets at the Uruguay Round negotiation was one of the most difficult areas of intellectual property rights since it did not meet the requirements of an intellectual property, namely, the obligation on the part of the right-holder to disclose the "secret."⁷² The developing countries that mostly did not have specific laws protecting trade secrets, once opposed the treatment of this issue as intellectual property rights.⁷³

There are two main provisions for trade secrets. First, the agreement does not require undisclosed information to be treated as a form of property. It requires that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices.

Second, the agreement contains provisions for undisclosed test data and other data whose submission is required by governments as a condition of approving the

⁷⁰ The Washington Treaty or the IPIC Treaty adopted under the auspices of the WIPO faced objection from the United States and Japan, particularly on the provision of nonvoluntary licenses contained in Article 6 (3) (a) of the IPIC Treaty. Primo Braga (1997, p. 392) and Worthy (1994, p. 197) noted that the provisions of the IPIC Treaty were not acceptable to the United States and Japan since the treaty provided lower standards of protection.

⁷¹ Article 38 of the TRIPS Agreement.

⁷² For example, Subramanian (1997, p. 320).

⁷³ See "Meeting of the Negotiating Group of 11, 12 and 14 December 1989: Note by the Secretariat," GATT Document MTN.GNC/NG11/17, January 23, 1990. In its draft (proposal) of the text of the TRIPS Agreement, developing countries did not recognize trade secret as a part of intellectual property rights. They merely recognized six categories of intellectual property: patents, trademarks, industrial design, geographical indications, copyright and neighboring rights, and integrated circuit layout designs. See also Communications from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, Uruguay, and Pakistan, GATT Document MTN/GNG/NG11/W/71, May 14, 1990.

marketing of pharmaceutical or agricultural chemical products which use new chemical entities. In such a situation the member government concerned must protect the data against unfair commercial use. Additionally, the members must protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use (UNCTAD 1994, p. 192).

The implication of the recognition and the obligation to protect the trade secrets is that information now becomes a crucial aspect of economic or trade issues (Ringo 1994, p. 134). It also means that the information will be more difficult and expensive to obtain, especially technology (Ringo 1994, p. 132).

B. *Enforcement of Intellectual Property Rights*

The provisions for enforcement of intellectual property rights have two basic objectives. First is to ensure that effective means of enforcement are available to right-holders. This also implies that there must be effective national enforcement of intellectual property laws (Subramanian 1997, p. 322). Second is to ensure that enforcement procedures are applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.⁷⁴

The agreement provides that the courts must be empowered to order an infringer, at least if he or she has acted in bad faith, to pay the right-holder adequate damages. They must also be authorized to order the infringer to pay the right-holder's expenses.⁷⁵

Article 48 provides that the judicial authorities must have the authority to order the applicant who has abused enforcement procedures to pay adequate compensation to the defendant who has been wrongfully enjoined or restrained to cover both the injury suffered and expenses. Such expenses may include appropriate attorney's fees. Public authorities and officials are exempted from liability to appropriate remedial measures only where action is taken or intended in good faith in the course of the administration of that law. The agreement provides that remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of corresponding gravity.⁷⁶

The comprehensiveness of the provision on the enforcement of intellectual property rights may be understood as the consequence of the main concern of developed countries, in particular the United States, regarding the poor condition of intellectual property enforcement in many countries, in particular developing countries.

Actually developing countries regard enforcement as an important aspect of the protection of intellectual property. In the draft agreement on intellectual property

⁷⁴ Article 41.1 of the TRIPS Agreement.

⁷⁵ Article 45 of the TRIPS Agreement.

⁷⁶ Article 61 of the TRIPS Agreement.

rights submitted by thirteen developing countries in 1990,⁷⁷ enforcement was placed in a special chapter (Chapter VIII). Nevertheless, developing countries did not contemplate a comprehensive procedure of enforcement of intellectual property rights as compared to the proposal submitted by developed countries (that is now embodied in the TRIPS Agreement). Developing countries contended that enforcement of intellectual property rights shall be provided in accordance with each country's legal and judicial system and traditions and within the limits of its administrative resources and capabilities.⁷⁸

C. *Settlement of Disputes*

Under the TRIPS Agreement, disputes on intellectual property rights will be settled in accordance with Articles XXII and XXIII of GATT 1994 as laid down in the Dispute Settlement Understanding.⁷⁹ It is also argued that the dispute settlement system will enable the members to impose cross-retaliation based on the authorization of the Dispute Settlement Body when the suspension of concessions or other obligations do not function (Weiss 1996, p. 21).

The Dispute Settlement Understanding lays down a certain time limit for the settlement of disputes.⁸⁰ When a member country does not abide by the Dispute Settlement Body (DSB) rulings, the General Council of the WTO could authorize sanctions imposed upon that country (UNCTAD 1994, p. 194). It is also argued that a member may apply cross-sectoral retaliation to strengthen the protection of intellectual property rights (Primo Braga 1995, p. 394). The establishment of the dispute settlement under the WTO is also expected to prevent the member countries from taking unilateral sanction against other states. The provision in Dispute Settlement Understanding requires its member states to settle their disputes or difference concerning the application of the TRIPS Agreement through the mechanism of the settlement of disputes which is available under the WTO.

The possibility that developing countries will be able to use the dispute settlement mechanism, in particular as complaints against developed countries, or even against other developing countries, is small.⁸¹ This is probably because the majority of intellectual property rights holders are those of developed countries. With their limited financial resources and inappropriate technological skill, it is difficult for developing countries in general to be able to invent "new" products. The probability is that developing countries will be those mostly brought to the Dispute

⁷⁷ Article 64.1 of the TRIPS Agreement.

⁷⁸ Article 17 of the Draft Agreement Part II.

⁷⁹ Article 64.1 of the TRIPS Agreement.

⁸⁰ For the settlement of disputes, see Geller (1995).

⁸¹ As of September 1999, the Dispute Settlement Body of the WTO has accepted sixteen cases on TRIPS. All of the complainants are developed countries, and four out of sixteen defendants are those coming from developing countries.

Settlement Body of the WTO for the alleged infringement of intellectual property rights.⁸²

D. *Transitional Arrangements*

The last part of the agreement concerns the transitional arrangements. It contains virtually four main provisions. First, the agreement allows for a general transitional period. Developing countries and countries in transition are given five years, and the least developed countries eleven years, to comply with the provisions of the agreement. This term may be extended if these countries request it. This provision is especially designed to enable them to have a differential treatment in the light of their weak economic condition, and the belief that their legal systems have not reached the level that may regulate or administer the areas of intellectual property rights. Second, the principles of national treatment and the MFN status came into effect one year after the general entry into force of the agreement (that is January 1, 1995). Third, where the implementation of the agreement could also cover product patent protection to a field of technology not previously protected (on the general date of application of the agreement), an additional transitional period of five years is allowed for the extension of such protection.⁸³ Fourth, subparagraphs (b) and (c) of Article XXIII of GATT 1994 will not apply to the settlement of disputes for a period of five years from the date of entry into force of the WTO Agreement.⁸⁴

Member countries that are to avail themselves of the transitional period are obliged to file patent applications for pharmaceutical and agricultural chemical products (“mailbox” provisions).⁸⁵ The TRIPS Agreement also requires that these member countries must grant exclusive marketing rights for the product for a period of five years after obtaining market approval or until a product patent is granted in that member.⁸⁶

Under the provision for transitional arrangement, Article 60.2 of the TRIPS Agreement provides for technology transfer to the least developed countries. This provision, again, just like other provisions designed for the interest of these countries⁸⁷

⁸² For further description on the dispute settlement on TRIPS, see Otten (1998).

⁸³ Article 65.4 of the TRIPS Agreement.

⁸⁴ Article 64.2 of the agreement. Also see UNCTAD (1994, pp. 194–95). Eric H. Smith of the International Intellectual Property Alliance (IIPA) argued that these delays of the application of the agreement undermine the force of the agreement. See Bhala (1996, p. 984).

⁸⁵ Article 70.8 of the TRIPS Agreement.

⁸⁶ Article 70.9 of the TRIPS Agreement. See also “India—Patent Agricultural Products,” Case No. WT/DS50/R, September 5, 1997 (a case concerning India’s alleged failure to provide mailbox protection and exclusive marketing rights to U.S. products). The case began in 1996 when the United States submitted a request to the WTO for consultations regarding India’s alleged noncompliance with TRIPS obligation. The United States argued that India has failed to establish a mailbox system and exclusive marketing rights for pharmaceutical and agricultural periods. In its decision the panel recommended that the DSB requests India to bring its transitional regime for patent protection form pharmaceutical and agricultural obligation under the TRIPS Agreement.

⁸⁷ The preamble, Article 7, and Article 8 of the TRIPS Agreement.

does not have its implementing provisions. It is couched in very broad terms.⁸⁸ It is not clear, however, what incentives, enterprises, or institutions the developed countries' government will provide.

E. *Technical Cooperation*

Another provision especially drawn up in the interests of developing countries is the provision for technical cooperation. This provision is important for developing and the least developed countries to bring their laws into conformity with the TRIPS minimum standards of protection (Otten and Wager 1996).⁸⁹ Article 67 of the agreement requires developed countries to provide "technical and financial cooperation" in favor of developing and the least developed countries to facilitate the implementation of the agreement. This provision may also be applied by developing countries in their efforts to face the economic implications of the TRIPS Agreement, especially in the area of patents, and in obtaining the necessary infrastructure for the process of granting patents, for example, computer facilities and training its personnel (UNCTAD 1996, p. 37; Primo Braga and Fink 1998; Evenson 1993, p. 361).⁹⁰

This provision, however, is not an "automatic" obligation of the developed countries' members. It is only provided that if developing or the least developed countries are requesting the cooperation, such technical cooperation is undertaken based upon "mutually agreed terms and conditions." The cooperation includes assistance in the preparation of laws and regulation, support for domestic offices and in the prevention of abuse of intellectual property rights.

From the provision above it may be easily seen that it is formulated vaguely and hence needs further clarification (Correa 1998, p. 14). In addition, the words "mutually agreed terms" indicate that cooperation, in fact, is not based on the understanding on the part of developed countries and that it is developing countries that need more cooperation and treatment from developed countries. This term also indicates that the respective term might be subject to commercial aspects as may be invoked by developed countries (Correa 1998, p. 14).

IV. INTELLECTUAL PROPERTY RIGHTS AND BIODIVERSITY

According to the first sentence of Article 27 (3) (b) of the TRIPS Agreement, the WTO members may exclude both plants and animals (other than micro-organisms)

⁸⁸ Article 60.2 of the TRIPS Agreement reads: "Developed Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to the least developed country Members in order to enable them to create a sound and viable technological base."

⁸⁹ Reemphasized in Otten (1998, p. 529).

⁹⁰ Evenson (1993) noted that in addition to the lack of staff, most developing countries do not have adequate court systems to administer intellectual property laws.

from patentability and essentially biological processes for the production of plants or animals (other than nonbiological and micro-biological processes).⁹¹ The implication of this provision is far reaching. It requires (and forces) developing countries to grant patent protection for micro-organisms and for nonbiological and non-microbiological processes.⁹² Developing countries are now obliged, for instance, to provide protection for seeds. This will increase costs and consequently affect a large percentage of the world population that is dependent on small agrarian operations. In India, for example, this means 70 per cent of the population and thus in India alone almost as much as the entire population of all industrialized countries (Pacón 1996, p. 344).

As far as the plant varieties are concerned, attention should be paid to the Convention on Biological Diversity (Biological Convention) of June 5, 1992.⁹³ This convention sponsored by the United Nations Environment Programme was adopted on June 5, 1992 in Rio de Janeiro, Brazil. It is unfortunate that the negotiators at the Uruguay Round (on TRIPS) did not mention or refer to any articles of this convention, despite the fact that it has been firmly recognized that this convention has a close connection with trade.⁹⁴ It was no coincidence that the convention was concluded during the Uruguay Round negotiations. The convention makes for broad provisions which include among others provisions for the national monitoring of biological diversity, the development of national strategy, transfer of technology, national reports from parties on measures taken to implement the convention, and the effectiveness of these measures.

The Biodiversity Convention defines biological diversity as the variability among living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part. This includes diversity within species, between species, and of ecosystems.⁹⁵ The interest of developed countries in this matter was to protect their investments in research and developments with a view to maintaining their leading position in the field of biotechnology and the protection of intellectual property rights from U.S. biotechnology firms (Bear 1995). On the other hand, developing countries control the majority of the world generic resources in which the industrialized countries are interested (Pacón 1996, p. 343). Unfortunately these resources are not yet utilized due to the lack of necessary capital and technology (Pacón 1996, p. 343). But the sub-

⁹¹ For intellectual property rights and biodiversity, see Marguilies (1993) and Ismail and Mohammed (1998).

⁹² Shiva (1993, p. 112) expressed his strong concern about this implication. He argued that this provision would only benefit multinationals corporations at the expense of the third world.

⁹³ See *International Legal Materials*, vol. 31 (1992), p. 818. The convention came into force on December 29, 1993. As of December 29, 1993, 174 states have become party to the convention.

⁹⁴ Downes (1994, p. 165) noted that "the Biodiversity Convention is a conservation agreement as well as a trade agreement."

⁹⁵ Article 2 of the Convention on Biological Diversity.

stantive provisions of the convention which became the concern of developed countries was that countries, especially developing countries, have the right to control and access their own genetic resources and also to obtain some “fair and equitable share of the benefits arising from their commercial and other utilization” (Dworkin 1996, p. 323).

When the convention was adopted, the United States strongly opposed and refused to sign it. The main reasons the United States did not sign the convention was that a number of issues of concern to the United States had not been addressed. They include, among others, the treatment of intellectual property rights, the provision for finances, the role of the Global Environmental Facility (GEF), and biotechnology.⁹⁶ But the main issue which hindered the United States from signing the convention is that it recognizes the special preferential treatment for developing countries, a preferential provision on transfer of technology for developing countries.⁹⁷ More importantly, the agreement recognizes the state’s sovereignty over its natural resources.⁹⁸

Eventually the U.S. policy towards the convention changed in 1993 when President Clinton gave his signature to the convention in June 1993. But, the United States also expressed its concern that the convention should be supplemented with the interpretation of the treaty with a view to bringing the provisions of the Biodiversity Convention into conformity with the TRIPS Agreement.

V. THE SIGNIFICANCE OF THE TRIPS AGREEMENT

The TRIPS Agreement provides a minimum standard of the substantive aspects of almost all fields of intellectual property rights. For developing countries, since most of the provisions and standards embodied in the TRIPS Agreement are relatively alien and impose various obligations on its members, it may be right to argue that the TRIPS Agreement imposes high standards on these countries (Watal 1998). It mostly covers the substantive provisions of the preexisting conventions on intellectual property rights such as the Berne, Paris, and Washington conventions. The agreement, in a way, has not only strengthened, but also omitted certain provisions of preexisting conventions.⁹⁹ But the agreement has also made an unprecedented move in the practice of states in international law of the treaties. It is probably the first agreement in international law that makes an international convention or treaty

⁹⁶ Paragraph 4, United States: Declaration made at the United Nations Environment Programme Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, May 22, 1992. See also, *International Legal Materials*, vol. 31 (1992), p. 848.

⁹⁷ Article 16 of the Biodiversity Convention in part reads: “2. Access to and transfer of technology . . . to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed.”

⁹⁸ Article 3 of the Biodiversity Convention. See also Marguilies (1993).

⁹⁹ The inapplicability of Article 6 bis of the Berne Convention on authors’ moral rights.

applicable to its members (although it does not breach the principle of the law of treaties, notably the provisions with regard to the membership of a state to the treaty).¹⁰⁰ The agreement has even enforced the unratified intellectual property treaty, namely, the 1989 Treaty on Intellectual Property in Respect of Protection of Integrated Circuit (IPIC Treaty).¹⁰¹

It is obvious that the content of the agreement has departed far from the mandate or objective of the TRIPS Agreement as inscribed in the GATT Ministerial Declaration of 1986. The Ministerial Declaration stipulates that the objective of the negotiation was to “develop a multilateral framework of principles, rules, and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT.”

Thus, it was indicated that the main objective of the TRIPS negotiation was to seek the (acceptable) principles, rules, and disciplines on “counterfeit goods.” It did not mandate to seek the international rules on, for example, substantive laws of intellectual property rights, the area which had been already administered by other specialized and more competent international bodies, such as WIPO. The objective of the negotiation also clearly required the members (contracting parties of GATT) to take into account the work already undertaken in GATT. Notable among these are the GATT case laws. It is nonetheless unfortunate that the value of the GATT case laws had not been referred to during the negotiation.¹⁰²

The present provisions of the TRIPS Agreement were, to some extent, actually the adoption of the preexisting intricate and highly protective intellectual property laws of developed countries (specifically the U.S. laws). This happened mainly because since the beginning the United States proposed aggressively the inclusion and the discussion of intellectual property rights in accordance with its own standards (coupled with the use of power and threat of trade sanctions to other member countries to accept it). It is developed countries as well that decided which laws should be included in the agreement and which laws or provisions should be avoided. Similarly, developed countries have also more power to determine the level of standards of intellectual property rights. In that, they can decide which standards are to be high (for example, in the case of patent protection) and which are to be low (for

¹⁰⁰ Article 2 of the agreement obligates member countries of the WTO to comply with Articles 1–12 and 19 of the Paris Convention (1967); and Article 9 obligates the members to comply with Articles 1–21 and the Appendix of the Berne Convention (1971). See Article 11 of the Vienna Convention on the Law of Treaties of 1969 (May 23, 1969) reads: “The consent of a State to be bound by a treaty must be expressed by signature, exchange of instruments constituting a treaty, notification, acceptance, approval or accession, or by any other means if so agreed.”

¹⁰¹ Article 35 of the TRIPS Agreement requires the members to comply with Articles 2–7 (other than paragraph 3 of Article 6, Article 12, and paragraph 3 of Article 16 of the IPIC Treaty).

¹⁰² In the TRIMS negotiation, the contracting parties of GATT had taken the right approach in elaborating further principles and rules by taking into account GATT case law which has close relations with trade-related investment measures.

example, Article 6 bis of the Berne Convention) or shunned (for example, the Biodiversity Convention) (South Centre 1997, p. 27).

On the issue of biodiversity, the development that springs up at present is the need to protect traditional knowledge and know-how in using plant genetic resources, which mostly exist in developing countries.¹⁰³ Nevertheless, again, as shown in the TRIPS negotiations, the discussion on this issue in the future will to a large extent depend on the part of the U.S. endeavor,¹⁰⁴ and on the part of the developing countries' endeavor to include this field in the future agreement.¹⁰⁵ Nevertheless, the Biodiversity Convention of 1991, which accommodates the interests of developing countries, is worth considering incorporation, just like the Paris or Berne conventions, into the TRIPS Agreement. In addition, it is also necessary that in the future the TRIPS Agreement will recognize and provide for protection of the traditional knowledge of local and indigenous communities, which is mostly found in developing countries.

The most significant aspect of the Uruguay Round results on the special provision for developing countries is the transitional period and the provision of technical cooperation. The agreement really recognizes that these countries are still weak in light of their economic development as well as in their legal infrastructures. It concedes the need of special treatment of these countries in implementing the results of the agreement.

This transitional period and technical cooperation, however, can by no means be freely enjoyed by developing countries. Developed countries, however, especially the United States, to a certain extent, do not even honor these special provisions especially designed in the interest of developing countries. A striking example is the U.S. double standards in the implementation of the agreement. On one hand, the United States expressed its concern that many countries (especially developing countries) have not asked for the cooperation from the United States.¹⁰⁶ On the other hand, the United States, demanding the retroactive application of the TRIPS Agreement on patent under the so-called pipeline solution (Correa 1998, p. 14), brought, for example, India before WTO panel for allegedly breaching the U.S. patent.¹⁰⁷

It is also worthwhile noting that this special provision for developing countries

¹⁰³ Cottier (1997) offers a sympathetic suggestion to include this field in the future TRIPS Agreement.

¹⁰⁴ See "US Wants TRIPS Off Seattle Agenda," *Washington Trade Daily*, August 5, 1999, noting that "there are also vague suggestions that intellectual property rights disciplines cover 'indigenous knowledge' in developing countries, which the US has not fully comprehended."

¹⁰⁵ See for example, the developing countries' efforts to successfully include the provision on transitional arrangement.

¹⁰⁶ See "US Wants" in footnote 104, noting that "the US official expressed US disappointment with the lack of interest on the part of developing countries to take up offers of technical assistance from the United States."

¹⁰⁷ "India—Patent Protection for Pharmaceutical-Agricultural Chemical Products," Document WT/DS50/R, September 5, 1997.

under the TRIPS Agreement, is not truly coming from consciousness on the part of the developed countries. As the history of the negotiations on TRIPS shows, this inclusion of this provision is the outcome of the efforts of developing countries during the negotiations. These countries endeavored to demand time leniency to enable them to prepare themselves to bring their legislation into conformity with the results of the negotiation on TRIPS.¹⁰⁸

The implication of the very limited special provision for developing countries in the form of a transitional period under the TRIPS Agreement is that when this period elapses, the status of these countries will disappear. Consequently, their position will be the same as developed countries under the TRIPS Agreement. This regulation apparently deviates from the normal or recognized principle concerning the special status of and special treatment for developing countries under GATT.¹⁰⁹ It has been argued that there should be always a balanced principle in international obligations. It is right then to maintain that “intellectual property rights systems must recognize differences in levels of development between economies” (Nayyar 1993, p. 166)¹¹⁰ and similarly that “obligations should be commensurate with the level of economic development” (Dhanjee and De Chazournes 1990, p. 13). This principle is very important in all fields of international economic relations and has been accepted by many countries.¹¹¹

The application of this principle, however, should not be limited or undermined by certain requirements, including the transitional period requirement as set forth in the TRIPS Agreement. The principle of special provision for developing countries is a binding principle that must exist in international trade agreements. On the basis of this principle, developing countries should be given more flexibility in discharging their obligations under international agreements in their home countries. It should be underlined that the discharge of such obligations should be consonant with the developing countries’ national development objectives taking into account, in Dhanjee and De Chazournes’s words, “the socioeconomic importance of certain sectors” to these countries, such as agriculture, food, and pharmaceutical sectors (Dhanjee and De Chazournes 1990, pp. 13–14).

¹⁰⁸ Correa (1998, p. 15) noted that “the establishment of this period was not a generous concession by industrialized countries. It was the result of hard negotiations in which the latter obtained in exchange a long transitional period for complying with their obligations in agriculture and textiles.”

¹⁰⁹ See Bronckers (1994, p. 1258), Article 1 (3) (iv) of GATT 1994. See also, Ministerial Declaration on the Uruguay Round GATT, 33d Supp. BISD 19 (1987), p. 21; par. 5 of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT, 26th Supp. BISD 203 (1980), p. 205, Article XXXVI (8) and Its Interpretative Note in Annex I GATT.

¹¹⁰ Reichman (1989) stated that “it would violate fundamental precepts of international economic law if the developed countries failed to differentiate between developing and the least developed countries (LDCs) when formulating minimum standards under the TRIPS Agreement.”

¹¹¹ Dhanjee and De Chazournes (1990) admitted, however, that there was no consensus as of today between developed and developing countries concerning the extent this principle should apply.

The TRIPS Agreement, being sponsored by developed countries and their multinational corporations (MNCs), cannot prevent its member countries from taking unilateral action against developing countries. An example of this is the determination and decision of the United States that this country will continue to use its power to impose unilateral trade sanctions on any country that has allegedly failed to provide for proper protection to its intellectual property rights (Abbott 1996; Chuchod 1997).¹¹² One commentator, however, argued that developing countries might be able to address this unilateral trade sanction by taking it to the dispute settlement mechanism of the WTO (Bronckers 1994, p. 1275). The efficacy of this provision, however, remains to be seen since so far no developing countries have taken this measure.¹¹³

Given its comprehensive provisions on intellectual property rights and especially its stronger and effective dispute settlement mechanism, it appears that the existence of the international organization on intellectual property rights such as WIPO will be undermined.¹¹⁴ This conclusion is also supported by the fact that major industrialized countries, especially the United States, virtually do not favor preexisting international organizations such as WIPO. A historical fact shows that the absence of the major industrialized countries in international organizations especially when they deal with trade or commercial value, will make its effectiveness wane. For instance, the absence of the United States in the membership of the WTO Treaty was one example to support this assumption. In addition, the dominant publications of intellectual property rights (by developed countries' scholars) which mostly discuss the substantive provisions of the WTO's TRIPS Agreement will only strengthen the position and role of this body in dealing with this issue.

The dominant and strong influence of developed countries in this field will also mean that the rules of the game in the TRIPS Agreement as well as in the WTO will be in the hands and under the strong control of developed countries. This implies that developing countries have to work harder in future negotiations in this field. The only hope that developing countries can "survive" is to try to convince developed countries that special provision and special treatment for developing coun-

¹¹² Abbott (1996) cited 19 U.S.C. §2411 (d) (3) (B) (II). For the case of trademarks, see also Reichman (1995).

¹¹³ One scholar argued, however, that the use of trade sanctions or the threat or trade sanctions is justified as external enforcement of the TRIPS Agreement. See Gana (1996).

¹¹⁴ See for example, Blakeney (1996, p. 9) and Cottier (1998, p. 116). Cottier argued that since WIPO has no jurisdiction standard found exclusively in TRIPS, cases will now be argued in the WTO. Professor Frederick M. Abbott (1996) argued that there has been a renewed interest in the WIPO recently. He cited the ongoing discussion on the dispute settlement between states in the field of intellectual property. But this development does not touch the core substantive provision of intellectual property rights. It questions the effectiveness of the WIPO's efforts in the field of dispute settlement of intellectual property disputes in the light of its lack of experience in this matter compared with the long experience of GATT in the settlement of trade disputes.

tries is a recognized and established principle of international economic law. For that, in any undertaking, including agreements in international trade involving developing countries, this principle must be always included.

On technical cooperation, this is also an acknowledgement that developing countries need technical support to enable them to implement fully the result of the TRIPS negotiation. Technical cooperation will also play strategic importance for developing countries in their efforts to gain access to technology. It has been conceded that under the available rules on transfer of technology, especially under the TRIPS Agreement, with its strong protection of intellectual property rights, the cost of transfer of technology may become very expensive (Sherwood 1997). The provision, however, is not very clear as to how the cooperation is to be implemented. It seems, therefore, that in future negotiations on this issue, a clear and better-formulated provision determining the implementation of this provision should be made. Moreover, the implementation of the agreement has demonstrated that it is international organizations, like WIPO, UNCTAD, and other international as well as regional organizations, which are truly concerned about developing countries' position in their efforts to bring their legislation into conformity with the TRIPS Agreement.

Given the lack of special provisions for developing countries and the stronger protection of intellectual property rights provided for by the TRIPS Agreement, it is hard to perceive that this agreement will benefit developing countries.¹¹⁵ It has been observed elsewhere that the efficacy of the application of the law will depend to a greater degree on the obedience of its members to international conventions and in the area of international intellectual property, will depend on the protection and enforcement of intellectual property rights. And, it has also been observed that the history of intellectual property rights has demonstrated that the regime of intellectual property rights protection is dependent upon the level of each country's economic development.¹¹⁶ This shows that a differential approach is needed to address this issue of intellectual property rights. Other international conventions on intellectual property rights, for example, the Paris Convention or Berne Convention, have recognized the need for different treatment for the different economic and other factors in each member country (Raghavan 1990, p. 119). It is also important to note that the principle of this differential treatment for developing countries should also be applicable to the area of intellectual property rights.

¹¹⁵ Contrast the economic growth that will be enjoyed by developed countries from the implementation of the TRIPS Agreement (Abbott 1998). Some developing countries have already expressed their concern about the lack of benefit the developing countries gain from the TRIPS Agreement. See for example: "Preparations for the 1999 Ministerial Conference," Proposals regarding the Agreement on Trade-Related Intellectual Property Rights, Communication from Colombia, WT/GC/W/316.

¹¹⁶ See for example, Zutshi (1998, p. 41).

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