

# **BARGAINING AROUND THE TRIPS AGREEMENT: THE CASE FOR ONGOING PUBLIC-PRIVATE INITIATIVES TO FACILITATE WORLDWIDE INTELLECTUAL PROPERTY TRANSACTIONS\***

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## I. INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>1</sup> (TRIPS Agreement) establishes a set of universal intellectual property norms<sup>2</sup> that all World Trade Organization (WTO)

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1. Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, April 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

2. Besides mandating new international minimum standards for patents, copyrights, trademarks, trade secrets, industrial designs, integrated circuit designs, and other intellectual property disciplines, the TRIPS Agreement incorporates the Berne and Paris Conventions, and certain provisions of the Rome Convention on Neighboring Rights and of the Washington Treaty on integrated circuit designs. See TRIPS Agreement, *supra* note 1, arts. 1(3), 2, 3(1), 9(1), 14, 35; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as last revised* at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised* at Paris, July 24, 1971, 828 U.N.T.S. 221; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, *adopted* Oct. 26, 1961, 496 U.N.T.S. 43; Treaty on Intellectual Property in Respect of Integrated Circuits, *opened for signature* May 26, 1989, 28 I.L.M. 1477. See generally Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 3 (Carlos M. Correa & Abdulqawi A. Yusuf, eds., 1998); J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the*

member states must respect in their domestic laws within prescribed periods of time.<sup>3</sup> Two sets of ancillary norms further buttress the resulting legal infrastructure. The first of these norms purports to recognize comparable minimum standards for the enforcement of intellectual property rights within single national systems.<sup>4</sup> The second norm establishes international dispute-settlement machinery that permits member states in good standing to extract compensatory damages from other recalcitrant states whose laws or practices are found to nullify or impair the trade advantages that should otherwise flow from the TRIPS Agreement.<sup>5</sup>

The TRIPS Agreement expressly provides certain built-in capabilities that could help to foster a cooperative approach to implementing its obligatory minimum standards. For example, the Council for TRIPS could, at least in principle, exercise a mediating role both with respect to reducing deviations from existing intellectual property norms and to fashioning a consensus to deal with emerging or candidate norms requiring future action.<sup>6</sup> In a similar vein, some provisions of the Agreement allow for, or mandate, consultations among states having different interests, for example, in such thorny areas as competition law<sup>7</sup> or geographical appellations of origin;<sup>8</sup> still other provisions mandate periodic reviews of subjects like biogenetic patenting, where gaps in the law remain to be filled.<sup>9</sup> Finally, the dedication of the WTO's principal intellectual property officers to pursue cooperative—rather than coercive—forms of implementation<sup>10</sup> con-

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*WTO Agreement* [hereinafter Reichman, *Universal Minimum Standards*], in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE*, *supra*, at 21.

3. See TRIPS Agreement, *supra* note 1, arts. 65, 66(1).

4. *Id.* arts. 41-61.

5. See *id.* arts. 63, 64; Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, 33 I.L.M. 112 (1994) [hereinafter DSU].

6. See, e.g., TRIPS Agreement, *supra* note 1, arts. 23(4), 24(2) (mandating that the Council for TRIPS will undertake negotiations to facilitate the protection of geographical indications of wines and spirits) art. 64(3) (requiring the Council to examine complaints and submit its recommendations to the Ministerial Conference for approval) art. 68 (requiring that the Council monitor the operation of the TRIPS Agreement and, "in particular, provide any assistance requested by them [member] in the context of dispute settlement procedures").

7. *Id.* arts. 40(3), (4).

8. *Id.* art. 24(1).

9. *Id.* art. 27(3)(b); see also *id.*, art. 71(1) ("The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.")

10. See, e.g., *id.* art. 1(1) ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.")

stitutes an intangible factor of considerable importance in estimating the prospects for success.<sup>11</sup>

Another built-in factor that favors some degree of cooperative action is the General Agreement on Tariffs and Trade (GATT) high principle of transparency, carried over from the GATT of 1947,<sup>12</sup> which colors the current phase of implementation activities.<sup>13</sup> Under this principle, the WTO Secretariat has been gathering information from member states concerning their existing intellectual property laws and planned legislation.<sup>14</sup> The various trade representatives will then evaluate the results of these surveys, with a view to identifying actual deviations from the agreed standards and other potential sources of friction, which may be addressed within the Council for TRIPS or in bilateral discussions.<sup>15</sup>

The zeal with which the developed countries have thrown themselves into this monitoring or "grading" exercise has bred high expectations among rightsholders and their organized representatives.<sup>16</sup> There is a widespread belief that, once the transitional deadlines begin to expire, the developing countries will succumb to an evolving high-protectionist agenda that looks well beyond the TRIPS Agreement itself.<sup>17</sup> This euphoria stems, in turn, from the conviction that

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art. 43 (emphasizing the need for each Member to provide adequate opportunity for consultation with each other in the case of a dispute) art. 69 ("Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights.").

11. See generally Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997); Adrian Otten [Director, Intellectual Property and Investment Division, WTO] & Hannu Wager [Legal Affairs Officer, Intellectual Property and Investment Division, WTO], *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 411-13 (1996) ("It is to be hoped that retaliation remains more of a threat that gives credibility to the system than anything else.").

12. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]; Multilateral Agreements on Trade in Goods, Apr. 15, 1994, WTO Agreement, Annex 1A, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

13. See TRIPS Agreement, *supra* note 1, art. 63(1).

14. *Id.* art. 63(2).

15. *Id.* art. 63(3).

16. For example, copyright industries have credited the establishment of the WTO and active United States government monitoring for decreasing piracy and for contributing to the growth of sales and exports. See Jeffrey Mays, *Copyright Industry Rise Tied to Global Markets*, J. COMM., Jan. 4, 1997, at 3A, available in LEXIS, New Library, Majpap File; see also Eric H. Smith, *Worldwide Copyright Protection Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 559, 572-78 (1996).

17. See J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL'Y 11, 17-21 (1997) [hereinafter Reichman, *From Free Riders to Fair Followers*] (providing a list of new rules and regulations that the

top-down pressures from governments in powerful developed countries, coupled with strategic litigation in defense of private rightsholders before the WTO's dispute-settlement panels, will suffice to keep the developing countries in line and make it expedient for them to cooperate fully in the implementation process.<sup>18</sup> The outcome thus envisioned is a worldwide intellectual property system in which the "rule of law," once firmly established at the international level, becomes translated into local action by orderly and effective means.<sup>19</sup>

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United States and European Union plan to implement in order to heighten protection for intellectual property). A number of professors and practitioners have voiced their belief that the WTO will help strengthen protection for intellectual property and bring developing nations into line with stronger protection. See, e.g., Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of the TRIPS Dispute Settlements?*, 29 INT'L LAW. 99, 112-13 (1995); Allen Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and the World Trade Organization*, 23 CAN-U.S. L.J. 261, 312 (1997) ("Accordingly, the WTO Dispute Settlement Body will soon be producing decisions which will be the international IP regime's first experience in the development of something approximating 'case law.'"); Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 783 (1997) (predicting that a higher degree of protection, enforcement, and harmonization will result from the implementation of the TRIPS Agreement); Karen D. Lee & Silke von Lewinski, *The Settlement of International Disputes in the Field of Intellectual Property*, in FROM GATT TO TRIPS: THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 278, 296 & n.85 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996); Gail E. Evans, *Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1994 WORLD COMPETITION L. & ECON. REV. 137 (1994) (tracing evolution of TRIPS Agreement).

18. For example, the United States prevailed against India in a WTO action claiming that India had failed to implement certain ancillary measures under the patent provisions of the TRIPS Agreement. See WTO Appellate Body Report on U.S. Complaint Concerning India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter *U.S. v. India*]; J.H. Reichman, *Securing Compliance with the TRIPS Agreement After U.S. v. India*, 1998 J. INT'L ECON. L. 585, 592-97 [hereinafter Reichman, *Securing Compliance with the TRIPS Agreement After U.S. v. India*] (analyzing the implications of this decision). Pressure from the multinational companies behind the TRIPS Agreement will not be confined to developing countries, which nonetheless remain the principle target. For example, in the case of Ireland's copyright law, the United States threatened to bring a complaint to the WTO against what it viewed as Ireland's weak copyright laws. See Dennis Kelleher, *US Pressure Forces Copyright Crackdown: Ireland Is Under Pressure to Strengthen Copyright Law*, IRISH TIMES, June 8, 1988, at 16, available in LEXIS, News Library, Majpap File; John Zaracostas, *US Withdraws Complaint Over Irish Piracy Rules*, J. COMM., Feb. 24, 1998, at 3A, available in LEXIS, News Library, Majpap File. In order to avoid proceedings at the WTO, Ireland engaged in bilateral discussions with the United States and came to an agreement that ensured that Ireland would change its copyright laws. See *id.*

19. See Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 J. INTL. L. BUS. 775, 805 (1997); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Government*, 90 AM. J. INT'L L. 193 (1996); see also *supra* note 17.

The authors of this Article do not share this rosy view of the ensuing implementation process. We believe that there are multiple factors tending to encourage non-cooperative behavior by developing countries during the implementation phase, some of which were clearly evidenced during the World Intellectual Property Organization's (WIPO) Conference on Copyright and Certain Related Questions held in December 1996,<sup>20</sup> and that these factors outweigh those likely to induce more cooperative attitudes. In a climate of non-cooperation, moreover, we believe that the developing countries will have abundant opportunities to resist and undermine the "rule of law" in subtle ways that will evoke difficulties that the developed countries previously experienced under the Paris and Berne Conventions.<sup>21</sup> If we are right, the many structural impediments to implementing the "rule of law" that are identified in Part II of this Article could significantly elevate the social costs of building the new international intellectual property system for all concerned, and could diminish the benefits that rightsholders currently expect from the TRIPS Agreement.<sup>22</sup>

To avoid such a negative outcome, we believe that the relevant interest groups in both developed and developing countries should

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20. See generally Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997).

21. Cf. Frederick M. Abbott, *The New Global Technology Regime: The WTO TRIPS Agreement and Global Economic Development*, 72 CHI.-KENT L. REV. 385, 399 (1996) (predicting that developing countries will "continue to resist changes to their Intellectual Property Rights (IPR) laws, and when they do make changes, they will be slow to enforce them in favor of foreign enterprises"); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 343-344 (1993) (observing that intellectual property laws are often manipulated to the disadvantage of a foreign applicant); John E. Giust, *Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working?* 8 IND. INT'L & COMP. L. REV. 69, 70 (1997) ("Despite its clear mandates, both developing and developed countries have been imperfect in enacting TRIPS-compliant legislation."); J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT'L L. 335, 356 (1997) [hereinafter Reichman, *Enforcing the Enforcement Procedures*] ("First, if the developed countries push too hard and too fast, the developing and the least-developed countries will find ways to push back.")

22. Compare Lisa S. Klainman, *Applying GATT Dispute Settlement Procedures to a Trade-in-Services Agreement: Proceed with Caution*, 11 U. PA. J. INT'L BUS. L. 657 (1990) (favoring a flexible, less legal approach to dispute settlement), with Miguel Montaña i Mori, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 128-36 (1993) (favoring a strong, rule of law approach). See also Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357 (1997) (pointing out weaknesses in the WTO dispute settlement system, discussing problems that arise from having governments rather than private parties arbitrate the dispute, and observing the need for more neutral approaches to dispute settlement than that provided by the WTO system).

consider treating the TRIPS Agreement as a set of default rules to be bargained around within a cooperative framework that removes impediments to the “rule of law” on a transactional basis and that seeks to maximize gains for participating rightsholders on a case-by-case approach. In other words, we see the need to establish an operational framework outside of the TRIPS Agreement’s own institutional machinery that would be conducive to “unofficial” cooperative strategies likely to produce win-win results for both public and private actors, regardless of the tensions that the TRIPS implementation process otherwise may generate among WTO member states.

Most developing countries regulate economic development either through administrative and consultative organs that influence the pace and direction of private enterprise or through state entities that participate directly in commercial activities. A cooperative strategy can succeed only with the tacit approval and support of these bodies.<sup>23</sup> Hence, we propose “public-private initiatives” to facilitate transnational intellectual property deal-making and to improve the climate for enhanced foreign investment in the developing countries. The success of the venture requires that state organs participate in these initiatives as “economic actors” engaging with private actors to achieve specified commercial results, and not as “political actors” responding to normative pressures or to the corresponding need to formulate official intellectual property policies.<sup>24</sup>

In what follows, we explain in greater detail both the need for a cooperative approach along the lines outlined above and a means of implementing it through ongoing public-private initiatives promoted by the International Forum for Intellectual Property Initiatives at the Duke Law School’s Center for Global Information Technologies. We illustrate how the Forum has facilitated negotiations between private companies and representatives of the Chinese government, leading toward particular or specific transactional outcomes. We end by emphasizing the potential short- and medium-term benefits of this approach for the international intellectual property system as a whole.

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23. Cf. HILTON L. ROOT, *SMALL COUNTRIES: BIG LESSONS: GOVERNANCE AND THE RISE OF EAST ASIA passim* (1996) (discussing the role of particular governments in the economic development of countries in East Asia and demonstrating the importance of good government administration in strengthening the economy).

24. Cf. Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT’L L. 389 (1995) (arguing that for disputes to be resolved, state involvement must be depoliticized).

## II. THE TRIPS AGREEMENT AS A NON-COOPERATIVE GAME

Viewed as a whole, the Uruguay Round of multilateral trade negotiations succeeded largely because the developing countries were offered greater access to markets for traditional manufactured goods and for their agricultural products in exchange for codified obligations to respect intellectual property rights in the nontraditional products and processes that are the stock in trade of the technology-exporting countries.<sup>25</sup> While the premises underlying this “package deal” make economic sense in a long-term perspective, apologists for the TRIPS Agreement have largely papered over the extent to which its elevated standards of intellectual property protection reflect the interests of high-tech producers at the expense of users and consumers generally, and especially of those in technology-importing countries.<sup>26</sup> The short-term social costs that most of these countries are destined to incur even under the most optimistic scenarios stem largely from the need to purchase essential goods and services, including food, medicines, and high-tech components of new industrial projects, on the global market for legitimate goods covered by intellectual property rights rather than on the shrinking market for counterfeit or copied substitutes.<sup>27</sup>

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25. See Abbott, *supra* note 21, at 387-88 (listing the bargaining chips used as including the reduction of subsidies for agriculture in industrialized nations, concessions with respect to imports of tropical products, the phasing out of quotas of textile products, substantial transition periods, incentives to transfer technology, and compulsory licensing). See generally Frederick M. Abbot, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989) (providing a thorough history of the negotiating history and objectives of the TRIPS Agreement); Evans, *supra* note 17 (historical view from Australian perspective).

26. See *How Changes in Treaties Affect the Consumer*, NEW STRAITS TIMES (Malay.), May 11, 1997, at 16, available in LEXIS, News Library, Majpap File (citing Dr. Benoit De Nayer at the Sixth International Conference on Consumer Law, who argues that the IP system often negatively affects consumers in terms of price, choice, and redress mechanisms). But see *Intellectual Property and Trade: Hearings Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary*, 99th Cong., 2d Sess. 51-53 (1986) (statement of Harvey E. Bale, Jr., Assistant U.S. Trade Representative for Trade Policy and Analysis) (arguing that weak protection undermines free trade and hurts consumers).

27. See, e.g., UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES at 15-20, 30-32, U.N. Doc. UNCTAD/ITE/1, U.N. Sales No. 96.II.D.10 (1996) (“Costs and Benefits Stemming from the TRIPS Agreement”) [hereinafter TRIPS AND DEVELOPING COUNTRIES]; WORLD HEALTH ORGANIZATION (WHO), GLOBALIZATION AND ACCESS TO DRUGS -- IMPLICATIONS OF THE WTO/TRIPS AGREEMENT at 11-35, WHO/DAP/98.9, Geneva Switzerland, (Nov. 1997); Giunta & Shang, *supra* note 21, at 331 (“[L]ax protection offers economic benefits to

To be sure, the burden of these added social costs will vary from one country to the next, and in some countries may be significantly reduced by countervailing gains from factors such as augmenting foreign investment, growing participation in the networked supply strategies of transnational corporations,<sup>28</sup> and the increasing ability of local innovators to achieve import substitution or to realize export potential.<sup>29</sup> Nevertheless, the knowledge gap separating advanced from developing countries remains a cardinal fact of international economic life, and so long as the former remain willing and able to invest disproportionately greater resources in basic and applied science than the rest of the world, the gap will persist for the foreseeable future.<sup>30</sup> A comparative disadvantage with respect to trade in knowledge goods will, in turn, compel most developing and least-developed countries to adopt defensive strategies for implementing the TRIPS Agreement, to reduce its resulting social costs and tensions, even as they strive to maximize their gains from the WTO Agreement as a whole.<sup>31</sup>

#### A. Structural Barriers on the Road to the “Rule of Law”

The need to minimize the social costs of higher standards of international intellectual property protection will give developing and least-developed countries strong incentives to behave strategically in a manner that has typified the response of both large and small countries to international trade agreements in the past.<sup>32</sup> Of course, even

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developing nations. Because pirates of intellectual property incur minimal production costs and no royalty payments, they are in a better position than legitimate producers to satisfy demands in developing countries.”).

28. See, e.g., TRIPS AND DEVELOPING COUNTRIES, *supra* note 27, at 16; J.H. Reichman, *From Free Riders to Fair Followers*, *supra* note 17, at 87-88; Keith E. Maskus & Denise Eby Konan, *Trade-Related Issues and Exploratory Results*, in ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 401, 409-16, 439-40 (Alan V. Deardorff & Robert M. Stern eds. 1994).

29. See Robert Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491, 493 (1997) [hereinafter Sherwood, *Implications for Developing Countries*].

30. See generally Brian F. Fitzgerald, *Trade Based Constitutionalism: The Framework for Universalizing Substantive International Law?*, 5 Y.B. OF INT'L L. 111 (1996/97); see also Abbott, *supra* note 21, at 395-396.

31. See Fitzgerald, *supra* note 30, at 152 (predicting that the high demands of TRIPS will not be met by developing nations because of economic hardship); Abbott, *supra* note 21, (predicting passive resistance to TRIPS by developing countries and the use of domestic tax policy to counterbalance TRIPS requirements).

32. See William P. Alford, *How Theory Does – And Does Not – Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 20-21 (1994) (observing East Asian resistance to strengthening intellectual property rights in response to

the developed countries may adopt defensive strategies of their own if the TRIPS Agreement turns out to pinch important sectors of their economies, but these temptations are circumscribed by the need to set a good example for the less-advanced countries.<sup>33</sup> In the latter countries, short- and medium-term needs to limit the adverse effects of the TRIPS Agreement will become pervasive, and the resulting efforts seem likely to engender certain recurring patterns of behavior. In particular, these countries are likely to exploit ambiguities in the international legal standards;<sup>34</sup> to adopt countervailing regulatory measures, especially measures sounding in competition law;<sup>35</sup> to devote minimum resources to enforcing intellectual property laws of primary interest to foreign rightsholders;<sup>36</sup> and to invoke safeguards embodied in the TRIPS Agreement to counteract some of the hardship the Agreement may cause.<sup>37</sup>

1. *Exploiting Normative Ambiguities.* The prohibitions of the TRIPS Agreement are clearest and likely to be most effective when they bear on clumsy infringers of its specified intellectual property rights.<sup>38</sup> In this context, the Agreement's minimum standards of

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pressure from the United States).

33. Cf. Ernesto M. Hizon, *The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection*, 15 J. INT'L L. BUS. 105, 130 (1994) (asserting that the WTO will only work if the more economically wealthy members exercise restraint); Andy Shoyer, *No Dispute: The WTO Works*, J. COMM., Dec. 18, 1997, at 6A, available in LEXIS, News Library, Majpap File (suggesting that the United States and E.U. should continue to comply with the WTO, since lesser developed countries will soon be "held responsible for safeguarding" intellectual property rights).

34. See Abbot, *supra* note 21; Dreyfuss & Lowenfeld, *supra* note 11, *passim*; J.H. Reichman, *From Free Riders to Fair Followers*, *supra* note 17, 26-86 (discussing loopholes in the TRIPS Agreement and advising developing countries to exploit them in a procompetitive manner); see also discussion *infra* Part A.1 (discussing normative ambiguities in the intellectual property regime).

35. See TRIPS, *supra* note 1, art. 40(2) ("Nothing in this agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.").

36. See *infra* text accompanying notes 119-44.

37. See TRIPS, *supra* note 1, arts. 7, 8; see also discussion *infra* p. 45 and accompanying notes (explaining how developing countries may use these articles).

38. See Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Provisions in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507, 517, 530-32 (1996) (arguing that Indian pharmaceutical industry will benefit more from patent protection under TRIPS than from free-riding practices of the past); Mays, *supra* note 16, (reporting observations from copyright industries that piracy was generally down). Also, countries such as Thailand, in coming into accord with the TRIPS Agreement, have reported better enforcement procedures and greater success at seizing pirated materials. See Ron Corben, *State Department: Thai Anti-Piracy Effort Not Enough; Infringements Called Key Bilateral Issue*, J. COMM., June

intellectual property protection inhibit free-riders from continuing to engage in wholesale duplication of vulnerable knowledge goods without making any corresponding investment of their own.<sup>39</sup> The Agreement should thus constitute a powerful weapon against the kind of “piratical” conduct that the early negotiations aimed to repress.<sup>40</sup>

Over the course of the negotiations, however, as Professor Hanns Ullrich has recently demonstrated, the drafters found it expedient to pursue a far more ambitious goal.<sup>41</sup> They tried to establish a worldwide intellectual property system that both promoted the global interests of the technology-exporting countries, and immunized these interests from disruptive exercises of the territorial sovereignty that had been formally guaranteed to Contracting Parties by Article XX (d) of GATT.<sup>42</sup> The drafters sought to attain these goals by means of a sweeping harmonization of international intellectual property standards at relatively high, rather than minimum levels, and by establishing detailed enforcement standards that domestic authorities must follow, which have no parallel in the pre-existing international conventions.<sup>43</sup>

Despite the legislative successes embodied in the text of the TRIPS Agreement, the drafters’ ambitious goals remain imperfectly achieved, because of the still rudimentary institutional infrastructure of the international intellectual property system,<sup>44</sup> and the system’s

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26, 1998, at 4A, available in LEXIS News Library, Majpap File. In 1997, seizures in Thailand tripled from 168,000 to 568,000. See *id.* The rate of software piracy in Israel dropped to 54% in 1997, from 69% a year earlier. See Nina Gilbert, *BSA: Piracy Down to 54%*, THE JERUSALEM POST, June 22, 1998, at 19, available in LEXIS News Library, Majpap File. For example, as part of its obligations under TRIPS, Singapore has passed stricter laws, making it an offence to possess equipment used to pirate copyrighted goods. See *Copyright Law Gets More Bite Against Piracy*, THE STRAITS TIMES (Sing.), February 20, 1998, at 28, available in LEXIS News Library, Majpap File.

39. See, e.g., Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991); David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT’L L. 893, 895-96 (1989).

40. See *U.S. Framework Proposal to GATT Concerning Intellectual Property Rights*, 4 INT’L TRADE REP. (BNA) 1371 (Nov. 4, 1987).

41. See Hanns Ullrich, *TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy*, in ANITRUST: A NEW INTERNATIONAL TRADE REMEDY? 184-93 (John O. Haley & Hiroshi Iyori eds., 1995).

42. See GATT 1947, *supra* note 12, art. XX(d) (carried over into GATT 1994, *supra* note 12, as modified by TRIPS Agreement); Ullrich, *supra* note 41, at 180-81.

43. See Ullrich, *supra* note 41, at 180-81; *infra* text accompanying notes 119-21.

44. See Dreyfuss & Lowenfeld, *supra* note 11, at 292-93 (noting that there is no legislative check or balance on dispute resolution in the WTO); Giunta & Shang, *supra* note 21, at 338

corresponding dependence on the cooperation of national systems for its day-to-day activities.<sup>45</sup> Only in some cases, and after the exhaustion of local remedies, will it prove possible to invoke the dispute-settlement machinery of the WTO Agreement,<sup>46</sup> and for reasons explained below, the effectiveness of this machinery remains to be seen. In most cases, the implementation of the entire TRIPS regime will in fact depend on the cooperation of domestic legislatures, courts, and administrative or consultative agencies, whose tactics or decisions will continue to have far-reaching, extraterritorial effects.<sup>47</sup>

When, for example, second-comers borrow from pre-existing innovations while adding some value of their own to the final product, even if only in the form of price reductions, the level of protection available to foreign rightsholders will vary considerably from one intellectual property subculture to another. In addition, the protection will vary from one jurisdiction to another, even with respect to the same legal subculture.<sup>48</sup> This follows because, by and large, the TRIPS Agreement declines to regulate either the scope of protection issues as such or the permissible range of exceptions to, and limitations on, the exclusive property rights whose transnational recognition it otherwise secures.<sup>49</sup>

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("While the TRIPS Agreement provides for specific enforcement mechanisms, including injunctions, damages and methods of obtaining evidence, it remains unclear how stringently these new provisions will be enforced."); *cf. also* J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 479 (1993) (suggesting that the TRIPS Agreement may be bogged down by an "obsolete and increasingly dysfunctional institutional framework").

45. See, e.g., *U.S. v. India*, *supra* note 18; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 341 (2d ed. 1997); Croley & Jackson, *supra* note 19.

46. See generally Bello, *supra* note 22 (describing the difficulties for United States parties).

47. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 45, at 99 (outlining the impact of national constitutions on the trading system); Timothy G. Ackerman, *Comment: Dis'ordre'ly Loopholes: TRIPS Patent Protection, GATT and the ECJ*, 32 TEX. INT'L L.J. 489, 492 (1997) (noting that interpretations will vary on TRIPS art. 27(2), which allows states to exclude certain inventions from patenting); Martine de Koning, *Why the Coercion-Based GATT Approach Is Not the Only Answer to International Piracy in the Asia-Pacific Region*, 19 EUR. INTELL. PROP. REV. 59 (1997).

48. See Michael Lehmann, *TRIPS, The Berne Convention, and Legal Hybrids*, 94 COLUM. L. REV. 2621, 2626 (1994) (noting how different jurisdictions define the term "technology"); J.H. Reichman, *The Know-How Gap in the TRIPS Agreement: Why Software fared Badly, and What are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 765 (1995) [hereinafter Reichman, *Know-How Gap in TRIPS*] (stressing that "both the strengths and weaknesses of the TRIPS Agreement stem from its essentially backwards-looking character.").

49. See J.H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171, 173-81 (1993).

These issues remain controversial even in the developed countries, and no harmonizing consensus has yet emerged at the international level.<sup>50</sup> Relevant decisions in single cases may thus depend upon territorial adaptations of existing but widely varying state practices,<sup>51</sup> and the decision-makers in developing countries will logically favor those practices that seem most favorable to their own, often shifting interests.<sup>52</sup> In the absence of either an emerging consensus or of some clarifying posterior international legislation, such as the recently adopted WIPO treaties concerning the application of copyrights and related rights to networked environments,<sup>53</sup> the WTO's Appellate Body seems unlikely to challenge these exercises of residual sovereignty in dispute settlement cases, except when the end result appears clearly to contradict an express provision of the TRIPS Agreement.<sup>54</sup>

The uncertain treatment of computer software in international intellectual property law after the TRIPS Agreement is a case in point that has recently attracted scholarly attention. There is no doubt that unauthorized wholesale duplication of copyrightable computer programs should soon trigger judicial sanctions nearly everywhere, and the customs authorities in WTO member states should increasingly bar entry to these illegal products.<sup>55</sup> However, copyright laws seldom apply in the absence of wholesale duplication because courts tend to regard the innovator's most commercially valuable components as functionally determined ideas or processes that are not protectable as expressive "works of authorship."<sup>56</sup> Copyright

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50. See *id.* at 29-52.

51. See, e.g., sources cited *infra* note 61 and accompanying text (providing an example of how the level of protection for computer software varies by country); see also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 509 (1997).

52. See Dreyfuss & Lowenfeld, *supra* note 11, at 296 (observing that without a 'best rule' policy, each country will tailor intellectual property law to its own needs).

53. See World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, WIPO Doc. CRNR/DC/94, adopted Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, WIPO Doc. CRNR/DC/95, adopted Dec. 20, 1996, 36 I.L.M. 76 (1997). See generally Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441 (1997).

54. See *U.S. v. India*, *supra* note 18.

55. See discussion *supra* note 38 (providing examples of increased vigilance against piracy in developing nations); TRIPS Agreement, *supra* note 1, arts. 51-60.

56. See Pamela Samuelson, Randall Davis, Mitchell D. Kapur & J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2356-65 (1994). See also, e.g., *Fonar Corp. v. Magnetic Resonance PLUS, Inc.*, 920 F. Supp 508, 514 (S.D.N.Y. 1996) ("Whether a party can maintain a copyright infringement action involving

laws and the domestic trade secret laws also leave wide room for second-comers to reverse-engineer both protected and unprotected components of computer programs, provided that the underlying technical solutions thus revealed are independently re-implemented and coded.<sup>57</sup> The extent to which patent law can or should take up the slack is hotly debated, and state practice varies from a virtually complete acceptance of computer programs as patentable subject matter, on a par with other fields of endeavor, to a virtually complete denial of eligibility.<sup>58</sup>

Given this uncertainty, the developing countries remain free to pick and choose from among the diverse legal options that respectable state practice makes available, with a view to implementing a normative framework that best suits the capabilities of their own software industries.<sup>59</sup> The same is true with respect to biogenetic engineering,<sup>60</sup> electronic databases,<sup>61</sup> and other promising information technologies that the TRIPS Agreement leaves largely unregulated.<sup>62</sup> Until subsequent legislation clarifies the picture, including the new

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computer software will often hinge on the extent to which the protectable elements of the copyrighted work have been copied. Indeed, even if defendants engaged in unrestrained copying of a plaintiff's work, plaintiff would still be obligated to show that elements that constituted protected expression had been infringed.”).

57. See Reichman, *Know-How Gap in TRIPS*, *supra* note 48, at 779-84; see also *Sega Enters. Ltd. v. Accolade, Inc.*, No. 92-15655, 1993 U.S. App. LEXIS 78, at \*93 (9th Cir. Jan. 6, 1993) (“[W]here disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of a copyrighted work.”)

58. See generally Jurgen Betten, *Patentability of Software in Europe: The German Perspective*, 13 NO. 8 COMPUTER LAW 1 (1996) (comparing the German Patent Office approach to software with the European Patent Office); Sean J. Hackett, *Patent Protection in Europe for Software Inventions*, 479 PLI/PAT 889 (1997) (comparing the approach of the United States to that of Europe).

59. See Dreyfuss & Lowenfeld, *supra* note 11, at 296.

60. See John Zarocostas, *Stronger Biotech Patent Rules Urged*, J. COMM., Apr. 3, 1998, at 3A, available in LEXIS, News Library, Majpap File (reporting the statements of Bruce Lehman, United States commissioner for patents and trademarks, that the TRIPS Agreement is “a bit unclear” on biotechnology and calling for stronger protection of biotechnology patents); Joseph Straus, *Patenting Human Genes in Europe – Past Developments and Prospects for the Future*, 26 INT’L REV. OF INDUS. PROP. & COPYRIGHT L. 920 (1995); Dan L. Burk, *Biotechnology and Patent Law: Fitting Innovation to the Procrustean Bed*, 17 RUTGERS COMPUTER & TECH. L. J. 1, 24-71 (1991).

61. See generally J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data*, 50 VAND. L. REV. 51 (1997).

62. See Thomas Cottier, *The New Global Technology Regime: The Impact of New Technologies on Multilateral Trade Regulation and Governance*, 72 CHI.-KENT. L. REV. 415, 426 (1996) (observing the novel legal nature of certain new technologies, including communication networks).

WIPO treaties that will begin to regulate the use of copyrightable works in networked environments, private parties will increasingly stipulate their own contractual rules to fill the gaps in existing intellectual property systems. Governments will, in turn, have to determine how to regulate these contractual exercises, and much will depend on the extent to which they subject private contracts concerning information goods to public interest limitations that may or may not parallel those of classical intellectual property laws.<sup>63</sup>

Even with respect to more traditional technologies that the TRIPS Agreement directly covers, recent studies show that existing, unharmonized ambiguities concerning the applicable international standards will leave the developing countries ample “wobble room” in which to forge pro-competitive strategies of their own. The authors do not have the space in this article to track these ambiguities in detail, and the authors refer the reader to the increasingly detailed literature on this subject.<sup>64</sup> Nevertheless, this literature clearly suggests that the end results may deviate considerably from the high-protectionist aspirations of foreign rightsholders.

The authors predict, indeed, that once entrepreneurs in any given developing country adopt a “fair followers” mentality in place of the free-riding tactics outlawed by the TRIPS Agreement, it will be harder to determine just where that country’s true economic interests really lie within the available range of more or less protectionist legal options than to navigate around the international minimum standards themselves.<sup>65</sup> One constant source of difficulty in this regard is that the international minimum standards will affect different sectors of any given country’s economy in different ways. For example, such fine-tuning can harm the capacity of some local firms to attract foreign investments or enter into alliances with foreign com-

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63. See generally J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, U. PA. L. REV. (forthcoming, April 1999); Mark A. Lemley, *Beyond Pre-emption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999).

64. See Reichman, *From Free Riders to Fair Followers*, *supra* note 17, at 28 (stating that “the TRIPS Agreement leaves developing countries ample ‘wobble room’ in which to implement national policies favoring the public interest in free competition”); Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 216 (1994) (discussing the problem of interpretation); Sherwood, *Implications for Developing Countries*, *supra* note 29, (noting that the TRIPS Agreement is “an illogical package of disparate concepts”); A. Samuel Oddi, *TRIPS - Natural Rights and a Polite Form of Economic Imperialism*, 29 VAND. J. TRANSNAT’L L. 415 (1996). *But see* Reich, *supra* note 19, at 804 (arguing that the WTO provides uniform and binding legal interpretations).

65. See Reichman, *Universal Minimum Standards*, *supra* note 2, at 91.

panies, even as it enhances the capacity of other firms operating in the same sector to improve their own innovative capabilities.<sup>66</sup> Moreover, states cannot overindulge in normative fine-tuning without running up against the constraints on national treatment, which the TRIPS Agreement has reinforced.<sup>67</sup>

Striking an appropriate balance between the incentives to create and the need to preserve healthy levels of free competition within parameters set by the TRIPS Agreement will not be easy for the developing countries,<sup>68</sup> whose needs keep changing from one decade to the next; it is a task that will require constant and refined economic monitoring.<sup>69</sup> As higher levels of intellectual property protection produce different economic effects on different national actors, the resulting tensions could paralyze the government's ability to mediate between those who stand to benefit and those who stand to lose. In India's pharmaceutical sector, for example, big firms already capable of profiting from the international patent system find themselves at odds with small but successful generic drug producers, who have been resisting the adoption of tougher patent laws.<sup>70</sup> The success of the Indian generic drug trade also constitutes a beacon to pharmaceutical companies in other developing countries who see their prospects for emulation diminished by higher patent standards both at home and in third-world export markets.<sup>71</sup>

The need for each developing country to strike a different balance between intellectual property protection and free competition in the post-TRIPS milieu thus hampers the drive for further harmonization of intellectual property laws in the immediate future.<sup>72</sup> Because

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66. See *infra* note 70 and accompanying text (providing the illustrative example of the patenting of pharmaceuticals in India).

67. See TRIPS Agreement, *supra* note 1, arts. 3 (national treatment), 4 (MFN); see also Gail E. Evans, *The Principle of National Treatment and the International Protection of Industrial Property*, 18 EUR. INTELL. PROP. REV. 149, 156-60 (1996).

68. It has been a difficult task even for countries that have established antitrust and intellectual property regimes. See Eleanor M. Fox, *Trade, Competition and Intellectual Property - TRIPS and its Antitrust Counterparts*, 29 VAND. J. TRANSNAT'L L. 481, 486-87 (1996).

69. See TRIPS AND DEVELOPING COUNTRIES, *supra* note 27, at 21-22.

70. See generally Adelman & Baldia, *supra* note 38; Le-Nhung McLeland & J. Herbert O'Toole, *Patent Systems in Less Developed Countries: The Cases of India and the Andean Pact Countries*, 2 J.L. & TECH. 229 (1987).

71. Cf. Adelman & Baldia, *supra* note 38, at 530-31; Mark Ritchie et al., *Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge*, 11 ST. JOHN'S J.L. COMM. 431, 434 (1996) (noting that Brazil and Argentina, like India, have fought against altering the national intellectual property laws to conform with the TRIPS Agreement in regard to pharmaceutical patents).

72. See Reichman, *From Free Riders to Fair Followers*, *supra* note 17, at 18-25; Abbott,

most developing countries will find it both logical and expedient to favor a minimalist or pro-competitive strategy for implementing the TRIPS standards, they will tend to postpone many hard decisions to future rounds of negotiations at both the domestic and international levels.<sup>73</sup> This approach could even win them the support of small and medium-sized firms in the developed countries, which might otherwise have to fend off the multinational corporations' high-protectionist tactics by themselves, without help from strategic allies in the global marketplace.<sup>74</sup>

A minimalist approach to implementing the TRIPS standards is fully consistent with the economic logic underlying periodic rounds of multilateral trade negotiations within the ambit of the GATT, and now, the WTO legal framework.<sup>75</sup> As Professor Cottier recognized early on, the shift away from WIPO as the primary negotiating forum has made it ever less likely that developing countries will contemplate concessions in the field of intellectual property law without obtaining corresponding gains in market access for their more traditional exports.<sup>76</sup> While the developed countries exercise considerable leverage in such negotiations because of the sheer size of their markets,<sup>77</sup> they are still digesting the results of both the Uruguay Round

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*supra* note 21, at 392.

73. See Reichman, *Universal Minimum Standards*, *supra* note 2, at 25. The current economic crisis in Asia has led countries such as Malaysia to propose approaches to trade liberalization that are contrary to the WTO's multilateral approach. The Asian countries argue that the WTO's proposals are impractical and that developing countries are not in a position to discuss further negotiations. See Fauziah Ismail, *Push for Sectoral Route to Free Trade*, NEW STRAITS TIMES (Malay.), May 13, 1998, at 1, available in LEXIS, News Library, Majpap File.

74. For example, a small pharmaceutical company in India may have more in common with small U.S. companies in the same sector than with the major Indian pharmaceutical concerns. Cf. Adelman & Baldia, *supra* note 38, at 526. In Malaysia, major software companies like Microsoft are reportedly fighting to prevent parallel imports, while smaller companies, including distribution companies, profit from parallel import business. See Ferina Manecksha, *Microsoft's New Move Against Software Piracy*, NEW STRAITS TIMES (Malay.), Jul. 16, 1988, at 6, available in LEXIS, News Library, Majpap File.

75. See generally JACKSON, *supra* note 45, at 73-78, 139-55.

76. Thomas Cottier, *The Prospects for Intellectual Property in GATT*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 414 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1991); see also John Zarocostas, *Developing Nations Stand Firm at WTO*, J. COMM., Sept. 18, 1996, at 1A, available in LEXIS, News Library, Majpap File (reporting that representatives from Asia and Latin America promised to strengthen protection for intellectual property only if developed nations expanded market access to clothing and textiles).

77. See Abbott, *supra* note 21, at 389 (explaining that developing nations signed the TRIPS Agreement, in part, because of their need to access developed countries' markets, and the former "could have ill afforded the potential result of more restricted access to major industrialized markets."). In 1994 (when the Uruguay Round was concluded), the United States market already absorbed between one-fifth and one-third of each Asian country's global ex-

and other regional trade agreements and could not readily grant the developing countries still greater market access without experiencing more political turmoil than they can handle at the moment.<sup>78</sup> By the same token, the developing countries already have much too much on their intellectual property “plates” to contemplate negotiations on new initiatives, regardless of the gaps in world intellectual property law that still need to be filled.<sup>79</sup>

Meanwhile, nothing impedes developing-country governments from encouraging privately negotiated concessions to foreign firms that are contractually exchanged for reciprocal benefits to their own firms or to specific economic sectors,<sup>80</sup> provided that both the Most Favored Nation (MFN)<sup>81</sup> and national treatment<sup>82</sup> clauses of the TRIPS Agreement are duly respected. Private concessions vetted on a case-by-case basis within a minimalist normative framework would provide governments with a practical means of empirically ascertaining the appropriate balance between legal incentives to innovate and free competition in particular sectors of their economies.

In so doing, developing-country governments may find that the growing dynamism of their own internal markets provides them with a degree of leverage they do not enjoy in multilateral negotiations between sovereign states, and this leverage may prove particularly useful in stimulating foreign investment under agreed conditions.

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ports. See Sam Jameson, *The Asia Boom; China Sets the Pace as Cash, Concrete Pour into World's Hottest Economic Region*, L. A. TIMES, Nov. 29, 1994, at 1, available in LEXIS, News Library, Majpap File.

78. Cf. James T. Madore, *WNY Has Winners, Losers Under GATT; Assembly-Line Operations Could be in Danger if They Don't Boost Productivity*, THE BUFFALO NEWS, Dec. 19, 1993, at 11, available in LEXIS, News Library, Majpap file (reporting that the textile and apparel industry, two of the most protected industries in America before the Uruguay Round, will suffer losses, and quoting a representative from the AFL-CIO calling the GATT “goobledygook”).

79. See Frances Williams, *Developing Nations: Fostering Interdependence*, FIN. TIMES, May 18, 1998, at 6, available in LEXIS, News Library, Majpap File (“Though ideological opposition to compliance in these areas is waning, it [TRIPS] has resulted in an onerous burden of obligations in terms of new legislation, trade policy notifications and presence at WTO meetings, which many developing countries are struggling to cope with.”).

80. See Patrick Cohendet et al., *Technological Learning, Economic Networks and Innovation Appropriability*, in TECHNOLOGY AND THE WEALTH OF NATIONS: THE DYNAMICS OF CONSTRUCTED ADVANTAGE: THE DYNAMICS OF CONSTRUCTED ADVANTAGE 66, 67-68 (Dominique Foray & Christopher Freeman eds., 1993); Carlos M. Correa, *Trends in Technology Transfer: Implications for Developing Countries*, 21 SCI. & PUB. POLICY 369, 377-79 (1994) (U.K.).

81. See TRIPS Agreement, *supra* note 1, art. 4.

82. *Id.* art. 3.

Because foreign firms want access to these markets,<sup>83</sup> they will be willing to trade specific benefits for specific privileges and guarantees on a transactional basis, even when state-to-state negotiations fail to harmonize normative standards or to improve the overall level of enforcement.

2. *Countervailing Regulatory Measures.* Since the collapse of the command economies in the former socialist republics of eastern Europe, the developing countries have increasingly encouraged free enterprise in more open markets and emphasized the need to attract direct or indirect foreign investments to these markets.<sup>84</sup> Whether this liberalizing trend will persist over time or merely constitutes a passing phase subject to *dirigiste* counter measures, as occurred in the past, remains to be seen. Despite recent setbacks, the relative economic successes of the Newly Industrialized Countries (NICs), especially those of East Asia, has reinforced the trend toward market-driven reforms, although even here some studies suggest that the critical role of what Hilton Root calls “good governance” in achieving this success subtly limits the general applicability of the free-market model to other developing countries.<sup>85</sup> In any event, the continuing dependence of these countries on foreign technology and investments has renewed interest in competition law as a tool for regulating the conduct of multinational firms in more open economies, with a view to ensuring that their short-term contributions to growth remain consistent with the host countries’ overall economic policies.<sup>86</sup>

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83. For example, 50% of multinational corporations expect foreign direct investment in developing countries to grow by 20% per year until 2001. See David Crane, *Multinationals are Gaining*, *United Nations Report Says*, TORONTO STAR, Sept. 22, 1997, at C2, available in LEXIS, News Library, Majpap File. In 1996 China received \$42 billion in foreign investment, while Mexico received \$6.4 billion. See Foo Choy Peng, *Report Lists Market Size as Key Lure for Business; China Eclipses US as Favourite Overseas Investment Destination*, S. CHINA MORNING POST, Apr. 11, 1997, at 4, available in LEXIS, News Library, Majpap File.

84. See TRIPS AND DEVELOPING COUNTRIES, *supra* note 27, at 7-22. Since the collapse of communism, Eastern European economies have also enjoyed stronger growth. See Frances Williams, *Eastern Europe Investment Grows Strongly*, FIN. TIMES, July. 17, 1996, at 4, available in LEXIS, News Library, Majpap File.

85. See ROOT, *supra* note 23, at 145 (noting that the definition of “good governance” is complex, but that “[i]t must give equal account to the particular and the universal. The abstract and the concrete must be blended. Leadership must be balanced by institutions. Accountability by autonomy. Transparency by respect for the proprietary nature of information. Democracy by meritocracy.”).

86. Cf. Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 138-39 (1993) (suggesting that developing countries should adhere to policies that afford protection to foreign firms willing to participate

Competition law remains cumbersome and controversial even as applied in most developed countries, however, and these theoretical and practical difficulties are greatly compounded when this body of law is invoked to limit the exercise of intellectual property rights.<sup>87</sup> Because such rights constitute short-term restraints on competition that states grant with a view to enhancing the level of competition later on,<sup>88</sup> the corrective role of competition law, if any, becomes objectively difficult to assess within national innovation systems.<sup>89</sup> In an international context, where the harmonization of intellectual property rights can mask the erection of legal and economic barriers to entry that may retard the developing countries' efforts to improve their own technical capabilities, the corrective role of competition law becomes even more problematic.<sup>90</sup> On the one hand, the developing countries may legitimately seek to correct anti-competitive practices stemming from any abuse of market power that the grant of exclusive intellectual property rights seems to aggravate.<sup>91</sup> On the other hand, overzealous resort to the rules of competition law in this area, as in others, breeds uncertainty and can reduce incentives for firms to invest in a reforming economy.<sup>92</sup>

Typically, a conflict between intellectual property law and competition law arises when states suspect that rightsholders have used their market power either to extend intellectual property rights beyond explicit or implicit statutory limits or to achieve other anticompetitive objectives not associated with the normal exercise of such rights.<sup>93</sup> In these cases, the rightsholders may have "abused" or

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in local technology transfer programs). See generally TRIPS AND DEVELOPING COUNTRIES, *supra* note 27, at 53-57; Pedro Roffe, *Control of Anti-Competitive Practices in Contractual Licenses Under the TRIPS Agreement*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE, *supra* note 2, at 261.

87. See generally Diane P. Wood, *Regulation in the Single Global Market: From Anarchy to World Federalism*, 23 OHIO N.U. L. REV. 297 (1996) (arguing that competition rules should not, as of yet, be internationalized); Ullrich, *supra* note 41, at 153-209.

88. See Michael Lehmann, *The Theory of Property Rights and the Protection of Intellectual and Industrial Property*, 16 INT'L REV. INDUS. PROP. & COPYRIGHT L. 525, 537 (1985).

89. For example, large drug companies have blamed competition law for discouraging investment. See Jeff Devlin & Paul Hemsley, *Development Demands Equal Treatment*, FIN. TIMES, Mar. 16, 1998, at 3, available in LEXIS, News Library, Majpap File.

90. See TRIPS AND DEVELOPING COUNTRIES, *supra* note 27, at 53-57; Eleanor M. Fox, *Trade, Competition, and Intellectual Property - TRIPS and Its Antitrust Counterparts*, 29 VAND. J. TRANSNAT'L L. 481, 486-91 (1996).

91. See TRIPS Agreement, *supra* note 1, art. 40(2).

92. See A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 HOUS. J. INT'L L. 311, 316-38 (1996).

93. See Fox, *supra* note 68, at 485.

“misused” the intellectual property right even if no formal violation of competition law otherwise exists.<sup>94</sup> Such a judicial or administrative finding may, in turn, trigger a variety of remedies, including compulsory licenses<sup>95</sup> and even forfeiture of an exclusive right; however, international law increasingly regulates the state’s ability to resort to these remedies in practice.<sup>96</sup>

Competition law generally remains within the residual territorial jurisdiction of the WTO member states,<sup>97</sup> and a review of state practice in the developed countries reveals no consensus concerning applications of the “abuse” doctrine to specific cases. For example, Professor Eleanor Fox found that, in core cases concerning alleged misuse of patents due to monopoly pricing, refusals to deal, and contracts limiting parallel imports, U.S. and European courts might reach opposite conclusions on the same set of facts under their respective competition laws.<sup>98</sup> One expects the tensions likely to arise from this lack of consensus to be intensified by the divergent economic goals and strategies that developed and developing countries prefer to adopt.<sup>99</sup> The latter are particularly prone to sacrifice efficiency to perceptions of “fairness” and the needs of infant industries in ways that the former would not recognize as appropriate applications of sound competition law and policy.<sup>100</sup>

The TRIPS Agreement reflects this lack of consensus by expressly allowing states to regulate abuses of intellectual property rights as they deem fit, subject to certain duties of cooperation<sup>101</sup> and

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94. See Gianna Julian-Arnold, *International Compulsory Licenses: The Rationales and the Reality*, 33 IDEA 349, 349-50 (1992).

95. See TRIPS Agreement, *supra* note 1, art. 31; Abbott, *supra* note 21, at 387 (“Rules with respect to the granting of compulsory licenses leave substantial discretion in the hands of national authorities. The United States . . . would have preferred tighter limits on the granting of compulsory licenses. The compulsory licensing provisions at least in part represent a concession to developing country interests.”).

96. See TRIPS Agreement, *supra* note 1, arts. 31, 40(1), (2); Reichman, *Universal Minimum Standards*, *supra* note 2, at 66-69.

97. See Abbott, *supra* note 21, at 387.

98. See Fox, *supra* note 68, at 487.

99. See *id.* at 490. Cf. Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U.J. INT’L L. & POL’Y 817, 818-19 (1993) (demonstrating that the conflict between the interest of western industrialized countries to protect technologies and the interest of lesser developed and newly industrialized countries to obtain technologies leads to pirate industries); Giunta & Shang, *supra* note 21, at 327-29.

100. See Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 98-104 (1993); Fox, *supra* note 68, at 490.

101. See TRIPS Agreement, *supra* note 1, art. 69.

consultation,<sup>102</sup> without endorsing any particular approach to this subject.<sup>103</sup> Licenses and other practices that unreasonably restrain trade or “adversely affect the international transfer of technology”<sup>104</sup> are thus legitimate targets of regulatory action, even though such regulation potentially conflicts with the exercise of intellectual property rights.<sup>105</sup> As Professor Reichman has elsewhere demonstrated, the developing countries thus remain free to pick and choose from the variety of formulations and approaches that developed countries use to decide what is a progressive response of business to market conditions and what is an abuse of market power or simply misuse of an intellectual property right, and to tailor these concepts to the needs of their own economic development strategies.<sup>106</sup>

In this permissive environment, the challenge for developing countries is not that of justifying their right to apply competition law to limit abuses of intellectual property rights, but rather that of avoiding self-defeating applications of such laws that could undermine transfers of up-to-date technology and the acquisition of needed foreign investment.<sup>107</sup> By the same token, the challenge for technology-exporting firms eager to gain access to developing country markets is to avoid the pitfalls of overzealous applications of competition law at both the initial transaction phase and at later stages of their business relations, when investments have been made and local competitors become more of a threat.<sup>108</sup>

Given these uncertainties, it seems logical that foreign investors and the relevant state organs or regulatory bodies should seek to ne-

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102. See *id.* art. 40(3).

103. See, e.g., TRIPS Agreement, *supra* note 1, art. 1(1); Reichman, *From Free Riders to Fair Followers*, *supra* note 17, at 54-55 & n.165.

104. TRIPS Agreement, *supra* note 1, art. 8(2).

105. See Andreas Heinemann, *Antitrust Law of Intellectual Property in the TRIPS Agreement of the World Trade Organization*, in FROM GATT TO TRIPS: THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 239, 244-47 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996).

106. See J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 377 (1996) [hereinafter Reichman, *Introduction to a Scholarly Debate*]; Reichman, *From Free Riders to Fair Followers*, *supra* note 17, at 52-58 (discussing ways in which developing countries may formulate competition and protectionist policies to their best advantage).

107. See Sherwood, *Implications for Developing Countries*, *supra* note 29, at 496; discussion *infra* note 143 and accompanying text (examining how weak protection may discourage local innovation and foreign direct investment).

108. See Reichman, *Universal Minimum Standards*, *supra* note 2, at 23, 55-56 (observing that anti-competitive conditions “tend to suffocate the small and medium-sized firms whose incremental innovations are often the real engines of domestic economic growth”).

gotiate the competition law aspects of projected activities on a case-by-case basis. While the social costs of applying broad-gauged competition law principles in the abstract are everywhere hard to predict,<sup>109</sup> the relative costs and benefits of single transactions are much easier to pin down and much more likely to produce immediate and tangible benefits to the host countries. Because both the competent state organs and concerned private interests in the host countries must evaluate the costs and benefits of major technology transfers and other intellectual property transactions anyway, the extra transaction costs of involving public agencies responsible for competition law in the negotiations would not be high.

At the same time, the host country's willingness to grant both market access and immunity from the constraints of its competition law gives it more clout<sup>110</sup> with which to obtain pro-competitive licensing terms and other concessions that are tailored to the facts at hand and not to some ideal transaction or model that happened to underlie top-down legal rules.<sup>111</sup> Conversely, would-be foreign investors should value the opportunity to leave the public-private bargaining table with contractually secured guarantees against predatory attacks in the name of competition law that could otherwise constitute a serious risk of loss once the project in question began to succeed.

While we have so far focused attention on the uncertain interface between competition law and intellectual property law within the confines of the TRIPS Agreement, one should note that the field for regulatory interference with intellectual property rights is much broader than what one envisions through the lens of competition law alone. With regard to pharmaceuticals, for example, states may legitimately regulate products within their health, safety and welfare powers,<sup>112</sup> and both price controls and environmental considerations<sup>113</sup>

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109. See Fox, *supra* note 68, at 497-500 (suggesting that the social costs may be quite high).

110. See *IP Way to Help Nations Achieve Developed Status*, NEW STRAITS TIMES (Malay.), Apr. 13, 1998, at 5, available in LEXIS, News Library, Majpap File (quoting Thailand's Ministry of Commerce Assistant Director General, Mr. Weerawit Weeranawit, as stating, "[i]f we want to become a developed country then we must have the attitude of the developed countries and use what they used to reach that goal.").

111. See Dreyfuss & Lowenfeld, *supra* note 11, at 323 (noting the shortcomings of the WTO rule of law model). Cf. generally Bello, *supra* note 22.

112. See TRIPS Agreement, *supra* note 1, art. 8(1).

113. See, e.g., Klaus Bosselmann, *Focus: Plants and Politics: The International Legal Regime Concerning Biotechnology and Biodiversity*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 111, 128-32 (1996) (arguing that intellectual property rules have undermined biodiversity and continue to harm the environment); Sara Dillon, *Trade and The Environment: A Challenge to the*

remain potential threats to the exercise of intellectual property rights by foreign firms. Taxes constitute still another threat,<sup>114</sup> as is the potential imposition of compulsory licenses on a variety of public interest grounds, which remain legal under the TRIPS Agreement if certain conditions are respected.<sup>115</sup>

Indeed, it seems safe to predict that, as the substantive norms of the TRIPS Agreement increasingly pinch firms in developing countries that were accustomed to operating under less constrained conditions, we shall witness the rise of a cottage industry of regulations whose principle effect is to clog the wheels of the TRIPS Agreement and slow its application down.<sup>116</sup> Such a development would be consistent with past experience under the GATT. To see why, consider that the harmonization of intellectual property rights under the TRIPS Agreement, which reduces impediments to the free flow of knowledge goods throughout the global marketplace, bears a family resemblance to the progressive reduction of quotas and tariffs that previously distorted the market for tangible goods. The rise of non-TRIPS-related regulations that we foresee would then parallel the proliferation of non-tariff barriers that occurred after the early rounds of multilateral trade negotiations that were held under the auspices of GATT.<sup>117</sup>

If this prediction proves accurate, decades will pass before states become willing to weaken the broad regulatory powers they retain under Article XX (d) of GATT 1994, in the interests of a more efficient global market for knowledge goods. In this uncharted regulatory climate, meanwhile, there is fertile ground for public-private initiatives that cut through the red tape and produce positive benefits to both would-be foreign investors and their host countries.

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*GATT/WTO Principle of "Ever-Freer Trade,"* 11 ST. JOHN'S J.L. COMM. 351, 376-82 (1996) (arguing that the WTO may undermine environmental concerns); ERNST-ULRICH PETERSMANN, *INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND* 40-52, 99-117 (1995) (discussing the problems of trade and environment in the context of the WTO).

114. See TRIPS Agreement, *supra* note 1, art. 3; Abbott, *supra* note 21, at 401 ("In applying IPRs-based taxes to OECD-based enterprises, developing countries must also apply IPRs-based taxes to their own enterprises. In theory, this might discourage innovation by domestic enterprises."); see also Oddi, *supra* note 64, at 461-63 (targeted fees).

115. See TRIPS Agreement, *supra* note 1, art. 31.

116. See generally Dreyfuss & Lowenfeld, *supra* note 11.

117. Cf. JACKSON, *supra* note 45, at 154-55 (discussing non-tariff trade barriers and noting that in 1973 GATT had catalogued over 800 barriers); JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 15-17 (1990) [hereinafter JACKSON, *RESTRUCTURING GATT*] (describing the impact of non-tariff trade barriers and non-tariff measures to address them).

3. *Enforcement Procedures—The Achilles’ Heel of the TRIPS Agreement.* After the adoption of the TRIPS Agreement in 1994, the early commentators heralded the inclusion of international minimum standards governing procedures for enforcing intellectual property rights in all WTO member states—set out in Articles 41 to 61 of that Agreement—as one of its greatest achievements.<sup>118</sup> Rightly or wrongly, the lack of any similar standards in the Paris and Berne Conventions was often blamed for contributing to the weakness of the international intellectual property system, and the closing of this gap was deemed indispensable to the creation of an efficient global market for the free circulation of knowledge goods.<sup>119</sup> Later commentators have, however, begun a more realistic assessment of these enforcement procedures, which on closer inspection appear to constitute a set of truly minimum standards of due process on which future legislation will have to build.<sup>120</sup>

Article 41 of the TRIPS Agreement expresses the four cardinal premises of the enforcement provisions, which are largely modeled on U.S. law.<sup>121</sup> First, specified procedures must be made available under the domestic laws to “permit effective action” against present and future acts of infringement. Second, pertinent judicial and administrative procedures must be “fair and equitable” and not “unnecessarily complicated,” or likely to cause “unwarranted delays.” Third, courts and administrators must base decisions on evidence available to all the parties, and should normally deliver written, reasoned opinions. Fourth, there must be some form of appellate review for decisions handed down by administrative or judicial agencies of first instance.

These general provisions, as amplified in the detailed provisions

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118. See Wood, *supra* note 87, at 302; Otten & Wager, *supra* note 11, at 403-07.

119. See Geller, *supra* note 17, at 100.

120. See Thomas Dreier, *TRIPS and the Enforcement of the Intellectual Property Rights, in FROM GATT TO TRIPS: THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 248, 276-77 (Friedrich-Kael Beier & Gerhard Schricker eds., 1996). Though stated, minimum standards lack enforcement measures. “[N]either the DSU, nor the TRIPS Agreement, nor the Berne or Paris Conventions, provide guidance on how minimum standards – rather than actual or optimal standards – will work in conjunction with an adjudicatory dispute resolution system that is backed with enforcement procedures.” Dreyfuss & Lowenfeld, *supra* note 11, at 281.

121. Compare TRIPS Agreement, *supra* note 1, art. 41 (requiring written notice to defendants) with FED. R. CIV. P. 4 (requiring the same); TRIPS Agreement, *supra* note 1, art. 44 (providing the grant of an injunction), with United States Copyright Act, 17 U.S.C.A. § 502 (West Supp. 1976) (authorizing courts to grant an injunction); and TRIPS Agreement, *supra* note 1, art. 45(2) (allowing an award of attorney’s fees) with 17 U.S.C.A § 505.

of Articles 42 to 50, are then supplemented by the special requirements of Articles 51 to 59, which oblige states to implement border controls to impede imports of infringing goods, and by the duty to enact criminal procedures as specified in Article 61. A failure to comply with any of these procedural standards of due process could, in principle, trigger the recalcitrant states' international responsibility and subject them to the dispute-settlement machinery of the WTO Agreement.<sup>122</sup>

The inherent weakness of this enforcement framework results from a combination of factors that have recently attracted greater attention. To begin with, the enforcement provisions are crafted as broad legal standards, rather than as narrow rules, and their inherent ambiguity will make it harder for mediators or dispute-settlement panels to pin down clear-cut violations of international law.<sup>123</sup> Moreover, the common-law philosophy that pervades the U.S. legal system differs greatly from the legal philosophies of other countries,<sup>124</sup> and the TRIPS Agreement expressly mandates respect for these "differences in national legal systems."<sup>125</sup> These differences, coupled with the ambiguities of the procedural standards as drafted, invite decision-makers to take local circumstances into account when seeking to evaluate actual or potential conflicts between states.<sup>126</sup>

Deference to local circumstances could also play a critical role with regard to the scope of protection issues that the TRIPS Agreement usually relegates to local law. In close cases, countries may claim that the weak level of enforcement meted out to a particular subject matter stems from doubts about the requisite scope of protection required under the substantive standards, and not from culpable

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122. See TRIPS Agreement, *supra* note 1, art. 64(1).

123. See generally Dreier, *supra* note 120, at 260-64.

124. See Dreyfuss & Lowenfeld, *supra* note 11, at 292. *But see* Reich, *supra* note 19 (arguing that the Appellate Body will be able to ensure a uniform and consistent development of jurisprudence).

125. TRIPS Agreement, *supra* note 1, pmb. at 83.

126. See Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 770-71 (1996) (stressing conflict of values with developing countries); J.H. Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 344; Laurence R. Helfer, *Adjudicating the Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 411-25 (1998) (suggesting that TRIPS jurists should explicitly take into consideration local circumstances); see also DSU, *supra* note 5, art. 8.10 (requiring that if a controversy involves a developing state, one member of the dispute settlement panel must be chosen from a developing state), 21(7) (requiring that the panel take into consideration the impact a decision will have on a developing countries economy when making recommendations).

laxity in applying the enforcement procedures as such.<sup>127</sup> These arguments will prove particularly difficult to overcome in cases concerning electronic information tools, where the TRIPS standards leave much to the discretion of local laws, and where state practice with respect to controversial issues varies widely.<sup>128</sup>

Above all, Article 41(5) contains explicit safeguards that immunize WTO member countries from any “obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general” or even to distribute proportionately greater resources to the enforcement of intellectual property rights than would be available for law enforcement in general. In other words, foreign rightsholders are merely entitled to the same legal product as their national counterparts. Because the rule of law is notoriously weak in most developing countries, and the systemic capabilities of enforcing intellectual property rights remain especially rudimentary in many of these countries, foreign rightsholders could experience serious disappointments when they rely on the TRIPS enforcement procedures in actual practice.<sup>129</sup>

Logically, of course, rightsholders should consider earmarking a share of their expected royalties from the technology-importing countries to supplement the resources available to law enforcement authorities in those countries.<sup>130</sup> Local authorities may also benefit from the technical assistance to which developing countries are entitled under the TRIPS Agreement.<sup>131</sup> However, rightsholders will not willingly contribute to the costs of law enforcement without some guarantees concerning the quality of the legal product likely to be

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127. See generally Betten, *supra* note 58; Hackett, *supra* note 58.

128. See generally Reichman, *Know-How Gap in TRIPS*, *supra* note 48; Reichman & Samuelson, *supra* note 61; see also, e.g., W. Matthew Wyman, Comment, *International Database Protection: A Multilateral Treaty Solution to the United States' Database Dilemma*, 37 SANTA CLARA L. REV. 427, 438-49 (1997) (describing some of the differences between American and European approach to protection of electronic databases).

129. For example, a 1998 report prepared by the economic section of the United States Embassy in Thailand stated that despite legislative and judicial reforms, Thailand still fell short in the protection of intellectual property. See U.S. State Department, *1997 Country Reports on Economic Policy and Trade Practices, Thailand: Economic Policy and Trade Practices Report* (Jan. 1998) at <[http://www.state.gov/www/issues/economic/trade\\_reports/eastasia97/thailand97](http://www.state.gov/www/issues/economic/trade_reports/eastasia97/thailand97)>. The report noted, in particular, problems arising from corruption and nepotism. See *id.*; Corben, *supra* note 38; Harish Mehta, *Thailand Still Plagued By Graft, Nepotism: US Govt Report Lashes Out at Ineffective Measures Against Intellectual Piracy*, BUS. TIMES (Sing.), June 24, 1998, at 7, available in LEXIS, News Library, Majpap File.

130. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 355.

131. See TRIPS Agreement, *supra* note 1, art. 67.

delivered and its relevance to their needs. By the same token, nothing obliges WTO member states to accept foreign funds proffered for the purpose of strengthening local enforcement procedures, at least so long as the sovereign exercise of their police powers is not so lacking in good faith as to engage the state's responsibility for nonviolation acts of nullification and impairment under Article 64 of the TRIPS Agreement.<sup>132</sup>

In theory, disgruntled rightsholders might persuade their own governments to invoke the WTO's dispute-settlement machinery, with a view to punishing states whose enforcement efforts fail to satisfy the new international minimum standards.<sup>133</sup> But we remain profoundly skeptical about the efficacy of this tactic. Past experience shows that international tribunals have been notoriously reluctant to find actionable violations of those minimum standards of due process that states already recognize as binding legal obligations under public international law.<sup>134</sup> This deference to local administration of justice in the name of state sovereignty seems likely to continue under the TRIPS Agreement.<sup>135</sup>

Even if some dispute-settlement panels were inclined to take a more activist stance with regard to the enforcement of intellectual property rights, it will remain objectively hard to distinguish non-compliance due to foot-dragging from shortcomings attributable to the rudimentary state of law enforcement that prevails in most developing countries.<sup>136</sup> For this and other reasons, Professor Reichman has elsewhere suggested that, absent a clear violation of the national treatment clause, WTO dispute-settlement panels evaluating claims of inadequate enforcement should only intervene when there is a consistent pattern of gross violations of the relevant international minimum standards.<sup>137</sup>

A dispute-settlement panel might reasonably exercise less restraint if it had grounds to question the accused state's good faith

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132. See TRIPS Agreement, *supra* note 1, art. 64; Reichman, *Universal Minimum Standards*, *supra* note 2, at 87 (noting that TRIPS art. 64(2) puts a moratorium on complaints about nonviolation acts of nullification or impairment arising under the TRIPS Agreement for a period of five years).

133. See generally Bello, *supra* note 22.

134. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 348 nn. 59-60 and accompanying text.

135. See generally Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996).

136. See discussion *supra* notes 38, 129 (discussing Thailand).

137. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 347.

compliance with the border control measures of the TRIPS Agreement, as distinct from its application of the general standards of enforcement. As Professors Lowenfeld and Dreyfuss have pointed out, deference to local decision-making is less warranted when the conduct in question adversely affects the global market for knowledge goods, and not just the accused state's own internal market, and lax enforcement of border control measures falls under this rubric.<sup>138</sup> Even so, one should note that the TRIPS Agreement does not expressly oblige member states to prevent exports of infringing goods,<sup>139</sup> which adds to the enforcement costs and burdens of states to which "counterfeit trademarked and pirated copyright goods" are shipped.

In the past, moreover, states were most reluctant to allow other states to question the workings of their domestic customs authorities, and it remains to be seen whether governments in leading developed countries will be more forthcoming when they implement the TRIPS Agreement.<sup>140</sup> Unless the European powers take steps to impede imports of counterfeit goods into such notorious receptacles as the ports of Naples<sup>141</sup> and Rotterdam,<sup>142</sup> for example, despite the economic disruption this will cause, they should not expect much sympathy from the international community when they seek to impede similar activities in the developing countries.

For all the reasons discussed above, we predict that the level of enforcement under the TRIPS Agreement will greatly disappoint rightsholders in the developed countries, and that recourse to coer-

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138. See TRIPS Agreement, *supra* note 2, arts. 51-60; Dreyfuss & Lowenfeld, *supra* note 11, at 327.

139. See Jasna Arsic, *Combating Trade in Counterfeit Goods: The GATT and the EC Approaches*, 18 WORLD COMP. L. & ECON. REV. 75, 84 (1995) ("Countries producing and exporting counterfeit and pirated goods have no obligation under the Agreement to inspect exported goods, which places the burden of finding counterfeit and pirated goods on the countries of importation.").

140. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 340.

141. Between 1995 and 1998, the illegal taping and reselling of videos, compact discs, and computer software in Italy cost United States industry an estimated \$2 billion. See James Blitz, *Italian Piracy Bill May Aid US*, FIN. TIMES, June 10, 1998, at 3, available in LEXIS, News Library, Majpap File (noting that in Naples, high capacity black market compact disc replicators are commonplace).

142. Pirated tapes account for 45% of the market in Netherlands. See *Export Briefs*, J. COMM., May 12, 1987 at 6A, available in LEXIS, News Library, Majpap File. The Netherlands has also become a major trans-shipping point for counterfeit goods. See Nancy Dunne, *U.S. Record Industry Seeks Help on Pirates*, FIN. TIMES, Nov. 15, 1983, at 8, available in LEXIS, News Library, Majpap File; see also *Spore Stands Out with Low Software Piracy Rate*, THE STRAITS TIMES (Sing.), July 26, 1994, at 40, available in LEXIS, News Library, Majpap File (noting that the Netherlands has a relatively high piracy rate).

cive measures will not appreciably improve the situation in the short and medium terms. This is not an unmitigated blessing for the developing countries, however, because shortcomings in the worldwide enforcement machinery can sometimes discourage both local innovation and much-needed foreign investment.<sup>143</sup> Monitoring the tradeoffs (including lost opportunity costs), will not be an easy task especially if some or many foreign investors simply vote because of dissatisfaction with the way intellectual property rights are enforced at the local level.

When, instead, potential investors make their enforcement needs known, and the specific projects in question are of reciprocal interest to firms and governments in the technology-importing countries, the logical response to this uncertainty is for the parties to negotiate a guaranteed level of intellectual property enforcement commensurate with other aspects of the deal.<sup>144</sup> A proper forum for public-private initiatives could facilitate these case-by-case transactions and help to ensure that they did not compromise the state's overall policy posture. Within such a framework, the very uncertainties inherent in the TRIPS enforcement standards become an incentive for would-be private investors to obtain tangible guarantees concerning the enforcement of intellectual property rights, in exchange for palpable contributions to local economic development and social welfare.

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143. See Janet T. MacLaughlin et al., *The Economic Significance of Piracy*, in INTELLECTUAL PROPERTY RIGHTS, GLOBAL CONSENSUS, GLOBAL CONFLICT? 89, 101 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (suggesting that protection of intellectual property serves as an economic incentive for innovative activity); Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) [hereinafter Sherwood, *Intellectual Property Systems and Investment Stimulation*] (finding that in evaluating intellectual property protection in various developing countries including Barbados, Mexico and South Korea, one of the key factors in determining a country's desirability as a place for foreign investment is its enforcement mechanisms); Josh Martin, *Copyright Law Reforms Mean Better Business Climate*, J. COMM., Mar. 7, 1996, at 1C, available in LEXIS, News Library, Majpap File (illustrating that as Arab nations have started to provide stronger intellectual property protection, foreign firms have been more willing to invest in them). A survey from the International Finance Corp., an affiliate of the World Bank, found that IPR legislation was a key factor in whether United States companies were willing to do business in a foreign country. While 48% of the companies surveyed said that IPR laws had a strong influence in whether to establish manufacturing facilities abroad, 80% said that IPRs were an important factor in determining whether to establish research and development facilities abroad. The survey was reported in Martin, *supra*.

144. See Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 31 VAND. J. TRANSNAT'L L. 553, 567, 570-73 (1998) (suggesting that public-private initiatives would be useful in overcoming the differences between national laws concerning networks).

4. *Uncertain Effects of the Safeguard Provisions.* We have been emphasizing the opportunities for strategic maneuvering that states retain under the TRIPS Agreement, despite the coercive instruments the WTO Agreement makes available to prevent nullification and impairment of the benefits supposed to flow from the Uruguay Round. Now, instead, we consider the case of a state that tries to implement its TRIPS obligations with demonstrable good faith but encounters economic hardships and difficulties that might arguably justify some measure of relief. The question is whether that state can successfully defend self-help measures taken in the name of some “vital” economic interest against claims of nullification and impairment of benefits under the TRIPS Agreement.

Formally, a state’s options in this regard are severely limited by the “package deal” concept underlying the WTO Agreement itself,<sup>145</sup> which requires member states to adopt the entire set of multilateral agreements incorporated into Annexes I, II and III.<sup>146</sup> In other words, the benefits of increased market access resulting from the WTO Agreement are conditioned upon acceptance of a duty to comply with all its corresponding obligations to lower tariffs and remove nontariff barriers that distort international trade.<sup>147</sup> No group of countries is singled out for “differential and more favorable treatment,” a usual practice under the GATT that acquired the force of law in the Tokyo Round.<sup>148</sup> To the extent that developing countries and so-called “countries in transition” (away from centrally planned economies) still retain privileges and immunities that take account of their special circumstances, these exceptions are separately identified in each of the Annexes to the WTO Agreement and expressly limited to their particular context.<sup>149</sup>

With specific regard to the level of intellectual property protection under the TRIPS Agreement, all Member States are held to the same international minimum standards of protection and enforce-

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145. See, e.g., Helfer, *supra* note 126, at 377; Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 J. INT’L L. BUS. 398, 442 (1997).

146. See WTO Agreement, *supra* note 1, art. 2(2); Final Act, *supra* note 1, para. 4.

147. See JACKSON, *supra* note 45, at 47-59.

148. See *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Nov. 28, 1979, GATT, BISD, 265/203 (1980). See generally Abdulgawi A. Yusuf, *The GATT Enabling Clause*, 14 J. WORLD TRADE L., 488 (1980).

149. See, e.g., DSU, *supra* note 5, art. 12 (11); TRIPS Agreement, *supra* note 1, arts. 6, 7, 65, 66.

ment,<sup>150</sup> and there is no “two-tiered” regime allowing for “differential and more favorable treatment.”<sup>151</sup> Instead, a complicated set of transitional arrangements allows both developing countries and countries in transition a five-year grace period in which to fulfill their obligations,<sup>152</sup> subject to a number of technical adjustments that may further delay full compliance with the patent provisions for another five years.<sup>153</sup> Least-developed countries (LDCs), which are not defined in the TRIPS Agreement, obtain a ten-year period of immunity from the duty to implement its substantive or procedural standards.<sup>154</sup> Nevertheless, even LDCs—like the developing countries and countries in transition—must immediately give effect to the national treatment and MFN clauses of Articles 3 and 4.<sup>155</sup>

On closer inspection, however, it appears that vestiges of the old “two-tiered” regime have been incorporated into the TRIPS Agreement, in a kind of “invisible ink” that will become more legible over time.<sup>156</sup> Thus, Article 66(1) recognizes the “special needs and requirements of least-developed country members . . . and their need for flexibility to create a viable technological base.” It then specifically endows the Council for TRIPS with the power to “accord extensions” of the initial ten-year grace period, when acting upon a “duly motivated request by a least-developed country member.” This same theme is reiterated in Article XI(2) of the WTO Agreement, which flatly declares that the “least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities.”

As Professor Reichman has elsewhere explained, some form of two-tiered regime was mandated by pre-existing international law, and despite the huffing and puffing of certain trade delegations, its de facto recognition in the TRIPS framework was unavoidable.<sup>157</sup> By the same token, LDCs invoking these privileges cannot allow themselves to become havens for wholesale piracy of the intellectual property

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150. *Id.* art. 1.

151. *See supra* note 150 and accompanying text.

152. *See id.* art. 65.

153. *See id.* art. 70(8), (9).

154. *Id.* art. 66.

155. *Id.* art. 66(1). *See generally*, Otten & Wager, *supra* note 11, at 408-09.

156. *See* Reichman, *Introduction to a Scholarly Debate*, *supra* note 106, at 373.

157. *See id.*

rights covered by the TRIPS Agreement without exposing themselves, after a five-year moratorium, to claims of nonviolation acts of nullification and impairment that could succeed on the merits.<sup>158</sup> The intriguing question is whether the TRIPS Agreement does not also contain the ingredients for concocting yet a third tier of exceptions and immunities, not restricted to LDCs, if and when developing countries or countries in transition should encounter undue economic hardships despite their good faith efforts to meet their treaty obligations.

While the relevant arguments of any given developing country to this effect must necessarily vary with the circumstances, and would also depend on the nature of the complaints lodged against it, in most cases these countries would logically fall back upon the broad objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement.<sup>159</sup> Article 7 insists that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”<sup>160</sup> Article 8(1) expands on this theme by allowing member states “to promote the public interest in sectors of vital importance to their socio-economic and technological development,” provided that such measures “are consistent with the provisions of this Agreement.” These objectives are also echoed in the preamble to the TRIPS Agreement, which stresses the “underlying public policy objectives” of national intellectual property systems, “including developmental and technological objectives”;<sup>161</sup> and again in the preamble to the WTO Agreement itself, which recognizes a “need for positive efforts designed to ensure that developing countries . . . secure a share in the growth in international trade commensurate with the needs of their economic

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158. See TRIPS Agreement, *supra* note 1, art. 64(1) (incorporating by reference GATT 1994, *supra* note 12, arts. XXII, XXIII, and DSU, *supra* note 5, art. 64(2)) (suspending subparagraphs 1(6) and 1(c) of GATT 1994, *supra* note 12, art. XXIII concerning nonviolation acts of nullification and impairment for a period of five years); *U.S. v. India*, *supra* note 18 (applying this provision to reverse panel opinion in first TRIPS dispute arising under DSU). See generally, Reichman, *Securing Compliance with the TRIPS Agreement After U.S. v. India*, *supra* note 18, at 595-97.

159. See generally Yusuf, *supra* note 1, at 10-15; see also Giunta & Shang, *supra* note 21.

160. See TRIPS Agreement, *supra* note 1, art. 7.

161. TRIPS Agreement, *supra* note 1, at 84.

development.”<sup>162</sup>

Whether objective evidence of hardship stemming from good-faith compliance with the TRIPS standards could trigger these safeguards would depend on numerous hard-to-predict factors. In general, the member state seeking relief would contend that supervening events or changed conditions had frustrated the attainment of the goals and purposes of the TRIPS Agreement, as specified in Articles 7 and 8(1), and that, in its case, these Articles had failed in their essential purpose. It would claim that its own benefits under the WTO Agreement could be nullified or impaired under the facts at hand, unless it obtained appropriate relief.

To this same end, any adversely affected developing country could invoke Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),<sup>163</sup> which explicitly recognizes an affirmative defense or counterclaim for “redress of . . . an impediment to the attainment of any objective of the covered agreements.”<sup>164</sup> A developing country might add that any failure of the basic objectives set out in Articles 7 and 8(1) of the TRIPS Agreement should automatically reinstate that country’s entitlement to differential and more favorable treatment under pre-existing GATT law, as amended in 1980.<sup>165</sup>

Predicting the outcome of such litigation would be risky at best, and contingent on many imponderables, including the forum in which recourse to these safeguards happened to occur. If, for example, a developing country raised these issues before the Council for TRIPS, it could appeal to the mediatory powers thought to be inherent in the Council’s duty “to monitor the operation of this Agreement . . . and . . . afford members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights.”<sup>166</sup> However, the developed countries could counter that Article 66 of the TRIPS Agreement empowers the Council to extend waivers for hardship only to LDCs, and that it, therefore, lacks any similar power to extend waivers to countries outside that category.

This debate might trigger an interpretive decision concerning the powers of the Council for TRIPS, which requires a three-fourths majority of the member states acting through the Ministerial Confer-

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162. WTO Agreement, *supra* note 1, pmb1.

163. *See* DSU, *supra* note 5.

164. *Id.* art. 23(a).

165. *See supra* note 149 and accompanying text.

166. TRIPS Agreement, *supra* note 1, art. 68.

ence or the General Council of the WTO under Article XI of the WTO Agreement. Alternatively, and by analogous means, it might produce a “waiver of an obligation” due to “exceptional circumstances” by the Ministerial Conference also acting under Article IX of the same Agreement. In this connection, one should observe that Article IX (2)(b) expressly authorizes the Council for TRIPS to recommend waivers to obligations arising under the TRIPS Agreement, and indeed, such a recommendation is made a pre-requisite for approval by the Ministerial Conference.

Meanwhile, as Professors Lowenfeld and Dreyfuss have pointed out, an aggrieved developed country might take matters into its own hands by convoking a dispute-settlement panel to hear its claim of nullification or impairment, despite the attempts of the defendant state to obtain a waiver for hardship or other special consideration from the Council for TRIPS.<sup>167</sup> In such cases, the Council for TRIPS is given no express powers to stay the appointment of a dispute-settlement panel or the relevant proceedings.<sup>168</sup> Unless a duly appointed panel deferred to a requested stay by one of the parties or by the Council for TRIPS in response either to the Council’s inferred powers or to an interpretive decision of the WTO Ministerial Council, that panel might have to decide on the merits of the developing country’s appeal for relief due to hardship under the safeguard provisions of the TRIPS Agreement and the WTO Agreement.<sup>169</sup>

Here, in turn, the end result could depend on the legal philosophy of the members of the panel itself. For example, panelists committed to a strong “rule of law” philosophy would be more likely to resist attributing legal effect to the safeguard provisions. Those adhering to the traditional view of the GATT as a forum for continuing and evolving trade negotiations, might be more inclined to temper the formal obligations of any given state in light of empirical realities.<sup>170</sup>

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167. See Dreyfuss & Lowenfeld, *supra* note 11, at 315.

168. See, e.g., TRIPS Agreement, *supra* note 1, art. 68.

169. See DSU, *supra* note 5, art. 3.2 (providing that dispute settlement panels “preserve the rights and obligations of the Members” under the TRIPS Agreement), art. 11 (requiring that dispute settlement panels make “an objective assessment” of the matter before them). Query whether a dispute settlement panel in this situation might itself decide to stay the proceedings pending a formal and timely request for a waiver under WTO Agreement, *supra* note 1, art. IX.

170. See discussion *supra* note 22 and accompanying text (discussing the disparate views on the pros and cons of a rule of law approach to dispute resolution). The “rule of law” model and the traditional model competed against each other in the old GATT dispute settlement regime as well. See Andreas F. Lowenfeld, *Remedies along with Rights: Institutional Reform in the*

We do not pretend to know how these issues will ultimately be resolved. But we do think that the very uncertainties that are built into the safeguard clauses of the TRIPS Agreement constitute an additional incentive for public-private initiatives to reach bargained-for, transactional solutions on a case-by-case basis. Opportunities to negotiate fast-track implementation of specific intellectual property standards by selected LDCs in exchange for accelerated transfers of technology or commitments to invest seem especially appropriate in this context. Even with regard to the developing countries, as distinct from LDCs, the safeguards identified in Articles 7 and 8(1) would seem to admonish against pushing them too hard and too fast, lest they push back in the manner outlined above.<sup>171</sup> By the same token, case-by-case transactions that seek to accommodate instances of hardship by exchanging other advantages in areas where no such hardship exists, could—if consistent with the MFN principle—expedite attainment of the goals underlying the TRIPS Agreement better than might otherwise be achieved by coercive measures,<sup>172</sup> and with much less strain on the comity between states.<sup>173</sup>

#### B. The Pessimist's View: Delayed Expectations

We are not suggesting that the TRIPS Agreement altogether lacks teeth, even though its normative ambiguities, regulatory gaps, procedural infirmities, and built-in safety valves allow noncooperative states abundant opportunities to dilute its impact. As stated at the outset, the TRIPS Agreement will primarily serve to eliminate wholesale duplication of high tech goods, especially information goods, emanating from the developed countries.<sup>174</sup> It will also bring NICs gradually into line with international intellectual property norms that have stood the test of time,<sup>175</sup> and it will eventually help to

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*New GATT*, 88 AM. J. INT'L L. 477, 479 (1994) ("Over the forty years of GATT dispute settlement there has been an ebb and flow between . . . the models.").

171. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 356 & n.12; Abbott, *supra* note 21, at 399 (predicting that developing countries will "continue to resist changes to their IPRs laws, and when they do make changes, they will be slow to enforce them in favor of foreign enterprises.").

172. See generally Alford, *supra* note 32; de Koning, *supra* note 47.

173. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 350-51.

174. See discussion *supra* note 38 and accompanying text (providing statistical evidence that piracy is down).

175. See Hanns Ullrich, *GATT: Industrial Property Protection, Fair Trade and Development*, in *GATT OR WIPO? NEW WAYS IN THE INTELLECTUAL PROTECTION OF INTELLECTUAL PROPERTY* 147-52 (Friedrich-Karl Beier & Gerhard Schricker eds., 1988).

stimulate local innovation in the developing countries.<sup>176</sup> While these are important contributions, it seems fair to observe that they might have been accomplished by simpler and less socially costly means than the elaborate legislative framework of the TRIPS Agreement.<sup>177</sup>

If that framework nonetheless represents an historic achievement, it is because it lays the groundwork for long-term harmonization of intellectual property rights on a non-territorial foundation, which is indispensable for the future growth of the worldwide economy.<sup>178</sup> The questions we are raising bear, instead, on the short- and medium-term perspectives, in which most countries of the world will still be struggling to realize the promise of economic prosperity inherent in the relative (and now spotty) success of the NICs. As Hilton Root's study makes clear, knowing that free-market reforms can work and making them work in one's own social and economic circumstances are two different things.<sup>179</sup> While the NICs' challenge to the economic and technical supremacy of Europe and the United States could not go without appropriate legal responses, it would be quite mistaken to treat other developing countries as if they were on an equal footing with the "tigers" before they had, in fact, succeeded in making market reforms work for them.<sup>180</sup>

In short, states with different economic and social needs, whose primary goal is to overcome technological lag, will not meekly cooperate in a worldwide scheme to curb the power of the NICs if it

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176. See discussion *supra* note 143 and accompanying text (demonstrating how stronger intellectual property protection can improve local innovation and stimulate foreign direct investment).

177. Professor Reichman would have preferred a softer, more gradual approach, built around a universal norm against slavish copying, which could have been integrated into Article 10*bis* of the Paris Convention, *supra* note 2, and made applicable to all WTO countries. In contrast, some observers would have preferred an even harder line than was ultimately taken by the TRIPS Agreement. See, e.g., Garcia, *supra* note 99, at 820-21 (arguing that section 301 of the Omnibus Trade and Competitiveness Act of 1988 is one of the more effective tools in combating weak intellectual property protection); Giunta & Shang, *supra* note 21, at 339-40 ("Bilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection. Unlike multilateral agreements, bilateral agreements are country specific and thus may provide more protection for owners of foreign patent rights.").

178. See JACKSON, *supra* note 45, at 310-13.

179. See ROOT, *supra* note 23.

180. See Simon Lester, *The Asian Newly Industrialized Countries to Graduate From Europe's GSP Tariffs*, 36 HARV. INT'L L.J. 220 (1995) (observing that the poorest countries are being forced to compete on even terms with countries with much higher gross national products (GNP), especially the NICs).

means that they cannot become NICs in their own right.<sup>181</sup> The developing countries will not content themselves with continued technological dependence on the existing economic powers merely because the TRIPS Agreement can be read to that effect.<sup>182</sup> Rather, these countries will adopt every available means to follow in the footsteps of the NICs; and in so doing, they will take advantage of all the weaknesses inherent in the TRIPS regime that we have identified.<sup>183</sup> In effect, each country will thus strive to reconcile implementation of the TRIPS Agreement with its own development needs.<sup>184</sup> The level of truly effective intellectual property protection around the world will gradually rise in relation to the broader social benefits it brings to these countries and to the growing perception that this type of protection actually serves the interest of national systems of innovation everywhere.<sup>185</sup>

In the meanwhile, tensions between high and low-protectionist countries will abound, and managing the attendant risks will require more statesmanship than international institutions are accustomed to mustering. On the positive side, each developing country must still strike its own territorial balance between incentives to create and the discipline of free competition.<sup>186</sup> The resulting efforts will benefit users, second-comers, and fair followers everywhere, including the developed countries, by maintaining suitable levels of competition in the global market even as the extraterritorial norms of intellectual property protection in the TRIPS Agreement promote greater diffusion of knowledge goods.<sup>187</sup> On the negative side, these tensions could deprive intellectual property owners of the full potential returns from their investments, and could also prevent them from real-

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181. Cf. Garcia, *supra* note 99, at 819 (noting that piracy has been an economic policy of the NICs and the LDCs); Carlos A. Primo Braga, *The Newly Industrializing Economies, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 168, 172 (Mitchel B. Wallerstein et al. eds., 1993) (observing that among developing nations, NICs are more likely to recognize the value of intellectual property because industrialization has meant that the cost of piracy has begun to outweigh the benefits).

182. See Giunta & Shang, *supra* note 21, *passim*; sources cited *supra* note 31 and accompanying text.

183. See discussion *supra* Parts A, B.

184. See Giunta & Shang, *supra* note 21, at 343 ("The need for intellectual property protection, therefore, must be analyzed for each foreign country and for each particular item of protection.").

185. See discussion *supra* note 143.

186. See Reichman, *From Free Riders to Fair Followers*, *supra* note 17, at 86-89 ("Balancing Interests at the Local Level"), 89-93 ("Towards a Transnational, Pro-Competitive Equilibrium").

187. Accord Sherwood, *Implications for Developing Countries*, *supra* note 29, at 493-96.

izing the economies of scale that extraterritorial protection makes possible.<sup>188</sup> As a result, governments in the developed countries may increasingly resort to the coercive machinery of the WTO Agreement to vindicate the unfulfilled expectations of the technologically most innovative firms whose hopes are riding on the TRIPS Agreement.<sup>189</sup>

Coercion is, however, a delicate, risky, and possibly counterproductive strategy, one that could easily backfire on those governments that succumb to this temptation.<sup>190</sup> The only sure road to victory before WTO dispute-settlement panels is to bring cases involving clear cut violations of the TRIPS standards, which would produce the “slam dunk” decisions that the former legal counsel to United States Trade Representative, Judith Bello, wants to see.<sup>191</sup> Unless a government limits its use of coercion to such cases, it may fail to persuade panel members of the soundness of its complaint, which could cause embarrassment at home and weaken confidence in the still embryonic WTO.<sup>192</sup>

But so-called “slam dunk” cases are less productive, and above all, less identifiable than is commonly supposed. If, for example, the case in question involves gross or wholesale free-riding on protected interests in clear violation of express norms, the very need to litigate probably reflects a failure of both bilateral and multilateral mediatory processes. At the very least, it would demonstrate the need to bolster the interim powers of the Council for TRIPS, which should be able to stay needless dispute-settlement proceedings until other, less conflictual means of persuasion were exhausted.

If, as appears more likely, the case involves what one side perceives as a “slam dunk” violation and the other side regards as an unresolved ambiguity in the codified norms themselves, premature resort to dispute-settlement will prove risky indeed.<sup>193</sup> Besides losing

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188. See *id.* at 493-510.

189. See Shoyer, *supra* note 33 (encouraging the United States to take disputes to the WTO); Smith, *supra* note 16, at 576-78 (advocating aggressive agenda for copyright owners); see also Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 VAND. J. TRANSNAT'L L. 579 (1996) (spirited defense of high-protectionist ethos). But see Peter A. Jaszi, *Goodbye to All That: A Reluctant [and Perhaps Premature] Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L L. 595 (1996); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613 (1996).

190. See Alford, *supra* note 32, at 21-23 (observing that such coercion may also undermine long term international relations); accord de Koning, *supra* note 47.

191. See Bello, *supra* note 22, *passim*.

192. See *id.* at 390.

193. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 335-354.

on the merits, an over-confident plaintiff could watch the dispute-settlement panel fill gaps in international intellectual property law at the expense of its own domestic sovereignty.<sup>194</sup> We do not believe that the developed countries are in fact ready to surrender their ability to make intellectual property policy to international bodies,<sup>195</sup> and we doubt that the WTO, in its present formative phase, could long withstand the tensions likely to result from divisive litigation over intellectual property issues on which no clear consensus had in fact emerged in relevant state practice.<sup>196</sup>

In view of these risks, we believe that the TRIPS Agreement can be made to yield greater benefits for all member countries in the short and medium terms by developing an alternative institutional framework for encouraging a more cooperative approach to implementing its normative and procedural standards. With such a framework in place, we contend that appropriate public-private initiatives can enable private rightsholders to realize their objectives faster than might otherwise be possible, while producing corresponding gains to the cooperating states.<sup>197</sup> In the rest of this Article, we, therefore, explain the nature, role, and field of operations that we envision for such initiatives and consider the impact they might have on the process of implementing the TRIPS Agreement as a whole.

### III. STRUCTURING A COOPERATIVE STRATEGY TO PRODUCE WIN-WIN RESULTS

In a recent article, Professor Ejan Mackaay reminds us that intellectual property laws are exercises in building fences around intangible assets, and that such fences are inherently imperfect and approximative.<sup>198</sup> Yet, these very imperfections perform important social roles because they leave room for spillovers and re-uses by second-comers who build on the advances of those who preceded them.<sup>199</sup> They also stimulate the formation of private contracts that adjust gaps in the intellectual property fence to the needs of particu-

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194. See Paul Geller, *supra* note 17, *passim*; Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 339-40. *But see U.S. v. India*, *supra* note 18 (opting for strict constructionist approach).

195. *Cf.* Croley & Jackson, *supra* note 135, at 194, 211 (discussing the tension between national sovereignty and international institutions).

196. See generally Bello, *supra* note 22; Dreyfuss & Lowenfeld, *supra* note 11.

197. See also Geller, *supra* note 144.

198. Ejan Mackaay, *Legal Hybrids: Beyond Property and Monopoly?*, 94 COLUM. L. REV. 2630, 2636-38 (1994).

199. See Cohendet et al., *supra* note 80.

lar parties.<sup>200</sup> The domestic courts and legislatures constantly perform a similar function for the public at large by attempting to strike a socially desirable balance between incentives to create and the needs of a competitive marketplace.<sup>201</sup>

A chronic problem for policymakers even in the most developed countries is that the one-size-fits-all paradigms that underlie classical intellectual property law have proved especially inadequate to deal with the needs of innovators and borrowers in an information age.<sup>202</sup> This problem is compounded many times over in the developing countries, where different players at different stages of development demand different and contradictory approaches to intellectual property rights in their respective fields of interest.<sup>203</sup> When foreign rightsholders add their demands for a particular level of protection to this already volatile mixture, it can put policymakers in the crossfire among irreconcilable interests and paralyze the government's capacity to resolve these tensions in the national interest.<sup>204</sup>

Such a paralysis can have deadly effects in the developing countries, moreover, where the private sector may not be capable of working around the impasse or of benefiting from the resulting lack of government intervention, as might occur in more developed countries.<sup>205</sup> According to a recent study by Hilton Root, in contrast,

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200. See Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 613 (1998) (observing that contract law could help to adjust the gaps in the law of cyberspace).

201. See *Feist Publications v. Rural Tel. Svc.*, 499 U.S. 340 (1991) (holding that a competing work is free to copy the facts from an original work, but may not copy the original author's expression); Reichman & Samuelson, *supra* note 61, at 58-113 (contrasting balanced approach of copyright laws with unbalanced attempts to enact an exclusive property right in noncopyrightable databases).

202. See generally Charles R. McManis, *Taking The TRIPS Agreement On the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, 41 VILL. L. REV. 207 (1996); J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigm*, 94 COLUM. L. REV. 2432, 2500-19 (1994).

203. See TRIPS AND DEVELOPING COUNTRIES, *supra* note 27, at 13-22.

204. See text accompanying notes 68-79; *U.S. v. India*, *supra* note 18 (an example of just such an impasse, which resulted in WTO dispute-settlement against India); see also Kenneth J. Cooper, *India Raises a Stink Over Fragrant Rice*, THE WASH. POST, Apr. 26, 1998, at A26, available in LEXIS, News Library, Majpap File (reporting that Indian farmers had marched on the United States Embassy in New Delhi in protest of what the farmers considered to be "bio-piracy" because of the patenting of a new strain of rice called basmati); Amy Louise Kazmin, *India to Sign Up to Patents Treaty*, FIN. TIMES, Aug. 14, 1998, at 4, available in LEXIS, News Library, Majpap File (reporting that after a ten year debate, and spurred in part by the controversy over a United States company's patent for a new strain of rice it called basmati, India has acceded to the Paris Convention); Ritchie et al., *supra* note 71.

205. Cf. ROOT, *supra* note 23, at 65-89 (describing the changing needs of Malaysia).

“good governance” has been an essential component of free-market reforms in those NICs whose economic successes have so challenged the developed countries and captured the imagination of other developing countries.<sup>206</sup> In this context, “good governance” usually means ensuring that the benefits of social sacrifices will be widely shared by most members of the community and that economic actors who take entrepreneurial risks will not become the victims of government-sponsored predatory behavior later on.<sup>207</sup>

Because intellectual property rights are an essential component of every national innovation system, their introduction to, and administration within, the larger context of free-market reforms similarly requires “good governance.”<sup>208</sup> As in other cases, this requires governments to monitor and adjust the intellectual property fences, with a view to ensuring appropriate rewards not only for those who invest in innovation and who actually create and invent, but also for the public at large, which must eventually share in the benefits that result from the social costs of temporary restraints on trade.<sup>209</sup> Good governance in this context further implies a high degree of trust and confidence that those who invest and create—whether domestic or foreign—will not become the victims of predation later on.<sup>210</sup>

“Good governance” with respect to the exercise of intellectual property rights in developing countries would thus logically seem to warrant a higher degree of mediation than is customary in developed countries, where private antagonists thrash out their differences before courts of law, and intellectual property policymaking is often as much a judicial or administrative function as an exercise in legislative initiatives. These are, indeed, concrete instances of the process of adjusting the size of the holes in the intellectual property fence that

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206. *Cf. id.* at 145-177.

207. WILLIAM KINGSTON, *INNOVATION, CREATIVITY AND LAW* 79 (1990); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 854-59 (illuminating discussion of conditions for market failure).

208. *See generally* Edwin Mansfield, *Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer* (International Finance Corporation of the World Bank Group Discussion Paper 19, 1994), *cited in* Sherwood, *Implications for Developing Countries*, *supra* note 29.

209. *Cf.* MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 1.03A (1993) (“Copyright law is predicated upon the dual premises that the public benefits from creative activities of authors and that the copyright monopoly is a necessary condition to the full realization of such creative activities.”).

210. *See generally* Russell E. Levin et al., *Ex Parte Patent Practices and the Rights of Third Parties*, 45 AM. U.L. REV. 1987 (1996) (providing examples of the combination of judicial function and legislative initiative in creating intellectual property policymaking).

Professor Makaay emphasized in his article.<sup>211</sup> Even in the developed countries, moreover, there is growing interest in mediation and alternative dispute resolution as means of obtaining comparable adjustments with lower transaction costs.<sup>212</sup> The evidence further suggests that any advantages to be derived from mediating intellectual property disputes by alternatives to litigation are likely to be even greater when these disputes concern transnational intellectual property issues,<sup>213</sup> particularly when firms or governments in developing countries are interested parties.<sup>214</sup>

These strands logically come together when we think about public-private initiatives to promote cooperative strategies for implementing the TRIPS Agreement. In other words, the appropriate institutional framework should provide a means for tailor-making domestic legal fences so that both foreign rightsholders and local interests can reciprocally benefit from specific transactions.<sup>215</sup> In the process, “good governance” should ensure that the benefits are widely shared and defended against predation, and that any positive outcomes are obtained at acceptable social costs, and without undue social conflict.

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211. See Mackaay, *supra* note 198, at 2637 (“Where valuable innovations are too easily copied, the fence is not high enough and the owner of information loses revenue to poachers.”).

212. See, e.g., Tomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law on International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985); Deloitte & Touche Litig. Servs., *1993 Survey of General and Outside Counsels: Alternative Dispute Resolution* 8-9 (describing advantages of ADR in diverse business fields including intellectual property), cited in Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Julia A. Martin, *Note: Arbitrating in the Alps Rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917 (1997); *INTA Online* (last modified May 18, 1998); see also HILARY ASTOR & CHRISTINE M. CHINKIN, *DISPUTE RESOLUTION IN AUSTRALIA*, ch. 1 (1992) (providing a practical guide to ADR, including a list of advantages from the perspective of industry insiders). Professor Chinkin has expressed some reservations about ADR in international law, which Professor John Jackson also shares (unpublished communications).

213. See sources cited *supra* note 204.

214. See Michael Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 40-42 (1998) (observing that dispute resolution is especially useful in conflicts between private parties and governments, including governments in developing countries).

215. Such initiatives have proven to be successful in other arenas such as in Japan's disbursement of ODA loans for environmental projects. As part of the projects, Japanese corporations tailor technologies for a nation's economic, cultural and social situations. See Yukiko Katsumi, *Adaptability Key to Ecological Projects*, THE DAILY YOMIURI, March 31, 1998, at 7, available in LEXIS, News Library, Majpap File.

### A. Goals of a Cooperative Approach

The key to tailor-made adjustments of the intellectual property fences in developing countries is rooted in the premise that any transaction involving a significant transfer of technology is likely to require both a local counterpart and government approval at the outset. In this context, the relevant intellectual property standard appears to operate as a neutral ground rule, like other constant factors in the domestic economic and legal situation that are common to all business deals. In reality, the abstract normative standard is, as we have seen, encased in layers of uncertainty that, in more developed countries, would have been reduced by a long history of judicial and administrative precedents.<sup>216</sup>

The technology exporting firm thus needs *ad hoc* guarantees that its expected gains from contractual relations with local counterparts will not be vitiated by unforeseen complications due to gaps in the law or other legal subtleties; to adverse regulations of which it was unaware at the time of contracting; to practical inabilities to enforce or defend its intellectual property rights, including its trade secrets, before courts and administrators in a potentially hostile environment; and to supervening changes of conditions demanded by governmental authorities that were not party to the original deal or that have undergone internal changes since then.<sup>217</sup> For its part, the developing country government wants to ensure that the technology in question is not a waste of precious resources; that it is up-to-date and properly rooted in the host country through appropriate training, spare parts, and other forms of support; that it actually enhances the technical capabilities of the receiving country; that the conditions of transfer and servicing are pro-competitive; and that admission of the foreign transferor into the local economy will not turn out to be a “Trojan horse” that weakens this or other sectors later on.<sup>218</sup>

What all the parties need is a tailor-made deal, facilitated by neutral intellectual property rules, that provides positive sum gains over and above those that might result from a more casual reliance on intellectual property rights as such in more developed countries.<sup>219</sup>

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216. See sources cited *supra* note 58.

217. See Martin, *supra* note 143.

218. Cf. Doris Estelle Long, *The Protection of Information Technology in a Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMPUTER & INFO. L. 129, 166 (noting that “today’s technological break-through is tomorrow’s obsolescence.”).

219. Cf. Geller, *supra* note 17, at 114 (Arguing that one of the shortcomings of WTO dis-

This approach entails more than the exercise of intellectual property rights within parameters set by international law; it is “intellectual property plus”—that is, an effort to obtain the added value that results from coordinating the exercise of intellectual property rights with other key economic variables, in selected transactions that ensure calculated gains for both private and public players. The potential for such gains will be much greater under the TRIPS Agreement than before. This follows because foreign rightsholders enjoy specific legal entitlements they can leverage and bargain around, while governments in the technology-importing countries know that they must increase foreign investment and expand their technological base by honest means,<sup>220</sup> in order to make up for diminishing returns from copycat industries and from other foregone opportunities to free-ride on investors in the developed countries.

Under these conditions, the players share a common interest in resolving old intellectual property disputes and preventing new ones that could adversely impact upon selected, reciprocally profitable transactions, especially when those transactions are tied to direct or indirect foreign investments. If the host country wants these investments badly enough, it should be willing to provide a climate of legal and regulatory stability in place of the uncertainty that otherwise confronts foreign rightsholders.<sup>221</sup> Contracts adjusting the holes in the intellectual property fence to the needs of both foreign and domestic firms thus make sense for both public and private actors, and they can significantly reduce the transaction costs for all concerned.<sup>222</sup> They can also help developing country governments to escape the paralysis likely to result when the enforcement of international intellectual property standards appears to conflict with national development goals or with powerful vested interests.<sup>223</sup> Provided that these governments take care to respect the MFN clause that the TRIPS Agreement now applies to trade in knowledge goods, a cooperative strategy would thus make it easier for them to accommodate the eco-

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pute settlement procedures is that “the TRIPS decision-making powers are nonetheless subject to a basic limitation. TRIPS panels will be focused on trade, while intellectual property laws, though attuned to economic considerations, are motivated by other values as well.”).

220. See generally Sherwood, *Intellectual Property Systems and Investment Stimulation*, *supra* note 143; sources cited *supra* note 70 and accompanying text.

221. See Sherwood, *Intellectual Property Systems and Investment Stimulation*, *supra* note 143, at 277; Martin, *supra* note 143.

222. See I. Trotter Hardy, *Contracts, Copyright, and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2, ¶ 46 (1995) (observing that contracts often involve lower transaction costs).

223. See sources cited *supra* note 205 and accompanying text.

conomic realities of an integrated global market without publicly pushing intellectual property protection farther than its constituents are prepared to go.

#### B. Modeling a Cooperative Framework

*A priori*, one might imagine that the best vehicle for promoting the cooperative strategies the authors envision would be a broad-ranging state organ whose role within any given developing country entailed more or less the same monitoring and mediatory powers attributed to the Council for TRIPS within the WTO framework. From an organizational standpoint, indeed, the complexities of the post-TRIPS environment do seem to require even developed countries to charge some central agency with the responsibility for managing intellectual property matters and to endow it with inter-agency jurisdictional powers that cut across traditional administrative hierarchies. This need for good management becomes imperative in the information age, as the constant flux of new technologies raise complex intellectual property issues of such transcending economic importance that they disrupt the decision-making capacities of the existing administrative apparatus.<sup>224</sup>

On closer analysis, however, it soon appears that a “National Council for TRIPS” would not be the appropriate vehicle for adequately implementing the kind of cooperative approach to the TRIPS Agreement that the authors envision.<sup>225</sup> All its operations would necessarily partake of official deeds and policies with respect to intellectual property matters, and it could not easily distinguish its position with respect to single business transactions from public and often controversial positions that pertain to overarching normative and procedural issues. Because it could never sufficiently distinguish its role as economic actor from its policymaking functions, any such official agency must lack the flexibility to exploit gaps in the law when structuring particular deals, and it might gradually succumb to the same internal tensions that inhibit or paralyze other agencies.<sup>226</sup> Moreover, the neutrality of any “National Council for TRIPS” would

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224. See generally McManis, *supra* note 202.

225. Besides being politicized, such a national council may also prove to be prohibitively expensive. See Amy E. Carroll, *A Review of Recent Decisions of the U.S. Court of Appeals for the Federal Circuit: Comment: Not Always the Best Medicine: Biotechnology and the Global Impact of U.S. Patent Law*, 44 AM. U. L. REV. 2433, 2467 (1995) (discussing the administrative costs of implementing intellectual property laws).

226. Cf. Young, *supra* note 24 (emphasizing the importance of depoliticized institutions).

be hard to sustain or guarantee over time, as pro- or anti-protectionist forces struggled to capture it and align it with their own point of view.<sup>227</sup> This struggle could, in turn, undermine both the confidence and trust of outside private negotiators, who must deal with such an agency, and weaken its ability to guarantee and enforce contractual bargains built around the TRIPS standards.

While the authors firmly believe that governments play an indispensable role in structuring a cooperative approach, their role here differs from that of the policymaking apparatus. Rather, taking the intellectual property policies adopted by a particular developing country as givens, the role of government in securing a cooperative approach is primarily that of economic actor, bound by the rule of law, and secondarily that of mediator and guarantor of the bargained-for outcomes. As economic actors, government officials seeking to enter into mutually beneficial transactions must be able to negotiate with all the parties concerned, including foreign interests, local firms (whether private or state enterprises), and all the relevant government agencies.<sup>228</sup> They must mediate among the conflicting interests in the local environment and help to arrive at business arrangements that will withstand scrutiny by the relevant government organs and that will be strictly enforced by the local judiciary and administrative authorities. At the same time, the participation of state actors as economic agents in negotiations with foreign rightsholders concerning specific transactions must not compromise the larger policymaking functions of the developing country's political organs. These entities continue to operate in a sovereign capacity above and beyond the level at which state enterprise and government officials *qua* economic actors surrender themselves to the rule of law.

The foregoing considerations suggest the need for a stable, ongoing private institution that could host transactional negotiations bearing on intellectual property rights and act as a go-between in facilitating relations among foreign rightsholders, local enterprise, and

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227. See Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1283, 1314 (1996) (“[I]f someone else agrees to pay the cost of supplying new institutions, it is difficult to overcome the temptation to free-ride. Then the problem for some appropriators is how to present the “facts” of the local situation in such a way that officials who may not know the local circumstances will be led to create institutions that will leave some individuals better off than others. Those individuals who have the resources to enable them to make the best case to external officials are most likely to gain rules (or exceptions to rules) that will advantage them most.”).

228. Cf. ROOT, *supra* note 23, at 66-74, 82-84 (discussing the role of the government in economic development and using Malaysia as an example).

government agencies.<sup>229</sup> In this connection, it is worth noting that the collection societies in many developed countries<sup>230</sup> already perform certain functions that are analogous to those the authors think proper for such an institution to carry out.<sup>231</sup> Collection societies bring together, and mediate between, the interests of, say, authors, publishers, and users of intellectual property, and in some countries they have a quasi-governmental status that makes them responsible to the public at large.<sup>232</sup> The collection societies vary considerably with respect to their different fields of operation, moreover, and some of the smaller ones, such as the Harry Fox Agency<sup>233</sup> in the United States, stand out for their propensity to facilitate low cost or standardized private contracts built around baseline intellectual property rules.<sup>234</sup>

The collection society model teaches us the importance of transactional stability and of maximizing the efficiencies that derive from

229. See Merges, *supra* note 227, at 1307 (“Private bargaining is therefore the only way intellectual property can be transferred efficiently.”).

230. For example, in Canada, the Society of Composers, Authors and Music Publishers of Canada, Ltd. handles all of the performing rights royalties of recorded musical works and the Canadian Musical Rights Reproduction Agency, Ltd. handles licensing of recorded musical works. In Brazil, The Central Bureau of Royalty Collection and Distribution (ECAD) collects and distributes all royalties, as well as fixes royalty rates. Sweden’s organizational system, which is made up of private unions and professional organizations, is considered to be one of the most efficient in the world. See *generally*, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Melville Nimmer & Paul Edward Geller eds., 1988). For more detailed descriptions of collection societies in other nations, also see Patrick F. Liechti, *The Collection of Copyright Royalties and the Federal Arbitral Commission in Switzerland*, 34 J. COPYRIGHT SOC’Y USA 214 (1987), Walter Dilenz, *The Copyright Tribunals in Austria, The Federal Republic of Germany and Switzerland*, 34 J. COPYRIGHT SOC’Y USA 193 (1987), and *Proceedings of the Eighth Annual Conference on Legal Aspects of Doing Business in Latin America: Developed Strategies, Alliances and Markets*, 10 FLA. J. INT’L L. 1, 41-46 (1996).

231. See Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 408 (1992) (discussing the economic advantages of a collection society in terms of transaction costs); Jay M. Fujitani, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CAL. L. REV. 103, 103-06 (1984) (explaining how collection societies are structured in the context of performing rights); Merges, *supra* note 227, at 1330-38 (focusing on ASCAP).

232. See Fujitani, *supra* note 231.

233. See *The Harry Fox Agency Inc.* (visited October 11, 1998) <<http://www.nmpa.org/hfa.html>> (providing general information on the Harry Fox Agency).

234. See Merges, *supra* note 227, at 1295 (“The lesson learned in a number of industries is that privately established Collective Rights Organizations (CROs) will often emerge to break the transactional bottleneck. From patent pools to collective copyright licensing organizations such as ASCAP and BMI, IPR owners in various industries have demonstrated the workability of these private transaction mechanisms. Indeed, these case studies uncover two distinct advantages of CROs: expert tailoring and reduced political economy problems.”); Fujitani, *supra* note 231, at 112-13 (reviewing the economic advantages that the Harry Fox Agency model provides).

repeat performances.<sup>235</sup> In the raw state of affairs, each intellectual property transaction affecting a given developed country must start from scratch, and all the attendant risks and uncertainties must be separately overcome for each transaction. In contrast, a proper institutional framework for implementing a cooperative approach to cross-border intellectual property transactions would obtain the necessary commitments to negotiate in advance, and would deepen its relations with both the public and private sectors over time. Repeat performance would thus make it a tool for lowering transaction costs, reducing uncertainties, increasing trust and confidence and, when necessary, resolving disputes.<sup>236</sup> In time, its mediatory role may give rise to standardized deals, useful precedents, and streamlined procedures, without sacrificing its ability to address each transaction on its own bottom, as the case requires.<sup>237</sup>

The collection society model also teaches a number of lessons about things to avoid when structuring ongoing public-private initiatives to facilitate transnational intellectual property negotiations. These societies often become cumbersome, rigid, bureaucratic, and inflexible, all traits that would defeat the purpose of the institution we are describing.<sup>238</sup> Moreover, the collection societies are susceptible to being captured or manipulated by one or more of their constituent groups, and some have been known to deviate from their missions in order to pursue interests of their own at the expense of their members.<sup>239</sup>

A public-private forum to bargain around the TRIPS Agreement must, instead, have no interest of its own other than that of facilitating positive-sum gains for all its clients. While benefiting from repeat performances and standardized solutions whenever possible, it needs to bring public and private actors together within a neutral and flexible forum that is beholden to no one.<sup>240</sup> The goals of the exercise are

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235. See Besen et al., *supra* note 231, at 384 (“Collective administration of the copyrights of a group of owners increases production efficiency” and provides incentives for cooperation).

236. See Merges, *supra* note 227, at 1299 (suggesting that such institutional structures have the advantage of reflecting the expertise of industry insiders and are flexible enough to be changed over time by participants).

237. See *id.* at 1319.

238. See generally Fujitani, *supra* note 231 (criticizing BMI and ASCAP).

239. For example, an established songwriter in ASCAP will receive more royalties than a newly admitted one. See Neville Miller, *The NAB View*, 11 AIR L. REV. 399, 403 (1940), cited in Besen et al., *supra* note 231, at 395-96 (explaining that collection societies in the United States are strictly regulated because of complaints of discrimination among members).

240. Cf. Abbott, *supra* note 21, at 398 (stating that in the field of intellectual property there is a “critical need” for a policy neutral research and analysis source).

precisely those outlined above: namely, it must seek to adjust the intellectual property fences to the needs of everyday actors, by means of its abilities to mediate disputes and encourage compliance with bargained-for outcomes. Above all, such an institution must be seen by both public and private actors as an instrument for subjecting intellectual property transactions to the same criteria of “good governance” that have otherwise distinguished the economic activities of the more successful developing countries from their less successful counterparts.<sup>241</sup>

### C. Organizing a Forum for Public-Private Initiatives After the TRIPS Agreement

Professor David Lange, joined by other principals, has established an International Forum for Intellectual Property Initiatives (IFIPI), at the Duke University Law School’s Center for Global Information Technologies. The Forum is intended to serve as a vehicle for the kind of ongoing public-private initiatives the authors have described above and is indeed, the occasion for their collaboration in the preparation of this article; in addition, The Forum recognizes the link between increased intellectual property stability in the emerging economies of the world and the potential for increased foreign direct investment. The Forum’s efforts gained early support from intellectual property officials in China and Vietnam as well as from private enterprises interested in doing business in these countries.

Though the Forum’s project is by no means limited to the Pacific Rim, its initial attention focused primarily on China, where considerable interest has been expressed in finding just such a neutral forum in which transnational intellectual property problems could be discussed and mediated. The first rounds of specific negotiations under the Forum’s auspices took place at a Conference in Brussels in July, 1997, organized and presented by Duke’s Center for Global Information Technologies and its several partners in the public-private initiatives project.<sup>242</sup> Participants included senior representatives from all major Chinese intellectual property agencies or bureaus (including the People’s Supreme Court and the Customs Bureau), as well as senior representatives of participating private enterprises. An

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241. See generally ROOT, *supra* note 23.

242. See David Lange, *Foreword: Public-Private Initiation after TRIPS; Designing A Global Agenda*, 9 DUKE J. COMP. & INT. L. 1 (1998) (acknowledging those who participated in organizing the Center for Global Information Technologies at Duke, and the Conference at which The Forum was formally introduced).

equally distinguished delegation from the Vietnamese Copyright Office also attended and participated as observers, as did executives from numerous enterprises and institutions interested in the venture.

In general, the discussions between the participating Chinese officials and representatives of the participating companies fell into two categories. One concerned matters of general import affecting a particular industry's interest in more secure or more favorable enforcement of existing laws and regulations bearing on its future activities in the Chinese market.<sup>243</sup> The second category concerned company-centered issues, which might also be of more general interest, but which in any event invited resolution at a transaction-specific level.<sup>244</sup>

The negotiations were off-the-record and confidential, as were also the identities of the private-sector participants; and the authors will make no attempt to identify the participants or to summarize the nature of the negotiations themselves in greater detail here. But it is fair to say that the discussions were spirited and productive, yet lacking altogether in the kind of adversarial rancor that often attends disputes grounded in international intellectual property issues. It seems no less fair to say that most of the parties left these negotiating sessions with a greater appreciation for the concept of public-private initiatives in practice. The Forum continues to be involved in pursuing negotiating initiatives of this kind, and intends to broaden the ranks of its participants to include intellectual property and trade officials from South Asian, African, East European and Latin American countries as well.<sup>245</sup>

#### IV. BARGAINING AROUND THE TRIPS AGREEMENT: A PRELIMINARY ASSESSMENT

The authors believe that, in time, the Forum can help to neutralize the cultural biases that have so far colored top-down imposition of international intellectual property standards.<sup>246</sup> It can also

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243. A pharmaceutical company, for example, sought clarification of certain regulations falling under the jurisdiction of the Office of Administrative Protection for Pharmaceuticals of the China State Pharmaceutical Administration.

244. For example, a trademark proprietor urged new recognition in China for a famous mark not presently protected for technical reasons; meanwhile, again for example, a chemical company, proposing to make a substantial direct investment in China, sought secure assurances that its technology would be protected against both trade secret and patent infringement.

245. For more on the Forum, including its mission statement, see *infra* Appendix.

246. See Long, *supra* note 218, at 154-62 (discussing cultural biases and how they color intellectual property standards around the world); Geller, *supra* note 64, at 216 (demonstrating the limits of the TRIPS Agreement in cross-cultural settings).

serve as an instrument for converting the residual dependence of these standards on territorial law into a strength, rather than a weakness. By facilitating cooperative strategies that enable interested parties to bargain around the ambiguities and gaps in the TRIPS regime, within the limits that its MFN clause permits, public-private initiatives can serve to reduce tensions and to give participating developing countries a greater short-term stake in the worldwide intellectual property system.

The authors further believe that the Forum's initiatives stand to benefit both developed and developing countries. On the one hand, these ongoing negotiations can help developing countries to work out a level playing field on which to reconcile intellectual property policies with competition law and with the drive for increased foreign investment. On the other hand, they enable firms in the developed countries to reach beyond the letter of the law as embodied in the TRIPS Agreement, and to address more than "slam dunk" issues, especially issues arising from the uncertain treatment of the most promising new technologies under the classical intellectual property paradigms. By helping to achieve a non-disruptive working consensus among all the affected parties, these initiatives can limit the risks to which both old and new players are exposed; avoid unbargained-for obstacles and predatory behavior; and promote sectoral sharing of the benefits of technological innovation on a global, rather than a merely national or regional basis.

From a larger perspective, the authors believe that the cooperative strategy these initiatives seek to foster is intimately bound up with the need for "good governance" in the developing countries' quest for successful market reforms. Intellectual property rights already represent a delicate balance between regulatory policies that limit competition and the efficiencies that free enterprise is known to yield. Every developing country has a stake in establishing a viable national system of innovation that can reduce path-dependence, narrow the technology gap, and prod local enterprise to address the global marketplace.<sup>247</sup> Each developing country that treats the TRIPS Agreement as a set of default rules to be bargained around, within the limits that the Agreement provides, regains some of the negotiating initiative that was lost during the multilateral trade negotiations of the Uruguay Round.<sup>248</sup> This, in turn, increases its power to convert

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247. See Sherwood, *Implications for Developing Countries*, *supra* note 29.

248. See generally Ullrich, *supra* note 41.

what might otherwise amount to short-term losses into palpable gains.

Good governance in this context requires participating developing countries sharply to distinguish between their regulatory or policymaking functions and their operations *qua* economic actors in the intellectual property arena. As economic actors, agents of the state implement the development policies that have been formulated with respect to its own national system of innovation; but they also interact with private and public actors in the global marketplace. In seeking to extract as many positive gains as it can from each transaction, the state economic actor must also be bound by its own commitments and the rule of law.

In this respect, the treatment of sovereign immunity in public international law teaches valuable lessons that apply to the new world of international intellectual property relations in the post-TRIPS environment.<sup>249</sup> The authors refer to the willingness of states to allow their commercial instrumentalities to be sued *qua* private actors for transgressions of the various domestic laws, a practice that has recently evolved into a settled exception to the standard doctrine of sovereign immunity.<sup>250</sup> While the obvious effect of this exception is to require state enterprises to obey foreign commercial laws, it also gives states an incentive to develop commercial policy on a transnational basis that might otherwise be lacking under a regime of pure sovereign immunity.<sup>251</sup> In effect, compliance with foreign commercial law strengthens the sovereign's capacity to formulate and develop its own commercial law on sounder, less parochial, foundations.

In the post-TRIPS environment, the dominant legal rules affecting national intellectual property systems, though largely extra-territorial in principle, are—as we have seen—open to widely varying implementation policies and procedures in actual state practice.<sup>252</sup> By monitoring and filtering that implementation process through mutually agreed private transactions, the state as economic actor directly

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249. See IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW*, 322-36, 507-08 (4th ed. 1990) (explaining the doctrine of sovereign immunity).

250. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 480-81 (1983) (ruling that the Foreign Sovereign Immunities Act did not bar a private party's suit against a state for commercial activities); Philip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 *STAN. L. REV.* 811, 812 (1990) ("Foreign governments and enterprises have also dramatically increased their commercial activities, rendering them accountable in American courts.").

251. See *Survey of International Law*, 19 *MD. J. INT'L L. & TRADE* 159 (1995).

252. See generally Dreyfuss & Lowenfeld, *supra* note 11.

or indirectly adjusts international standards to its own intellectual property policies and sets the level of their enforcement. In so doing, it exploits the risks and uncertainties inherent in the WTO's dispute-settlement process, especially as that process affects developing countries, in order to extract concessions of clear benefit to its own economic development strategies. The cumulative effects of such individual deals, spun out against the shadows cast by the TRIPS Agreement, should transcend the borders of single developing countries and help to create a better worldwide balance between legal incentives to innovate and the need to preserve the conditions in which free competition thrives.

We do not mean to overstate our case, either by denigrating the strength of the TRIPS regime as adopted at Marrakesh, Morocco in 1994, or by underestimating the outer limits that its MFN clause imposes on the plausible range of public-private deal making. Yet, the MFN clause that applies to knowledge goods under a public law treaty that regards intellectual property owners as third-party beneficiaries is not the same MFN clause that the Contracting Parties have applied to trade in tangible goods under the GATT.<sup>253</sup> Trade experts who fail to take these differences into account will miscalculate the probable legal consequences of applying the MFN principle to international intellectual property rights and will underestimate the opportunities for states to cut deals with private companies, as distinct from deals with other states.

The discretionary variables inherent in the application of intellectual property paradigms, even in the most developed countries, necessarily create a range of state practice and experience not rising to the level of formal rules and procedures, on which each state remains free to draw in the transnational context,<sup>254</sup> so long as legal discrimination against other states or their nationals does not result.<sup>255</sup> Given equal access to the bargaining process, it will not be easy to prove true discrimination on the basis of single transactions in which intellectual property is but one of many commercial components. Nor will international tribunals be eager to compromise the residual territorial sovereignty of the bulk of the WTO's membership.<sup>256</sup>

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253. See Cottier, *supra* note 76, at 397-98 (noting that the rules in intellectual property concern persons, while the GATT relates to products).

254. See *U.S. v. India*, *supra* note 18. See generally Dreyfuss & Lowenfeld, *supra* note 11.

255. See TRIPS Agreement, *supra* note 1, arts. 3, 4.

256. See *U.S. v. India*, *supra* note 18; Reichman, *Securing Compliance with the TRIPS Agreement After U.S. v. India*, *supra* note 18, at 592-97 ("Limits of the Rule of Law").

Meanwhile, a mediatory framework, in which case-by-case intellectual property transactions can be addressed through public-private initiatives, represents an opportunity for preventing disputes that might otherwise weaken the still embryonic foundation of the WTO.<sup>257</sup> While mediation has always been a basic instrument of international relations, its potential role in the post-TRIPS environment is magnified by the risk that every dispute between private firms in developed countries and their counterparts in developing countries can escalate into a test case before the WTO's dispute-settlement panels, which even the Council for TRIPS seems powerless to stay.<sup>258</sup> If matters do proceed to litigation, the uncertain results can vex comity and augment resentment and frictions that will undermine the pacific enjoyment of intellectual property rights at a future time.<sup>259</sup> When, instead, such disputes are resolved or avoided by mediation accepted as binding by the private firm, and also accepted as binding by the developing country (*qua* economic actor) with respect to certain intellectual property commitments, that result will indirectly advance the cause of intellectual property owners everywhere.

It follows that public-private initiatives that engage the state as economic actor afford both developed and developing countries a unique opportunity to define a workable intellectual property framework that produces positive gains (and lower social costs) for all concerned, including the international community as a whole. No comparable gains could emerge from purely private transactions that remain subject to state scrutiny or from state-to-state negotiations under the threat of coercion or retaliation. What makes the IFIPI an intriguing venture is precisely its ability to maximize flexibility by insulating both the mediators and public and private negotiators from outside influences. Within its precincts, practical decisions having profound policy implications can be worked out serenely, and without recourse to formal, rigidifying declarations of official policy, or worse yet, to litigation before the WTO's dispute-settlement panels.

If the Forum succeeds, it will become a shop in which to forge common-law and common sense solutions to transnational intellectual property problems that might otherwise become intractable. It thus represents a potentially useful and, one hopes, efficient tool for

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257. See generally Helfer, *supra* note 126 (noting that bringing controversial cases to the WTO may undermine the WTO).

258. Cf. Bello, *supra* note 22; *supra* text accompanying notes 188-94.

259. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 21, at 346-47, 561.

achieving, step by step, a proper balance between incentives to create and the preservation of the competitive ethos in an integrated global market. We hope you will agree that the Forum and its project merit cultivation and support from both the public and private spheres concerned with implementing international intellectual property rights in the post-TRIPS environment.

## APPENDIX

### MISSION STATEMENT OF THE INTERNATIONAL FORUM FOR INTELLECTUAL PROPERTY INITIATIVES

The following outline reflects the initial organizing principles under which the Forum's project has gone forward to date. Though it must be emphasized that these principles are still quite fluid and subject to change, they do represent a preliminary "mission statement":

#### Purpose

*To promote improved intellectual property protection and increased capital investment in the evolving economies of the world through public-private initiatives (structured, on-going working relationships between IP proprietors and their public sector counterparts in the evolving economies)*

#### Membership

##### Voting

*By invitation, upon payment of dues:*

- *Intellectual property (and trade) officials in the evolving economies*
- *Senior IP and investor management and professionals interested in the global marketplace*
- *Distinguished members of the academy*

##### Non-Voting (Observer) Status

*Open to all*

#### Funding

- *Membership subscriptions*
- *Transaction fees*
- *Project Development (revenue generating distance education, conferences, etc.)*
- *Foundation support*

## Organization

### Oversight

*Board of Directors nominated and elected by voting members*

### Administration

*Center for Global Information Technologies (Duke Law School) pro tem; subject to funding out initial investment and subsequent spin-off into free-standing independent organization, with principal offices in New York, Brussels (or Geneva), Buenos Aires and Hong Kong and continued educational link to Duke Law School*

## Goals

*To design and implement more efficient post-TRIPS mechanisms for securing adequate recognition, protection and enforcement of IP rights (with resulting increases in capital investment) in the evolving economies*

### First Five Years

- *To secure adequate funding, participation and support to insure survival*
- *To demonstrate the fundamental viability of the concept and practice of “bargaining around TRIPS”*
- *To demonstrate the relationship between IP stability and increased capital investment*

### Second Five Years

- *To achieve substantially wider recognition and increased support*

### Thereafter

- *To achieve the full Goals of the enterprise*

## Operative Principles and Accords

### Mutuality

*Success depends upon the degree to which both public and private parties consider themselves mutually obligated in these respects:*

### Commitment

*i.e., Commitment to the goals and processes of the enterprise*

**Respect**

*The enterprise is voluntary by definition; a decent respect for opposing parties is therefore a sine qua non*

**Confidence**

*Trust*

**Willingness to be Bound**

*Again, the success of a voluntary enterprise presupposes a mutual willingness to live by the rules of the game*

**Equal Access to All Players in the Global Marketplace**

*The Forum must be available to IP (and related) officials in all evolving economies (a proposal obviously requiring additional definition); and to all private parties interested in investing in the evolving economies*

**Equal Treatment in Equal Circumstances**

*The MFN principles of the TRIPS Agreement (and other international agreements) may need to be accommodated to the realities of transaction-centered bargaining, but it is therefore also absolutely essential that parties extend and receive equal treatment in equal circumstances; when combined with the principle of equal access (above), the fundamental purposes of MFN are met*

**Integrity of Process**

*The process must be developed and participated in by all parties so as to insure confidence in such attributes of integrity as confidentiality, truth-telling, internal transparency, consistency, and the like*

**Non-Waiver of Rights and Prerogatives**

*The parties initially must be secure in their [a priori rights] and prerogatives under international and domestic laws; in time, as confidence in the integrity of the process increases, some adjustments may be made here, subject to approval by the parties themselves*