Carrots and Sticks: Evaluating the Tools for Securing Successful TRIPs Implementation

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[T]he major issue around IPR [intellectual property rights] in developing countries has shifted in the past decade from whether to adopt stronger laws protecting IPR to whether, and if so, how, to enforce the laws in a way that will actually decrease IPR infringement. That is not to say that there will be no more legal and regulatory developments. New legislation and regulations will certainly emerge as TRIPs deficiencies and loopholes are fixed and as new obligations kick in when some transition periods expire in the next year. But the more interesting question will be which developing countries will manage to effectively enforce intellectual property rights and what the consequences of their actions, or inactions, will be. ¹

The Trade Related Aspects of Intellectual Property Rights agreement (TRIPs)² was a significant milestone in the development of an international intellectual property rights system – establishing minimum standards that all signatories are required to integrate into their domestic laws.³ Despite its call for full implementation by a majority of its signatories by 2000,⁴ there remains much

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³ Id., Part III, Art. 1, at 1213.
⁴ All developed member nations were required to fully integrate the agreement into their domestic law by
progress to be made before this goal is achieved. Since the adoption of TRIPs, many
developing countries have failed to fully embrace and implement the agreement’s
terms. The imposition of strong intellectual property rights systems on developing
countries raises practical, political, social, and economic challenges that threaten the
growth and development of their economies and societies. Conversely, developed
nations, who are often pressured by their intellectual property-based industries, are
more eager to see the full protections of TRIPs actively enforced. The United States
and the European Union, in particular, were both instrumental in the design and
adoption of the TRIPs agreement and remain leaders in the effort to achieve its full
enactment.

There are a number of both positive and negative incentives (“carrots” and
“sticks”), which the United States and European Union have employed to spur
hesitant developing countries toward full implementation of the TRIPs agreement.
However, there is considerable evidence that the “carrots” offered by these
developed nations may not come to fruition, at least not in the timeframes or at the
magnitude originally expected. Therefore, the degree to which developing
countries will implement TRIPs will depend largely on four factors. First, the more
advanced a developing country’s economy is and the more it desires to enter into and
expand in the international marketplace, the more likely the country will voluntarily

January 1996, one year after the agreement becomes effective. Id., Part VI, Art. 65, at 1222.
Developing countries were given a longer transition period, requiring full adoption by January 2000. Id.
Those transitioning to a fair-market system and currently struggling to implement an intellectual property
rights system are also allowed until January 2000 to comply. Id. Least developed countries are required
to enact TRIPS by 2006. Id., Part VI, Art. 66, at 1222. A subsequent agreement has extended this
deadline for terms related to pharmaceutical product patents until 2016. World Trade Organization,

5 Under the WTO, developing countries are self-determined and least developed nations are based on the
United Nations Conference on Trade and Development (UNCTAD). WTO Development Gateway,
Introduction to the WTO and Developing Countries, Definitions: Who are the developing countries in
the WTO?, at http://www.wto.org/english/tratop_e/develop_e/d1who_e.htm (last visited Jan. 1, 2005);
Least Developed Countries, at http://www.unctad.org/Templates/WebFlyer.asp?intItemID=2161&lang=1
(last visited Jan. 1, 2005) (providing a list of those countries currently designated as “least developed” by UNCTAD).
Because the impacts and factors related to both developing and least developed nations are similar in nature, the term
“developing countries” in this article refers to both developing and least developed nations as recognized
by the WTO unless otherwise noted. With respect to this article, what differs between developing
countries and least developed nations is the degree to which these impacts and factors are prevalent; least
developed nations likely will feel the negative effects to a greater degree than more developed countries.

6 See infra Part II.B (examining the hurdles developing nations face in implementing TRIPs).

7 Peter Drahos, Developing Countries and International Intellectual Property Standard-Setting 11-12 (Commission on Intellectual Property Rights, Study Paper 8, 2001); http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf; Robert Weissman, A
Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property
Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries, 25 U. Pa. J.
INT’L ECON. L. 1079, 1085-90 (2004). This desire to achieve full implementation is, of course, tempered
by the actual impact of each specific TRIPs term as well as subject to a nation’s individual interpretation
of what each term means.

8 Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political
Constraints, 98 AM.I. INT’L L. 247, 250 (2004); Weissman, supra note 7, at 1085-90. See also infra Part
III.B (discussing the efforts of the United States in enforcing TRIPs).

9 See infra Part III.A (discussing the “carrots,” including trade incentives and technical assistance). See
infra Part III.B (discussing the “sticks,” including trade sanctions and dispute resolution processes).

10 See infra Part III.A (examining the deficiencies of incentives used to encourage developing countries
to support and implement TRIPs).
move to implement TRIPs terms. Second, the degree of implementation will depend on whether the “sticks” used by developed nations will create enough perceived or actual harm to outweigh the economic, social, and political costs resulting from full implementation of TRIPs. Third, implementation efforts will depend on whether the area(s) of intellectual property rights upon which the United States and other developed nations focus enforcement efforts impact significant industries or sectors of a given developing country’s economy. Lastly, the degree to which developing countries can fight back, either through existing enforcement mechanisms or the creation of effective coalitions, will also impact the extent to which TRIPs is successfully implemented.

Given the relative economic strength of developing countries to developed nations, particularly the United States and the European Union, it is likely that the economic ramifications of non-compliance will outweigh the costs of implementation or defiance by developing countries. Furthermore, the history of TRIPs thus far indicates that it is unlikely that developing countries will successfully establish the sustained coalitions necessary to achieve more than small, targeted victories over developed nations. Consequently, the success achieved through TRIPs will likely be driven by the speed and direction of enforcement efforts exercised by developed nations, particularly the United States and European Union.

This article will explore the “carrots” and “sticks” currently being used by developed nations, specifically the United States, and whether they can bring about the successful implementation of the TRIPs agreement. Part I of this article provides background on the motivations behind the TRIPs agreement and its objectives. Part II explores the degree to which TRIPs has been implemented and the primary obstacles to full implementation. Part III focuses on the efficacy of the various “carrots” and “sticks” employed by United States. Part IV explores the potential for developing countries to manipulate the current environment to better serve their interests. Part V discusses the likely future of TRIPs and the potential for successful implementation, given this environment.

I. THE FORMATION AND GOALS OF TRIPs

TRIPs was adopted in 1994 under the General Agreement on Tariffs and Trade (GATT) as a means of establishing a system “to promote effective and adequate protection of intellectual property rights, and to ensure that . . . enforce[ment of] intellectual property rights do[es] not . . . become [a] barrier[] to legitimate trade.” To achieve this goal, TRIPs established minimum standards for the protection of intellectual property rights, including enforcement measures, which all World

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11 See Steinberg, supra note 8, at 275 (defining the relative economic strength between developing countries and the United States and European Union); infra Part II.B (describing the costs to implement TRIPs); infra Part III.B (describing the enforcement mechanisms employed by developed nations and ramifications of non-compliance).
12 See infra Part IV.C (exploring the difficulties in building and sustaining coalitions to withstand pressure from developed nations).
14 TRIPs, supra note 2, at 1198.
15 TRIPs, supra note 2, Part II, at 1201-13. TRIPs establishes minimum standards such as length and
Trade Organization (WTO) member nations must incorporate into their domestic intellectual property rights laws. In addition, as an element of the GATT, TRIPs integrated the use of the WTO dispute resolution process as an international enforcement mechanism. This dispute resolution process allows nations to compel fellow WTO member nations to demonstrate that they have adopted and are enforcing TRIPs-compliant laws as well as legitimizes the use of trade sanctions as a repercussion for failing to do so.

However, while the stated TRIPs goal is the development of an international intellectual property rights system that does not hinder trade activity, the motivating factors behind its establishment paint a less balanced picture. Initially, developing countries did not widely support TRIPs and, in fact, had been arguing for changes to previously existing agreements with terms addressing intellectual property rights protections. Developing countries feared the potential detrimental impact to their developing economies that could emerge from rigorous intellectual property rights protection.

Developed nations, on the other hand, particularly the United States and European Union, took great pains to ensure the adoption of TRIPs. Many view TRIPs as the result of coercive action on the part of the United States to force reluctant developing countries to support an agreement they did not fully understand by dangling before them technology- and agricultural-related trade incentives, as well as implicit threats of trade sanctions. The efforts of developed nations, especially the United States, were fueled by the concerns of domestic industry sectors, such as breadth of protection for copyrights, trademarks, geographical indicators, industrial designs, patents, layout designs, protection of undisclosed information, and anti-competitive practices in contractual licenses, as well as domestic enforcement mechanisms. Id.

See Drahos, supra note 7, at 11-14 (describing the series of strategic negotiations conducted by the United States with various partners who virtually developed the TRIPs agreement with little, if any, input from developing countries).

the pharmaceutical industry,\textsuperscript{26} that suffered significant economic losses as a result of rampant international counterfeiting and piracy.\textsuperscript{27}

Given the explicit purpose of TRIPs, as well as the motivating factors behind its promotion and adoption, the success of TRIPs can be measured in two ways: (1) the establishment of a consistently enforced minimum set of intellectual property rights across WTO member nations; and (2) the significant reduction in violations of intellectual property rights held by developed nations. However, the reluctance of developing countries to adopt TRIPs and their subsequent slow and incomplete implementation of the agreement raises questions as to whether TRIPs can be successful (as defined above) and, more specifically, whether the “carrots” and “sticks” currently used by developed nations can bring about its full implementation.

II. THE SOURCES OF NON-COMPLIANCE

Determining the potential for successful implementation of TRIPs begins with an examination of the degree to which its terms have been implemented and the nature of the obstacles blocking complete implementation.

A. Degrees of Implementation

The first step in implementing TRIPs is the enactment of TRIPs-compliant domestic laws. Some believe that a majority of WTO member nations have met the requirement for enacting TRIPs-compliant written laws.\textsuperscript{28} However, a review of the notifications of compliant laws recorded in the WTO document database indicates that there are many nations that have not fully enacted TRIPs domestically.\textsuperscript{29} In

\textsuperscript{26} DRAHOS, supra note 7, at 7.  See also Weismann, supra note 7, at 1086-87 (providing a detailed description of the influence of the pharmaceutical industry in the United States).

\textsuperscript{27} Campbell, supra note 21, at 613. In 2004, the U.S. Trade Representative reported estimates of $200 to $250 billion in lost revenues to industry from counterfeiting alone. UNITED STATES TRADE REPRESENTATIVE, 2004 SPECIAL 301 REPORT 10 (May 3, 2004), http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Section_Index.htm [hereinafter 2004 SPECIAL 301 REPORT].


\textsuperscript{29} See WTO TRIPs Gateway, Notifications Under TRIPs Agreement, at http://www.wto.org/english/tratop_c/trips_e/intel7_e.htm (last visited Jan. 1, 2005) [hereinafter WTO Notification Analysis] (based on analysis of notifications (WTO Doc. Files IP/N/1/*) listed in the WTO website’s online document database as of Sept. 31, 2004). In accordance with Article 63.2, all nations must submit notification of compliance with TRIPs within the established timeframes as well as copies of relevant legislation for review by fellow WTO members. TRIPs, supra note 2, Part V, Art. 63, at 1221. The TRIPs Council’s 2000 Annual Report indicates that only 70 of the 140 WTO nations required to meet the January 2000 deadline notified the Council that at least portion of its legislation was TRIPs compliant and only sixty nations had submitted information regarding the enactment of required enforcement mechanisms. Annual Report (2000) of the TRIPs Council, WTO Doc. 00-5308 (Dec. 6, 2000), http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/IP/C/22.DOC.HTM (indicating then number of nations who provided notification); WTO Members and Observers, at http://www.wto.org/english/tratop_e/chivec_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 1, 2005) (indicating that there were 140 WTO member nations as of Dec. 31, 2000; 110 of the member nations were developed and developing countries). As of June 2004, all but three developed or developing countries had submitted at least one notification. Minutes of Meeting- June 16, 2004, WTO Doc. 04-3099 (July 19, 2004),
particular, many nations have not provided notification for laws in the areas of geographic indicators, industrial designs, and undisclosed information.\(^{30}\) Moreover, based on comments by the TRIPs Council Chair as well as a review of the United States Special 301 Report Watch Lists\(^{31}\) over the last three years, it appears that many of the laws that have been enacted are not consistent with TRIPs standards.\(^{32}\)

While the extent to which TRIPs-compliant written laws have been enacted appears debatable, it is widely recognized that enforcement efforts are not being established or effectively implemented.\(^{33}\) TRIPs requires that nations establish enforcement mechanisms to ensure that domestic intellectual property rights laws are followed and that those whose rights are infringed upon have adequate redress.\(^{34}\) These mechanisms are required to include easily navigated and effective civil and criminal procedures and remedies to enforce intellectual property rights.\(^{35}\) They

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\(^{30}\) See WTO Notification Analysis, supra note 29.

\(^{31}\) The Trade Act of 1974 was amended in 1984 to incorporate the Special 301 provision, which allowed the United States to impose sanctions on countries to enforce trade agreements. *Drahos*, supra note 7, at 14. The Trade Act was amended again in 1988 to extend the Special 301 provision to include enforcement of intellectual property rights. *Id.; 2004 SPECIAL 301 REPORT*, supra note 27, at 10. The Special 301 Report includes three watch lists that identify nations that are “deny[ing] adequate and effective protection of intellectual property rights or fair and equitable market access for U.S. persons that rely on intellectual property protection even if it is in compliance with its obligations under the TRIPs Agreement.” *Id.* See also Allison Cychosz, *The Effectiveness of International Enforcement of Intellectual Property Rights*, 37 J. Marshall L. Rev. 985, 1001-02 (2004). Once placed on the list, a nation is effectively put on notice that the United States will potentially investigate allegations of poor intellectual property rights protection, conduct dialogues to address the concerns of the United States and ultimately, if satisfactory progress is not made, initiate enforcement through the WTO or through trade sanctions. *2004 SPECIAL 301 REPORT*, supra note 27, at 10.

\(^{32}\) See TRIPs Council Minutes - June 16, 2004, supra note 28; Minutes of Meeting- Mar. 8, 2004, WTO Doc. 04-2044 (May 7, 2004), http://docsonline.wto.org/GEN_vieweviewer.asp?id=DDFDOCUMENTS/T/JP/C/M43.DOC.HTM (reflecting the Chair urging member nations to respond to questions raised by other WTO member nations after reviewing legislation that was submitted as compliant). The United States Special 301 Reports have also recognized the inadequacy of written laws in an average of 44% of the forty-three nations placed on the watch lists in each of the last three years. *See 2004 SPECIAL 301 REPORT, supra note 27; UNITED STATES TRADE REPRESENTATIVE, 2003 SPECIAL 301 REPORT (May 1, 2003), http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Section_Index.html [hereinafter 2003 SPECIAL 301 REPORT]; UNITED STATES TRADE REPRESENTATIVE, 2002 SPECIAL 301 REPORT (Apr. 30, 2002), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002/2002_Special_301_Report/asset_upload_files567_6367.pdf [hereinafter 2002 SPECIAL 301 REPORT].

\(^{33}\) Wu, *supra* note 1, at 104. See also Cychosz, supra note 31, at 985 (speaking specifically about patents); *Tom Pengelly, INT’L COUNCIL ON TRADE AND SUSTAINABLE DEVELOPMENT, TECHNICAL ASSISTANCE FOR THE FORMULATION AND IMPLEMENTATION OF INTELLECTUAL PROPERTY POLICY IN DEVELOPING COUNTRIES AND TRANSITION ECONOMIES 5 (draft report 2004), http://www.ictsd.org/pubs/ictsd_series/iprs/CS_Pengelly.pdf.*

\(^{34}\) TRIPs, *supra* note 2, Part V, Art. 63, at 1221.

\(^{35}\) *Id.*, Part V, Art. 61, at 1220.
must also include adequate border controls to contain counterfeiting and piracy.\textsuperscript{36} The United States’ Special 301 Reports indicate that there are sufficient deficiencies, both in the written laws establishing enforcement mechanisms and actual enforcement efforts by many WTO member nations.\textsuperscript{37} Over the last three years, ninety percent of the WTO member nations placed on the Special 301 Watch Lists, were listed in part because of deficient enforcement efforts.\textsuperscript{38} The types of enforcement issues raised address the full gamut of TRIPs requirements including: slow judicial processes, ineffective prosecutorial efforts, remedies that are inadequate to deter future violations, and woefully ineffective border control efforts.\textsuperscript{39} In addition, processes are slow, expensive, and cumbersome, making the use and navigation of the systems for establishing and defending intellectual property rights difficult.\textsuperscript{40}

B. Impediments to Full Implementation

WTO member nations, in particular developing countries, face significant practical, economic, social, and political challenges in implementing TRIPs provisions domestically. The largest practical challenge faced by developing countries is the development of an extensive intellectual property rights system capable of administering and enforcing the expansive nature of rights recognized under TRIPs.\textsuperscript{41} Many developing countries are hindered by both the lack of existing intellectual property laws and minimal, if any, internal legal expertise in either the legal or intellectual property fields.\textsuperscript{42} To mitigate these difficulties, many nations are relying on outside technical assistance from their fellow WTO nations, the World Intellectual Property Organization (WIPO), and other nongovernmental organizations to write portions of their laws.\textsuperscript{43} Other WTO nations are developing their laws through various governmental agencies, each working on an area of the law independently.\textsuperscript{44} As a result of these piece-meal approaches, there are often inconsistencies in the laws themselves.\textsuperscript{45}

Developing countries also lack the institutional capacity necessary to enforce the expansive intellectual property rights established by the TRIPs agreement.\textsuperscript{46}

\textsuperscript{36}Id.
\textsuperscript{37}See 2004 SPECIAL 301 REPORT, supra note 27; 2003 SPECIAL 301 REPORT, supra note 32; 2002 SPECIAL 301 REPORT, supra note 32. (Each Report identifies individual nations with poor enforcement of intellectual property rights.)
\textsuperscript{38}See 2004 SPECIAL 301 REPORT, supra note 27; 2003 SPECIAL 301 REPORT, supra note 32; 2002 SPECIAL 301 REPORT, supra note 32. (Notably, the majority of those listed were developing countries.)
\textsuperscript{39}2004 SPECIAL 301 REPORT, supra note 27 (listing countries affected by these issues, including Mexico, Argentina, India, Egypt, Philippines, Russia, Bulgaria, Canada, Costa Rica, and Romania). See also Cychosz, supra note 31, at 1001 (speaking specifically about patents).
\textsuperscript{40}2004 SPECIAL 301 REPORT, supra note 27 (listing countries affected by these problems, including India, Egypt, Israel, and Italy).
\textsuperscript{41}See CIPR, supra note 24, at 137-38.
\textsuperscript{42}Id. at 138, 141-42; PENGELLY, supra note 33, at 4.
\textsuperscript{43}CIPR, supra note 24, at 138-39; PENGELLY, supra note 33, at 8.
\textsuperscript{44}CIPR, supra note 24, at 139-40. This typically involves agencies or ministries related to health, justice, science, environment, agriculture and education. See id. at 139.
\textsuperscript{45}See id. See also 2004 SPECIAL 301 REPORT, supra note 27 (listing countries characterized by this problem, including Philippines, Korea, India, and Argentina).
\textsuperscript{46}Wu, supra note 1, at 105. See also PENGELLY, supra note 33, at 5.
Creating or even modifying an existing system, for many countries, requires an extensive policy making process that is time consuming and complex.\textsuperscript{47} In addition, the costs of establishing and administering the comprehensive intellectual property systems required under TRIPs are proportionally exorbitant for developing countries.\textsuperscript{48} One source indicates that the total cost of establishing an intellectual property regime in a developing country could range between $250,000 and $800,000.\textsuperscript{49} Given the limited resources and already overdrawn budgets of developing countries, they are often forced to choose between supporting intellectual property rights administration and enforcement efforts, and addressing the numerous and significant public welfare issues consistently faced by these nations.\textsuperscript{50} As a result of these limited resources, intellectual property rights systems in developing countries are forced to rely on minimal and highly untrained judicial and administrative staff.\textsuperscript{51} The staff often works in unsophisticated environments without the benefits of technology to support their efforts.\textsuperscript{52}

In addition to the practical impediments faced by developing countries in the drafting of legislation and the establishment of administrative systems, there are political and economic issues at play that make it difficult for governments to enact and enforce new TRIPs-compliant laws.\textsuperscript{53} Introducing new rigorous intellectual property rights that are international in scope can have devastating initial economic impacts. Protecting intellectual property that was not previously protected will result in higher prices for goods and impeded access to vital resources and production material that many industries have been accessing for minimal costs or even for free.\textsuperscript{54} While prices are rising, these new laws do not generate counteracting sources of revenue.\textsuperscript{55} In addition, enforcement of intellectual property rights will likely result in lost jobs in strong underground economies or in industries that clearly violate intellectual property rights.\textsuperscript{56} In many developing countries, these economic

\textsuperscript{47} CIPR, \textit{supra} note 24, at 138.
\textsuperscript{48} \textit{Id.} at 145.
\textsuperscript{49} \textit{Id.} Net on-going costs vary based on the amount of revenue that can be raised to cover expenditures. \textit{Id.} at 141-42. Developing nations will likely raise far less revenue and, therefore, will be less likely to cover administrative costs. \textit{Id.}
\textsuperscript{51} Cychosz, \textit{supra} note 31, at 1011; CIPR, \textit{supra} note 24, at 141-42.
\textsuperscript{52} PENGELLY, \textit{supra} note 33, at 5; CIPR, \textit{supra} note 24, at 142.
\textsuperscript{53} Wu, \textit{supra} note 1, at 105.
\textsuperscript{55} \textit{See} Dreyfuss, \textit{supra} note 54, at 21-22 (speaking specifically regarding patents).
\textsuperscript{56} \textit{See} CIPR, \textit{supra} note 24, at 146 (identifying the potential economic and political impacts of enforcing intellectual property rights including increased prices, impacts on employment, and decreasing tax
elements represent a significant portion of the country’s economy. The result of these economic impacts is that government officials must act in precarious political environments.

India’s implementation of TRIPs Articles 70.8 and 70.9 illustrates the challenges created by these political and economic impacts. In 1995, initial legislation compliant with these provisions of TRIPs was enacted temporarily by the President of India but expired before Parliament could conclude its consideration of the proposed terms. The law was stalled in the Parliament because members (and local drug manufacturers) were concerned that the granting of exclusive marketing rights would both raise the cost of medicine and turn the local drug market over to foreign multinationals, ultimately destroying the local drug industry. In the interim, India’s President took steps to ensure that, in practice, these TRIPs terms continued to be met. Despite these steps, the United States challenged India through the WTO dispute resolution process, and ultimately both a panel and appellate review declared India out of compliance with TRIPs. Even with the WTO dispute resolution ruling requiring the adoption of compliant laws, political issues managed to stall the official adoption of adequate legislation until March 1999, four years after the temporary ordinance lapsed and more than one year after the WTO appellate ruling.

Similarly, many developed nations were required to adjust their intellectual property rights schemes in order to become compliant with TRIPs. These changes

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57 See Wu, supra note 1, at 105 (stating that not all governments are convinced that enforcing intellectual property rights is beneficial due to the impact of lost jobs).


59 TRIPs, supra note 2, Part VII, Arts. 70.8, 70.9, at 1224 (requiring a means of filing pharmaceutical and agricultural chemical product patent applications from the date of force of TRIPs, extending protection consistent with TRIPs to these patents and establishing exclusive marketing rights for these patented products).

60 Panel Report, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, paras 2.1 –2.12, WT/DS50/R (Sept. 5, 1997), http://docsonline.wto.org/GEN_viewervwindow.asp?D:/DDFDOCUMENTS/T/WT/DS/50R.WPF.HTM [hereinafter WTO DS50 Panel Report on India]. Indian law allows the President to enact an ordinance when Parliament is not in session. Id. The Ordinance is effective for six weeks after Parliament assembles. Id. The President of India passed a Patent Ordinance that brought India in compliance with TRIPs §70.8 and §70.9. Id. The ordinance was passed by the lower house of Parliament but was stalled in committee in the upper house. Id.


62 WTO DS50 Panel Report on India, supra note 60 at para. 2.6 (stating that the President “instruct[ed] the patent offices in India to continue to receive patent applications for pharmaceutical and agricultural chemical products and to store them separately for processing as and when the change in the Indian patent law to make such subject matter patentable would take effect.”).

63 Id. at paras. 1.1, 8.1; Appellate Body Report, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997).


can also produce economic and/or political effects that may lead leaders to question whether they should enforce certain TRIPs-compliant laws. The fact that developed nations, who recognize the value of intellectual property rights protection, face these same political and economic pressures makes similar pressures faced by developing countries all the more poignant.

III. CARROTS AND STICKS WIELDED BY DEVELOPED NATIONS

In most cases, the success of TRIPs will depend to some degree on the ability of developed nations to address the factors that are impacting the willingness and ability of developing countries to enact and enforce TRIPs-compliant laws domestically. Developed nations have used a variety of incentives – both positive and negative - to support and “encourage” WTO member nations down the path toward full TRIPs implementation and intellectual property rights protection in general.

The extent to which the prodding of developed nations is necessary will depend a great deal on the level of internal initiative to implement TRIPs compliant laws. More sophisticated and economically advanced developing countries such as Brazil and India see economic advantages to implementing many terms of the agreement, including domestic economic growth and their ability to expand into global markets. Therefore, these countries are more inclined to expand their current intellectual property rights systems to incorporate TRIPs terms. Other less sophisticated and economically advanced developing countries face stronger internal political and economic pressures to not comply. They are focused more on domestic social issues and less on their emergence into global markets. In these environments, outside pressure is a larger factor in bringing about the implementation of TRIPs.

A. The Carrots (Positive Incentives For Compliance)

If they materialize, the “carrots” dangled by the developed nations would be significant motivators for developing countries to comply with the TRIPs agreement. These positive incentives focus on providing support in the implementation of TRIPs through technical assistance and additional time to become compliant as well as creating short and long-term economic incentives. However, the manner in which developed nations carry out these incentives fails to convey a sense of true commitment to or recognition of the unique environments and issues faced by developing countries. Without these two qualities, any attempt to bring positive results to fruition will likely backfire.

1. Long-term Economic Growth

The most substantial and lasting potential incentive for developing countries is the positive long-term economic benefits that an intellectual property rights system
under TRIPs has been touted to bring. Supporters of TRIPs contend “that a uniform set of relatively high standards of protection fuels creativity and innovation, attracts foreign investment, and encourages a more rapid transfer of technology.”

However, since the adoption of TRIPs, many have come to question whether the claimed advantages have, or will, come to fruition. In addition to questionable positive results, there has been much discussion about the negative effects that are emerging as developing countries continue to move toward implementation. In addition to the economic and political ramifications of implementing TRIPs-compliant laws, these negative impacts include collateral ramifications on broader issues, such as public health and biodiversity, and greater difficulties in achieving technological and scientific development. Thus, the impacts of these TRIPs-compliant laws are likely to be particularly devastating to those countries with little scientific and technological capacity, as well as to those that face significant social and economic challenges, a characterization that aptly describes many developing countries.

2. Trade Incentives

During the TRIPs negotiations it was recognized that the nature of emerging economies would likely produce many short-term costs for developing countries as they establish their intellectual property rights systems. Thus, in an effort to offset these costs, and to entice developing countries to adopt the TRIPs agreement, developed nations promised to undertake positive efforts in the areas of technology transfer and agricultural trade. Indeed, these agreements were central to the final acquiescence of developing countries to the TRIPs agreement. However, developed nations do not appear to be standing behind these promises in a substantive way.

Article 66.2 of TRIPs requires developed nations to “provide incentives to

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68 Id. at 3-4; CIPR, supra note 24, at 11-12 (ultimately determining, based on a broad study of developing nations, that the impact of TRIPs will vary widely based on the social and economic development, as well as scientific and technological capabilities of the nation); Weissman, supra note 7, at 1129-30, 1132 (theorizing that in a pharmaceutical context, patent monopolies are not the defining factor for a company to establish a company site in a given country, thereby building a strong, innovative economy, but rather, it is the degree of science and technology infrastructure available and the educational and research systems, as well as the level of government spending to support them, that has the greatest impact).
69 Helfer, supra note 67, at 3.
70 See supra Part II.B (discussing the impediments to developing countries in implementing TRIPs).
71 Helfer, supra note 67, at 3-4.
72 CIPR, supra note 24, at 11 (noting that history shows that the development of a technological infrastructure is critical to successfully building an economy).
73 Id. at 11, 25.
74 See Helfer, supra note 67, at 2 (noting that trade incentives were offered to offset some of these short term costs).
75 CIPR, supra note 24, at 8.
76 See Helfer, supra note 67, at 22.
enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country members." Not only has the TRIPs Council had to take additional steps to ensure compliance by developed nations, but some have expressed concern as to whether the scope of the term itself adequately supports the transfer of technology. Of particular concern is the fact that these incentives have been limited to least developed nations, leaving many other developing countries to struggle to close the technology gap while at the same time passing intellectual property rights laws that will make obtaining this technology more expensive and potentially cost prohibitive.

There have been similar concerns with the agricultural-related agreements. Under GATT, WTO member nations also committed to a multilateral agreement on agricultural goods trade which expressly declared a long-term goal “to provide for substantial progressive reductions in agricultural support and protection . . . resulting in correcting and preventing restrictions and distortions in world agricultural markets.” As part of this agreement, efforts to place domestic suppliers and exporters in a more competitive position would be minimized and there would be “greater improvement of opportunities and terms of access” for developing countries. Despite this agreement, the European Union and other developed nations have maintained significant protectionist measures. The United States initially appeared to be following through with its agricultural commitments. However, despite these initial actions and subsequent commitments at the 2001 WTO Ministerial Conference in Doha to fulfill the agricultural agreement, the United States passed the Farm Bill of 2002, which effectively skirted all promises by enacting measures to significantly increase domestic subsidies.

The achievement of agricultural trade concessions still remains uncertain. While the European Union and the United States reached a surprising compromise on a proposal for how these agricultural trade incentives will be provided, many

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78 TRIPs, supra note 2, Part VI, Art 66.2, at 1222 (“Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”).
79 Implementation of Article 66.2 of the TRIPs Agreement, WTO Doc. 03-1083 (Feb 19, 2003), http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FTRIPS%2FIP%2FC%2F28%2EDOC%2EHTM&curdoc=3&popTitle=IP%2FC%2F28 (requiring developed nations to submit regular reports as to the steps they have taken to improve technology transfer).
80 CIPR, supra note 24, at 26 (“[S]ome of the [intellectual property rights] provisions used historically to facilitate technology transfer, such as the use of compulsory working, have been significantly diluted under TRIPS.”).
81 Id.
83 Id.
85 In its Freedom to Farm Act of 1996, the United States lowered subsidies as promised. Johnson, supra note 77, 456.
86 Johnson, supra note 77, at 457. However, positive efforts were soon countered by supplemental legislation in response to several agricultural crises. Id.
87 Id. at 457.
88 Cho, supra note 84, at 228. The European Union and United States have historically addressed
developing nations were unwilling to accept it, literally walking out of the discussion at the WTO Ministerial Conference in Cancun. 89 It remains to be seen how this deadlock will be resolved.

Failure of developed nations to substantially live up to these agreements, along with the increasing skepticism regarding the long-term economic benefits of TRIPs, likely confirm for developing countries their initial belief that TRIPs was only intended to secure the economic position of developed nations and that this would occur primarily at the expense of developing countries. 90 Without these short and long-term economic incentives, developing countries are left with little economic support to mitigate the costs of implementing TRIPs and its economic impacts. Moreover, the political ramifications of such costs also remain active impediments to the TRIPs implementation process. In the end, these economic and political results only serve as disincentives for developing countries to enact and enforce TRIPs compliant laws.

3. Technical Assistance

In recognition of developing countries’ limited internal legal and intellectual property expertise, developed nations also committed to providing technical assistance to support developing countries in establishing their intellectual property rights systems. 91 To address the gaps that this limited technical knowledge creates, developing countries require a significant and wide range of technical assistance, including policymaking and legal reforms, re-organization and automation of intellectual property rights systems, and strengthening of capacity for regulation and enforcement of intellectual property rights. 92

While a significant amount of technical assistance has been provided, 93 it has been inadequate. 94 Despite the Doha Declaration’s call for greater support, technical assistance efforts are under-funded. 95 There is also concern that the advice provided

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89 Johnson, supra note 77, at 445. See also Cho, supra note 84, at 228 (citing criticism of the United States and European Union joint position paper by a coalition of developing countries dubbed ‘G-21’ and led by Brazil, India and China).

90 See Helfer, supra note 67, at 24 (suggestion that the TRIPs implementation process fostered a growing belief that TRIPs was a “coerced agreement that should be resisted rather than embraced”).

91 TRIPs, supra note 2, Part VI, Art 67, 1222-23.

92 PENGELLY, supra note 33, at 3 (citing M. Leesti & T. Pengelly, INSTITUTIONAL ISSUES FOR DEVELOPING COUNTRIES IN INTELLECTUAL PROPERTY POLICYMAKING, ADMINISTRATION & ENFORCEMENT, (Commission on Intellectual Property Rights, Study Paper 9, 2002).

93 See PENGELLY, supra note 33, at 35 (indicating that a significant number of people have received general and specific intellectual property rights training). Based on a study of technical assistance provided to developing nations, technical assistance efforts have focused on specialized training for human resource development, advice on IP policy and legal reforms, assistance with preparing draft laws, support for modernizing IPR administration including automation, international patent cooperation and information services, and assistance that promotes locally innovative strategies. Id. at 7. Efforts have also focused primarily on more advanced developing nations and the regions of Latin America and Eastern Europe. Id. at 45.


95 Cho, supra note 84, at 226. See also Ierley, supra note 94, at 650 (noting the lack of technical support
has not taken into account the holistic and unique developmental needs of the nation being assisted. Indeed, there is a natural conflict of interest for developed nations in that they seek to strengthen intellectual property rights laws in developing countries in order to further the economic growth of companies doing business in their own countries. By not taking the unique issues faced by developing countries into account, the intellectual property rights systems that are implemented could exacerbate any negative economic impacts that would have naturally emerged from the establishment of any new intellectual property rights system, providing even greater discouragement for implementation of TRIPs. Furthermore, while technical assistance in the form of drafting legislation, training staff, and initial investments in automation is significant, it does little to address the substantial ongoing costs of administration and enforcement of these intellectual property rights.

4. Extended Implementation Periods

Developing countries have also been given additional time to comply with TRIPs terms. In addition to the expressly extended transitional periods offered under of TRIPs, it could be argued that limited enforcement of adherence to explicit TRIPs timeframes has also served as a defacto extension. Some contend that the failure to hold nations to these timelines will be detrimental because it will only serve to diminish the ability of TRIPs to be seen as a true mandate. Others argue that extending the implementation time further will increase the chances of successfully implementing TRIPs. A recent study commissioned by the United Kingdom suggests that greater flexibility with respect to timeframes will allow nations to establish intellectual property systems that are appropriate for their level of development at an optimal time in the course of their development. The study argues that this flexibility will increase the potential for the economic gains promised of an intellectual property system.

On the contrary, we believe there are strong arguments for greater flexibility in setting an optimum time to strengthen IP protection, taking into account the nation’s level of economic, social and technological development. . . . We think that TRIPS would be improved by utilising these provisions to take greater account of the special needs of LDCs. These countries need longer to devise appropriate IP regimes and to establish the necessary administrative and institutional infrastructure, as well as the required regulatory frameworks, including complementary legislation such as competition law. The challenges are formidable
An extended transition period would provide developing countries with more time to position their economies so that they would be in a better position to benefit from an intellectual property rights system. In turn, this would delay any short-term impacts of a newly implemented intellectual property system and provide government officials more time to maneuver through the politics of the situation. On the other hand, extending the transition period will do little to address the lack of resources necessary for implementing intellectual property laws. Moreover, it is questionable as to whether developing countries could secure further extensions. Those that argue for longer implementation timeframes recommend up to a ten year extension beyond the current TRIPs implementation timeframes in order to allow enough time for developing economies to reach the stage where intellectual property rights could reap true economic benefits. \footnote{CIPR, \textit{supra} note 24, at 162.} The likelihood of receiving additional time to implement will depend on the degree to which developed nations begin enforcing TRIPs terms and the ability of the developing countries to garner the power necessary to influence the direction of international intellectual property rights policy.

B. The Sticks (Ramifications of Non-Compliance)

With the likely minimal effect of positive incentives, the ability of developing countries to compel full implementation of TRIPs will depend significantly on whether the actual or perceived impacts of the “sticks” employed outweigh the economic, political, and social costs of compliance. The United States has been the most active supporter and enforcer of TRIPs. \footnote{See DRAHOS, \textit{supra} note 7, at 11-17 (demonstrating the central role of the United States in the negotiation and approval process for TRIPs); WTO Dispute Settlement Gateway, Index of Dispute Issues, TRIPs, at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (last visited Jan. 1, 2005) [hereinafter TRIPs Dispute Index] (demonstrating that the United States has dominated the use of the WTO dispute resolution process, raising fourteen of the twenty-three TRIPs-related consultations and panel reviews).} Its willingness to use enforcement mechanisms combined with its economic strength \footnote{See World Development Indicators Database, at http://devdata.worldbank.org/data-query/ (last viewed Jan. 1, 2005) [hereinafter World Development Indicators Analysis] (indicating that, in 2004, the United States represents thirty percent of the gross domestic product of all WTO nations compared to thirty-four percent held by the European Union (twenty-five countries), twelve percent held by Japan and the remaining twenty-four percent by the balance of the WTO nations).} virtually ensure that the enforcement efforts of the United States will be one of the most defining factors in whether TRIPs will be implemented successfully.

In order to encourage compliance with TRIPs, the United States has employed several negative incentives, including the use of the Special 301 Report to identify nations that have particularly weak intellectual property systems and the subsequent threat of trade sanctions. \footnote{See \textit{supra} note 31 (providing a description of the Special 301 Report, including its purpose and relation to trade sanctions).} In addition, it has utilized bilateral and regional trade...
agreements to bind nations to even more extensive intellectual property rights protections than stipulated in TRIPs. Given the economic nature of the “sticks” employed and the relative economic positions of the developing countries to the United States, it is no surprise that these negative incentives have proven to be effective motivators.

1. Special 301 Reports

The United States uses its Special 301 Report Watch Lists to place nations on notice that their intellectual property rights protections are considered less than adequate and that, if these protections are not improved, the United States may take further action to compel greater protection. Special 301 Watch Lists have been used widely to spur other nations to improve their protection of intellectual property for decades. Since 1999, approximately half of the developed WTO member nations and over half of the developing member countries (fifty-eight in total) have been placed on the list at least once. The true power of the Watch Lists lies in the inherent threat of trade sanctions and damage awards through the WTO dispute resolution process. Many developing countries signed TRIPs, in part, because the United States led them to believe, erroneously, that TRIPs would restrain the wide use of Special 301 actions with respect to intellectual property rights concerns. However, the Watch Lists are used to threaten or coerce other nations as frequently as the Watch Lists were prior to the enactment of TRIPS. Despite this continued widespread use and what looks

107 Helfer, supra note 67, at 24.
108 See supra note 31 (providing a description of the Special 301 Report). In 1982, the European Communities also enacted something similar to the Special 301 Reports (Council Regulation 264/84), but the Commission found it difficult to gain agreement on how and when to apply it. Drahos, supra note 7, at 14. They did take action against Indonesia and Thailand, and sanctioned Korea’s GSP support for poor intellectual property rights protection. Id. They have begun to explore a similar process again as part of its newly adopted strategy for enforcement in developing countries. European Comm. Directorate General, supra note 28, at 6.
109 Drahos, supra note 7, at 14-17 (outlining the United States’s use of the Special 301 Reports both before and after TRIPs was enacted to coerce agreement with its international intellectual property rights proposals, including TRIPs, and to force stronger domestic intellectual property rights protections). See also Weissman, supra note 7, at 1088-90 (providing a brief historical discussion of the United States’s use of the Special 301 reports).
111 See Drahos, supra note 7, at 15 (“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.”).
112 Id. at 15-17.
to be an extensive lack of compliance by many nations for significant periods of time, few trade sanctions or other retributive steps appear to have been employed for intellectual property rights-related issues. This lack of action leads some to believe that the Special 301 Reports are ineffective. Others indicate that many countries perceive the threat of trade sanctions invoked by the Watch Lists as real. The Special 301 Reports themselves support this notion, indicating that changes and additions are being made to laws and enforcement efforts are improving, albeit slowly.

2. General System of Preferences Program and Other Sources of Trade Sanctions

Prior to TRIPs, the United States relied largely on the threat of sanctions through the General System of Preferences program (GSP) to motivate developing countries. Approximately ten WTO member nations have been subject to the GSP review process since 1995, when TRIPs came into force. While the GSP review of many countries has lasted more than three years, only three nations have actually had their GSP privileges sanctioned as a result of weak intellectual property

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113 See 2004 SPECIAL 301 REPORT, supra note 27; 2003 SPECIAL 301 REPORT, supra note 32; 2002 SPECIAL 301 REPORT, supra note 32; 2001 SPECIAL 301 REPORT, supra note 110, 2000 SPECIAL 301 REPORT, supra note 110; 1999 SPECIAL 301 REPORT, supra note 110. See also Cychoz, supra note 31, at 1002 (noting continued noncompliance in the area of patent rights).

114 See Cychoz, supra note 31, at 1004.

115 DRAHOS, supra note 7, at 15-16 (providing examples of both how the United States used the Watch List to intimidate and situations where countries acted out of fear of the Watch List process).

116 See 2004 SPECIAL 301 REPORT, supra note 27; 2003 SPECIAL 301 REPORT, supra note 32; 2002 SPECIAL 301 REPORT, supra note 32; 2001 SPECIAL 301 REPORT, supra note 110; 2000 SPECIAL 301 REPORT, supra note 110; 1999 SPECIAL 301 REPORT, supra note 110.

117 General System of Preferences (GSP) program provides duty-free treatment for specific products imported from specific developing countries and incorporates a review process to evaluate whether sanctions should be imposed. WILLIAM H. COOPER, GENERALIZED SYSTEM OF PREFERENCES, CRS REPORT FOR CONGRESS 2-3 (updated Feb. 27, 2004), http://www.ncseonline.org/nlc/crsreports/economics/econ60.cfm?&CFID=18187632&CFTOKEN=97032532.


119 Estimated based on review of last five Special 301 Reports. See 2004 SPECIAL 301 REPORT, supra note 27; 2003 SPECIAL 301 REPORT, supra note 32; 2002 SPECIAL 301 REPORT, supra note 32; 2001 SPECIAL 301 REPORT, supra note 110, 2000 SPECIAL 301 REPORT, supra note 110; 1999 SPECIAL 301 REPORT, supra note 110.
Some have pointed out that the benefits offered through the GSP are diminishing and, therefore, may lose their deterrence power. However, there is no indication that developing countries feel any less dependant upon these trade benefits for their economic development. As long as this perceived dependency exists, the GSP will continue to serve as a strong incentive to comply with demands made by the United States, including the full implementation of TRIPs. Even if the GSP loses its impact, the United States has been executing, with increasing frequency, bilateral and regional trade agreements, which incorporate both trade supports and intellectual property rights protections. Trade sanctions can be effectively implemented against these agreements as well.

3. WTO Dispute Resolution

While the United States had been able to use the GSP program as an incentive for developing countries to implement intellectual property rights systems, it has also actively pursued a second path for encouraging greater protection – the WTO dispute resolution process. The WTO dispute resolution process benefits the United States because it forces nations to the negotiation table through international peer pressure and, if a mutually acceptable solution cannot be found, legitimizes trade sanctions through an independent validation of the sanctions’ appropriateness. This internationally sanctioned process creates legitimacy for enforcement actions that the United States did not have when it relied solely on its Special 301 Report Watch Lists and related trade sanctions.

The United States was quick to employ this mechanism, initiating twelve cases in the first four years after TRIPs came into force. These efforts proved fruitful. All

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120 Based on a review of Special 301 Reports and subsequent Internet searches. Argentina and Honduras had privileges suspended, Turkey was denied expanded privileges. See 2004 SPECIAL 301 REPORT, supra note 27; 2003 SPECIAL 301 REPORT, supra note 32; 2002 SPECIAL 301 REPORT, supra note 32; 2001 SPECIAL 301 REPORT, supra note 110; 2000 SPECIAL 301 REPORT, supra note 110; 1999 SPECIAL 301 REPORT, supra note 110; IIPA Press Release, supra note 118; IIPA Oct. 1996 Letter to USTR, supra note 118; IIPA Website, supra note 118; Info. & Comm. Tech. Team, supra note 118.

121 See Cooper, supra note 117, at 6 (noting that developed nations offering GSP programs have reduced the number of eligible nations and products significantly and are supplanting these benefits by integrating trade preferences and tariff reductions in bilateral, regional, and multilateral agreements).

122 See supra Part III.B.4 (discussing how the United States is using regional and bilateral trade agreements).

123 The WTO dispute resolution process is a systematic dispute resolution system that focuses first upon seeking mutually beneficial agreements to issues related to non-compliance with trade agreements including TRIPs. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Art. 3, para. 7, 33 I.L.M. 1226, 1227. If a mutual agreement cannot be achieved, a WTO dispute resolution panel is established to serve as a neutral arbitrator and identifies a solution. Id.

124 Weissman, supra note 7, at 1105; Steinberg, supra note 8, at 250.

125 Steinberg, supra note 8, at 250.

126 See TRIPS Dispute Index, supra note 104 (citing disputes with Argentina concerning patent protection for pharmaceuticals and test data protection for agricultural chemicals (WT/DS171 and 196), Brazil concerning measures affecting patent protection (WT/DS197), Canada concerning term of patent protection (WT/DS170), Denmark concerning measures affecting the enforcement of intellectual property rights (WT/DS83), European Communities (EC) concerning protection of trademarks and geographical indications for agricultural products and foodstuffs (WT/DS174), EC/Greece concerning enforcement of intellectual property rights for motion pictures and television programs (WT/DS124 and
but one of the TRIPs-related cases resolved favorably for the United States, and fifty-percent of these were settled prior to the establishment of a WTO dispute resolution panel review.\(^{127}\) In all but one of the cases that settled, the opposing nation took the steps necessary to comply with the settlement or WTO dispute resolution panel decision rather than face paying damages.\(^{128}\)

Curiously, despite the successful use of the WTO dispute resolution process to force compliance with TRIPs, the United States appears to have reduced its use of the process.\(^{129}\) One likely reason for this decrease is the successful use of the WTO dispute resolution process against the United States. The European Union successfully challenged the United States on several issues, one of which resulted in an award of damages to the European Communities.\(^{130}\) In addition, Brazil, the only developing country to raise a WTO dispute resolution request, successfully compelled the United States to drop its WTO dispute resolution request against them by countering with its own case against the United States.\(^{131}\)

\(^{125}\) See TRIPs Dispute Index, supra note 104 (citing only two cases that have been raised since 1999, Argentina in 2000 (WT/DS196) and Brazil in 2000 (WT/DS197), both of which were settled prior to a panel decision).

\(^{126}\) See Report of the Appellate Body, European Communities complaint concerning Section 337 of the U.S. Tariff Act of 1930 and Amendments Thereto, WTO Doc. 00-0215 (Jan. 18, 2000), http://docsonline.wto.org/GEN_viewerwindow.asp?ID/DDFDOCUMENTS/T/IP/D/21.DOC.HTM (stating that a panel has not been requested and no settlement has been filed).


\(^{128}\) Id.

\(^{129}\) See also Notification of Mutually Agreed Solution, U.S. complaint concerning Brazil's Measures Affecting Patent Protection, WTO Doc. 01-3506 (July 19, 2001),
If the United States were to resume its use of the WTO dispute resolution system again, the impact beyond the inherent threat of sanctions may prove somewhat limited. The WTO dispute resolution process cannot guarantee that panel rulings will be followed. Developing and developed nations alike face competing social, political, and economic challenges that may pressure a nation to remain out of compliance. Thus, if a nation is inclined to defy the United States, ultimately compliance will rest on the balance between potential trade sanctions and the internal political and economic costs of non-compliance. While developing countries are unlikely to be able to withstand these costs of non-compliance, developed nations, however, may have the capacity to do so. To date, there has been only one instance related to the TRIPs agreement where sanctions were imposed in order to obtain compliance. However, the broader use of the WTO dispute resolution process suggests that non-compliance is a strong possibility for developed nations. Developed nations will also need to consider that the more they fail to comply, the less pressure developing nations will feel to also comply. While trade sanctions based on WTO rulings will likely compel most countries to conform their laws to meet TRIPs terms, the limited reach of the WTO enforcement efforts still leaves room for countries to remain non-compliant. Because ongoing enforcement efforts are hard to monitor, individuals attempting to protect their intellectual property rights in other nations may still find the application of written laws to be lacking. Access to enforcing intellectual property rights can be impeded by the often inefficient, complex, and ineffective bureaucracy of intellectual property rights enforcement systems. Even when cases are raised in the judicial system of a given country, national

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132 Cychosz, supra note 31, at 996-97.
133 Steinberg, supra note 8, at 266. See also supra Part II.B (discussing the political challenges for developing countries in implementing TRIPs). See also Movsesian, supra note 19, at 9-16 (providing two examples of how external factors impact decisions to comply. The European Union changed its banana importation parameters to comply with a WTO ruling in response to cries from business impacted by the resulting sanctions for non-compliance. Conversely, the European Union continues to restrict importation of beef with hormones despite a WTO ruling and strong business opposition in response to fervent public opinion regarding the safety of the beef with hormones).
134 Ierley, supra note 94, at 625-26; Movsesian, supra note 19, at 17. Remedies through the WTO dispute resolution process are based on the expected future damage to the country raising the issue. Id. at 8-9. The impact on individual developing countries “is likely to be minuscule in relation to [most] developed countr[ies’] larger economy.” Id. at 17.
135 WTO Settlement Agreement concerning US Copyright, supra note 130.
136 Ierley, supra note 94, at 637-38. The WTO DSU process applies to the full GATT agreement. In looking at all WTO DSU cases, one third of nations fail to comply with panel rulings, and only two fifths actually come to full compliance. Id.
137 Ierley, supra note 94, at 626, 650 (indicating that developing countries consider this the primary factor in deciding whether to comply).
138 See Cychosz, supra note 31, at 996-97 (indicating there is a lack of enforcement procedures to ensure compliance). See also supra Part II (discussing the challenges faced by developing countries as they draft their intellectual property rights laws).
139 See Cychosz, supra note 31, at 996-97 (noting that enforcement procedures in some countries can be “time consuming and arduous”).
courts are not required to apply WTO rulings. Accordingly, no domestic court has recognized the controlling nature of WTO rulings. As a result, individuals and companies who believe they are damaged by non-compliance with TRIPs will have to seek support from their home countries. Consequently, the areas of non-compliance that are likely to be addressed will be those that impact companies from developed nations with a significant enough economic stake in the issue to justify continued efforts and the political clout to get the attention of their government — namely large corporations representing a significant enough portion of the developed nation’s economy to warrant being heard or companies tied to strong industry associations and/or lobbies.

4. TRIPs-Plus Agreements

Over the last several years, the United States has placed greater emphasis on the use of bilateral trade agreements as a mechanism for achieving the desired level of intellectual property rights protection. These agreements have been used to not only emphasize TRIPs commitments, but also to expand intellectual property rights protections beyond TRIPs terms. In addition, the United States has used these agreements to limit the use of inherent flexibilities within TRIPs and to fill gaps in the TRIPs agreement in ways most beneficial to it.

In order to ensure developing countries agree to these more expansive terms, the United States often ties these trade agreements to agreements for economic assistance or science and technology cooperation. While developing nations accepted the terms of TRIPs, in part, because they hoped it would result in reduced use of bilateral agreements, the number of bilateral agreements has actually increased since the adoption of TRIPs. In the end, developing countries sign these bilateral agreements out of the need to have access to United States’s markets, to secure the additional economic incentives, and in response to being placed on the Special 301 Watch Lists, which create the potential for trade sanctions. Thus, the

140 Alberto Alemanno, Judicial Enforcement of the WTO Hormones Ruling Within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions?, 45 HARV. INT’L L.J. 547, 547 (2004) (indicating that the European Union is the only entity to leave open the possibility of declaring WTO rulings as controlling in domestic courts).

141 See Cychosz, supra note 31, at 996-97 (indicating that the U.S. Trade Representative had to take on this role for businesses in the United States who could not effectively challenge intellectual property rights violations in other countries).


143 VIVAS-EUGUI, supra note 142, at 3 (discussing how the US used NAFTA to raise intellectual property rights protections above TRIPs standards). See also Frederick M. Abbott, Intellectual Property Rights in Global Trade Framework: IP Trends in Developing Countries 98 AM. SOC’Y INT’L L. PROC. 95, 99 (2004) (providing an example of how bilateral agreements were used to raise standards above TRIPs for pharmaceuticals).

144 DRAHOS, supra note 7, at 19; VIVAS-EUGUI, supra note 142, at 3. See also Abbott, supra note 143, at 21 (describing how the United States used bilateral agreements to undermine flexibilities related to pharmaceuticals).

145 DRAHOS, supra note 7, at 31. See also VIVAS-EUGUI, supra note 142, at 7-10 (discussing how intellectual property rights protections are integrated into various trade agreements).

146 Id. at 7.

147 VIVAS-EUGUI, supra note 142, at 9 (discussing the use of Special 301 by the United States in the
success of these agreements also turns, in part, on the continued success of the Special 301 Report Watch Lists in “encouraging” countries to comply.

An additional benefit to developed nations from the use of bilateral trade agreements with respect to successful implementation of TRIPs is the ability of these agreements to systematically raise intellectual property rights protections. The United States successfully used existing bilateral agreements to gain support for the TRIPs agreement itself.148 By entering into bilateral and regional agreements that incorporated intellectual property rights protections at a level beyond what is required in TRIPs, nations become accustomed to high standards, making it less likely that they will oppose a multilateral agreement that incorporates these higher levels of protection.149 In addition, not only are nations becoming accustomed to higher standards, but also the wide use of TRIPs-plus terms creates an environment that encourages developing countries to seek technical assistance that supports them in meeting TRIPs as well as TRIPs-plus terms.150 This, in turn, improves the chances for successful TRIPs implementation.

The United States has also used TRIPs-plus agreements to splinter opposing coalitions and derail multilateral discussions that appear to be at a standstill or moving in the wrong direction.151 Establishing bilateral agreements isolates each country, making each one more vulnerable to sanctions and pressure. Enforcing these agreements through the Special 301 Watch Lists naturally changes the interests of each country in ways that are likely to shake loose alliances and change the direction of multilateral negotiations.

IV. CHECKS ON THE POWER OF DEVELOPED NATIONS

While the “carrots” employed by the United States will likely create minimal positive incentives for developing countries to fully implement TRIPs, the relative economic positions of developing and developed nations clearly create a dynamic in which the “sticks” can spur other countries toward implementation.152 Indeed, the adoption of TRIPs is evidence itself that the United States is skillful in intertwining the use of negative incentives to facilitate the establishment of intellectual property rights protections.153 As a result, developing countries with no internal incentives to conform to TRIPs will likely continue to make just enough progress toward implementation to appease the United States, while seeking other avenues to influence the terms and direction of international intellectual property rights policy.

Given the potential for such large gains (the purported billions of dollars in lost revenue for American-based companies) and the significant domestic pressures applied by industry,154 it is unlikely the United States will abort its efforts to achieve

148 Id. at 7.
150 DRAHOS, supra note 7, at 24.
151 Dinwoodie, supra note 149, at 215-16.
152 See infra Part III.B (describing the sticks being used by developed nations).
153 See infra Part I (describing the techniques employed by the United States to secure the adoption of the TRIPs agreement).
154 See e.g. Abbott, supra note 143, at 97, 99 (providing a description of how the pharmaceutical industry
the full implementation of TRIPs. Rather, they will likely continue to slowly but methodically utilize a combination of threats via the Special 301 Watch Lists and bilateral agreements with individual nations, while at the same time defending current TRIPs standards and expanding upon them in multilateral negotiations. Thus, any hope developing countries have to alter the development of international intellectual property rights policies to better meet the needs of their developing economies will have to emerge from sources outside the United States. These sources could include the WTO dispute resolution process, the TRIPs Council and WTO Ministerial Conferences, and the establishment of more favorable soft and hard law through other fora and with the support of nongovernmental organizations. Critical to success in any of these paths will be the ability of the developing countries to establish strong coalitions. Even more influential will be the level of support developing countries receive from the European Union.

A. Using the WTO Dispute Resolution Process & Trade Sanctions

Developing countries could increase their use of the WTO dispute resolution process as a means to control the United States’s efforts. To date, their participation has been minimal. This is not surprising given that the WTO dispute resolution process is an expensive, complex and time-consuming endeavor. In addition, identifying viable disputes and effectively challenging a developed nation requires a level of sophisticated legal expertise that many developing nations lack.

Assuming that a developing country or a coalition of developing countries garners the necessary expertise and resources to bring a case before the WTO, there are two additional challenges they will face. The first is retaliation. The United States has demonstrated a willingness to use its Special 301 Watch Lists and GSP sanction
review list in response to defiant behavior.\textsuperscript{160} Moreover, even if a developing country could endure the threats of retaliation and obtain a judgment against the United States, the United States can likely withstand any trade sanctions that may result from a WTO ruling.\textsuperscript{161} Therefore, unless there is a significant trade interest at stake or there are other strategic, political, or economic factors influencing the United States to comply, it may very well choose to defy the WTO ruling and pay the resulting damages.\textsuperscript{162}

Despite these obstacles, one dispute initiated by Brazil shines a ray of hope with respect to the use of the WTO dispute resolution process by developing countries. In 2000, the United States initiated WTO action to address a Brazilian compulsory license provision that placed limits on non-domestic patents.\textsuperscript{163} In response, Brazil requested a WTO consultation focused on a similar United States law that favored domestic patents.\textsuperscript{164} Brazil’s efforts resulted in the United States agreeing to rescind its WTO action if Brazil withdrew its consultation request.\textsuperscript{165} This example suggests that properly chosen disputes, raised or supported by stronger developing countries or a coalition of developing countries, wherein the nation opposed has other interests to protect, could serve as a check on developed nations like the United States.

B. TRIPS Council Proposals

Developing countries could also attempt to garner support for more favorable standards by seeking amendments or favorable interpretations from the TRIPS Council.\textsuperscript{166} However, this will be difficult to achieve for several reasons. First, developing countries face challenges in being able to effectively participate in forums where many TRIPS decisions are negotiated prior to going to the full Council for approval.\textsuperscript{167} Budgetary limitations make it difficult to ensure attendance at the many meetings held in Geneva.\textsuperscript{168} Moreover, despite holding a majority of votes, developing nations find themselves shut out of the decision making process, particularly at Ministerial Conferences.\textsuperscript{169} As a result, developing countries have no

\textsuperscript{160} Drahos, supra note 7, at 15-16 (noting that of the 18 developing countries that joined together to challenge the United States during the negotiation process for TRIPS, over half were placed on the Special 301 Watch Lists and three of them were actually sanctioned).

\textsuperscript{161} Movsesian, supra note 19, at 17. Remedies through the WTO dispute resolution process are based on the expected future damage to the country raising the issue. \textit{Id.} at 8-9. The impact on individual developing countries “is likely to be miniscule in relation to [most] developed countr[ies’] larger economy.” \textit{Id.} at 17.

\textsuperscript{162} See Steinberg, supra note 8, at 266-67 (noting that there are instances where the United States has chosen not to comply with non-TRIPS related WTO dispute resolution rulings for political reasons).

\textsuperscript{163} Request for Consultations by the U.S. concerning Brazil’s measures affecting patent protection, WTO Doc. 00-2254 (June 8, 2000), http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/G/L/385.DOC.HTM.

\textsuperscript{164} WTO Consultation Request-Brazil complaint against U.S., supra note 131.

\textsuperscript{165} WTO Settlement Notification Brazil/U.S. Patent Complaints, supra note 131.

\textsuperscript{166} TRIPS, supra note 2, Part VII, Art 71, at 1224-25.

\textsuperscript{167} See Rebecca Povarchuk, Comment, Cambodia’s WTO Accession: A Strenuous But Necessary Step for a Poor Nation Seeking Economic Prosperity, 13 PAC. RIM L. & POL’Y J. 645, 659-60 (2004) (noting the lack of “voice” of developing countries in the WTO resulting from a lack of resources to attend many meetings in Geneva or to station a representative there).

\textsuperscript{168} Id.

\textsuperscript{169} Martin Khor, An Analysis of the WTO’s Fifth Ministerial Conference, 3-6 (n.d.), http://www.g24.org/khorgva.pdf (describing the limited ability of developing countries to influence
ability to influence the development of proposals during their most formative phases.

In addition, the TRIPs Council operates under a consensus approach. Therefore, any proposals brought to the Council must be supported by all member nations in order to be adopted. The United States has demonstrated in numerous forums its willingness to stand firm against the pressures of a majority of developing and developed nations as well as the effectiveness of its strategy to use bilateral agreements to derail negotiations. Thus, it will take extraordinary outside pressure to move the United States to adopt any amendments or additions to the TRIPs agreement.

C. WTO Ministerial Conferences and Work Groups

WTO Ministerial Conferences and work groups were established as forums for WTO nations to continue to work through unresolved issues and concerns with the TRIPs agreement. Developing countries have struggled to compel developed nations to adequately address their issues through these forums. However, there have been some contextual successes in the most recent Conferences that provide insight into the types of efforts developing countries can focus on in order to contain the power of developed nations. The most successful conference for developing countries was the Doha Round, during which these countries achieved greater flexibility with respect to prescription drug patents in order to address public health issues, and a clear articulation of a commitment and a plan to address concerns previously raised by developing nations. The 2003 Ministerial Conference in Cancun was not nearly as successful. However, while developing countries were unsuccessful in garnering greater trade access for agricultural products, they did withstand pressure from the United States and the European Union to adopt their proposal on agricultural issues.
Within these experiences, there are several factors regarded as instrumental in bringing about these successes. First, viable coalitions of developing countries emerged to withstand the efforts of the developed nations. Second, external circumstantial factors changed the interests of the United States to be more in line with the needs of developing countries. Third, nongovernmental organizations were actively supporting developing countries in terms of technical expertise and/or publicity. Lastly, the European Union took a stance that was contrary to the United States, or at least more supportive of developing countries.

1. Building Coalitions

The willingness of developing countries to work in concert has impacted their success. Their coordinated efforts at the Doha Round, as well as the more formal coalition, G-21, which emerged from the Conference in Cancun, were instrumental in keeping developed nations from imposing their proposals onto developing countries. However, sustaining these coalitions will likely prove difficult for several reasons. First, the United States has been skilled at using bilateral agreements to break up these coalitions. In addition, while developing countries share many broad goals and challenges, they each have unique economic and political environments that create the need for different types of agreements. Moreover, as these more successful developing nations grow, their interests will become more in tune with developed nations, and accordingly, they will no longer serve as champions for the efforts of the developing countries.

Even when viable coalitions are established, developing nations still do not have the collective bargaining power to compete with the United States and European Union. Some suggest that the entrance of China will tip the scale, as it likely did...
in the establishment of the G-21 in Cancun and its ability to hold back the United States and European Union.\(^{186}\) However, even taking into account China’s growing economy, developing countries will still not rival the United States and European Union in trade strength.\(^{187}\) Therefore, while support from China may be a factor, particularly if the United States and the European Union are not united, it is not guaranteed to ensure a successful stand against developed nations.

Despite these potential hurdles to developing sustainable coalitions, developing countries should not be discouraged from creating strong, targeted coalitions. While these targeted coalitions have not been successful in moving forward the full agenda of developing countries, they have proven successful in containing developed nations, which is an equally important task.

2. **External factors**

In one instance, the Doha Public Health Declaration, external circumstantial factors brought the interests of the United States more in line with the interests of developing countries. The United States had strongly opposed previous proposals that allowed less restrictive pharmaceutical patent rights.\(^{188}\) However, external factors, including the events of September 11, the anthrax scare and resulting need for medicines from Germany, and an overall sense of global insecurity, created national interests that warranted a slightly more compromising approach to the negotiations that resulted in the Doha Public Health Declaration.\(^{189}\) Developing countries may find similarly strong external influences in the future on which they can capitalize.

3. **Partnering with Non-Governmental Organizations (NGOs) and Other International Fora**

The support of nongovernmental organizations (NGOs) has also proven to be an important tool for developing countries to impact international policy on intellectual property rights.\(^{190}\) NGOs can assist in establishing stronger, more sustainable coalitions among developing countries. By focusing on larger, moral and global issues often faced by many developing countries, rather than trade and economic issues, which are unique to each country, NGOs can create broader common goals, around which developing countries can rally.\(^{191}\)

Moreover, transferring discussions regarding intellectual property rights from purely trade-based debates to other fora besides the TRIPs Council where they will

\(^{186}\) See Cho, *supra* note 84, at 235 (discussing the role of China in the WTO Ministerial Conference in Cancun, held in September 2003).

\(^{187}\) See World Development Indicators Analysis, *supra* note 105 (indicating that China represents less than 5% of the gross domestic profit of WTO nations in both 2003 and 2004 as compared to the more than 60% attributable to the United States and European Union collectively).

\(^{188}\) Abbott, *supra* note 143, at 96.

\(^{189}\) *Id.*

\(^{190}\) See CIPR, *supra* note 24, at 165 (highlighting impacts of NGOs in agriculture, genetic resources, traditional knowledge and public health); DRAHOS, *supra* note 7, at 27-29 (discussing the ways in which NGOs have participated in intellectual property rights issues).

\(^{191}\) See DRAHOS, *supra* note 7, at 28 (noting that NGOs can provide a “scope for an alliance” with developing countries, through which change is potentially achievable, as well as the tendency for economic and trade issues to result in fractured interests among developing countries).
be discussed in the context of global and moral concerns can have several positive impacts. First, these broader, moral goals can increase commonality between developed nations and developing countries. It will also open the door to input from a wider array of perspectives as it shift the conversation away from the typical economic approach of trade discussions. Additionally, these types of issues tend to capture the passions of the public, thereby creating stronger public pressure to bring about change. For example, NGOs were instrumental in the achievement of more flexible pharmaceutical patent standards at the Doha Round because they raised public awareness of the global health issues impacted by restraints on pharmaceuticals.

Despite these advantages, history shows that the inclusion of NGOs alone is not sufficient. The United States is strong enough to bear the impacts of significant public backlash. In addition, the United States has methods for addressing the hard and soft laws that emerge from the various international fora sponsoring these public interest-centered discussions. In instances where soft law is emerging, the United States can initiate a shift in the forum in which it is emerging to one that has less enforcement strength, or it could simply refuse to be bound by what emerges. When hard law begins to form, the United States can refuse to accept any forum other than the TRIPs Council as the place where changes to TRIPs can be achieved. Moreover, the United States can continue to use bi-lateral and regional agreements to push developing countries toward stronger intellectual property rights protection despite soft and hard law emerging from other fora.

5. The European Union

While oftentimes the European Union can be among the worst of enemies, it may also prove to be one of the best allies developing countries can have. The European Union is likely the only “nation” with the economic strength to challenge the United States directly. As a developed “nation,” it shares many of the economic interests that drive the United States to seek more stringent intellectual property rights. However, history has shown that the European Union does not always align itself with the United States.

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192 See e.g. David Fidler, *Caught Between Paradise and Power: Public Health, Pathogenic Threats and the Axis of Illness*, 35 MCGEORGE L. REV. 45, 103-04 (2004) (suggesting that the concurrence of interest in public health is the most likely vehicle for bringing together divergent parties).

193 See *DRAHOS*, supra note 7, at 27, 29 (discussing the ways in which NGOs can raise public awareness and pressure).

194 See id. at 27.

195 See id. at 27-29 (citing the public health issues as an example of when the United States has not given into developing countries’ demands, despite NGO participation and growing public concern regarding the issue).

196 Id. at 28.


198 See * supra* Part III.B.4 (discussing how the United States uses TRIPs Plus agreements to compel stronger intellectual property rights protection).

199 See *World Development Indicators Analysis, supra* note 105 (indicating that, in 2004, the European Union (25 countries) represents 34% of the gross domestic product of all WTO nations compared to 30% held by the United States, 12% held by Japan and the remaining 24% by the balance of the WTO nations).

200 See Steinberg, * supra* note 8, at 275.
There appear to be two reasons that the European Union will approach an issue differently from the United States. The first and most obvious source of their divergent approaches is the differences in their economies, which dictate a different approach. This is demonstrated in the European Union’s policies regarding agriculture and geographic indicators.\footnote{See Harry N. Niska, Note, The European Union TRIPs Over the U.S. Constitution: Can the First Amendment Save the Bologna That Has A First Name? 13 MINN. J. GLOBAL TRADE 413, 415-23 (2004) (discussing European Union and United States differences regarding geographic indicators); Johnson, supra note 77, at 467-71 (discussing how differences in agricultural-related policies).} When the United States and the European Union find themselves at odds, one or both of these nations may incorporate “incentives” or may soften their proposals to be more favorable to developing countries in order to lure their support.\footnote{E.g., Johnson, supra note 77, at 469 (discussing how the European Union included terms specifically designed to lure developing countries to support its proposal over the proposal of the United States). It should be noted that in the case of agricultural subsidies, the United States proposed terms that were more favorable to developing countries. Id. Thus, in this instance, developing countries would have received a less favorable outcome as a result of the European Union’s stance against the United States and the necessary compromise proposal that was developed. Id.}

The second variable is less obvious, yet far more important. Unlike the United States, which approaches foreign policy from a perspective of power and relies on threats and unilateral behavior, the European approach to foreign policy focuses on multilateralism, negotiation, and diplomacy.\footnote{See also Fidler, supra note 192, 87-88 (noting that this approach to foreign policy could be seen playing itself out in the dispute around public health).} This more collaborative and peaceful approach culminated in the establishment of the European Union.\footnote{Robert Kagan, Power and Weakness, 113 POL’Y REV. 1 (June & July 2002) at http://www.policyreview.org/JUN02/kagan_print.html (last visited Jan. 1, 2005). Kagan argues that the European approach is the result of its development as a multilateral organization as well as its relatively weak military position with respect to the United States. Id. The United States, on the other hand, by virtue of its strength, has taken to see the world in terms of challenges it must conquer. Id. See also Fidler, supra note 192, 87-88 (noting that this approach to foreign policy could be seen playing itself out in the dispute around public health).} Not surprisingly, the less aggressive European approach is reflected in several recent efforts engaged in by the European Union, wherein they have sought a compromise that bridged the gap between the developed nations and developing countries. These efforts include facilitating compromises related to public health.

This approach is also prevalent in communications from the European Union, which signal a much more sympathetic approach to working with developing countries. The recently adopted Strategy for the Enforcement of Intellectual Property Rights in Third Countries, while incorporating many of the same effective negative incentives employed by the United States, presents strong enforcement measures in the context of tailoring domestic intellectual property rights systems to the individual needs of developing countries’ emerging economies and enforcing intellectual property rights through non-unilateral approaches.\footnote{Helfer, supra note 67, at 43-45 (describing how the European Union’s stance on HIV/AIDS crisis impacted the ability of developing nations to secure a more favorable agreement).} A recent speech by Pascal Lamy, Commissioner of the European Union, urged members to take into account the social welfare issues faced by developing countries and the unique needs of their emerging economies as the European Union supports them in the enactment
This softer approach to foreign policy, which seems to be evident in its approach to the ongoing development of international intellectual property rights, signals that developing countries may find the European Union willing to support their needs to some extent. In the past, when they have chosen to do so, the developing countries have found success.

IV. THE FUTURE OF TRIPS

Whether TRIPs will be successful is ultimately dependant upon whether the United States can successfully enforce the full implementation of the TRIPs agreement. To the degree that it can identify and target the non-compliance of other nations, the United States has proven to have an effective arsenal for garnering compliance with existing TRIPs terms. The United States has established an effective mechanism through its Special 301 process, which relies upon domestic industry associations and domestically-based companies to identify the primary areas where non-compliance is having the greatest economic impact. Thus, as long as these mechanisms remain active, the United States will achieve systematic success in reducing the violations of intellectual property rights internationally.

Developing nations simply do not have the trade depth or economic weight to resist the tactics employed by the United States. The obstacles they face in establishing their systems will likely only serve to slow down the inevitable implementation of the agreement. On their own, developing nations will only be able to make a stand in strategically selected, transparent arenas, wherein the United States has a related outside interest that could be negatively impacted by continuing to push the developing country to amend its practices. However, it is likely that, even in these scenarios, the United States will continue to use its bilateral tactics (trade agreements and the Special 301 Watch Lists) to continue to prod developing countries into providing minimum degrees of intellectual property rights protected under TRIPs. Even in coalitions, the relative trade strength of the developing nations will not be enough to withstand the economic pressure likely to be exerted by the United States. In the face of these coalitions, the United States will fall back to its bilateral tactics to create independent incentives that ultimately destroy the coalition.

The United States does face greater challenges with respect to issues where the European Union has different economic interests, or sees a public interest at stake for which there is a solution with minimal negative impacts on European Union members. In such cases, the European Union provides the economic weight necessary to force the United States to reconsider before standing its ground.

The options for developing nations to alter the direction of international intellectual property rights protections are even more limited. While the support of the European Union in these efforts will also provide a significant boost toward change, many of these changes will have to be accomplished through outside fora,

208 Helfer, supra note 67, at 43-45 (describing how the European Union’s stance on HIV/AIDS crisis led to a more favorable agreement for developing nations).
with the support of NGOs and strong coalitions. The United States is likely to engage in regime-changing efforts to avoid hard law that conflicts with TRIPs terms and will declare itself unbound by soft law accomplishments. The greatest chances for success of developing nations will be to seek change through links with global moral issues, such as public health, human rights, and poverty, particularly since the European Union demonstrates greater flexibility and desire to find a compromise in the face of these larger public interests. Developing nations should also focus on areas where their interests coincide with the interests of the European Union.

Ultimately, any successes developing nations achieve will be won through long and difficult fights. While these successes will be hard won and will require the coming together of several factors, they are not impossible. Continual pressure on the United States, strategically applied through both the TRIPs Council and WTO and outside fora, will ensure that developing countries are well positioned to take advantage of any outside influences that alter the interests or relative power of the United States. It is in these times that the developing nations can achieve progress.

While, as a general rule, the United States will be capable of moving developing countries toward full implementation of TRIPs, success will likely be limited to those countries that have internal motivations for implementing and those arenas where the United States has a significant economic interest for enforcing compliance. For many developing countries, without pressure from the United States, there are few reasons to enforce TRIPs terms and many reasons not to. In the end, TRIPs will successfully assist the United States in achieving slow but certain decreases in intellectual property violations as a result of its own efforts, but it is unlikely that TRIPs will result in the establishment of enforced minimum intellectual property standards across all WTO member nations.