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

Christine Thelen*

[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

* J.D. candidate, 2007, Temple University, B.A., 1994, Claremont McKenna College. Special thanks to Prof. Donald Harris for his guidance and support in developing this article.

¹ Mark Wu, Intellectual Property Rights in Global Trade Framework: IP Trends In Developing Countries, *in* 98 AM. SOC'Y INT'L L. PROC. 103, 106 (Hannah Buxbaum & Janie Chuang eds., 2004).

² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1197-1225 [hereinafter TRIPs].

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 countries⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ 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, Ministerial Declaration of 14 November 2001, WT/MIN(-1)/DEC/2, 41 I.L.M. 755, 756.

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/devel_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 J. 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.¹¹ 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.¹² 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)¹³ 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.”¹⁴ To achieve this goal, TRIPs established minimum standards for the protection of intellectual property rights, including enforcement measures,¹⁵ which all World

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).

¹³ General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, December 15, 1993, 33 I.L.M. 1125.

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.¹⁶ In addition, as an element of the GATT, TRIPs integrated the use of the WTO dispute resolution process as an international enforcement mechanism.¹⁷ This dispute resolution process allows nations to compel fellow WTO member nations to demonstrate that they have adopted and are enforcing TRIPs-compliant laws¹⁸ as well as legitimizes the use of trade sanctions as a repercussion for failing to do so.¹⁹

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.²⁰ Developing countries feared the potential detrimental impact to their developing economies that could emerge from rigorous intellectual property rights protection.²¹

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 States²² to force reluctant developing countries to support an agreement they did not fully understand²³ by dangling before them technology- and agricultural-related trade incentives,²⁴ as well as implicit threats of trade sanctions.²⁵ 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.*

¹⁶ *Id.*, Part I, Art. 1, at 1198.

¹⁷ *Id.*, Part V, Art. 64, at 1221.

¹⁸ *Id.*, Part V, Art. 63, at 1221.

¹⁹ See Mark Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 2 (2003).

²⁰ See DRAHOS, *supra* note 7, at 10-11 (describing the unsuccessful efforts of developing countries to amend international copyright and patent agreements incorporated into the Paris and the Berne Conventions).

²¹ Randy L. Campbell, *Global Patent Law Harmonization: Benefits and Implementation*, 13 IND. INT'L & COMP. L. REV. 605, 615 (2003).

²² See Steinberg, *supra* note 8, at 265 (“[The] European Communities and United States entered into the Agreement Establishing the [WTO], which included the GATT 1994 and its most-favored-nation (MFN) guarantee . . . [and later] withdrew from GATT 1947, disengaging from that agreement’s MFN commitment to developing countries. This maneuver . . . presented the developing countries with a fait accompli: either sign onto the entire WTO package or lose the legal basis for continued access to the enormous European and U.S. markets.”).

²³ 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).

²⁴ COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 8 (2d ed. 2002),

http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf [hereinafter CIPR]. See also *infra* Part III.A.2 (discussing the trade incentives promised).

²⁵ DRAHOS, *supra* note 7, at 14-15; Weismann, *supra* note 7, at 1088. See *infra* Parts III.B.1, 2 (discussing how trade sanction threats are wielded).

the pharmaceutical industry,²⁶ that suffered significant economic losses as a result of rampant international counterfeiting and piracy.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.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.²⁹ In

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).

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.html [hereinafter 2004 SPECIAL 301 REPORT].

²⁸ Wu, *supra* note 1, at 104; EUROPEAN COMM. DIRECTORATE GENERAL FOR TRADE, STRATEGY FOR THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES 3 (2004), <http://www.eudelyug.org/en/news/news/final20041110/11129d.pdf> [hereinafter EUROPEAN COMM. DIRECTORATE GENERAL] (referring to enforcement legislation only).

²⁹ *See* WTO TRIPs Gateway, Notifications Under TRIPs Agreement, at http://www.wto.org/english/tratop_e/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 some 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/thewto_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 Lists³¹ 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

http://docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDOCUMENTS/T/IP/C/M44.DOC.HTM [hereinafter *TRIPs Council Minutes - June 16, 2004*] (noting that as of June 2004, Papua New Guinea, Saint Kitts and Nevis, Saint Vincent, and the Grenadines still had submitted a notification). While this indicates a vast improvement, upon further scrutiny of the actual notifications made by member nations, it becomes clear that many developed and developing nations have not fully integrated TRIPs terms into domestic laws. As of September 2004, only five of the twenty-five developed WTO member nations have notified the Council that they had adopted the domestic law necessary to fully comply with TRIPs. See WTO Notification Analysis, *supra* note 29. Similarly, none of the ninety developing countries required to comply by January 2000 have notified the Council that their domestic laws are in compliance. *Id.*

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_viewerwindow.asp?D:DDFDOCUMENTS/T/IP/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_file567_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.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.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.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.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.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.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.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.⁴³ Other WTO nations are developing their laws through various governmental agencies, each working on an area of the law independently.⁴⁴ As a result of these piece-meal approaches, there are often inconsistencies in the laws themselves.⁴⁵

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

³⁶ *Id.*

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.)

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.)

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).

⁴⁰ 2004 SPECIAL 301 REPORT, *supra* note 27 (listing countries affected by these problems, including India, Egypt, Israel, and Italy).

⁴¹ See CIPR, *supra* note 24, at 137-38.

⁴² *Id.* at 138, 141-42; PENGELLY, *supra* note 33, at 4.

⁴³ CIPR, *supra* note 24, at 138-39; PENGELLY, *supra* note 33, at 8.

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.

⁴⁵ See *id.* See also 2004 SPECIAL 301 REPORT, *supra* note 27 (listing countries characterized by this problem, including Philippines, Korea, India, and Argentina).

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.⁴⁷ In addition, the costs of establishing and administering the comprehensive intellectual property systems required under TRIPs are proportionally exorbitant for developing countries.⁴⁸ One source indicates that the total cost of establishing an intellectual property regime in a developing country could range between \$250,000 and \$800,000.⁴⁹ 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.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.⁵¹ The staff often works in unsophisticated environments without the benefits of technology to support their efforts.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.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.⁵⁴ While prices are rising, these new laws do not generate counteracting sources of revenue.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.⁵⁶ In many developing countries, these economic

⁴⁷ CIPR, *supra* note 24, at 138.

⁴⁸ *Id.* at 145.

The establishment and operation of the [intellectual property] infrastructure in developing countries involves a range of both one-time and recurrent costs. One-time costs could include acquisition of office premises; automation (hardware and software) and office equipment; consultancy services (for policy research, the drafting of new legislation, design of automation strategies, management re-organization etc); and training of staff in the relevant agencies dealing with policy/law making, administration and enforcement. Recurrent costs could include staff salaries and benefits; charges for utilities; information technology equipment maintenance; communications services (including development of an annual report and website); travel expenses for participation in meetings of the international and regional organizations; and annual contributions to WIPO and regional organizations. *Id.*

⁴⁹ *Id.* Net on-going costs vary based on the amount of revenue that can be raised to cover expenditures. *Id.* at 141-42. Developing nations will likely raise far less revenue and, therefore, will be less likely to cover administrative costs. *Id.*

⁵⁰ *Id.* at 145-46. See also Ruth L. Okediji, *The Institutions of Intellectual Property: New Trends in an Old Debate*, 98 AM. SOC'Y INT'L L. PROC. 219, 221 (2004) (discussing the impact of TRIPs on the ability of developing countries to ensure the welfare of their citizens).

⁵¹ Cychosz, *supra* note 31, at 1011; CIPR, *supra* note 24, at 141-42.

⁵² PENGELLY, *supra* note 33, at 5; CIPR, *supra* note 24, at 142.

⁵³ Wu, *supra* note 1, at 105.

⁵⁴ See PENGELLY, *supra* note 33, at 5; Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21-22 (2004) (speaking specifically regarding patents).

⁵⁵ See Dreyfuss, *supra* note 54, at 21-22 (speaking specifically regarding patents).

⁵⁶ See CIPR, *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.⁵⁷ The result of these economic impacts is that government officials must act in precarious political environments.⁵⁸

India's implementation of TRIPs Articles 70.8 and 70.9⁵⁹ 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.⁶⁰ 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.⁶¹ In the interim, India's President took steps to ensure that, in practice, these TRIPs terms continued to be met.⁶² 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.⁶³ 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.⁶⁴

Similarly, many developed nations were required to adjust their intellectual property rights schemes in order to become compliant with TRIPs.⁶⁵ These changes

revenues); 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).

⁵⁷ See Wu, *supra* note 1, at 105 (stating that increasing intellectual property rights could "clamp down" on the struggling local economy).

⁵⁸ See Charles Levy, *Implementing TRIPs: A Test of Political Will*, 31 LAW & POL'Y INT'L BUS. 789, 791 (2000) (stating that "for some developing countries, the costs of fully compensating the holders of [intellectual property] rights are a substantial political burden").

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_viewerwindow.asp?D:DDFDDOCUMENTS/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.*

⁶¹ Srividhya Ragavan, *Patent Amendments in India in the Wake of TRIPs*, CASRIP NEWSLETTER (CASRIP, Seattle, WA), Winter 2001, at 1, <http://www.law.washington.edu/casrip/Newsletter/Vol8/newsv8i1Ragavan.pdf>.

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).

⁶⁴ Status Report, *Implementation of the Recommendations and Rulings in the dispute regarding India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/10/Add.4 (Apr. 16, 1999).

⁶⁵ See Appellate Body Report, *Canada - Term of Patent Protection*, WT/DS170/AB/R, (Sept. 18, 2000)

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,⁶⁶ 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

(providing an example of a developed nation that was forced to change its existing intellectual property rights to meet TRIPs standards).

⁶⁶ DRAHOS, *supra* note 7, at 6 (noting in particular India’s decreasing role as a leader of developing countries in fighting TRIPs terms as they recognize greater benefits to their more developed economy). *See also* Okediji, *supra* note 50, at 221 (noting Brazil and India’s growing commonality with developed nations with respect to the types and manner of intellectual property rights protections).

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.”⁶⁷ However, since the adoption of TRIPs, many have come to question whether the claimed advantages have, or will, come to fruition.⁶⁸ 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.⁶⁹ In addition to the economic and political ramifications of implementing TRIPs-compliant laws,⁷⁰ these negative impacts include collateral ramifications on broader issues, such as public health and biodiversity,⁷¹ and greater difficulties in achieving technological and scientific development.⁷² 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,⁷³ 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.⁷⁴ 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.⁷⁵ Indeed, these agreements were central to the final acquiescence of developing countries to the TRIPs agreement.⁷⁶ However, developed nations do not appear to be standing behind these promises in a substantive way.⁷⁷

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

⁶⁷ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 2 (2004).

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.

⁷⁷ CIPR, *supra* note 24, at 25-6; Clete D. Johnson, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 464-65 (2004).

enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country [m]embers.”⁷⁸ Not only has the TRIPs Council had to take additional steps to ensure compliance by developed nations,⁷⁹ but some have expressed concern as to whether the scope of the term itself adequately supports the transfer of technology.⁸⁰ 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.⁸¹

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.”⁸² 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.⁸³ Despite this agreement, the European Union and other developed nations have maintained significant protectionist measures.⁸⁴ The United States initially appeared to be following through with its agricultural commitments.⁸⁵ However, despite these initial actions and subsequent commitments at the 2001 WTO Ministerial Conference in Doha⁸⁶ 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.⁸⁷

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,⁸⁸ many

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%2FDDDFDOCUMENTS%2FT%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.*

⁸² Multilateral Agreements on Trade in Goods, Agreement on Agriculture, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Preamble, 33 I.L.M. 1125.

⁸³ *Id.*

⁸⁴ Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219, 226 (2004).

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

agricultural issues from two entirely different and conflicting perspectives, although originally they had developed two diametrically opposed proposals. *Id.* at 228-229.

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 (suggesting 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 45 (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 co-operation 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.

⁹⁴ Douglas Ierley, *Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute Over Bananas*, 33 LAW & POL'Y INT'L BUS. 615, 643-44 (2002) (based on a series of interviews with several leaders of developing nations).

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.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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.⁹⁹ Others argue that extending the implementation time further will increase the chances of successfully implementing TRIPs.¹⁰⁰ 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.¹⁰¹ The study argues that this flexibility will increase the potential for the economic gains promised of an intellectual property system.¹⁰²

for developing countries with respect to the WTO dispute resolution process); PENGELLY, *supra* note 33, at 47 (noting the particular lack of resources for least developed countries).

⁹⁶ PENGELLY, *supra* note 33, at 49; CIPR, *supra* note 24, at 151.

⁹⁷ PENGELLY, *supra* note 33, at 49.

⁹⁸ TRIPs, *supra* note 2, Part VI, Arts. 65, 66, at 1222.

⁹⁹ Cychosz *supra* note 31, at 1003-04 (explaining that TRIPs undercuts its effectiveness as an enforcement mechanism by allowing continual extensions of the compliance period for developing countries, creating a disincentive for them to provide even minimal patent protection). It should be noted that this report also calls for economic incentives that mitigate initial costs to administer the intellectual property rights system as well as to supplement the increased costs of goods in order to bring the country's economy to a point where the intellectual property rights protections are beneficial. *Id.* at 1015.

¹⁰⁰ CIPR, *supra* note 24, at 161-62.

¹⁰¹ *Id.*

¹⁰² *Id.*

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.¹⁰³ 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.¹⁰⁴ Its willingness to use enforcement mechanisms combined with its economic strength¹⁰⁵ 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.¹⁰⁶ In addition, it has utilized bilateral and regional trade

and developing countries will incur significant costs if they rush to establish an IP regime that is inappropriate to their level of development. And, quite obviously, the governments of many LDCs, particularly in sub-Saharan Africa are facing much more immediate demands in critically important areas such as health, education and food security.

Id.

¹⁰³ CIPR, *supra* note 24, at 162.

¹⁰⁴ See DRAHOS, *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).

¹⁰⁵ 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).

¹⁰⁶ See *supra* note 31 (providing a description of the Special 301 Report, including its purpose and relation to trade sanctions).

agreements to bind nations to even more extensive intellectual property rights protections than stipulated in TRIPs.¹⁰⁷ 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.¹⁰⁸ Special 301 Watch Lists have been used widely to spur other nations to improve their protection of intellectual property for decades.¹⁰⁹ 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.¹¹⁰

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.¹¹¹ 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.¹¹² 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).

¹¹⁰ See 2004 SPECIAL 301 REPORT, *supra* note 27; 2003 SPECIAL 301 REPORT, *supra* note 32; 2002 SPECIAL 301 REPORT, *supra* note 32; UNITED STATES TRADE REPRESENTATIVE, 2001 SPECIAL 301 REPORT (2001), http://www.ustr.gov/Document_Library/Reports_Publications/2001/2001_Special_301_Report/Section_Index.html [hereinafter 2001 SPECIAL 301 REPORT]; UNITED STATES TRADE REPRESENTATIVE, 2000 SPECIAL 301 REPORT (May 1, 2000),

http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Section_Index.html [hereinafter 2000 SPECIAL 301 REPORT]; UNITED STATES TRADE REPRESENTATIVE, 1999 SPECIAL 301 REPORT (Apr. 30, 1999),

http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Section_Index.html [hereinafter 1999 SPECIAL 301 REPORT]. An analysis of these reports shows that most developed nations were removed from the list by the 2003 report. Only three remained in 2004. *Id.* Conversely, the number of developing countries has steadily increased since 2002. *Id.*

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.¹¹³ This lack of action leads some to believe that the Special 301 Reports are ineffective.¹¹⁴ Others indicate that many countries perceive the threat of trade sanctions invoked by the Watch Lists as real.¹¹⁵ 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.¹¹⁶

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)¹¹⁷ to motivate developing countries. Approximately ten WTO member nations have been subject to the GSP review process since 1995, when TRIPs came into force.¹¹⁸ While the GSP review of many countries has lasted more than three years,¹¹⁹ only three nations have actually had their GSP privileges sanctioned as a result of weak intellectual property

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 Cychosz, *supra* note 31, at 1002 (noting continued noncompliance in the area of patent rights).

¹¹⁴ See Cychosz, *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/nle/crsreports/economics/econ60.cfm?&CFID=18187632&CFTOKEN=97032532>.

¹¹⁸ Based on a review of Special 301 Reports and subsequent Internet searches. Nations subject to a GSP review were Argentina, Brazil, Russia, Turkey, Dominican Republic, Honduras, Panama and Paraguay. 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; Press Release, IIPA Applauds the Administration for Initiating a GSP Review of Pakistan's Copyright Protection and Enforcement and Expects Swift Action by the Brazilian and Russian Governments to Improve Copyright Enforcement (July 2, 2004), http://www.iipa.com/pressreleases/2004_July2_GSP-rev.pdf [hereinafter IIPA Press Release]; Letter from Maria Strong, Vice President/Associate General Counsel, International Intellectual Property Alliance to Chairman of the GSP Subcommittee of the Trade Policy Staff Committee, Office of the U.S. Trade Representative (Oct. 4, 1996), at http://www.iipa.com/gsp/1996_Oct29_cmnts.html (last visited Jan. 1, 2005) [hereinafter IIPA Oct. 1996 Letter to USTR] (regarding Panama and Paraguay); International Intellectual Property Alliance, at http://www.iipa.com/rbc/1998/rbc_honduras_301_98.html (last visited Jan. 1, 2005) [herein after IIPA Website] (regarding Honduras GSP review status); Info. & Comm. Tech. Team, E. Mich. U. & U.S. Dep't. of Com., at

http://www.emich.edu/ict_usa/HONDURAS.htm#Intellectual_Property_Rights (last visited Jan. 1, 2005) [hereinafter Info. & Comm. Tech. Team] (regarding Honduras GSP sanctions).

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.

rights protection.¹²⁰

Some have pointed out that the benefits offered through the GSP are diminishing and, therefore, may lose their deterrence power.¹²¹ 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.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵

The United States was quick to employ this mechanism, initiating twelve cases in the first four years after TRIPs came into force.¹²⁶ These efforts proved fruitful. All

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), India concerning patent protection for pharmaceutical and agricultural chemical products (WT/DS50), Ireland concerning measures affecting the grant of copyright and neighboring rights (WT/DS82 and 115), Japan concerning sound recordings (WT/DS28), Pakistan concerning patent protection for pharmaceutical and agricultural chemical products (WT/DS36), Portugal concerning patent protection under the industrial property law (WT/DS37), Sweden concerning measures affecting the enforcement of intellectual property rights (WT/DS86).

¹²⁷ *Id.* Six of the twelve cases settled in favor of the United States before a request for a panel. (Japan-WT/DS28, Portugal -WT/DS37, Denmark-WT/83, Sweden -WT/DS86, EC/Greece -WT/DS124&125, Argentina -WT/DS171&196). *Id.* Two settled in favor of the United States following a request for a panel, but before a panel decision was rendered (Pakistan -WT/DS36, Ireland-WT/DS82&115). *Id.* One case was settled neutrally (no corrective action in favor of the United States) following a request for a panel, but before a panel decision was rendered (Brazil -WT/DS197). *Id.* Two went through the full review process and were decided in favor of the United States (Canada -WT/DS170, India -WT/DS50). *Id.* One remains under panel review (European Communities-WT/DS174). *Id.*

¹²⁸ *Id.* In its settlement with Argentina, the United States reserved the right to raise consultation regarding Argentina's steps, or lack of, to protect test study data submitted in connection with marketing approvals for pharmaceutical or agricultural chemical products. Notification of Mutually Agreed Solution, U.S. Complaints Concerning Argentinean Patent Protection for Pharmaceuticals and Test Data, and Certain Measures on the Protection of Patents and Test Data Protection for Agricultural Chemicals, WTO Doc. 02-3427 (June 20, 2002).

¹²⁹ 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).

¹³⁰ See Report of the Appellate Body, European Communities complaint concerning Section 211 of the U.S. Omnibus Appropriations Act of 1998, WTO Doc. 02-0001 (Jan. 2, 2002), http://docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDDOCUMENTS/T/WT/DS/176ABR.DOC.HTM (stating that the decision included actions requiring the United States to come into compliance with TRIPs); Notification of a Mutually Satisfactory Temporary Arrangement, European Communities complaint concerning Section 110(5) of the U.S. Copyright Act, WTO Doc. 03-3400 (June 26, 2003), http://docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDDOCUMENTS/T/WT/DS/160-23.DOC.HTM [hereafter WTO Settlement Agreement concerning US Copyright] (stating that the case resulted in \$3.3m in damages as a temporary solution). One case remains outstanding. See Request for Consultations by the European Communities 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?D:DDFDDOCUMENTS/T/IP/D/21.DOC.HTM (stating that a panel has not been requested and no settlement has been filed).

¹³¹ See Request for Consultations by Brazil concerning U.S. Patents Code, WTO Doc. 01-0597 (Feb. 7, 2001),

http://docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDDOCUMENTS/T/G/TRIMS/D18.DOC.HTM [hereafter WTO Consultation Request-Brazil complaint against U.S.]. 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.¹³² Developing and developed nations alike face competing social, political, and economic challenges that may pressure a nation to remain out of compliance.¹³³ 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.¹³⁴ To date, there has been only one instance related to the TRIPs agreement where sanctions were imposed in order to obtain compliance.¹³⁵ However, the broader use of the WTO dispute resolution process suggests that non-compliance is a strong possibility for developed nations.¹³⁶ Developed nations will also need to consider that the more they fail to comply, the less pressure developing nations will feel to also comply.¹³⁷

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.¹³⁸ Access to enforcing intellectual property rights can be impeded by the often inefficient, complex, and ineffective bureaucracy of intellectual property rights enforcement systems.¹³⁹

Even when cases are raised in the judicial system of a given country, national

http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDDOCUMENTS/T/IP/D/23A1.DOC.HTM [hereafter WTO Settlement Notification Brazil/U.S. Patent Complaints]. Both nations agreed not to pursue their respective panel review requests. *Id.*

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 miniscule 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.¹⁴⁰ 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.¹⁴¹ 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 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.¹⁴² These agreements have been used to not only emphasize TRIPs commitments, but also to expand intellectual property rights protections beyond TRIPs terms.¹⁴³ 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.¹⁴⁴

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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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).

¹⁴² DAVID VIVAS-EUGUI, REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE FREE TRADE AREA OF THE AMERICAS (FTAA) 7 (2003), [http://www.geneva.quino.info/pdf/FTAA%20\(A4\).pdf](http://www.geneva.quino.info/pdf/FTAA%20(A4).pdf)

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

context of bilateral agreements with Nicaragua and Ecuador, respectively).

¹⁴⁸ *Id.* at 7.

¹⁴⁹ Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 98 *Am. Soc’y Int’l L. Proc.* 213, 215-16 (2004).

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.¹⁵⁵ To date, their participation has been minimal.¹⁵⁶ This is not surprising given that the WTO dispute resolution process is an expensive, complex and time-consuming endeavor.¹⁵⁷ In addition, identifying viable disputes and effectively challenging a developed nation requires a level of sophisticated legal expertise that many developing nations lack.¹⁵⁸

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.¹⁵⁹ The United States has demonstrated a willingness to use its Special 301 Watch Lists and GSP sanction

is actively involved in pressuring the United States to maintain high standards for the protection of drug patents); International Intellectual Property Association, About IIPA, at <http://www.iipa.com/aboutiipa.html> (last viewed Jan. 1, 2005) (declaring the IIPA as a "private sector coalition formed . . . to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials" and explicitly noting that they "work[] closely with the U.S. Trade Representative" to identify countries who are not providing adequate intellectual property rights protections).

¹⁵⁵ TRIPs, *supra* note 2, Part V, Art. 64, at 1221.

¹⁵⁶ See TRIPs Dispute Index, *supra* note 104. Currently, only one developing country, Brazil, has initiated a WTO dispute resolution, and developing countries have only joined in three other cases. *Id.* Brazil successfully raised a dispute issue against the United States regarding the U.S. Patent Code and in response to a dispute resolution issue raised against them by the United States (WT/DS199, WT/DS224). *Id.* Other developing nations including India, Brazil, Argentina, Columbia, México, Romania, and Turkey joined in up to three other cases: 1) Australian complaint concerning the European Communities' protection of trademarks and geographical indications for agricultural products and foodstuffs (WT/DS290); 2) European Communities' complaint concerning Canada's patent protection of pharmaceutical products (WT/DS114); and 3) United States's complaint against the European Communities concerning protection of trademarks and geographical indications for agricultural products and foodstuffs (WT/DS174). *Id.*

¹⁵⁷ *Ierley*, *supra* note 94, at 622, 643, 645 (reciting comments by representatives of developing countries as to why they do not use the WTO dispute resolution process more (for TRIPs and other trade disputes) despite a growing sense of empowerment it appears to be creating for those that have been involved).

¹⁵⁸ See *id.* at 643 (identifying the need for training and the lack of competent staff in order to fully utilize the WTO dispute resolution process). See also PENGELLY, *supra* note 33, at 4 (identifying the lack of legal and intellectual property rights knowledge generally).

¹⁵⁹ DRAHOS, *supra* note 7, at 43.

review list in response to defiant behavior.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.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.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.¹⁶³ In response, Brazil requested a WTO consultation focused on a similar United States law that favored domestic patents.¹⁶⁴ Brazil's efforts resulted in the United States agreeing to rescind its WTO action if Brazil withdrew its consultation request.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.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.¹⁶⁷ Budgetary limitations make it difficult to ensure attendance at the many meetings held in Geneva.¹⁶⁸ Moreover, despite holding a majority of votes, developing nations find themselves shut out of the decision making process, particularly at Ministerial Conferences.¹⁶⁹ As a result, developing countries have no

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).

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. *Id.* at 8-9. The impact on individual developing countries "is likely to be miniscule in relation to [most] developed countr[ies'] larger economy." *Id.* at 17.

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).

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.

¹⁶⁴ WTO Consultation Request-Brazil complaint against U.S., *supra* note 131.

¹⁶⁵ WTO Settlement Notification Brazil/U.S. Patent Complaints, *supra* note 131.

¹⁶⁶ TRIPs, *supra* note 2, Part VII, Art 71, at 1224-25.

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).

¹⁶⁸ *Id.*

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.¹⁷⁰ 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 nations¹⁷¹ as well as the effectiveness of its strategy to use bilateral agreements to derail negotiations.¹⁷² 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.¹⁷³ Developing countries have struggled to compel developed nations to adequately address their issues through these forums.¹⁷⁴ 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,¹⁷⁵ 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.¹⁷⁶ The 2003 Ministerial Conference in Cancun¹⁷⁷ was not nearly as successful.¹⁷⁸ 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.¹⁷⁹

TRIPs related proposals as a result of the use of Green Rooms which limit attendees in key discussions for redrafting proposals and the practice of Ministerial Chair's to redraft proposals based on informal discussions).

¹⁷⁰ DRAHOS, *supra* note 7, at 29.

¹⁷¹ Cho, *supra* note 84, at 230 (describing how the United States defied both a large group of developing nations and the Chair of the WTO by blocking a proposal that called for the elimination of cotton subsidies so that these developing countries could compete in the markets of the United States and other developed nations).

¹⁷² See Abbott, *supra* note 143, at 97 (describing efforts by the United States through TRIPs-plus agreements to undermine agreements simultaneously being made by the WTO nations regarding access to pharmaceuticals). See also *supra* Part III.B.4 (describing how the United States uses TRIPs-plus agreements to influence the terms agreed to in the TRIPs Council).

¹⁷³ Cho, *supra* note 84, at 221-22. As part of the WTO charter, the general membership of the WTO hold a Ministerial Conference at least once every two years for representatives of member nations to discuss outstanding issues. *Id.* at 221. At the first meeting in Singapore in 1996, the Membership established work groups to address unresolved issues between Ministerial Conferences. *Id.* at 222.

¹⁷⁴ See *id.* at 220-22 (discussing the breakdown of discussions at the 2003 WTO Ministerial Conference in Cancun as well as the "omens of th[is] . . . fiasco in the two previous Ministerial Conferences in Singapore (1996) and Geneva (1998)).

¹⁷⁵ Fourth WTO Ministerial Conference held in Doha, Qatar, Nov. 9-13, 2001.

¹⁷⁶ Cho, *supra* note 84, at 224-25.

¹⁷⁷ Fifth WTO Ministerial Conference in Cancun, Mexico, in Sept. 2003.

¹⁷⁸ Cho, *supra* note 84, at 232-33.

¹⁷⁹ *Id.* at 228.

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,¹⁸⁰ as well as the more formal coalition, G-21, which emerged from the Conference in Cancun,¹⁸¹ 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.¹⁸² 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.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ Some suggest that the entrance of China will tip the scale, as it likely did

¹⁸⁰ See Ellen 't Hoen, TRIPs, *Pharmaceutical Patents, and Access to Essential Medicines: A Long Way From Seattle to Doha*, 3 CHIC. J. INT'L L. 27, 39-40, 44 (2002) (providing description of how the African Group, a coalition of African countries, lead nineteen other countries in fighting for greater ability to address public health concerns through less stringent intellectual property rights related to pharmaceuticals).

¹⁸¹ Cho, *supra* note 84, at 227-28. A United States-European Union joint paper was presented as a base text for the agriculture trade negotiations. *Id.* However, the initial dissenters to the proposal, Brazil, India, and China, eventually succeeded in persuading other developing countries to form a coalition dubbed 'G-21', despite the fact that some members of the G-21 faced individual pressure from the United States and the European Union not to join. *Id.* Ultimately, the initial joint United States-European Union text was withdrawn by the Conference Chair. *Id.*

¹⁸² DRAHOS, *supra* note 7, at 14-15, 19-20 (describing how the United States used bilateral agreements to dismantle groups of developing countries who rejected TRIPs and WIPO treaties backed by United States). See also Dinwoodie, *supra* note 149, at 216 (noting that bilateral agreements with the United States may break down the coalition of developing countries fighting stronger trademark protections). See also *supra* Part III.B.4 (describing how the United States uses bilateral agreements to secure high intellectual property rights protections).

¹⁸³ See Cho, *supra* note 84, at 236 (noting several differing opinions on critical issues, including India and Brazil's different stance on agriculture); DRAHOS, *supra* note 7, at 28 (noting differences between the African Group and India on the prohibition of patenting life and the difference between India and many developing countries on geographic indicators).

¹⁸⁴ Okediji, *supra* note 50, at 221.

¹⁸⁵ See Steinberg, *supra* note 8, at 275 n.207 (noting that the United States and European Union markets have accounted for 65% of the WTO gross domestic product in the last decade). See also 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).

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.¹⁹² 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.¹⁹³ 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.¹⁹⁴

Despite these advantages, history shows that the inclusion of NGOs alone is not sufficient.¹⁹⁵ The United States is strong enough to bear the impacts of significant public backlash.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹ As a developed “nation,” it shares many of the economic interests that drive the United States to seek more stringent intellectual property rights.²⁰⁰ However, history has shown that the European Union does not always align itself with the United States.

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.

¹⁹⁷ See Helfer, *supra* note 67, at 56-57.

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.²⁰¹ 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.²⁰²

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.²⁰³ This more collaborative and peaceful approach culminated in the establishment of the European Union.²⁰⁴ 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.²⁰⁵

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.²⁰⁶ 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

²⁰¹ 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).

²⁰² 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.*

²⁰³ 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).

²⁰⁴ Kagan, *supra* note 204.

²⁰⁵ 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).

²⁰⁶ EUROPEAN COMM. DIRECTORATE GENERAL FOR TRADE, *supra* note 28.

and enforcement of TRIPs.²⁰⁷

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.²⁰⁸

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,

²⁰⁷ Pascal Lamy, The TRIPs Agreement 10 Years On, Speech at International Conference on the 10th Anniversary of the WTO TRIPs Agreement (June 23, 2004), at http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla233_en.htm (last Jan. 1, 2005).

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.