

Commission on Intellectual Property Rights

Study Paper 8

**Developing Countries and International
Intellectual Property Standard-setting**

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**This report has been commissioned by the IPR Commission as a
background paper. The views expressed are those of the author and
do not necessarily represent those of the Commission.**

EXECUTIVE SUMMARY

The report examines the extent to which developing countries influence outcomes in the international intellectual property standard-setting process. It concludes that developing countries have comparatively little influence. The main reason lies in the continued use of webs of coercion by the US and EU, both of which remain united on the need for strong global standards of intellectual property protection.

Analytical framework

The study draws on the analytical framework developed by Braithwaite and Drahos in *Global Business Regulation* (GBR).¹ GBR ranged across more than 15 different areas of business regulation, including intellectual property. It found that regulatory globalisation is a process in which different types of actors use various mechanisms to push for or against principles.

More than 500 people were interviewed for GBR. The study also draws on a forthcoming book by Drahos and Braithwaite (*Information Feudalism: Who Controls the Knowledge Economy?*) dealing with the globalisation of intellectual property rights. Further interviews were undertaken for the purposes of the study, including interviews at WIPO and the WTO.

Standard-Setting Pre-TRIPS

The study briefly describes the impact of developing countries in the international standard-setting process pre-TRIPS. The main conclusion is that as developing countries came to be influential within fora such as WIPO by virtue of their number, the US embarked on a strategy of forum shifting.

The TRIPS negotiations

The paper evaluates the TRIPS negotiations using a theory of democratic property rights. The theory argues that efficiently defined property rights are more likely to emerge if at least three conditions are met. Firstly, all relevant interests have to be represented in the negotiating process (*the condition of representation*). Secondly, all those involved in the negotiation must have full information about the consequences of various possible outcomes (*the condition of full information*). Thirdly, one party must not coerce the others (*the condition of non-domination*). The study concludes that the TRIPS negotiations did not meet these conditions of democratic bargaining.

Bilateralism in Intellectual Property Post-TRIPS

The study details continued US bilateralism on intellectual property rights. It compares TRIPS with the provisions on intellectual property in bilateral trade agreements and bilateral investment treaties that the US has signed with developing countries. The study concludes that bilateral intellectual property and investment

¹ J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge, Cambridge University Press, 2000.

agreements are part of a ratcheting process that is seeing intellectual property norms globalize at a remarkable rate. The role of WIPO in this process is examined.

The Global Politics of TRIPS

The paper looks at the impact of civil society on the intellectual property standard-setting process. NGOs, after states and business, have become a third force in the global politics of intellectual property rights. NGOs function as an analytical resource for developing states and as possible partners in a global coalition of minority factions on international intellectual property standard-setting issues. But these kinds of coalitions are difficult to put together, are issue specific and predominantly rely on a crisis of some kind to be truly effective. They do not threaten the standard-setting dominance of the US and EU, especially when these two states are united on the direction in which global regulation should travel.

The study makes the following recommendations:

SUMMARY OF RECOMMENDATIONS

1. Developing countries should use the Council for TRIPS to create a practice of asking states to explain bilateral departures from multilaterally agreed IP standards.

2. Developing countries should use the WTO Trade Review Policy Mechanism to review distortions in trade being caused by excessively high intellectual property standards.

3. Trade policy bodies/institutes within developing countries should investigate the feasibility of forming a developing country Quad along the lines suggested in the paper.

4. An independent review of WIPO's current private sector income and development spending should be undertaken with a view to assessing the possibility of WIPO playing a role in the UN Programme Of Action For The Least Developed Countries For The Decade 2001-2010.

5. (i) Developing countries should review their participation in the WIPO standard-setting process with a view to increasing their participation in the expert groups and broadening the range of experts they send to WIPO meetings to include, for example, experts in health, environment and agriculture.

(ii) Developed countries could assist by funding aid projects aimed at establishing

structures for cooperation amongst ministries/regulators which have expertise to contribute on development aspects of intellectual property issues within a given developing country.

6. Developed countries should review the operation of the policy advisory committees that advise their patent offices with a view to significantly increasing the participation of members of civil society in those committees.

7. Developed countries should assess their conduct of trade negotiations with developing countries with a view to ensuring that development objectives remain a priority during those negotiations.

PART I

1. Introduction

Lying at the heart of this report is a simple question. To what extent can developing countries influence outcomes in the international intellectual property standard-setting process? This report concludes that they have comparatively little influence. The main reason lies in the continued use of webs of coercion by the US and EU, both of which remain united on the need for strong global standards of intellectual property protection.

The influence that developing countries do possess is contingent upon them being able to form coalitions with non-state actors, in particular the influential players within civil society. Some developed countries are arguably worse off than in the past. During the Cold War least-developed countries (LDCs) had the benefit of India and Brazil's leadership of a broad coalition of developing countries (DCs), a coalition that mainly expressed itself in the form of the G77. The G77 has faded in importance. It is also not clear that India and Brazil are prepared to provide the general leadership on intellectual property issues they once did. In part this is because some Indians believe that India has something to gain from parts of the intellectual property regime such as copyright and geographical indications. Processes of modernisation (and modernity) are fragmenting what was once a more unified bloc of countries.

Does it matter if the capacity of DCs to influence the standard-setting process remains weak? This question raises a complex set of normative and empirical questions about the role of intellectual property rights in the development process. Since intellectual property rights are but one micro-tool of national policy it is difficult to isolate their importance as a variable in development. If, as the World Bank has suggested, development is about expanding the ability of people "to shape their own futures" then we have a *prima facie* normative reason to be concerned about the loss of national sovereignty of developing countries over standards that impact on sectors such as agriculture, food, environment, health and education.²

The final sections of this report suggest ways in which the influence of developing countries over the standard-setting process can be improved. These recommendations proceed on the premise that the US and EU will make few concessions on intellectual property standards.

2. Analytical Framework

This study draws on the analytical framework developed by Braithwaite and Drahos in *Global Business Regulation* (GBR).³ GBR ranged across more than 15 different areas of business regulation, including intellectual property. It found that regulatory globalisation is a process in which different types of actors use various mechanisms to

² World Bank, *The Quality of Growth*, OUP, NY, 2000, xxiii.

³ J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge, Cambridge University Press, 2000.

push for or against principles. Over time detailed rule-making follows the principles which have been established. So, for example, in the case of bilateral intellectual property negotiations in the 1980s the US state (an actor) used the threat of the withdrawal of trading privileges in its market (the mechanism of coercion) to obtain the adoption of higher standards of intellectual property protection by developing countries (the trumping of the principle of national sovereignty by the principles of national treatment and harmonization).

The US was not the only actor and coercion was not the only mechanism that explained the dynamic of intellectual property standard-setting in the 1980s. For example, a number of corporations from the US, Europe and Japan claiming to represent the international business community released a document in 1989⁴ that indicated strong support for a plurilateral agreement on intellectual property during the Uruguay Round (the mechanism of modelling). Australia supported the US position on TRIPS despite being a net intellectual property importer because it believed that by doing so it would achieve gains in the area of agriculture. This was an example of the mechanism of non-reciprocal coordination (see Annex 1). Other principles relevant to understanding the evolution of intellectual property regimes include the principles of strategic trade, reciprocity, free flow of information, common heritage of mankind and world's best practice (see Annex 1).⁵

GBR distinguished amongst particular categories of actors, principles and mechanisms. Actors, for example, were divided into seven categories including organisations of states (for example, WIPO and WTO), business organisations, corporations and NGOs. In certain cases it was useful to disaggregate actors into sub-units (eg states into the Ministry of Trade) or aggregate them into macro-units (eg developing countries). A list of these categories of actors, mechanisms and principles and their definitions is to be found in Annex 1 of this study. There were 44 conclusions of general import in GBR. They are listed in Annex 2. Many of these are referred to in the present study.

More than 500 people were interviewed for GBR (the methodology is described in chapter 3). This study also draws on a forthcoming book by Drahos and Braithwaite dealing with the globalisation of intellectual property rights for which additional interviews were undertaken (approximately 20).⁶ The author also carried out further interviews for a report to the Trade Directorate of the European Commission entitled 'Study on the Relationship Between the Agreement on TRIPS and Biodiversity Related Issues', September 2000.

For the purposes of this study, six developing country negotiators based in Geneva were interviewed. None wished to be named. In addition the following people were interviewed: Adrian Otten, Director, Intellectual Property Division, WTO; Peter Tulloch, Director, Development Division, WTO; Francis Gurry, WIPO; James

⁴ *Basic Framework Of GATT Provisions On Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities* (Intellectual Property Committee (USA), Keidanren (Japan) and UNICE (Europe)).

⁵ See J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge, Cambridge University Press, 2000, Chapter 7.

⁶ P. Drahos and J. Braithwaite, *Information Feudalism*, (forthcoming 2002).

Quashie-Idun, Director, and Kurt Kemper, Counsellor, Cooperation for Development Department, WIPO; Jørgen Blomqvist, Director, Copyright Law Division; Phillippe Baechtold, Head, Patent Law Section, WIPO; Pushpendra Rai, WIPO Academy, Marco Alemán, WIPO; Dominic Keating, USTR Office in Geneva.

3. Standard-Setting Pre-TRIPS⁷

The international movement of intellectual property standards has been from developed to developing countries. It has largely been a spread from key western states with strong intellectual property exporting lobbies to developing countries. There are some exceptions to this. Prior to the beginning of liberalisation in Vietnam in 1986 its intellectual property laws were modelled on those of the former Soviet Union.

In most cases the transplant of intellectual property laws to developing countries has been the outcome of processes of empire-building and colonisation (see conclusion 8 in Annex 2). For example, in parts of pre-independent Malaysia it was English copyright law that applied. When in 1911 the United Kingdom enacted the Copyright Act of 1911 its operation was extended to include ‘his Majesty’s dominions’. In the case of pre-independent Malaysia the 1911 Act was restricted to the Straits Settlement. Later when British collecting societies began to worry about copying, representations were made to the Colonial Office and to the Board of Trade to have the Federated Malay States, North Borneo and Sarawak enact copyright law based on the 1911 Act.⁸ These states in the 1930s passed copyright laws based on the 1911 Act. Copyright policy was firmly in the grip of London, especially London publishers.⁹

Patent law in the Philippines also reveals the forces of empire at work. While the Philippines remained a Spanish colony, it was Spanish patent law that applied. After December 1898 when the US took over the running of the Philippines, patent applications from the Philippines went to the US Patent and Trademark Office and were assessed under US law.¹⁰ Until 1947 when the Philippines created an independent patent system it largely followed US patent law, adopting, for example, the first-to-invent rule. In 1997 the Philippine Congress passed the Intellectual Property Code of the Philippines in order to comply with TRIPS.

The case of the Philippines illustrates that many developing countries for most of their history have never exercised a meaningful sovereignty over the setting of intellectual property standards. The direction of Korean patent law was affected by military conflict. In 1910 the Japanese replaced Korean patent law with their own. In

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁸ K.L. Tee, Khaw Lake, *Copyright Law in Malaysia*, Butterworths Asia, Malaysia, 1994, 2-5.

⁹ On the way in which London publishers used copyright to divide world markets see C. Clark, ‘Commentary’ in W.R. Cornish, *Copyright in Free and Competitive Markets*, ESC Publishing, Oxford, 1986, 127.

¹⁰ E.B. Astudillo, ‘Intellectual Property Regime Of the Philippines’ in Arthur Wineburg (ed) *Intellectual Property Protection in Asia* (2nd edn), Lexis Law Publishing, Charlottesville, Virginia, 1999.

1946 Korea acquired another patent law as a consequence of US military administration. In the 1980s South Korea was amongst the first to have its intellectual property laws targetted by the US under US trade laws. India had a patent law before many European countries, having acquired one in 1856 while under British colonial rule.

Colonialism had a profound impact on the expansion of copyright. Four major colonial powers ratified the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1887, the year in which it came into force: France, Germany, Spain and the UK. Under Article 19 of the Berne Act for the Convention these states had the right to accede to the Convention “at any time for their Colonies or foreign possessions”. Each of these colonial powers took advantage of Article 19 to include their territories, colonies and protectorates in their accession to the Convention¹¹ More and more colonies were drawn into the Berne system, especially after another two colonial powers, the Netherlands and Portugal, joined it in 1914.

The Berne system was run to suit the interests of copyright exporters. Each successive revision of the Berne brought with it a higher set of copyright standards. By the time many countries shed their colonial status, they were confronted by a Berne system that was run by an Old World club of former colonial powers to suit their economic interests. Former colonial powers continued to watch over their former colonies. When eleven Sub-Saharan states joined Berne they were “so totally dependent economically and culturally upon France (and Belgium) and so inexperienced in copyright matters that their adherence was, in effect, politically dictated by the ‘mother country’ during the aftermath of reaching independence”.¹²

After World War II many developing countries became independent states. Some of them began to review the operation of the intellectual property systems that had been left to them by their colonisers. So, for example, after India’s independence two expert committees conducted a review of the Indian patent system. They concluded that the Indian patent system had failed “to stimulate inventions among Indians and to encourage the development and exploitation of new inventions”.¹³ Interestingly, India did not choose to abandon patent law as a tool of regulatory policy, but instead to redesign it to suit her own national circumstances - a country with a low R&D base, with a large population of poor people and having some of the highest drug prices in the world. Passed in 1970 India’s new patent law followed the German system of allowing the patenting of methods or processes that led to drugs, but not allowing the patenting of the drugs themselves. Patent protection for pharmaceuticals was only granted for seven years as opposed to 14 years for other inventions. This law became the foundation stone for a highly successful Indian generics industry.

¹¹ S. Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986* Centre for Commercial Law Studies, London, 1987, 791.

¹² A.H. Lazar, ‘Developing Countries and Authors’ Rights in International Copyright’ in *Copyright Law Symposium*, vol. 19, Columbia University Press, New York and London, 1971, 1.

¹³ S. Vedaraman, ‘The New Indian Patents Law’, 3 (1972) *International Review of Industrial Property and Copyright Law*, 39, 43.

India was not the only country that began to reform its patent law. During the 1970s Brazil, Argentina, Mexico and the Andean Pact countries all passed laws that saw patent rights in the pharmaceutical area weakened. Developing country generic manufacturers also became a threat to the western pharmaceutical cartels that had dominated the international pharmaceutical industry. Mexico's entry into the manufacture of steroids in the 1960s, for example, contributed to the end of the European cartel that had dominated production until then.¹⁴ Developing countries, in adjusting their intellectual property laws to suit their national interests, were only doing what they had observed developed countries doing. So, for example, fearing the might of the German chemical industry the UK changed its patent law in 1919 to prevent the patentability of chemical compounds. A study undertaken by the World Intellectual Property Organisation (WIPO) in 1988 for the negotiating group that was dealing with TRIPS in the Uruguay Trade Round revealed that of the 98 members of the Paris Convention for the Protection of Industrial Property (Paris Convention), 49 excluded pharmaceutical products from protection, 45 excluded animal varieties, 44 excluded methods of treatment, 44 excluded plant varieties, 42 excluded biological processes for producing animal or plant varieties, 35 excluded food products, 32 excluded computer programs and 22 excluded chemical products.¹⁵ These numbers include developed as well as developing countries. They also show the Paris Convention did not stand in the way of states adopting quite different standards of industrial property protection. Additionally they reveal that TRIPS principles do not reflect a harmonisation that had already occurred at the national level.

During the 1960s and 1970s developing countries began to ask questions about the international standards of intellectual property that had emerged in previous decades, particularly in relation to the two main conventions, the Paris Convention and the Berne Convention. The theme of these questions was always the same. Were the international standards tilted too far towards the appropriation of knowledge rather than its diffusion? Developing countries sought adjustments to both the international copyright regime and the international patent regime. In both cases they were unsuccessful. Their attempts to adjust copyright rules to meet their needs in mass education precipitated a crisis in international copyright in the 1960s.¹⁶ Similarly, the attempts to revise the Paris Convention broke down. The fiercest debates took place over the revision of compulsory licensing of patented technology.¹⁷ For the US, developing country proposals for exclusive compulsory licensing amounted to little more than expropriation of US intellectual property rights. The revision of the Paris Convention that had begun in 1980 was never completed. In the eyes of key industry players like Pfizer, WIPO had failed to secure the higher patent standards that the large pharmaceuticals players wanted. Even more dangerously, countries like India, Brazil, Argentina and Mexico had shown that developing countries could lower standards of patent protection and still have a thriving generics industry. In the words

¹⁴ G. Gereffi, *The Pharmaceutical Industry and Dependency in the Third World*, Princeton University Press, Princeton, New Jersey, 1983.

¹⁵ WIPO (1988) 'Existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property', WO/INF/29 September 1988, issued as GATT document number MTN.GNG/NG11/W/24/REv.1.

¹⁶ C.F. Johnson, 'The Origins of the Stockholm Protocol' 18 (1970-71) *Bulletin of the Copyright Society of the USA*, 91.

¹⁷ D.M. Mills, 'Patents and the Exploitation of Technology Transferred to Developing Countries (in Particular, Those of Africa)', 24 (1985) *Industrial Property*, 120.

of Lou Clemente, Pfizer's General Counsel, "[o]ur experience with WIPO was the last straw in our attempt to operate by persuasion."¹⁸

The disappointments of the 1970s in intellectual property standard-setting led the US in the 1980s to adopt a strategy of forum-shifting (see conclusions 12-14, Annex 2). In fora such as WIPO, UNCTAD and UNESCO, the US faced the problem that developing country blocs could defeat its proposals on intellectual property or advance their own. The US began to argue the issue of intellectual property protection should become the subject of a multilateral trade negotiation within the General Agreement on Tariffs and Trade (GATT). The GATT was a forum in which the US was the single most influential player. Largely due to the efforts of the US and the US big business community the Ministerial Declaration, which in 1986 launched the Uruguay Trade Round, listed the trade-related aspects of intellectual property rights as a subject for negotiation.¹⁹

4. The TRIPS negotiations²⁰

TRIPS, it might be argued, was an agreement that was produced as a result of bargaining amongst sovereign and equal states all having the capacity to conclude treaties and which agreed to TRIPS as part of a larger package of trade-offs in which there were gains for all. This line of defence becomes stronger if one can show that some form of democratic bargaining did take place amongst states on TRIPS. Conversely, if TRIPS does not meet the minimal conditions of democratic bargaining this raises questions about its efficiency, as well as its legitimacy. The theory of democratic bargaining argues that efficiently defined property rights are more likely to emerge if at least three conditions are met.²¹ Firstly, all relevant interests have to be represented in the negotiating process (*the condition of representation*). Secondly, all those involved in the negotiation must have full information about the consequences of various possible outcomes (*the condition of full information*). Thirdly, one party must not coerce the others (*the condition of non-domination*).

The first condition of democratic bargaining requires that developing country interests were represented at the TRIPS negotiations. On the face of it this condition seems to have been met. Not all developing states participated in the TRIPS negotiations, but

¹⁸ See 'Pfizer: Protecting Intellectual Property in a Global Marketplace', Harvard Business School, 1992, 8.

¹⁹ See P. Drahos, 'Global Property Rights in Information: The Story of TRIPS at the GATT' 13 (1995) *Prometheus* 6; S.K. Sell, 'Intellectual property protection and antitrust in the developing world: crisis, coercion, and choice', *International Organization*, 49 (1995), 315.

²⁰ There is a growing body of literature on the negotiations. See, for example, J.C. Ross and J.A. Wasserman, 'Trade-Related Aspects of Intellectual Property Rights' in Terence P. Stewart (ed.) *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993, 2241; D. Gervais, *The TRIPS Agreement: Drafting History And Analysis* Sweet and Maxwell, London, 1998; Jacques J. Gorlin, *An Analysis Of The Pharmaceutical-Related Provisions Of The WTO TRIPS (Intellectual Property Agreement)*, Intellectual Property Institute, 1999; Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, OUP, New Delhi, 2001.

²¹ The theory of democratic bargaining and democratic property rights are presented in P. Drahos and J. Braithwaite, *Information Feudalism*, (forthcoming, 2002).

key developing country leaders on intellectual property, most notably India and Brazil, did send negotiators. Lying behind representation in democratic bargaining is the idea that the representatives have some continuity of voice in the process. In other words, exclusion must not be practised. Here the track record of the GATT was not very good from a developing country perspective. This was one of the reasons why the US had chosen it as a forum for intellectual property. In the Tokyo Round, the EEC, US, Japan, Switzerland, NZ, Canada, the Nordic Countries and Austria on 13 July 1978 released a 'Framework of Understanding' setting out what they believed to be the principal elements of a deal. Developing countries reacted angrily pointing out that they had been left out of a process that was laying the foundations for a final agreement. The then Director-General of the GATT Oliver Long in his report recognised the problem of exclusion, but defended this behaviour as a practical necessity²². The deeper problem with this process was that it involved a strategy in which a non-representational inner circle of consensus was expanded to create larger circles until the goals of those in the inner circle had been met.

The TRIPS negotiations saw the use of circles of consensus reach new heights. GATT negotiations had developed a traditional pattern, known as the "Green Room" process:

In the 'Green Room' process, negotiators from all engaged countries face each other across the table (traditionally in the Green Room on the main floor of the WTO Building) and negotiate. Drafts are exchanged and progress is noted as differences are narrowed and brackets are removed in successive drafts.²³

This Green Room process had, in the case of TRIPS, been profoundly shaped by the consensus-building exercise that the private sector had undertaken outside of the Green Room. The European Commission was brought around to the US view on the importance of securing a code on intellectual property. The Quad states (US, EC, Japan and Canada) were all enrolled in support of the US business agenda, as were their business communities. Then there were the meetings of the Friends of Intellectual Property Group in places like Washington where the US circulated draft texts of a possible agreement. After the negotiations on the detail of TRIPS began in 1990 and especially after the breakdown of the Uruguay Round talks in Brussels over agriculture in 1991 further groups were created within the TRIPS negotiations to move the process towards a final deal, most notably the "10+10" Group which consisted of a mix of developed and developing countries. As the TRIPS negotiations descended into higher levels of informality the "10+10" was contracted or expanded to "3+3" or "5+5" or a group of 25 depending on the issue. It was in these informal groupings that much of the real negotiating was done and where the consensus and agreement that mattered was obtained. A list of these groups in roughly their order of importance would be:

²² GATT, *The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT*, Geneva, 1979.

²³ J. Gorlin, *An Analysis Of The Pharmaceutical-Related Provisions Of The WTO TRIPS (Intellectual Property) Agreement*, Intellectual Property Institute, London, 1999, 4.

1. US and Europe
2. US, Europe, Japan
3. US, Europe, Japan, Canada (Quad)
5. Quad 'plus' (membership depended on issue, but Switzerland and Australia were regulars in this group)
6. Friends of Intellectual Property (a larger group that included the Quad, Australia, and Switzerland)
7. 10+10 (and the variants thereof such as 5+5, 3+3)

The US and the European Community were always part of any such group if the issue was important. Other active members were Japan, Nordics, Canada, Argentina, Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand.)

8. Developing country groups

(for example, the Andean Group - Bolivia, Colombia, Peru and Venezuela; Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay combined to submit a developing countries draft text in 1990)

9. Group 11 (the entire TRIPS negotiating group - about 40 countries were active in this group)

It was the first three circles of consensus that really mattered in the TRIPS negotiations. Through the use of these circles of consensus the TRIPS process became one of hierarchical rather than democratic management. Those in the inner circle of groups knew what TRIPS had to contain. They worked on those in the outer circle until the agreement of all groups to a text had been obtained. TRIPS was much more the product of the first three groups than it was of the last six. LDCs were not a part of any of the groups that mattered.

The use of circles of consensus also makes it difficult to claim that the second condition of democratic bargaining, namely full information, was fulfilled. It can be seen from the list of groups that the US and Europe could move amongst all the key groups. This allowed them to soak up more information than anyone else about the overall negotiations. Whenever they needed higher levels of secrecy they could reform into a smaller negotiating globule. The claim that the TRIPS negotiations were a model of transparency is difficult to defend. In truth it was the transparency of a one-way mirror. This arrangement of groups also allowed the US and the EC the fluidity to build a consensus when and where it was required. For certain issues, such as how royalties from collective licensing were to be divided, they retreated to the bilaterals. Even though they were not able to always secure an agreement between themselves, their disagreement did not derail the TRIPS process itself.

It is also worth observing that all states were in ignorance about the likely effects of TRIPS in information markets. That there would be trade gains for the US was beyond doubt, but the real world costs of extending intellectual property rights and their effects on barriers to entry in markets were not at all clear. Multinationals had better information about the strategic use of intellectual property portfolios (since this was private information) in various markets around the world than did most governments.²⁴

It is the third condition of democratic bargaining, the absence of coercion, on which TRIPS lies most exposed. The US in its Trade and Tariff Act of 1984 had begun adapting section 301 of its 1974 Trade Act to its objectives on intellectual property, as well as linking its negotiating objectives on the protection of high technology to intellectual property trade barriers.²⁵ (Section 301 is a national trade enforcement tool that allows the US to withdraw the benefits of trade agreements or impose duties on goods from foreign countries). In 1988 there were further significant changes to the US Trade Act of 1974 in the form of what came to be known as the ‘Special 301’ provisions. These require the USTR to identify foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to US intellectual property holders.²⁶ Also significant were the changes to the system of Generalized Special Preferences (GSP) that the 1984 Act had wrought. The President in deciding whether a developing country’s products were to gain preferential treatment under the GSP system had to give ‘great weight’ to its protection of foreign intellectual property rights.²⁷ For many developing countries gaining access to the closed and subsidised agricultural markets of developed countries was the main game. The whole point of the GSP system was to improve this access. At a meeting of the GATT Committee on Trade and Development in November 1985 some developing country representatives had suggested that the US was using its GSP system in a way that was “quite alien to the spirit and purpose of the generalized system of trade preferences in favour of developing countries”.²⁸ The European Community also enacted something similar to 301 in 1984 (the new commercial policy instrument – Council Regulation 264/84), but the Commission found it difficult to obtain consensus on its use. The Commission moved against Indonesia and Thailand for record piracy and suspended Korea’s GSP privileges for failing to provide satisfactory intellectual property protection.

When the US began to push for the inclusion of intellectual property in a new round of multilateral trade negotiations at the beginning of the 1980s, developing countries resisted the proposal. Their line of argument was that the GATT was primarily concerned with trade in goods and not personal rights of property in intangibles. Such rights fell within WIPO’s brief. The countries that were the most active in their

²⁴ For example, the first attempt to measure the welfare losses of applying the TRIPS patent period of 20 years to patents in existence for a country was an Australian study after TRIPS came into operation: See N. Gruen, G. Prior, I. Bruce, *Extending Patent Life: Is It In Australia's Economic Interests?*, Industry Commission, Staff Information Paper, June 1996.

²⁵ See section 305 of the Trade and Tariff Act of 1984.

²⁶ See 19 USC sec. 2242.

²⁷ See section 505 of the Trade and Tariff Act of 1984.

²⁸ Report of Committee on Trade and Development (L/5913) (1984-1985). *Basic Instruments and Selected Documents, General Agreement on Tariffs and Trade*, 32nd Supplement, 21, 26.

opposition to the US agenda were India, Brazil, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.²⁹ After the Ministerial Declaration of 1986 these countries continued to argue for a narrow interpretation of the Ministerial mandate on the negotiation of intellectual property. Breaking the resistance of these ‘hard liners’ was fundamental to achieving the outcome that the US wanted. Special 301 was swung into action in the beginning of 1989. When the USTR announced the targets of Special 301, five of the ten developing countries that were members of the hard line group in the GATT that were opposing the US agenda found themselves listed for bilateral attention. Brazil and India, the two leaders, were placed in the more serious category of Priority Watch List, while Argentina, Egypt and Yugoslavia were put on the Watch List.³⁰ US bilateralism was not confined to these countries. By 1989 USTR fact sheets were reporting other successes: copyright agreements with Indonesia and Taiwan, Saudia Arabia’s adoption of a patent law and Colombia including computer software in its copyright law.

TRIPS was less a negotiation and more a “convergence of processes” in the words of a someone who was a US trade negotiator at the time. Opposition to the US GATT agenda was being diluted through the bilaterals. Each bilateral the US concluded with a developing country brought that country that much closer to TRIPS, “so that accepting TRIPS was no big deal” (1994 interview, US trade negotiator).

The negotiations on TRIPS are often said to have begun properly in the second half of 1989 when a number of countries made proposals, or the first part of 1990 when five draft texts of an agreement were submitted to the negotiating group.³¹ A more sceptical view is that the negotiations were by then largely over. Developing countries had simply run out of alternatives and options. If they did not negotiate multilaterally they would each have to face the US alone. Table 1, below, shows that the US used its 301 process to target bilaterally the developing countries that were resisting its intellectual property agenda at the GATT. In the GATT developing countries were not part of the circles of consensus that set the agendas. Furthermore, if they resisted the US multilaterally they could expect to be on the receiving end of a 301 action. This was anything but a veiled threat by the US. Its 1988 Trade Act made resisting the US in a multilateral forum part of the conditions that could lead to a country being identified as a Priority Foreign Country and therefore the subject of a Special 301 investigation.³² There could be no clearer articulation of a threat than to enact it as law. At least if developing countries negotiated multilaterally there was the possibility that they would be able to obtain some limits on the use of 301 actions. This, at any rate, was what they were being told by developed country negotiators and the GATT Secretariat.

Table 1.

²⁹ J.A Bradley, ‘Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations’, 23 (1987) *Stanford Journal of International Law*, 57, 81.

³⁰ Abbott, Frederick M. (1989) ‘Protecting First World Assets In The Third World: Intellectual Property Negotiations In The GATT Multilateral Framework’, *Vanderbilt Journal of Transnational Law*, vol. 22, 689, 708-709.

³¹ See, for example, Daniel Gervais, *The TRIPS Agreement: Drafting History And Analysis*, Sweet and Maxwell, London, 1998, 15; Jacques J. Gorlin, *An Analysis Of The Pharmaceutical-Related Provisions Of The WTO TRIPS (Intellectual Property Agreement)*, Intellectual Property Institute, 1999, 2.

³² See 19 USC 2242(b)(1)(C).

US trade action against key developing countries in the GATT between 1984-1993.³³

Developing Countries members of the hardliners opposing IP in the GATT or active in the 10 plus 10 TRIPS negotiating Group or both.	Years between 1984-1993 in which developing country was the subject of a petition ^a , listed, investigated or had penalties imposed under US 301 or GSP programme.
Argentina	1988-1993
Brazil	1985, 1987-1993 (1988*)
Chile	1988-1993
Cuba	
Egypt	1989-1993
Hong Kong	
India	1989-1993 (1992*)
Indonesia	1989, 1990
Malaysia	1989, 1990 1993
Nicaragua	
Nigeria	
Peru	1992,1993
Singapore	
Tanzania	
Thailand	1989*-1993
Uruguay	
Venezuela	1989-1993
Yugoslavia	1989-1991

a - Under US trade law a person may file a petition complaining of discriminatory conduct by a state in relation to intellectual property and requesting the USTR to investigate. For example, in February 1988 the Pharmaceutical Manufacturers Association (PMA) filed a petition under 301 complaining of Chile's denial of product protection for pharmaceuticals. The petition was withdrawn in April 1988 by the PMA.

* Year in which penalties were actually imposed.

Table 1 considerably understates the level and extent of economic threat that was deployed by the US against developing countries during the 1980s. The USTR Clayton Yeutter stated publicly that the 301 investigation of South Korea in 1985 was intended to send a message to GATT members.³⁴ Similarly countries like Singapore and Hong Kong (which have no entries next to their name in Table 1) began in the 1980s to reform their intellectual property law knowing that if they did not they ran

³³ This is by no means a complete list of actions that the US took against developing countries. During this period it took action against, for example, Mexico and South Korea.

³⁴ See the report of Yeutter's speech in vol. 32 (1986) of BNA's Patent, Trademark & Copyright Journal, 736.

the strong risk of losing GSP benefits in the US market. The risk of losing GSP benefits was real. Yeutter, for instance, had written to a US Senator stating that if Mexico did not make substantial changes on intellectual property “I will not hesitate to recommend a significant reduction in Mexico’s future level of GSP benefits”.³⁵ When Singapore was taken off the GSP programme by the US in 1989 because they no longer met the criteria, Singaporean officials expressed disappointment saying that in 1987 they had been given a GSP package because they had made improvements in intellectual property.³⁶

5. The Promise of Multilateralism in Intellectual Property Standard-Setting Post-TRIPS.

During the Uruguay Round there were suggestions that if developing countries agreed to TRIPS the US would ease off negotiating intellectual property standards bilaterally. The following statement in 1989 from the Director for Intellectual Property at the Office of the United States Trade Representative (USTR) makes the point:

What happens if we fail [to obtain TRIPS]? I think there are a number of consequences to failure. First, will be an increase in bilateralism. For those of you who think bilateralism is a bad thing, a bad thing will come about.³⁷

It was always clear at all stages of the TRIPS negotiations that the principal players (US, EC and Japan) saw TRIPS as setting only minimum obligations. Nevertheless developing countries might reasonably have expected the World Trade Organization (WTO) or the World Intellectual Property Organization in some cases to become the principal fora for the negotiation of new intellectual property standards.

TRIPS was concluded as part of the text of Final Act of Uruguay Round negotiations (the Round was concluded on December 15 1993 and the Final Act signed on 15 April 1994) and came into operation on 1 January 1995. There has been no apparent decline in US bilateral activity on intellectual property since the signing of TRIPS. Table 2 in Annex 3 shows that the level of bilateral activity by the US has increased. This is consistent with a broader trend identified by John Jackson in US trade policy in which the US has moved away from its earlier support for multilateralism and MFN (most-favoured-nation) to “a more ‘pragmatic’ – some might say ‘ad hoc’ approach – of dealing with trading partners on a bilateral basis and ‘rewarding friends’”.³⁸

6. Bilateralism in Intellectual Property Post-TRIPS

³⁵ See the report of Yeutter’s speech in vol. 32 (1986) of BNA’s Patent, Trademark & Copyright Journal, 737.

³⁶ See ‘Four Pacific Rim Nations Are Graduated From GSP Status’, vol. 35 (1988) BNA’s Patent, Trademark & Copyright Journal, 282, 283.

³⁷ Emory Simon, ‘Remarks of Mr Emory Simon’, Symposium: Trade-Related Aspects Of Intellectual Property, 22 (1989), *Vanderbilt Journal of Transnational Law*, 370.

³⁸ J. Jackson, *The World Trading System*, The MIT Press, Cambridge, Mass., London, 1997, 173.

Model Bilateral Agreements

In bilateral trade negotiations between states involving a strong and weak state, generally speaking, the strong state comes along with a prepared draft text which acts as a starting point for the negotiations. Bilateral negotiations are complex and lengthy affairs, features which make them costly even for strong states. In order to lower the transaction costs of bilateralism the US has developed models or prototypes of the kind of bilateral treaties it wishes to have with other countries. Once a model treaty is ratified by the Senate, US trade negotiators know that if they stick to its terms in other negotiations there is a good chance the treaties flowing from these negotiations will also be approved. For the US there are very strong incentives for a standardization of bilateral treaty standards. So, for example, the bilateral investment treaty (BIT) which the US signed with Nicaragua in 1995 was based on the prototype that the US had developed for such treaties in 1994. Similarly the Free Trade Agreement (FTA) that the US has negotiated with Jordan will serve as a model for other FTAs being negotiated with Chile and Singapore. The following two sections offer a brief analysis of the intellectual property provisions of the Jordan FTA and the Nicaraguan BIT.

The US Jordan FTA³⁹

The Jordan FTA is an example of a model agreement. It is a wide-ranging agreement containing provisions on trade in goods, services, intellectual property rights, environment and labour, electronic commerce and government procurement. In contrast to the somewhat soft provisions on environment and labour (eg. each Party “shall strive to ensure” that its labour standards are consistent with international norms (Article 6.3)) the provisions on intellectual property are long and detailed. The TRIPS plus⁴⁰ features of the Jordan FTA include the following:

- the requirement that each Party give effect to the International Convention for the Protection of New Varieties of Plants 1991 (UPOV) and that in the case of Jordan it ratify UPOV within 12 months;
- the grant to authors, performers and phonogram producers of an exclusive importation right;
- the regulation of the government use of computer software;
- narrowing the grounds of exclusion from patentability (basically, the grounds of exclusion in Article 27.3(b) of TRIPS are omitted);
- a redrafted compulsory licensing provision which confines the use of compulsory licences to specified cases rather than, as in the case of TRIPS,

³⁹ Agreement between the USA and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, signed by both parties in October, 2000.

⁴⁰ A standard is TRIPS plus if it (a) requires a Member to implement a more extensive standard, or (b) it eliminates an option for a Member under a TRIPS standard.

placing conditions on the use of compulsory licences. (The specified cases are for remedying an anti-competitive practice, use in public non-commercial contexts, national emergencies and other cases of extreme urgency, and the failure to meet working requirements); and

- an obligation to provide for an extension of patent term to compensate patent owners for regulatory delays in being able to exploit the patent.

There are other important aspects to this agreement that make it TRIPS plus or that take the evolution of intellectual property rights beyond TRIPS. As a general point it is clear that the US has constructed a model agreement that meets the problems it perceives with TRIPS or that resolves some of the ambiguities of TRIPS. So, for example, Article 39.3 of TRIPS, which obliges a Member to protect data submitted as part of the process of getting regulatory approval for the marketing of pharmaceutical or agricultural products involving “new chemical entities”, leaves open the question of what is meant by a new chemical entity, whereas the Jordan FTA stipulates that new chemical entity includes “protection for new uses for old chemical entities for a period of three years”.

The Jordan FTA illustrates how the US is using bilateral agreements to intervene in a detailed way in the regulation of a developing country’s economy. So, for example, under the MOU accompanying the FTA Jordan is obliged to drop the current condition in its law that the importation of products to satisfy use requirements must be in “large quantities at reasonable prices”. Likewise the interpretation of what is meant by the exclusion of mathematical methods in Jordanian Patent law would appear to be settled by the MOU rather than the Jordanian judiciary. The scope of this exclusion has implications for the patenting of business methods and software inventions, areas in which US corporations patent heavily. Similarly the MOU stipulates the level of criminal penalties for certain kinds of infringement of intellectual property. Generally the level of criminal penalties in a state is a matter of domestic policy and culture.

Another key feature of the Jordan FTA is the creation of a Joint Committee “to supervise the proper implementation” of the Agreement (see Article 15.1). The Joint Committee’s functions include considering and adopting amendments to the Agreement and developing guidelines and rules for its proper implementation. Heading the Joint Committee is the USTR and Jordan’s Minister for Trade. Obviously there are some hard questions to ask about the role of such a committee, not least of all how it squares with the promotion of the ideal of democratic law-making. Clearly the Joint Committee will be carrying out, in effect, what amounts to a delegated law-making function.

Finally, the Jordan FTA is an example of the way in which developing countries are being further drawn into a web of intellectual property treaties. The Jordan FTA obliges Jordan to ratify the so-called WIPO “internet treaties” within 6 months of the FTA coming into operation. These treaties are of huge significance to US copyright-based industries such as software, film and sound-recording. The WIPO treaties require a certain number of ratifications before they come into operation. The probable sequence of evolution will be a series of bilateral agreements that bring the

WIPO treaties into force, followed by further pressure on developing countries to join these treaties. Eventually if all WTO members have ratified the treaties they will be folded into TRIPS (see Article 71.2 of TRIPS).

The Nicaraguan BIT

The Nicaraguan BIT is part of the US Bilateral Investment Treaty Program. This program continues the same set of policy objectives that lay behind the draft Multilateral Agreement on Investment (MAI). Broadly speaking, the belief is that foreign investment and trade flows are intimately related and that liberalising the rules on investment will also enhance trade. Adequate and effective protection for intellectual property is an explicit goal of the US BIT Program.

The Nicaraguan BIT like other BITs does not set specific standards of intellectual property. Instead it protects the rights of investors who use intellectual property as a mode of investment. The BIT accomplishes this by including intellectual property in its definition of investment (much like the draft MAI did). Intellectual property is defined widely to include copyright, patents, rights in plant varieties, designs, semiconductor chips, trade secrets, trade and service marks and trade names. The licensing of intellectual property also falls within the meaning of investment since the definition of investment includes “rights conferred pursuant to law, such as licenses and permits” (see Article 1.1(d)(vi)).

Typically a BIT creates MFN obligations and national treatment obligations for the parties to the treaty. These principles are not of much use to US investors if the developing country in question does not have intellectual property laws, has low standard laws or is taking advantage of the transitional provisions under TRIPS. MFN and national treatment in bilateral treaties have the effect of equalising treatment but not of raising standards within a country. It is for this reason that “prospective BIT partners are generally expected, at the time the BIT is signed, to make a commitment to implement ... TRIPS agreement obligations within a reasonable time.”⁴¹ If this expectation is not met the US is ready to use its 301 process to secure the necessary commitment.

Since BITs do not usually contain intellectual property standards, but rather depend on standards set in other agreements, their TRIPS plus effects are difficult to evaluate. Adding to this is the fact that investment is defined broadly, the definition of investment in these treaties being only illustrative rather than exhaustive. An example of an intellectual property investment-related activity not counting as investment for the purposes of a BIT would be the simple case of the sale of an intellectual property-related good across a border which involved no other activity. However, most other uses of intellectual property by intellectual property owners in foreign territories would appear to be caught by the provisions of a standard BIT. As section 7 of this paper shows the US is using BITs as a carrot to get developing countries to sign bilateral intellectual property agreements (BIPs).

⁴¹ See U.S. Bilateral Investment Treaty Program, Fact Sheet, Released by the Office of Investment Affairs, Bureau of Economic and Business Affairs, November 1, 2000 available at <http://www.state.gov/www/issues/economic/7treaty.html>.

The wide-ranging terms in which BITs are drafted are likely to give international investors grounds for arguments, which if successful, may well be TRIPS plus in their effects. For example, a US company may grant an exclusive licence to a company in a developing country to import its intellectual property related products (or it may set up a subsidiary for the same purpose). The purpose of the licensing arrangement may be to give the local company an incentive to support and market the relevant goods. Assuming the developing country government has signed a standard BIT, the licensing arrangement would be a covered investment for the purposes of that BIT (Article 1.1(e) of the Nicaraguan BIT). If the developing country passes a measure that undermines this contractual arrangement (eg the issue of a compulsory licence) then the US company would be able to argue a breach of some of the provisions of the standard BIT.⁴²

The outcome of such a dispute would be affected by a variety of factors including the developing country's exhaustion regime on intellectual property rights and its membership of treaties other than TRIPS. The general point, though, is that because the BIT protects the contractual exploitation of intellectual property rights as a covered investment there may be circumstances where it produces a TRIPS plus effect.

It is also worth noting that the standard BIT limits the capacity of governments to impose performance requirements on investment activity (for example, the Nicaraguan BIT does not allow for the imposition of a condition to transfer technology, a production process or other proprietary knowledge except to remedy a violation of competition law - See Article VI.1(e)). In the context of intellectual property rights it means that governments have less capacity to impose restrictions on the way that foreign companies choose to exploit their technology. An UNCTAD report observed that since TRIPS expanded the licensing possibilities for foreign companies in developing countries it could result in "reduced inward technology flows at higher prices".⁴³ The restrictions on performance requirements in BITs may have the same effect. These restrictions may in fact be stronger in effect than the ones in TRIPS since BITs do not contain the kind of clauses providing for exceptions to exclusive rights to be found in TRIPS (eg. Article 30 of TRIPS).

7. BITs and BIPs - The Negotiating Links

The case of Nicaragua is instructive on the interaction between BIT/BIP negotiations, the 301 process and TRIPS in the US context. Consider the following factual sequence of events:

1. July 1995: the US and Nicaragua sign a BIT. The BIT is made conditional upon Nicaragua signing a BIP providing adequate and effective protection for

⁴² For example, the obligation not "to impair by unreasonable and discriminatory measures the management, conduct, operation ... of covered investments" in Article II.3(b) of the Nicaraguan BIT.

⁴³ UNCTAD, *The TRIPS Agreement and Developing Countries*, UN, New York and Geneva, 1997, 18.

US intellectual property rights. Nicaragua is a developing country for WTO purposes and so is not obliged to implement TRIPS until 1 January 2000.

2. Nicaragua and the US enter into negotiations over intellectual property rights. In 1996 the USTR reports that negotiations on a BIP are still proceeding.

3. April 1997: the USTR adds Nicaragua to the Special 301 Other Observations list.

4. January 1998: US and Nicaragua sign a Bilateral Intellectual Property Rights Agreement. The Agreement must be implemented by July 1999, ahead of the expiry of Nicaragua's TRIPS deadline. The Agreement contains TRIPS plus features (for example, the obligation to join UPOV).

In this particular negotiating sequence the BIT (which Nicaragua probably wanted) was linked to an intellectual property agreement (which Nicaragua probably did not want - certainly not its TRIPS plus features). The 301 process was wheeled in presumably to speed up the negotiating cycle on the BIP which had been proceeding too slowly for the US.

8. The Global IP Ratchet

Bilateral intellectual property and investment agreements are part of a ratcheting process that is seeing intellectual property norms globalise at a remarkable rate. The two actors responsible for this process are the US and the EU. In short form this ratcheting process is dependent upon -

(a) a process of forum shifting⁴⁴ - a strategy in which the US and EU shift the standard-setting agenda from fora in which they are encountering difficulties to those fora where they are likely to succeed (eg from WIPO to the WTO to BIPs);

(b) co-ordinated bilateral and multilateral IP strategies; and

(c) the entrenchment in international agreements of a principle of minimum standards.

The principle of minimum standards plays a vital role in this strategy. Each bilateral or multilateral agreement dealing with intellectual property contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favourable treatment (See, for example, Article 1702 of NAFTA, Article 1.1 of TRIPS, Article 4.1 of the Jordan FTA and

⁴⁴ For a detailed explanation of this strategy and some examples see John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, ch.24.

Article XI of the Nicaraguan BIT). This means that each subsequent bilateral or multilateral agreement can establish a higher standard.

Bilateral agreements are also being drafted in ways to ensure that developing countries are integrated into multilateral IP regimes with maximum speed. Developing countries are being obliged to comply with multilateral standards in conventions to which they are not a party, to ratify multilateral treaties or both. So, for example, the Jordan FTA requires Jordan to give effect to Articles 1 - 14 of the WIPO Copyright Treaty and to ratify UPOV (see Article 4.1 and 4.29 of the Jordan FTA).

The global ratchet for IP consists of waves of bilaterals (beginning in the 1980s) followed by occasional multilateral standard-setting (eg TRIPS, the WIPO Copyright Treaty). Each wave of bilaterals or multilateral treaty never derogates from existing standards and very often sets new ones.

For the time being at least there appears to be no end in sight to the use being made of this global IP ratchet. The current negotiations of the Free Trade Area of the Americas (FTAA) have produced a long draft text on intellectual property rights. The draft text is far from final form and contains a lot of bracketed text indicating that the relevant clause or phrase is the subject of negotiation. Robert Weissman in a recent submission to the USTR has drawn attention to some of the TRIPS plus language contained in draft text relating to medicines and compulsory licensing.⁴⁵ The Electronic Frontier Foundation has also argued that draft language in the FTAA exceeds even the standards to be found in the US Digital Copyright Millennium Act on anti-circumvention and should be opposed because of its impacts on free speech and scientific communication.⁴⁶

9. The Role of WIPO in the Global IP Ratchet

The General Assembly of WIPO passed two resolutions, one in 1994 and the other in 1995, requiring the International Bureau of WIPO to provide assistance to WIPO members on TRIPS-related issues. In addition there is a cooperation agreement between WIPO and the WTO in which WIPO assumes obligations to provide legal-technical assistance to developing country WTO Members on TRIPS matters whether or not those countries are members of WIPO.⁴⁷ The two resolutions oblige the International Bureau to provide advice and legal/technical assistance on matters such as the compatibility of a country's national IP legislation with TRIPS.

Demand for services of the International Bureau by developing countries has been high. Consider the following figures:⁴⁸

⁴⁵ Robert Weissman, Co-Director, Essential Action, submission to USTR on negotiating objectives for the proposed FTAA, 22 August, 2001.

⁴⁶ See EFF Action Alert, <http://www.eff.org>.

⁴⁷ Agreement Between the World Intellectual Property Organization and the World Trade Organization (1995), Article 4.

⁴⁸ See *WIPO'S Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement From January 1, 1996, to December 31, 2000*, WIPO, June 2001

- From 1996 to 2000, 214 draft laws on intellectual property were prepared by the International Bureau for 119 developing countries (including some regional organizations); and
- The International Bureau during the same period also commented on or drafted amending provisions for 235 draft laws received from 134 developing countries (including some regional organizations).

The work of the International Bureau extends well beyond the drafting of laws for developing countries. Other forms of assistance include the provision of workshops for developing country drafters on the drafting of IP legislation and many meetings/seminars/training courses held in Geneva or in developing countries.

The provision of draft laws and legal advice to developing countries carries with it a burden of moral responsibility. LDCs in particular do not have local experts to evaluate the suitability of model international laws to local economic, social and cultural conditions. LDCs often lack drafting expertise and are reliant upon outside legal drafters, who may be brought in from those western legal systems to which the LDC has historical links as consultants or on contract basis for a set period. The problem is especially acute in the case of intellectual property since there are very few people who possess both the specialised technical skills of legislative drafting, as well as expertise in intellectual property law.⁴⁹ Various articles of TRIPS create drafting options for a country. For example, a country experiencing an AIDS crisis which has no sophisticated pharmaceutical R&D base would want to take full advantage of the exceptions from patentability in Article 27.3, especially those in Article 27.3(a) (allowing for the exclusion of therapeutic method patents ie the exclusion of new uses of old drugs).

The interviews carried out in WIPO for the purpose of this study revealed that WIPO officers were more than aware of the responsibilities they had in the provision of advice and draft laws on TRIPS issues. However, the interviews also revealed a structural dynamic at work. The inclination on the part of the International Bureau was to provide laws and advice to a developing country that would avoid any danger of that country becoming involved in dispute resolution (“we don’t want them to get into the trouble with the WTO”, as one put it). Obviously the way in which to guarantee this is to provide TRIPS plus models. It needs to borne in mind that WIPO as an organisation is also acutely aware of the dangers to it of a US forum shifting strategy (see conclusions 12-14 of the Annex 2). On top of this the majority of WIPO’s NGO membership consists of western NGOs of IP owners rather than users. Few NGOs are focussed on the needs of developing countries (interview at WIPO). These factors all combine to provide the International Bureau with a strong incentive to provide advice and laws that are of a TRIPS plus nature.

It is also probably the case that some developing countries themselves come to WIPO seeking TRIPS plus laws. US bilateral pressure on IP, as this paper shows, has

⁴⁹ The author is speaking from his experience as a drafter of parliamentary legislation in the Commonwealth Attorney-Generals Department of Australia between 1981-1986.

increased rather than decreased (see Table 2 in Annex 3). One simple way to deal with this pressure is to enact TRIPS plus laws.

The WIPO standard-setting process in both copyright and patents goes through the same basic stages:⁵⁰

1. A working group of experts issues a report (convened by a Standing Committee);
2. The report is considered by the Standing Committee. The Committee is comprised of WIPO Member states from different country regions such as Africa, Asia Pacific and so on. There are usually five members from each region. The Committee cannot make binding decisions;
3. The Standing Committee formulates recommendations for consideration by the WIPO General Assembly;
4. A Diplomatic Conference is held.

As one travels from stages 1 to 4 the process of standard-setting becomes more representative. Paradoxically, there is probably progressively less opportunity to influence the standard-setting process than at the working group of experts stage. By the time of the Diplomatic Conference, the standards have obviously been drafted and WIPO itself will through the relevant Standing Committee have carried out a massive consensus-building exercise in order to ensure the success of the diplomatic conference. Obviously there is no guarantee of success at a diplomatic conference since an effective veto coalition may emerge (as it did in the case of the proposed database treaty).

Stage 1 is perhaps just as important a site of influence as the other stages since it is at this stage that the framing of many of the issues takes place. Generally, the working groups in Stage 1 have no or poor representation from developing countries and especially LDCs. From the interviews it emerged that the problem here was that developing countries lacked experts. Much, of course, depends on the kind of filters that are applied to determine the possession of expertise. The epistemic community that has been the main influence on intellectual property standard-setting has been dominated by those with legal knowledge. Generally, when WIPO searches for 'experts' it is looking for legal expertise. In a patent law standard-setting exercise, for example, it would not seek a non-legal expert in biodiversity or economic development, even though many developing countries would have such expertise and would certainly see it as relevant to such an exercise (witness, for example, the OAU's model law which was drafted with a high level of scientific expertise⁵¹). At the point of a diplomatic conference WIPO does provide generous financial assistance

⁵⁰ A brief description of the work of the Standing Committee of Patents is to be found in WIPO SCP/1/2, May 4, 1998.

⁵¹ *The OAU's Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, Organization of African Unity, Scientific, Technical Research & Research Commission, Prof. J.A. Ekpere, Project Coordinator, PMB 2359 Lagos, Nigeria, November 2000.

for representatives from LDCs to attend, but generally these representatives, if they speak, speak for the record at such an event.

10. Developing Country Efforts at IP Standard-Setting

Some economists have argued that countries ought to be able to have IPR standards that line up with their comparative advantage.⁵² Developing countries have over the last 40 years persistently argued for international rules that facilitate the transfer of technology and give them some control over the conduct of multinationals. The trend, however, has been in the opposite direction. By way of illustration consider the following key events in the history of IP standard-setting:

- The attempts to modify the Berne Convention to take into account the educational and development needs of developing countries in the field of copyright during the 1960s and 70s failed. The Stockholm Protocol never came into force and the Appendix to the Paris Act of Berne produced no real improvement in access to copyright materials.
- Since the copyright crisis the scope of copyright law and patent law has increased, most notably to include software (see, for example, Articles 10.1 and 27.1 of TRIPS) and the use of the Internet (see, for example, Articles 7 and 8 of the WIPO Copyright Treaty).
- Attempts by developing countries to change the compulsory licence provisions of the Paris Convention during the 1970s failed and the negotiations concerning the Convention came to an end during the 1980s. Patent law in the main patenting jurisdictions (US, Japan and European Union) has steadily expanded to meet the needs of large industry players concerned with the industrial application of biological science. The use of compulsory licences as a regulatory tool has become harder rather than easier.
- The work by UNCTAD on the Code of Conduct for the Transfer of Technology which had begun in 1976 came to a halt in the mid 1980s.
- Work on the UN Code of Conduct for Transnational Corporations which had begun in 1975 eventually ground to a halt in 1993.
- TRIPS commenced operating in 1996. It is an agreement which represents the successful completion of an international business agenda for the global strengthening of intellectual property law. TRIPS contains only modest concessions to the development needs of developing countries.

⁵² See M. Trebilcock and R. Howse, *The Regulation of International Trade*, 1995, cited in O. Lippert, 'One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights through the Free Trade Area of the Americas' 9 (1998), *Fordham Intellectual Property, Media & Entertainment Law Journal*, 241, 267.

- Continued bilateralism by the US and EU in the 1990s is removing the flexibility that exists in TRIPS on matters such as compulsory licensing, scope of patentability and membership of international IP conventions.

The picture which emerges is one in which higher and higher standards of intellectual property protection are being globalised (as well as a trend towards using encryption technology to protect information) with little or no attempt to build into those standards transfer of technology objectives. In those cases where transfer of technology obligations are to be found in international conventions those obligations are framed in soft language and surrounded by provisions obliging members to respect intellectual property rights.⁵³ Developing countries are largely left to pursue their agendas within the interstices of an IP paradigm dominated by the US and EU. This was illustrated in the interviews at WIPO. When asked about developing country influence within WIPO, WIPO officials gave as examples the influence of Singapore in the preambular statement to the WIPO Copyright Treaty and the influence of developing countries on the issue of non-voluntary licences. The comparative triviality of these examples speaks volumes about the impact of developing countries within WIPO standard-setting exercises.

11. The Emerging Global Politics of TRIPS

During the TRIPS negotiations international NGOs and African states were not significant players. The two most striking features in terms of actors involved in the post-TRIPS scene has been the engagement of international NGOs in TRIPS issues and the leadership of the Africa group on health and biodiversity issues. The Organisation of African Unity (OAU), Ethiopia, Kenya, the Third World Network and the Institute for Sustainable Development have been prime movers in developing model legislation for African states which sets out regulatory principles for the ownership and use of biological resources and related local community knowledge. The model law initiative has informed the position of the African Group on intellectual property issues within the TRIPS Council and its accompanying review processes, as well as the Group's position in the negotiations on the International Undertaking. The special sessions of the TRIPS Council on the issue of intellectual property rights and access to medicines, the first of which was held in June of 2001, were inspired by a proposal from the African Group that was discussed and agreed to at a TRIP Council meeting in April of 2001.

There is little doubt that the rise in influence of the Africa Group has been enabled by a partnership with NGOs. Every single developing country negotiator interviewed for the purposes of this study commented on the positive role that NGOs have played in the debate over TRIPS and access to medicines (The role of the Quaker Geneva Secretariat came in for express mention. Another interviewee said "what negotiators like me failed to accomplish Oxfam and MSF have accomplished").

Western NGOs have broadly followed the reactive sequence of regulatory change outlined in conclusion 44 of Appendix 2. The death toll in Africa from AIDS has

⁵³ See Article 16 of the Convention on Biological Diversity.

created one of the greatest international public health crises in history. By bringing details of this crisis before mass western publics NGOs have forced companies and governments to respond with initiatives, including a dialogue in the TRIPS Council concerning the impact of TRIPS on the sovereign capacity of states to pass public health measures to meet the crisis. Outside of the debates of the TRIPS Council an alliance between civil society and developing countries has seen a range of responses from the R&D-based pharmaceutical industry (including the dropping of the lawsuit against South Africa, voluntary drug donations, price drops in AIDS drugs), the involvement of other international organisations in the debate (eg the UN Commission on Human Rights), and policy proposals from key developed country actors (the tiered pricing option being advocated by the European Commission).

In spite of these successes attempts by developing countries and NGOs to bring interpretative certainty to TRIPS standards on this issue by means of a Ministerial Declaration have met with resistance from a coalition of developed countries led by the US. Further, as has been pointed out in other sections of this report, US bilateralism on intellectual property standards is aimed at producing standards that are less flexible than those to be found in TRIPS. In similar fashion the alliance between food/seed NGOs and the Africa Group in the WTO has so far not been successful using the review of Article 27(3)(b) to meet their goals of a prohibition on the patenting of living organisms and a recognition of a broader CBD reading of the sui generis option for plant variety protection. The lack of progress within the WTO on these issues has seen them included in a Declaration on the Fourth WTO Ministerial at Doha issued by the G77 and China.⁵⁴

Aside from the many hundreds of NGOs working on intellectual property issues as they arise in the food, agriculture, seed, health and biotechnology sectors and other NGOs work on intellectual property issues as they affect education, software programming, libraries, privacy and free speech. So, for example, the US academic community especially in the field of copyright has become one of the principal defenders of the public domain. Through their writing, pro bono litigation, amicus briefs, lobbying and the formation of the Digital Future Coalition, US academics in alliance with other groups such as librarians have fought the expansionist agendas of

⁵⁴ Paragraphs 12 and 13 of the Declaration of the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar (Geneva, 22 October 2001) read as follows:

12. We consider that negotiations should make operational the provisions under the TRIPS Agreement relating to the transfer of technology, to the mutual advantage of producers and users of technological knowledge, and seek mechanisms that allow for the disclosure of the sources of traditional knowledge and (genetic resources used in inventions, in order to achieve a fair and equitable sharing of benefits. In this regard, the TRIPS agreement should be supportive of and not run counter to the objectives and principles of the CBD with view to ensuring the protection of biological resources and to promote disciplines to protect traditional knowledge and genetic resources. The TRIPS review shall fully take into account the developmental dimension and during the course of this review members should agree not to invoke dispute settlement procedures against the developing countries.

13. We affirm that nothing in the TRIPS agreement should prevent governments from taking measures for protecting public health and nutrition as well as from ensuring affordable access to essential medicines and life saving drugs in keeping with public health concerns of developing countries.

corporate intellectual property owners. Richard Stallman, the founder of the Free Software Foundation, has been a vital force in showing how a society can meet its needs for software on a non-proprietary basis.

The presence of so many NGOs working on intellectual property issues provides scope for an alliance between developing states and NGOs. United minority factions can under certain conditions secure global regulatory change (see conclusion 34 of Annex 2). The possibility of securing such change in the context of intellectual property rights and TRIPS especially should not be overestimated. An alliance of minority factions is difficult to build. It requires unity amongst developing countries. Once intellectual property becomes mediated through the dollars and mentality of trade gains and losses, achieving that unity becomes more and more difficult. The Africa Group's position of a prohibition on the patenting of life is not shared by India and similarly India is much more supportive of extending protection for geographical indications than many other developing countries. Different NGOs also see the IP issues differently (eg 'seed' NGOs are strong opponents of patenting, while health NGOs recognise a role for patents). Western NGOs are at their most effective when they can capture western media interest and publicity. It has taken literally millions of deaths in Africa in order for the western media to become interested in the links between patents, price and AIDS drugs (despite the fact that cartelism in pharmaceutical industry has been a problem for the health care system of developing countries for decades⁵⁵). Many western viewers will watch a documentary about AIDS deaths in Africa, but are probably less likely to watch a documentary about the history of technology transfer from developed to developing countries. The effectiveness of western NGOs in an alliance of minority factions is affected by their capacity to foment mass public concern through the media (see conclusion 36 of Appendix 2). Even if, as in the case of the AIDS crisis, developing countries can unite and form a partnership with western NGOs to run an effective global campaign on an intellectual property issue, they can nevertheless be defeated in the context of TRIPS. The Council for TRIPS operates on the basis of consensus. Any one country can, if it so chooses, veto a standard-setting initiative put forward by others. Moreover, a powerful player such as the US can more easily wear the costs of resisting consensus than weaker players. The broad declaration that developing countries and NGOs are seeking on TRIPS and public health care is presently not being supported by the US and may well never emerge, at least in the form being sought by developing countries.

The effectiveness of developing countries in the TRIPS Council has been a major factor in contributing to US bilateralism. Despite the US sending delegations of 10 to 12 to TRIPS Council meetings there is "lots of deadlock" and progress on the implementation of TRIPS has been slow. For the US the full benefits of TRIPS are tied to full implementation. Concluding bilateral agreements on IP with states like Chile that have "modern views" is seen by the US as a way forward.

⁵⁵ For the history see G. Gereffi, *The Pharmaceutical Industry and Dependency in the Third World*, Princeton University Press, Princeton, New Jersey, 1983.

PART II

12. Conclusion

A summary of international intellectual property standard-setting might be that it has been dominated by western states and intellectual property owners. Since World War II the dominant mechanism of standard-setting has become economic coercion, of which TRIPS is the most potent multilateral expression (see conclusions 9-11 of Annex 2). Prior to TRIPS developing countries were essentially able to base some of their development strategies on free-riding strategies because they were either not members of international IP conventions or there was no mechanism of compliance. TRIPS makes the pursuit of free-riding strategies more difficult. Continued bilateralism by the US especially on intellectual property rights is further limiting the possibilities of such strategies. The principle of special and differential treatment for developing countries has in the context of intellectual property rights become symbolic rather than real. The ten years given to LDCs under TRIPS to enact and enforce fully functioning systems of copyright, patents and trademarks is not particularly generous, especially given that the development effects of doing so are anything but clear.⁵⁶

The reality of standard-setting for developing countries is that they operate within an intellectual property paradigm dominated by the US and EC and international business. Developing countries are encircled in the IP standard-setting process. TRIPS sets minimum standards. Bilaterally the bar on IP standards continues to be raised. When developing countries turn to WIPO for legislative assistance that assistance steers them down a TRIPS plus path. They are not in a position to mobilise webs of coercion and have to rely on webs of dialogue.

NGOs, after states and business, have become a third force in the global politics of intellectual property rights. NGOs function as an analytical resource for developing states and as possible partners in a global coalition of minority factions in international intellectual property standard-setting issues. But these kinds of coalitions are difficult to put together, are issue specific and predominantly rely on a crisis of some kind to be truly effective. They do not threaten the standard-setting dominance of the US and EU, especially when these two states are united on the direction in which global regulation should travel (see conclusion 1 of Annex 2).

Given the track record of both the US and EU on intellectual property in the past developing countries can expect very few concessions on intellectual property issues in either a bilateral or multilateral context. Essentially developing countries will have to look to self-help on these issues and operate on the assumption that the global IP ratchet will continue to be worked by the US and EU in their economic interests and only minimal consideration being given to the development interests of developing countries.

⁵⁶ In principle the TRIPS Council could grant an extension, but an extension is not automatic.

13. Self-help - some proposals

Dealing with the global IP ratchet

As Table 2 shows the US is pursuing a TRIPS plus agenda bilaterally. Developing countries are prepared to sign such agreements in order to gain access to the US market or avoid losing access. There is not much the developing countries can do about US bilateralism on intellectual property. Developing countries could propose that the Council for TRIPS become a forum in which states begin to address distortions that are occurring in global information markets because of excessive levels of intellectual property protection. The Council for TRIPS, for example, might make it a practice to request members which are seeking to raise intellectual property standards beyond those agreed to multilaterally to explain the case for doing so. The onus ought to be put on states in the TRIPS Council to explain why they are departing from intellectual property standards that have the multilateral endorsement of the world's trading community.

A second strategy for developing countries to consider is a more determined use of the WTO Trade Policy Review Body (TPRB). Continued IP bilateralism by the US and EU has broader implications for the stability of the WTO system. The objectives of the TPRB include an "increased transparency and understanding of countries trade policies" as well as "to enable a multilateral assessment of the effects of policies on the world trading system".⁵⁷ It would be entirely appropriate for developing countries to begin reporting on and debating the effects of the global IP ratchet on development within the context of the TPRB.

A Developing Country Quad?

The tough lines that have emerged from the metropolises of the west on the rules for the production and flows of knowledge suggest that developing countries will have to be very tightly organised on any future negotiations involving TRIPS or other WTO agreements for that matter. In particular they should give consideration to creating a developing country counter-weight to the Quad. In the last round developing countries had no equivalent to the Quad, meaning that they had no counter-weight to the agenda-setting powers of the Quad or its capacity to manage the crucial stages of a trade negotiation. The emergence of such a countervailing power would bring WTO negotiations closer to the ideal of democratic bargaining.

One possibility is that four developing country leaders (for example, India, Brazil, Nigeria and China) could form a group that would represent developing country interests in the hard or final stages of a multilateral trade

⁵⁷ These statement of objectives is to be found on the WTO's website.

negotiation. Each of these countries could chair a working group on some of the key negotiating issues of a given trade round. There could, for example, be a group on Services and Investment, a group on Intellectual Property and Biotechnology, a group on Agriculture and Goods and another on Competition, Environment and Labour (or whatever emerging issues there were in that trade round).⁵⁸ Other developing countries could join one of these four groups, perhaps with some taking responsibility for forming a working party on some aspect of the negotiations for which that group had overall responsibility (eg an African country could take responsibility for forming a working group on intellectual property and biodiversity within the Intellectual Property and Biotechnology Group). One advantage of this structure would be that the expertise of developing countries would be pooled, thereby reducing the capacity problems that they faced in the last round.

The loose group structures currently employed by developing countries (for example, the ‘like-minded group’, the ‘informal group of DCs’) do not maximise the capacities of developing countries and nor do they provide the kind of leadership that is needed during the course of a multilateral trade round. Loose groups of developing countries are more susceptible to divide and conquer tactics of strong states. It is true that the more formally organized group structure outlined above would be more costly to organise, but the gains in terms of capacity and leadership would be much greater.

By pooling their resources by means of a more formal structure developing countries would be providing each other with public goods on a reciprocal basis, thereby enhancing the capacity of all developing countries. There are initiatives by developed countries to improve the capacity of developing countries to participate in the WTO,⁵⁹ but these cannot be counted on by developing countries. Ultimately trade rounds come down to hard coercive bargaining. Developing countries have to respond to the imperatives of such negotiations with better organisation and leadership. In any case developed country initiatives are dependent upon funding. Progress under the Integrated Framework for Trade-Related Assistance to Least Developed Countries, for example, has been described by the World Bank as “slow, with new donor projects in just one country (Uganda).”⁶⁰

The Uruguay Round also demonstrated that developing country negotiators, no matter how good their performance, need the backing of strong leadership from the top. The words of one Indian negotiator make the point:

The impression went round that the show of firmness that the negotiators were making in the period from Sept 1986 to Dec. 1988 was only a facade not backed by a firm political support at the capital.

⁵⁸ I am indebted to a late night email conversation with John Braithwaite for helping me to think through this possibility.

⁵⁹ For a discussion of some these see *A Study on Assistance and Representation Needs of the Developing Countries without WTO Permanent Representation in Geneva* (“*Thye WTO Non-Residents*”), Study by APCO Global Trade Practice for the Economic Affairs Division of the Commonwealth Secretariat, August 2001.

⁶⁰ See World Development Report 2000/2001: *Attacking Poverty*, World Bank, OUP, NY, 2001, 186.

No negotiators can hope to muster support from other countries on difficult issues involving disagreement and even confrontation with major powers, if those countries suspect the inherent strength of the stand or even the sincerity of its propounders.⁶¹

Trade policy bodies/institutes within developing countries ought at least to investigate the feasibility of a developing country Quad leading a more formally organised group of developing countries.

14. Re-thinking the role of WIPO

One of the interesting features of the interviews of developing country negotiators for this study was that every negotiator expressed scepticism about the usefulness, in terms of development, of the assistance that WIPO was providing to developing countries. There is, one might observe, a fundamental tension between the work of an international organisation that exists to promote the propertisation of information and LDCs which are not in a position to meet the increased costs that such propertisation generally brings.

Developing countries (which form a majority of the membership of WIPO) could begin a process of reconsidering the role that WIPO plays in development assistance. A first step would be a genuinely independent cost-benefit analysis of the WIPO's current development-related expenditures. A second step might be to investigate the way in which WIPO, a member of the UN family, could play a greater role, especially financially, in UN development initiatives. It is also worth observing that WIPO is an extremely well-resourced organisation because of the fees it obtains from the private sector under the Patent Cooperation Treaty, Madrid, The Hague and Lisbon systems as well as its on-line domain name dispute resolution service (85% of its income is generated by fees). By its own reckoning income for the 2002-2003 biennium will be approximately (Sfr) 532 million.⁶² The global services that WIPO runs and the rising demand for those services means that the organisation has in effect a large and permanent income stream.

At the Third United Nations Conference on the Least Developed Countries held in Brussels, Belgium, 14-20 May 2001 a Programme Of Action For The Least Developed Countries For The Decade 2001-2010 was adopted. The financial resources required to implement this programme are massive. WIPO's revenue stream could be utilised in ways that helped to meet the goals of this programme and that were still consistent with WIPO's mandate of promoting intellectual property. For example, groups of LDCs could bid for money from WIPO to commission R&D by pharmaceutical companies on diseases in those countries that were not currently being researched by those companies. In this context it is worth noting the observation of a recent World Bank study that "more than anything else, the poor

⁶¹ Mr S.P. Shukla, Indian Ambassador to the GATT at that time quoted in *Agriculture In Dunkel's Draft Of GATT - A Critical Analysis*, Third World Network, 1993, 6.

⁶² See Revised Draft Program and Budget 2002-2003, WIPO, WO/PBC/4/2.

dread serious illness within the family”.⁶³ Thinking of creative ways in which to integrate WIPO’s considerable assets into a broader development agenda should be a fundamental priority.

Since the conclusion of TRIPS developing countries have not been effective within WIPO in questioning the orthodoxy that more and more western style intellectual property norms are better and better for developing countries. The Africa Group which has been so effective in the TRIPS Council does not have a similarly successful counterpart in WIPO (interviews with developing country negotiators, Geneva 2001). This has much to do with the fact that developing countries send representatives from intellectual property offices who, while having a technical knowledge of patent or trademark administration, have no knowledge of intellectual property as a tool of regulatory and development policy. WIPO’s generous funding of LDC representatives means that those representatives are unlikely to raise heterodox views about IP and development for the simple reason that they might not be invited back to more WIPO Geneva events (interviews with developing country negotiators, Geneva, 2001). The result is that the heterodox debate over intellectual property and development never takes place within WIPO’s conference rooms.

The impact of this international orthodoxy is different for different developing countries. Developing country leaders like India and Brazil have sufficient analytical resources to generate an evaluation and debate about the development impacts of western intellectual property systems.⁶⁴ LDCs lack the analytical resources to generate the debates, with the result that western intellectual property models are received with very little public discussion or analysis. For LDCs the main problem becomes how to project compliance with international standards to watching US trade officials and US companies when these countries can only, at best, afford to staff their local intellectual property offices with a handful of people.

The WIPO secretariat also faces its own kind of structural problem. When in the 1960s and 70s WIPO did become a forum for the criticism of intellectual property norms in copyright and patents the US and US business shifted their attention to the GATT as a forum better suited to their interests. It was a classic case of US forum shifting (see conclusions 12-14). The WIPO Secretariat, having learnt to share its pre-eminence with the WTO in the field of intellectual property, does not want a re-run of the crises it faced several decades ago with the US.

None of this, however, changes the need for developing countries to begin a debate within WIPO about the effects on development of the continued globalisation of intellectual property norms, especially for LDCs. The key to having a more constructive influence in WIPO on development issues lies in much higher levels of co-ordination than currently exist amongst ministries within developing countries and sending different kinds of experts along to the meetings. Brazil, for example, at the last TRIPS Council meeting sent delegates from its health ministry. Given the importance of WIPO in the international standard-setting process developing

⁶³ Deepa Narayan et al, *Voices of the Poor: Can Anyone hear Us?*, World Bank, OUP, NY, 2000, 53.

⁶⁴ By way of example see the sometimes stinging critiques of India’s participation in the WTO system in VR Krishna Iyer, O Chinnappa Reddy, DA Desai, Rajinder Sachar, *Peoples’ Commission On GATT*, Centre for Study of Global Trade System and Development, New Delhi, 1996.

countries should adopt a similar sort of strategy with respect to WIPO, sending regulatory experts from different areas such as health, environment and agriculture. This is a long term strategy. Changing the quality of intellectual property regulation in WIPO to produce better outcomes for LDCs depends on changing the nature and power of the epistemic community that currently shapes that regulation (see conclusion 15 in Annex 2).

15. NGOs - re-thinking strategy

NGOs have been the single most important factor in raising the issue of the impact of international intellectual property standards on development issues such as health, food and agriculture. In many ways it has been through their efforts that TRIPS has become symbolic of the problems of globalisation and of the WTO itself. As one USTR official observed NGOs, through the medicines campaign especially, have “got prime ministers and presidents talking about TRIPS”.

However, to remain effective in the long run on intellectual property issues NGOs will have to become more engaged in the intellectual property policy process itself. Amongst other things, this means gaining membership of those policy advisory committees that inform the thinking of key national patent offices. Typically, such committees draw their members from the biggest users of the patent system, the multinational companies as well as patent law experts. The result is a policy community dominated by a narrow, insular, technocratic culture that is disconnected from the broader welfare issues raised by patent monopolies and that fails completely to take into account development issues. It is from this community that WIPO draws the individuals who sit on the various expert committees that draft new standards for adoption at diplomatic conferences. WIPO, through its recruitment of experts, promotes and sustains internationally a jurisprudence of intellectual property that isolates intellectual property from use as a regulatory tool in relation to development issues in health, the environment, food and agriculture. It is an Anglo-American-German jurisprudential game in which developing countries are the most marginal of marginal players.⁶⁵

⁶⁵ When developing countries do depart from western models as in the case of the OAU model law they encounter the disciplinary force of WIPO. The GRAIN website contains an interesting account of what happened when WIPO and UPOV had commented on the OAU's model law.

“In his immediate reply to the submissions of WIPO and UPOV, Dr Tewolde Berhan Egziabher, head of Ethiopia's Environmental Protection Authority, reminded everyone that the two agencies were invited by Africa's Trade Ministers to contribute to the furtherance the OAU process. They were not invited, he said, to change the essence of the Model Law. After all, the central features of the Model Law -- those relating to community rights and access to genetic resources -- had already been approved at the highest level: by the Heads of African States.”

It is vital that NGOs seek membership of these committees both nationally and internationally as part of a long term engagement with the international standard-setting process. To date, NGOs have neglected this longer term game. The NGO MSF, for example, which has been so important in the campaign over access to medicines has a seat at WIPO, but to date has not occupied it.⁶⁶ Elsewhere Drahos and Braithwaite have drawn attention to the need for NGOs to shift from the romance of campaigns to the dullness of occupying seats on the many committees that work on international standards, including intellectual property (see also conclusion 6 in Annex 2):⁶⁷

Consumer groups in many countries today do have the clout to demand seats on the policy and consultative committees of patent offices, copyright offices and trade mark offices, seats that are currently occupied almost exclusively by business, copyright, patent and trade mark attorney interests. It is not enough for NGOs to make submissions to these committees or to have a token representation. Submissions without advocates on decision-taking committees tend to become part of filing history rather than committee action. NGOs can set themselves the objective of campaigning in a classic hard-cop-soft-cop fashion for reform of patent or other intellectual property offices. The soft cop NGOs can take their seats on policy committees within the walls of the patent office seeking to persuade changes in patent administration: (1) that demand resistance to the strategic litigation games of the multinationals; (2) that demand effective application of the tests of patentability in the public interest; (3) that demand that human rights, such as rights to health and indigenous rights, be taken seriously in patent determinations; (4) that insist on denial of patents to companies which do not adequately document the know-how required to reproduce the invention once the patent has expired so generic manufacturers can exploit the patent and so new generations of innovators can stand on their shoulders. The hard cop NGOs can attack the patent office (and indeed the soft cop NGOs) from outside the walls, accusing them of regulatory capture. Experience in other domains with combating regulatory capture by big business, for example with environmental regulation, suggests that persistence over a long period with this strategy of hard cop and soft cop NGOs competing for political influence is what produces public-regarding reform.

16. Developed countries

Obviously developed countries can lend support to some of the initiatives described above. Reforming patent office regulation with a view to integrating it into a broader social regulatory agenda should be high on the list of priorities, as should be a review of WIPO's development role. Similarly, lending support for the admission of the CBD Secretariat to the TRIPS Council as an observer would help to support developing country policy objectives on the overlap between intellectual property and biodiversity.

⁶⁶ Personal communication with MSF.

⁶⁷ P. Drahos and J. Braithwaite, *Information Feudalism*, (forthcoming, 2002), ch. 12.

More fundamentally, developed countries might look to the behaviour of their own trade negotiators when it comes to dealing with LDCs. World Bank reports on growth, globalisation and the poor are full of ideas about sustainable development, good governance, social and human capital, civil society institutions and so on. The theories and policy proposals to be found in these reports all begin to sound glib and rhetorical when set along aside the reality of trade negotiations. In the trade negotiator's world careers are built by bringing back to capitals deals containing trade gains. If that means inflicting trade losses on others so be it. The trade negotiator listens to the concentrated voices of organised business, not the voices of the poor, because those concentrated voices whisper siren-like of trade gains to be won and losses to be avoided. Hard tactics are used by US and EU negotiators to drive hard bargains with developing countries. Negotiators from LDCs can be threatened with loss of LDC status if they do not co-operate, developed country negotiators who do not toe the line find that their Ministers back in the capitals are approached to sort out the problem and Caribbean negotiators subject to divide and conquer tactics find that "you never actually know who in the room is really with you." In this sub-culture of threat and coercion developing country negotiators do not retaliate, not because of any inherent moral superiority, but because there is no reciprocity of coercive bargaining power:

The US can credibly threaten trade sanctions, foreign aid withdrawal, flight of investment and refusal to transfer technology to an African state. The African state cannot credibly threaten the US with any of these things.⁶⁸

The US leads in these kinds of tactics and the EU plays the role of quiet supporter, complaining about the use of US aggressive unilateralism during the 1980s but sending in its negotiating teams to obtain a bilateral IP deal after US teams had finished with a developing country under the 301 process. The EU like the US has its version of 301 and like the US it pushes and prods developing countries into TRIPS plus agreements.⁶⁹

States, of course, are not unitary actors. Those working in development, environmental and health ministries of the EU and US probably have a much better understanding of the way in which intellectual property standards are likely to impact on the welfare of the poor in LDCs and what to do about it. But these ministries are not the dominant ones in a trade negotiation. As a trade round wears on they become even more marginalised players; trade ministries with their culture of hard bargaining become the voice of the unitary state. The upshot of this trade culture are deals on intellectual property that do not in any real sense take into account the welfare impacts on the poor in developing countries. For so long as this situation prevails in developed countries Jayashree Watal is probably right to conclude that developing countries will have to "learn to play by the new rules of the game".⁷⁰

⁶⁸ P. Drahoš and J. Braithwaite, *Information Feudalism*, (forthcoming, 2002), ch. 12.

⁶⁹ For details see GRAIN in co-operation with SANFEC, "'TRIPS-plus" through the back door: how bilateral treaties impose much stronger rules for IPRS than the WTO', July 2001, available from <http://www.grain.org>.

⁷⁰ Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, OUP, New Delhi, 2001, 47.

SUMMARY OF RECOMMENDATIONS

1. Developing countries should use the Council for TRIPS to create a practice of asking states to explain bilateral departures from multilaterally agreed IP standards.

2. Developing countries should use the Trade Review Policy Mechanism to review distortions in trade being caused by excessively high intellectual property standards.

3. Trade policy bodies/institutes within developing countries should investigate the feasibility of forming a developing country Quad along the lines suggested in the paper.

4. An independent review of WIPO's current private sector income and development spending should be undertaken with a view to assessing the possibility of WIPO playing a role in the UN Programme Of Action For The Least Developed Countries For The Decade 2001-2010.

5. (i) Developing countries should review their participation in the WIPO standard-setting process with a view to increasing their participation in the expert groups and broadening the range of experts they send to WIPO meetings to include, for example, experts in health, environment and agriculture.

(ii) Developed countries could assist by funding aid projects aimed at establishing structures for cooperation amongst ministries/regulators which have expertise to contribute on development aspects of intellectual property issues within a given developing country.

6. Developed countries should review the operation of the policy advisory committees that advise their patent offices with a view to significantly increasing the participation of members of civil society in those committees.

7. Developed countries should assess their conduct of trade negotiations with developing countries with a view to ensuring that development objectives remain a priority during those negotiations.

ANNEX 1.

Definitions of Actors, Mechanisms and Principles

Actors

Organisations of States: Organizations formed by groups of states that meet together and employ staff to explore common agendas (e.g. the World Bank, the OECD, treaty secretariats).

States: Organized political communities with governments and geographical boundaries recognised by international law (e.g. France). For many analytic purposes in this book, it is more useful to disaggregate the state into component parts, such as the Ministry of Trade.

Business Organizations: Organizations formed by firms and/or business organizations that meet together and employ staff to explore common agendas. They can be national (e.g. US Chamber of Commerce) or linked into international organizations (e.g. International Chamber of Commerce).

Corporations: Organizations formed by actors who invest in them as commercial vehicles (e.g. General Motors, the US Postal Service).

NGOs: Organizations formed by citizens and Non-Government Organizations (excluding business organizations) that meet together and employ staff to explore common agendas. They can be international (e.g. Consumers' International) or national (e.g. British Standards Institute).

Mass Publics: Large audiences of citizens who, while they might not meet together or employ staff, can express in unison a common concern about a regulatory question.

Epistemic Communities of Actors: Large audiences of state, business and NGO actors who do meet sporadically with one another and share a common regulatory discourse based on shared knowledge, sometimes technical knowledge requiring professional training.

Key Principles

Lowest Cost Location: The prescription of economic activity being located wherever on the globe and under whatever regulatory rules it can be transacted most cheaply.

World's Best Practice: The prescription of economic activity being conducted under rules that substantially exceed the requirements set by present practice or regulation.

Liberalization-Deregulation: The prescription of reducing the number, stringency or enforcement of rules.

Strategic Trade: The prescription of designing the content and stringency of regulation so as to advantage national exporters or importers over foreign exporters or importers.

Rule Compliance: The prescription that companies ought to see legality as exhausting their obligations; to go as far as the rules require in, for example, reducing pollution, but no further.

Continuous Improvement: The prescription of doing better every year than the previous year in terms of a regulatory objective like protecting the environment, even if the requirements of the law were exceeded in the previous year.

National Sovereignty: The prescription that the nation state should be supreme over any other source of power on matters affecting its citizens or territory.

Harmonization: The prescription that different levels of government and different governments should set the same rules.

Mutual Recognition: The prescription that different levels of government and different governments should recognise one another's rules, permit economic activity performed under one another's rules, even if the rules are different.

Transparency: The prescription that any person should be able to observe regulatory deliberation or discover with ease the outcomes of the deliberation and their justifications.

National Treatment: The prescription that a state should regulate foreign corporations according to the same rules as national corporations.

Most Favoured Nation: The prescription that any regulatory benefit accorded to importers or exporters from one nation should be accorded to importers or exporters from other nations.

Reciprocity: The prescription that if one nation grants a regulatory benefit to importers or exporters from a second nation, the second nation should grant the same regulatory benefit to the first nation regardless of the regulatory benefits it accords third nations.

Mechanisms

Military Coercion: Globalization of regulation achieved by the threat, fear or use of military force.

Economic Coercion: Globalization of regulation achieved by the threat, fear or use of economic sanctions.

Systems of Reward: Globalization of regulation achieved by systematic means of raising the expected value of compliance with a globalizing order (as opposed to coercion which reduces the expected value of non-compliance).

Modelling: Globalization of regulation achieved by observational learning with a symbolic content, learning based on conceptions of action portrayed in words and images. The latter cognitive content makes modelling more than mere imitation, where imitation means one actor matching the actions of another usually close in time.

Reciprocal Adjustment: Globalization of regulation achieved by non-coerced negotiation where opposite parties both agree to adjust the rules they follow. This is conceived as cooperative adjustment where reciprocation occurs without coercion, as where all parties agree to drive on the left side of the road to avoid crashes.

Non-Reciprocal Coordination: Non-reciprocal coordination occurs when movement toward common rules occurs without all parties believing they have a common interest in that movement. One party believes the new rule is in their interest, but this belief is not reciprocated. Non-reciprocal coordination often involves non-reciprocity within an overall reciprocity of issue linkage: A wins on this and loses on that; B loses on this and wins on that.

Capacity Building: Globalization of regulation achieved by helping actors get the technical competence to satisfy global standards, when they wish to meet them but lack the capacity to do so.

Other Concepts Frequently Used in the Analysis

Hegemony: Globalization of regulation achieved by other actors following the lead of the dominant power because these other actors define their own interests in terms of those of the dominant power (that is, without the necessity of threat or offer of reward by the hegemonic power).

Regime: “Principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area” (Krasner, 1982: 185).

ANNEX 2.

Global Business Regulation: Summary of Conclusions

Powerful Actors

1. The US state has been by far the most influential actor in accomplishing the globalization of regulation. Today the Commission for the European Community (the EC) is beginning to approach US influence. When the US and EC can agree on which direction global regulatory change should run, that is usually the direction it does run. Japan's influence is remarkably weak.

2. States have always been objects as well as subjects of regulation, regulators and regulatees. States were regulated by the Fuggers in the sixteenth century, the British East India Company in the eighteenth century, the Rothschilds until the 1930s, and today by business organizations like the Big Six accounting firms, IATA, the Société Générale de Surveillance, Moody's, Standards and Poors plus international organizations like the IMF and World Bank. In 1999, the British mercenary corporation, Sandline International, in a dispute over its involvement in the war in Bougainville, took legal action to freeze various overseas funds of the Papua New Guinea government in order to chill its capacity for overseas borrowing.

3. The most recurrently effective actors in enrolling both the power of states and of the most potent international organizations (such as the WTO and IMF) are large US corporations.

4. The International Chamber of Commerce is an important actor in the globalization of regulation because in addition to having an interest group strategy for shaping regulation, for seventy years it has also had a private ordering strategy based on recording its members' customary practices and releasing them in the form of model rules and agreements.

5. Individual legal entrepreneurs sometimes exert enormous power by selling a regulatory idea to the CEO of a large company and persuading the CEO to enrol the power of a pivotal state actor like the President of the United States. Many of the individuals listed in the Acknowledgments do not see themselves as passive puppets of inexorable global forces, but as deft puppeteers, capable of pulling strings to move big players that remain passive until activated by someone with the imagination to inspire them with a vision of where their interests lie.

6. Most influence to shape regulation globally is accumulated in thousands of obscure technical committees of international organizations like the ITU and private standard-setting bodies like the ISO.

7. The last two decades of the twentieth century has seen the rise of a "new regulatory state", where states do not so much run things as regulate them or monitor self-regulation. Self-regulatory organizations frequently become more important than states in the epistemic communities where debates over regulatory design are framed.

The Role of Coercion

8. Until the end of World War II, military coercion is a surprisingly important mechanism of the globalization of business regulation.

9. Since World War II, economic coercion has been much more important. It is effectively only available to the strong, however. Even the United States is extremely reluctant to achieve regulatory objectives by the imposition of trade sanctions and rarely does so. Actors other than the US do not apply trade sanctions except in extraordinary cases like South Africa because they consider them ineffective and fear retaliation. “Watch-listing” seems to work for the US as a Sword of Damocles that is rarely lowered. A routine where the US Congress is a hard cop threatening trade sanctions and the Executive Branch a soft cop resisting them has served US objectives well, however. Economic coercion is much more widely used in the form of strong states cutting off foreign aid to weak states, the IMF and development banks imposing conditionality on loans to struggling economies and insurers refusing coverage or imposing punitive premiums.

10. The more profound the hegemony of a state, the less it has to resort to the threat or use of economic sanctions, yet the more the compliance it secures is grounded in the fear of that possibility.

11. Coercion is more widely used and generally more cost-effective than reward for actors who want to enlist compliance with a global regulatory regime. The main reason is that threatening and withdrawing coercion can work well while promising and renegeing on rewards does not. Contextual diplomatic wisdom is especially important to understanding what works here.

Forum Shifting

12. When the post-World War II US has not been able to get multilateral agreement on what it wants, it either attempts to shift decisionmaking to an alternative multilateral forum or shifts to a sequence of bilateral deals with other key states. These accumulated bilaterals often later set the framework for a new attempt at multilateral agreement.

13. There are three basic strategies of forum shifting around international organizations: (a) moving a regulatory agenda from one organization to another; (b) abandoning an organization; and (c) pursuing the same agenda in more than one organization. The first two strategies are only widely used by the US, and have only been practically available to the US, the EC and (formerly) the USSR. Forum blocking, preventing an international organization from acting as a forum for regulatory development in the first place, is a fourth strategy used by major players.

14. Strong states forum shift to fora that embed the principles most valued by them for the regulatory problems at issue. For example, the principle that knowledge is the “common heritage of mankind” was defeated by shifting intellectual property issues from UNESCO and UNCTAD to the World Intellectual Property Organization and the GATT where knowledge was treated as property subject to trade principles.

The Role of Epistemic Communities

15. To enrol the support of strategic actors for regulatory change, it is usually necessary to work epistemic communities. The OECD is the single most important builder of business regulatory epistemic communities. Epistemic communities are more than transgovernmental elite networks. They include technically competent regulatory experts from science, professions, business and NGOs.

The Role of Principles

16. The globalization of business regulation proceeds through contests of principles. Negotiation occurs mostly at the level of principles because it is too complex for each nation to put its national rules on the table as a negotiating position.

17. Transparency is the principle that has most consistently strengthened in importance in regulatory debates. It is an emergent property of globalization, a meta-principle in the sense of revealing the operation of all other principles.

18. While national sovereignty is a principle still with enormous bite, it has been the principle most in retreat in the face of the advance of harmonization and its allied principle, mutual recognition.

19. The entrenchment of *national treatment* and *Most Favoured Nation* in the trade agreements of the Uruguay Round of the GATT has inched these non-discrimination principles toward a formal juridical triumph in the world system.

20. Often the more dominant a principle becomes in a regime, the more viable a niche market is created for the principle in opposition to it. For example, the influence of the principle of *world's best practice* in shipping creates a niche market for flags of convenience with low standards; *transparency's* dominance on the New York Stock Exchange creates a niche for lowest cost listing on Asian exchanges (and indeed a compromise niche at the Australian Stock Exchange, with middling transparency).

21. Principles are often used symbolically in global regulatory regimes as part of a rhetorical strategy to engender quiescence. This can backfire when mass publics are stirred out of quiescence by a disaster the regime fails to prevent; then the principles may form an expansive framework for instrumental rules. Indeed, sequences of disasters have ratcheted up a number of symbolic framework agreements over time.

22. *Mechanisms* of globalization are more potent as influences on action if they are linked to *principles* which give symbolic meaning to the direction of influence. Obversely, principles depend on mechanisms like economic coercion to push start them to the point where they have a momentum of their own.

23. Empirically, the rule of law is not as influential a principle in global regulatory regimes as it is in liberal nations; indeed, it is endlessly trumped by the principles of reciprocity and conditionality at institutions like the WTO and the IMF respectively. International regulation is not characterized by a rule of laws which constrain but by a rule of principles. Under the rule of principles, principles are weighed and balanced.

24. Because it is normally too complex to negotiate a new regulatory regime as a contest of rules, regimes mostly start as a framework of principles. Framework agreements to enshrine principles disadvantage poorly resourced parties less than interminably complex negotiations over rules. Paradoxically, contests of principles render conflicts sharper, clearer and more accessible than conflicts at the level of systems of rules.

The Role of Mechanisms

25. Military coercion, economic coercion, systems of reward, reciprocal adjustment, non-reciprocal coordination, capacity building and modelling have all been mechanisms of some importance to the globalization of regulation. There is no master mechanism and little prospect of a parsimonious rational choice account explaining all.

26. Modelling, a mechanism that may be more about identity than rational choice, has been the most consistently important mechanism. Histories of globalization have a complexity of networked action which means that few, if any, actors have the synoptic capacity to be rational in the way rational choice theory would have it. They dither in a confusion of complexity they cannot grasp, which is why they can be led by entrepreneurs who enlist them to a plausibly interest-enhancing path.

27. *Reciprocal adjustment* is a more important mechanism of globalization of regulation when the externalities imposed by firms of one state on other states are reciprocated by externalities imposed by the other states on the first state (e.g. the US and Canada polluting the Great Lakes). Where externalities are non-reciprocal, issue linkage can constitute a contract zone so the mechanism of *non-reciprocal coordination* can deliver globalization.

Regulation and the Nature of Capitalism

28. The Issuance of government bonds in the eighteenth century began processes of securitization and corporatization of the world, which combined with its progressive contractualization, have given global capitalism its regulatory character.

29. Contemporary capitalism has shifted from industrial to information capitalism. Information capitalism was constituted by regulated transparency and a legal commodification of knowledge. Abstract objects such as patents were thus created as the most important kind of property of the new capitalism. Hegemony in the world system shifted from the control of territory, to industrialization (and the control of capital and labour it implied), to the control of abstract objects.

30. World Trade Organization enforcement of a positive set of harmonized intellectual property standards is unique. A crucial question for the future is whether other domains of regulation such as environment will be accorded the same positive linkage to the trade sanctions of WTO Panels.

WEBS OF INFLUENCE AND CITIZEN SOVEREIGNTY

Weak Actors and Webs of Influence

31. There are paradoxes of sovereignty in the growth of global regulation. Sometimes when national sovereignty and the sovereignty of elected parliaments are eroded, the sovereignty of ordinary citizens is enhanced.

32. Realist international relations theory gives a poor account of our data. State power is best understood as constituted by and helping to constitute webs of regulatory influences comprised of many actors wielding many mechanisms.

33. Histories of globalization are complex. They cannot be understood in terms of the agency of single actors using single mechanisms. Rather, as difficult an accomplishment as the globalization of regulation seems to require a web of influences - many actors deploying many mechanisms. Weak single strands of webs of influence often become strong by being tied to other weak strands.

34. International agreement sometimes arises when united minority factions from many states (working with NGOs) defeat majority factions. While majority factions "control" states, if they fail to work together with majority factions from other states they can be defeated by their minorities joined in cross-national alliance. Often power is not a matter of imposing a sovereign will, but of enrolling the cooperation of chains of actors.

35. Attempts by developing countries and NGOs to exercise influence by organizing independently of the business-dominated epistemic communities have failed. For example, the influence of the G-77 has declined and the forum it captured, UNCTAD, has been substantially neutralized.

36. NGO influence has been greatest when it has captured the imagination of mass publics in powerful states. The most important instances have been the temperance, anti-slavery, labour, womens' and environment movements. We have found Ralph Nader to have had a wider influence across a range of regimes than any other individual in the history of the globalization of business regulation.

Countering Forum Shifting

37. The weaker player is best to rely on the insight of the nested game to increase complexity for the stronger player when it forum shifts. This is accomplished by linking the game played in an abandoned or ignored forum that embeds an opposed principle to the game in the forum the strong player has chosen. For example, players like Ralph Nader are linking the intellectual property game of extending pharmaceutical patents to the public health game of affordable health care and the competition policy game of minimizing monopoly. Principles, in sum, can be used strategically by weaker actors to increase levels of nested complexity for stronger actors. This move can reduce the returns to the strong from forum shifting.

38. The history of failed attempts to forum shift from the International Labour Organization reveals that forum shifting may be more difficult from an organization with a more tripartite constitution.

The Role of Dialogue

39. Webs of coercion are at the disposal of the strong but not the weak (which allows the strong to exercise domination or hegemony without so much as hinting at coercion). Webs of dialogue are available to both (though access and domination are still superior for the strong). A consolation for the weak is that webs of dialogue are both more commonly used and more often effective than webs of coercion. Our informants prefer to rely on webs of dialogue because they believe coercion disrupts relationships in regulatory diplomacy.

40. In addition to the facilitation of modelling, dialogue builds regimes through defining issues as a concern, creating contracting spaces where complex interdependency can induce cooperation, constituting normative commitments, nurturing habits of compliance that are then institutionalized into bureaucratic routines, communicating informal praise and shame that are then institutionalized and building capacity. When many different types of actors are mobilizing many dialogic mechanisms of this sort, both impressive regime building and impressive compliance with them have repeatedly been demonstrated.

41. Webs of dialogue build both top-down and bottom-up globalization sequences. *Top-down*: definition of a problem, agree on principles to solve it, agree on rules, enforce rules. *Bottom-Up*: definition of a problem, some firms change practice to solve the problem, others model the new practice, globalization of the new custom, globalization of law in the shadow of custom.

The Role of Modelling

42. Model mongers float a variety of models until they find one that catches opponents off balance through striking a resonant appeal to the sense of identity of a people. Because a model touted by an NGO can frame a debate, clever model mongering can deliver the weak a decisive advantage over the strong.

43. Theoretically, the possibility of the weak prevailing over the strong in the world system is illuminated by marrying Latour's theory of power and enrolment and Putnam's theory of global politics as a two-level game (or as an even more nested game). A further marriage of these with a sociological theory of modelling in the world system reveals surprisingly potent mechanisms for the weak prevailing over the strong.

44. There are recurrent proactive and reactive sequences of strategic micro action to secure global regulatory change:

Proactive Sequence

Individual entrepreneurship
with regulatory innovation



Enrolment of organizational
power



Modelling the regulatory
innovation



Global standardizing of
the innovation



Early-mover organizations
suffer regulatory costs



Early-movers lobby for
globalization of costs



Early-movers get
adjustment and technology
transfer benefits from being
an early-mover

Reactive Sequence

Disaster



Media Hype



Mass Publics want
regulatory innovation



Individual entrepreneurs
pull regulatory innovation
out of drawer



Modelling the regulatory
innovation



Global standardizing
of the innovation



National
publics
placated



Global
publics
placated

ANNEX 3

Table 2.

US BILATERALISM ON INTELLECTUAL PROPERTY

	BIP ^o	BIT	301 ^{oo}	WTO Status**
Albania	1992	1998		M
Argentina		1994	Y	M
Armenia	1992	1996	Y	O
Azerbaijan	1995	1997*	Y	O
Bahrain		1999*	Y	M
Bangladesh		1989	Y	M (LDC)
Belarus	1993	1994*	Y	O
Bolivia		1998*	Y	M
Bulgaria	1991,1994	1994	Y	M
Cambodia	1996			A
Cameroon		1989		M
China	1992, 1995, 1996		Y	M
Congo (formerly Zaire)		1989		M
Congo (Republic of)		1994		M (LDC)
Croatia	1998	1996*		M
Czech Republic	1990	1992	Y	M
Ecuador	1993	1997	Y	M
Egypt		1992	Y	M
El Salvador		1999*	Y	M
Estonia	1994*	1997	Y	M
Georgia	1993	1997		M
Grenada		1989		M
Honduras		1995*	Y	M
Hungary	1993		Y	M
India	1993		Y	M
Jamaica	1994	1997	Y	M
Jordan	2000*	1997*	Y	M
Kazakhstan	1992	1994	Y	O
Korea	1986, 1990	1989	Y	M
Kyrgyzstan	1992	1994		M
Laos	1997*			A
Latvia	1995	1996	Y	M
Lithuania	1994*	1998*	Y	M

Moldova	1992	1994	Y	M
Mongolia	1991	1997		M
Morocco		1991		M
Nicaragua	1997	1995*	Y	M
Panama	1994	1991	Y	M
Paraguay	1998		Y	M
Peru	1997		Y	M
Philippines	1993		Y	M
Poland		1994	Y	M
Romania	1992	1994	Y	M
Russia	1992	1992*	Y	O
Senegal		1990		M
Singapore	1987		Y	M
Slovakia		1992		M
Sri Lanka	1993	1991		M
Surinam	1993			M
Taiwan	1992, 1993		Y	
Tajikstan	1993		Y	
Thailand	1991		Y	M
Trinidad and Tobago	1994	1996		M
Tunisia		1993	Y	M
Turkey		1990	Y	M
Turkmenistan	1993		Y	
Ukraine	1992	1996	Y	O
Uzbekistan	1994	1994*	Y	O
Vietnam	1997		Y	O

Notes

This Table was compiled from information available on the USTR and WTO websites which were last visited on 29 August 2001.

◦ BIP includes both agreements specifically on intellectual property rights and trade agreements containing provisions on intellectual property rights. The information here may be incomplete.

◦◦ A country with a Y in this column has had a 301 action brought against it or been listed, reviewed or observed under the 301 process. The information here may be incomplete.

* Signed in this year but had not yet entered into force as at the beginning of 2000.

** The countries listed in this column are developing countries Members of the WTO, WTO Members undergoing a transformation from centrally planned economies to free-enterprise economies or least-developed country Members and therefore entitled to the benefits of the transitional provisions in Articles 65 and 66 of TRIPS.

M = Member

M (LDC) = Least-Developed Country Member

A = LDC in the process of accession to the WTO

O = Observer government which must start accession negotiations within 5 years of becoming an observer.