The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property

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Abstract

The World Trade Organization's Trade Related Intellectual Property (TRIPS) Agreement is controversial, requiring WTO members to establish a host of domestic institutions to support intellectual property rights, including substantive laws creating rights and a host of enforcement procedures. Trade scholars and development advocates frequently criticize the agreement as economically harmful to developing countries. This Article does not argue that the TRIPS Agreement is beneficial for developing states, but highlights how the agreement has produced some surprising benefits over the last decade and a half. First, the TRIPS Agreement's requirement that developing states make the domestic enforcement of intellectual property rules available is weak. The TRIPS Agreement relies on the existence of domestic remedies to enforce intellectual property rules. This reliance is unwarranted, however, because states are explicitly exempted from any obligation to allocate significant resources (i.e. police or prosecutors) to enforce these laws. Nor are courts or judicial authorities required to order the remedies that the TRIPS Agreement gives them the authority to provide. The result is that states can set their effective level of intellectual property enforcement at a level well below that of developed states with similar laws and enforcement institutions. Second, this article highlights the beneficial effects that trade retaliation in intellectual property can have for developing countries. The possibility of retaliating by suspending the TRIPS Agreement’s obligations gives developing states much greater leverage to enforce other trade obligations against developed states.

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I. INTRODUCTION

The Trade Related Intellectual Property (TRIPS) Agreement is controversial. Negotiated as part of the Uruguay Round that created the World Trade Organization (WTO), the TRIPS Agreement created a minimum standards regime in intellectual property for all member states of the WTO. This was a major change to the international trade system. Intellectual property rights went from being almost entirely outside of the jurisdiction of trade institutions to having the status of a core obligation of the global trading system. Some commentators view this as a positive development, extending protections for intellectual property goods, which are increasingly becoming a significant
portion of international trade in foreign markets. The dominant narrative, however, is that the TRIPS Agreement is detrimental, imposing a level of intellectual property protection that is too high for much of the developing world. Strict intellectual property enforcement places many goods, most importantly life saving medicines, further out of the reach of developing states. Some commentators further argue that the process of adopting the TRIPS Agreement was itself flawed—an act of economic coercion whereby the key states in the developed world effectively left the developing world with no choice but to accept it.

Yet the link between trade and intellectual property has developed in surprising ways. The expansion of intellectual property protections through the WTO was intended to assure rights-holders with greater security, but the effects of tying intellectual property to market access have proven less straightforward than intellectual property holders had hoped. The TRIPS Agreement has actually provided developing countries with some benefits that few anticipated. Two aspects of the TRIPS Agreement have been critical in this regard. To start, the

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2 See José E. Alvarez and Jagdish Bhagwati, *Afterword: The Question of Linkages*, 96 Am J Intl L 126, 127 (2002) (stating that the TRIPS Agreement “facilitates, even enforces with the aid of trade sanctions, what is in the main a payment by the poor countries (which consume intellectual property) to the rich countries (which produce it”)”; Peter M. Gerhart, *The Tragedy of TRIPS*, 2007 Mich St L Rev 143, 167–69 (2007) (arguing that the TRIPS Agreement was the result of uneven bargaining power and results in the perpetuation of wealth disparities); Jerome H. Reichman and Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 Duke L J 85, 94–98 (noting that TRIPS, in practice, puts a heavy burden on developing countries attempting to compete in knowledge goods); Peter K. Yu, *The International Enclosure Movement*, 82 Ind L J 827, 871 (2007) (arguing that TRIPS requires “poor countries to develop a rich-country intellectual property system”).

TRIPS Agreement is difficult to enforce against developing states. It allows developing states to act strategically, modulating their enforcement of intellectual property rights to achieve a level of domestic protection that is closer to their preferred level. In addition, the linkage between intellectual property and trade provides developing countries with a credible threat in WTO dispute settlement that they previously lacked: the threat to suspend intellectual property protections in their national markets. This threat allows developing countries to address trade violations by developed states in the areas most salient to developing states—namely agriculture issues. Together, these elements have reversed the fortunes of some rights-holders in developed states—they have made themselves the hostages for their government’s continued compliance with international trade rules but have failed to achieve security for their rights in the global marketplace.

On balance, the TRIPS Agreement may nonetheless be detrimental to developing states. These countries, fearing the reaction of developed state governments, might refrain from taking full advantage of the flexibilities that TRIPS offers. Even with the robust use of these flexibilities, developing states may find that the TRIPS Agreement imposes constraints on their abilities to produce or import pharmaceuticals or other critical goods. Nonetheless, the TRIPS Agreement is not as constraining as intellectual property rights-holders in developed states intended it to be. Over the last decade and a half, the agreement has developed—imposed constraints on developing states, as expected—but also producing some surprising benefits.

More broadly, this Article examines the complex relationship between domestic politics and international law as well as the unexpected consequences of institutional design. The TRIPS Agreement engages domestic policies in a manner that is unusual for international agreements. Most international agreements establish substantive outcomes that the state must meet but do not engage the issue of how the state will meet those obligations. The TRIPS Agreement turns this standard international law practice on its head, demanding that states alter their governmental structure by adopting specific domestic institutions but not requiring states to meet specific enforcement outcomes, such as a set of targets for intellectual property enforcement. Negotiators from developed governments chose this approach as a means of changing the legal culture in developing countries. By demanding the creation of domestic institutions, these negotiators expected that a respect for intellectual property rights would become embedded in the domestic political culture of developing countries: intellectual property rights would be created and enforced as a part and parcel of domestic law rather than international pressure. Yet this strategy did not fully anticipate how exported institutions would be received in different political systems. As this Article discusses, developing states have different policy preferences that influence the functioning of their domestic institutions.
While police and prosecutors in developed states may make intellectual property rights enforcement a priority, there are few reasons to expect this to be true in developing states. Similarly, judges in developing states may have little interest in imposing strong remedies (criminally or civilly) for intellectual property infringement, even if they possess the authority to do so.

In addition, developments in international law can have unexpected effects on domestic politics. By incorporating intellectual property rights into the World Trade Organization system, developed states were pressing their advantage. To extract concessions on intellectual property rights from developing states, the US and the European Communities withdrew from the earlier global trade agreement—General Agreement on Tariffs and Trade (GATT 1947). Developing states had to sign onto the TRIPS Agreement to maintain their previous level of market access to these developed states. Yet the linkage has turned out to be helpful for developing states by providing them with leverage that they previously lacked. By embedding intellectual property rights in a multi-issue regime, developing states can make the enforcement of intellectual property rights contingent on developed states compliance with other trade issues. Intellectual property rights-holders have found themselves drawn into domestic political battles in which they formerly had no direct interest.

This Article proceeds in four sections. Section II reviews the negotiation and adoption of the TRIPS Agreement, including its substantive requirements. This Section discusses how rights-holders in the US, the European Communities, and Japan sought to move intellectual property issues into trade negotiations. Global trade negotiations offered rights-holders an opportunity to raise the minimum level of intellectual property protection and to extend these protections to a wide geographic area. This Section also reviews some common popular and scholarly criticisms of the Agreement, most importantly that the TRIPS Agreement effectively is a wealth transfer from poorer countries to richer countries.

The third Section turns to the issue of enforcement of intellectual property rights under the TRIPS Agreement. The model for trade liberalization has traditionally been one of preventing discrimination based on national origin. States are not required to adopt trade regulations, but any state’s decision to regulate must be made on a non-discriminatory basis (that is, all WTO members must receive the same treatment and, once past the border, imported goods must receive national treatment). For rights-holders, such a non-discriminatory

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model was unacceptable for intellectual property negotiations. Where trade partners provided only low levels of intellectual property rights, the guarantee of non-discriminatory enforcement of those rights was cold comfort. The resulting negotiations developed along a different model, establishing a floor for intellectual property rights in each member state. Rights-holders envisioned that domestic authorities—police, prosecutors, and judges—would monitor and enforce intellectual property rules. If domestic authorities failed to enforce these rights effectively, then the WTO dispute resolution system would demand that the government adopt effective measures.

As Section III discusses, this vision of enforcement has not materialized. While the TRIPS Agreement requires states to adopt specific intellectual property laws, the agreement fails to establish a baseline for judging a state’s enforcement efforts. Rather, the TRIPS Agreement demands the creation of elaborate domestic legal institutions—such as criminal law penalties and administrative remedies—but does not require that governments actually dedicate any resources to supporting these institutions. In fact, the TRIPS Agreement goes even further, explicitly relieving states of any obligation to allocate government resources to the enforcement of intellectual property law. Essentially, the TRIPS Agreement relies on the existence of formal sanctions and not the efforts of governments to enforce domestic laws. This reliance makes little sense. A system of public enforcement requires government resources to detect and prosecute violations and to use legal sanctions to punish them. It is the combination of these two elements that establishes the government’s level of enforcement. This system allows developing states to vary the effective level of property rights in their own domestic markets. So long as the government adopts the correct institutions, it can have lower effective levels of intellectual property protection than developed states with the same laws and enforcement institutions without breaching WTO law.

This picture is complicated by the TRIPS Agreement’s requirement that each state establish a system of civil remedies for intellectual property violations. The civil system might, in practice, be far more important than the administrative or criminal system if foreign rights-holders are willing to bear the costs of detecting and prosecuting intellectual property infringements. Yet this system also has limitations. Depending on the costs of intellectual property reproduction (for example, pharmaceuticals versus DVDs), private actors may find that the benefits of shutting down a single producer to be more cost-effective (high reproduction costs) or less cost-effective (low reproduction costs). Even if the rights-holder decided to bring a civil claim, the domestic

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court system has significant discretion in providing a remedy. The TRIPS Agreement requires the government provide judges the authority to issue injunctions and order compensatory damages in civil actions. However, the state is under no obligation to ensure that its judges actually use such authority. Domestic judges can refuse to order these remedies (in any one case or in all cases), and yet the state would remain in compliance with the TRIPS Agreement.

Section IV explores the role of the TRIPS Agreement in the international enforcement of trade rules. This Section argues that intellectual property retaliation is far more advantageous to developing states, compared to retaliation in goods, when targeting developed states. This is true both in terms of the economic effects on the developing state and the political effects of the sanction on the developed state.

Developing states have long maintained that the WTO dispute settlement system is still power-based. Although legal decisions at the WTO are made based on the merits of each case, the remedy is still highly contingent on the state's market power. The WTO system allows states to retaliate with trade sanctions if the responding state does not cease its violation. Small and developing states are often unable to threaten credibly to impose significant economic harm on their developed trading partners. As a result, a developing state may be able to win the legal case at the WTO and yet be unable to enforce the judgment. The TRIPS Agreement is a leveler in this regard. Developing states can permit domestic industries to reproduce protected intellectual property from the respondent state up to the value of the WTO-authorized retaliation.

As trade scholars have discussed, intellectual property retaliation has several attractive characteristics for developing states. First, it improves net welfare for the developing state—it does not require that the state bear an economic loss to sanction the violating state, as do most suspensions of trade in goods or services. Second, the net welfare gains of retaliation and the greater capacity to sanction make the threat of sanctions more credible. The more credible the sanction, the more likely the respondent state is to modify its behavior, even if sanctions are never actually applied. Finally, the effects of retaliation in intellectual property are felt by very influential interest groups in the respondent state. The real value of trade retaliation is in convincing the target government to change its policies, and thus, the key element of the sanction's effectiveness is the political pain it can inflict on the respondent government, not the net pain that the retaliation causes on the respondent state's economy. As a result, retaliation in intellectual property is likely to give developing states a greater bang for their buck than other forms of retaliation.

Section IV argues that the prospect of an increased use of intellectual property sanctions by developing countries politically binds the agriculture industry and the intellectual property industry in developed states. The greatest liability for developed states in terms of international trade law is these countries'
policies of subsidies for agriculture. The Brazilian government, for example, has successfully sued the US government over its support of American cotton exports. If developing states retaliate in intellectual property, it will be the developed states’ pharmaceutical or entertainment industries that will bear the costs of trade sanctions prompted by agricultural policies. These intellectual property industries then have an incentive to lobby to change their own state’s agriculture policy, providing a political counterweight to the agriculture industry’s lobbying power. In essence, intellectual property industries in developing states have become the hostages for their government’s compliance with promises of agricultural reform.

The Article concludes by discussing the limits of these benefits to developing states. International trade rules, like all of international law, take place against a background of power-based international relations. Although developing states may formally have the standing to bring legal claims to the WTO and the ability to retaliate if authorized, many developing states will not do so out of fear of backlash from developed countries. The same is true with the enforcement of intellectual property rights domestically. Some developing countries may be unwilling to take advantage of the full flexibilities of the TRIPS Agreement in the face of political pressure from developed states. Both of these limitations are functions of the system of power politics in the international system and not the direct result of the TRIPS Agreement. Yet some developing states, most notably Brazil, India, and China, have sufficient economic and political weight to resist political pressure and will be able to take fuller advantage of the trade strategies that the TRIPS Agreement makes possible.

II. THE TRIPS AGREEMENT

A. The Negotiation of the TRIPS Agreement

The addition of intellectual property to international trade negotiations is a relatively recent development. There have long been international negotiations

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on intellectual property rights, but these were always independent of trade negotiations.\(^7\) States negotiated the Paris Convention of 1883 dealing with patent law and the Berne Convention of 1886 addressing copyright law.\(^8\) The UN created an international organization, the World Intellectual Property Organization (WIPO), in 1967 to coordinate intellectual property rights laws multilaterally.\(^9\) However, intellectual property rules were not part of the Havana Charter negotiations to form the International Trade Organization (ITO) in 1947 or the General Agreement on Tariffs and Trade (GATT).\(^10\)

A number of developments pushed the issue of intellectual property rights into the GATT’s Uruguay Round of negotiations (1986–1995), which created the TRIPS Agreement\(^11\) under the WTO's umbrella.\(^12\) Many developed countries were frustrated by the progress of intellectual property rights negotiations under the auspices of WIPO. They had several complaints. First, developed state governments were disappointed with the breadth of WIPO’s membership; some developing governments had joined WIPO but many had not.\(^13\) Without voluntarily joining the agreement, developing states did not have any obligations under international law to establish domestic intellectual property regimes. Second, the governments of developed states were not entirely satisfied with WIPO’s substantive obligations, as the levels of copyright and patent law protections established through the WIPO process were weaker than what many

\(^7\) See Rochelle Cooper Dreyfuss and Andreas F. Lovenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 Va J Intl L 275, 277 (1997) (noting that, before the Uruguay Round, intellectual property issues were addressed outside of the GATT system).


\(^12\) Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154 (1994) (“WTO Agreement”).

\(^13\) See Reichman, 29 Intl Lawyer at 361–62 & n 118 (cited in 1) (noting that many key developing states did not join the Paris Convention).
developed countries already had established domestically. The prospects for progress on these issues seemed dim as multilateral negotiations to increase WIPO's level of intellectual property rights failed to reach consensus. In addition, WIPO rules did not cover a range of new intellectual property areas, such as computer circuits and software, and did not have much of a dispute settlement system. If a state failed to abide by the intellectual property standards established in WIPO, complaining states had little recourse other than diplomatic negotiations.

One means for developed states to address these problems was to shift intellectual property negotiations from WIPO to trade negotiations. The failure to provide intellectual property rights could be characterized as a trade barrier (for example, the inability to retain intellectual property rights on pharmaceuticals or DVDs abroad inhibits trade), so there was a legitimate link to trade negotiations. Trade negotiation had several advantages over WIPO for

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14 See Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* 149 (Oxford 1995) (discussing how the international conventions that laid down standards for the protection of intellectual property were administered by WIPO, but "[j]ust net exporters of IP or IP-intensive goods were not fully satisfied with the existing conventions and sought to fill certain gaps through the TRIPs Agreement"); Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 Ind Org 315, 321 (1995) (noting that the US repeatedly pushed for stronger IP protections at WIPO); Yu, 82 Ind L J at 858–59 (cited in note 2) (describing the US as resisting developing countries' demands regarding IP law and eventually advocating a shift from WIPO to GATT); Reichman, 29 Intl Lawyer at 351–54 (cited in note 1) (describing how developed states sought to revise patent protections higher than the Paris Convention while developing countries sought to weaken patent protections); Sell, 13 Legal Stud at 407–11 (cited in note 6) (same).


16 See Reichman, 29 Intl Lawyer at 361–62 (cited in note 1) (noting the norm of "tax enforcement" among members of the Paris Convention).

17 See Richard H. Scriniger, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 Intl Org 339, 349 (2002) (observing that "in the early 1980s, when the EC and the United States were unable to attain the required majority in the World Intellectual Property Organization for broader intellectual property protection, they moved the issue to the GATT, where they were able to conclude the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement in 1994").

18 See Reichman, 29 Intl Lawyer at 346 (cited in note 1) (discussing the link positively and noting how intellectual property protection is essential to developed countries' comparative advantage in intellectual property); Gorlin, *Business Community* at 171–72 (cited in note 1) (claiming that foreign reproductions "seriously distort international trade, destroy markets, and cause extensive losses to industry worldwide"). For a rejection of this linkage, see Alvarez and Bhagwati, 96 Am J Intl L at 127–28 (cited in note 2) (rejecting the argument that there is an intrinsic link between intellectual property and trade); Sell, 49 Intl Org at 321–32 (cited in note 14) (describing the linkage in terms of economic coercion).
developed state governments. The GATT’s Uruguay Round negotiations, which created the WTO, gave developed state governments the opportunity to negotiate a higher level of protection for intellectual property rights.\textsuperscript{19} By moving the forum to the GATT’s Uruguay Round, developed state governments were able to free themselves of the WIPO procedural rules for intellectual property rights. In addition, developed states were able to leverage their greater bargaining power on trade issues into greater control of the TRIPS negotiation process.\textsuperscript{20} As a result, the TRIPS Agreement generally reflects the developed world’s intellectual property standards. The TRIPS Agreement requires that states establish a twenty-year patent monopoly,\textsuperscript{21} a fifty-year copyright monopoly,\textsuperscript{22} and a ten-year monopoly for industrial designs.\textsuperscript{23} The TRIPS Agreement further requires exclusive rights to use trademarks\textsuperscript{24} and exclusive rights for the use of marks of geographic origin.\textsuperscript{25} In addition, the agreement covered a new area of intellectual property law, computer circuitry, with a ten year monopoly.\textsuperscript{26}

The WTO Agreement also offered a more rigorous system of dispute settlement than WIPO.\textsuperscript{27} Under the WTO’s Dispute Settlement Understanding

\textsuperscript{19} See Nitsan Chorev, \textit{Rebalancing U.S. Trade Policy: From Protectionism to Globalization} 153–55 (Cornell 2007) (describing how the US used the Uruguay Round to bring the protection of intellectual property into the agenda over the objection of developing countries); Hoekman and Kostecki, \textit{Political Economy} at 152–53 (cited in note 14) (discussing how the TRIPS talks nearly divided the developed and developing countries and how developing countries “increasingly felt that stricter IP protection was in their interest, if only because it was a necessary component of a more general move towards a market economy”).

\textsuperscript{20} See Helfer, 29 Yale J Int'l L at 20–23 (cited in note 15) (discussing the three institutional features of GATT/WTO that made it a superior venue to negotiate intellectual property standards: greater leverage for the US and EC to negotiate due to having the largest domestic markets, the ability to link intellectual property protection to other issue areas within GATT/WTO, and a more effective dispute settlement system).

\textsuperscript{21} TRIPS, Arts 27–34.

\textsuperscript{22} TRIPS, Arts 9–14.

\textsuperscript{23} TRIPS, Arts 25–26.

\textsuperscript{24} TRIPS, Arts 15–21.

\textsuperscript{25} TRIPS, Arts 22–24.

\textsuperscript{26} TRIPS, Arts 35–38.

\textsuperscript{27} See Yu, 82 Ind. L. J at 862 (cited in note 2) (citing the existence of enforcement through the dispute settlement system of the WTO as a significant modification to the international intellectual property regime brought about by TRIPS); J.H. Reichman, \textit{Enforcing the Enforcement Procedures of the TRIPS Agreement}, 37 Va J Int'l L 335, 339 (1997) (highlighting that the WTO dispute settlement provisions “put teeth” to intellectual property enforcement at the international level); Reichman, 29 Ind. L. & Business Law at 385 (cited in note 1) (discussing the possibility that the failure of one state to enforce its national intellectual property rights could be challenged by foreign nations at the WTO); Harris, 27 U Pa J Int'l Econ L at 725 (cited in note 3) (noting the superior enforcement power of the WTO relative to WIPO).
(DSU), any member state in the WTO could bring a formal complaint against other member states that failed to abide by trade rules, including the new intellectual property requirements. The DSU system would have compulsory jurisdiction to adjudicate these claims. If the DSU system found a violation, then the respondent state would have a reasonable period of time to remove the offending measure (or in the case of intellectual property law, to enact the required intellectual property measure) or it would face retaliatory trade measures from the complaining state.

Most importantly, trade negotiations provided developed states with a means of expanding the geographic reach of intellectual property rules. Far more states were members of the GATT than were members of WIPO. While many developing states did not find it in their interest to have strong (or even weak) intellectual property laws (and thus did not have much of a reason to join WIPO), they did want access to developed states’ markets. Joining the GATT would provide developing states with that market access at the same tariff rates enjoyed by other GATT members (or even lower tariff rates, under the Generalized System on Preferences). However, the GATT did not assure “open” access to all goods markets. Agriculture and textile markets, in particular, were still subject to high levels of protection, but GATT provided some trade benefits in other areas. Thus, developed states could potentially expand the range of states that would be bound to intellectual property rules by shifting intellectual property negotiations into trade negotiations.

The desire to expand the geographic scope of international intellectual property rules also went hand in glove with efforts in trade negotiations to bundle all the existing trade agreements together. The shift from the GATT to the WTO at the conclusion of the Uruguay Round was a “single undertaking”—that is, states that wished to become members of the WTO would have to agree

See Dreyfuss and Lowenfeld, 37 Va J Int'l L at 276–84 (cited in note 7) (addressing issues relating to WTO review of national intellectual property laws); Helfer, 29 Yale J Int'l L at 20–23 (cited in note 15) (addressing same issues).


See Dreyfuss and Lowenfeld, 37 Va J Int'l L at 277 (cited in note 7) (noting that “TRIPS signals the entry of many new states into the intellectual property community”).


For a discussion of the Generalized System of Preferences, see Trebilcock and Howse, Regulation of International Trade at 524–32 (cited in note 4).

See Steinberg, 56 Int'l Org at 359–60 (cited in note 17) (discussing developing countries’ need to maintain the access to large foreign markets that GATT provided).
to all of the new agreements under the WTO umbrella. These agreements included the GATT Agreement, a new agreement on services (GATS), the agreement on intellectual property (TRIPS), and a dispute resolution system (the DSU) as well as other agreements on subsidies, domestic trade remedies, and related issues. The decision to make the WTO a single undertaking was particularly important for the agreement on intellectual property. If states were able to select which trade agreements they wanted to join (as had been the case in earlier GATT rounds), then many developing states would have opted out of the intellectual property agreement. Many developing states had chosen not to join WIPO because they did not have an interest in establishing intellectual property rules domestically, and they could similarly have refused to join the WTO's intellectual property agreement. The bundling of trade and intellectual property protections within the WTO agreement was thus crucial to expanding the breadth of international intellectual property law. Under the WTO rules, any state that wished to obtain the benefits of greater access to foreign goods markets would also have to agree to establish intellectual property rights at home.

The question remains, however, why developing states did not reject the WTO Agreements and simply remain members of the GATT Agreement. Under this option, developing states would continue to gain the benefits of the GATT Agreement without signing onto the new agreements. This more limited option became untenable for most developing countries when the US and the European Communities jointly announced that they planned to withdraw from the GATT 1947 Agreement. By doing so, the US and the European Communities made continued access to their markets on GATT terms

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34 See Dreyfuss and Lowenfeld, 37 Va J Int'l L at 277 (cited in note 7) (noting that all members of the WTO have to accept all of the agreements negotiated in the Uruguay Round); Harzis, 27 U Pa J Int'l Econ L at 728 (cited in note 3) (making the same observation).

35 Trade scholars view the TRIPS Agreement as a very pro-intellectual property rights-holder agreement. Hoekman and Kostecki argue:

The final outcome of the negotiations suggests that US pharmaceutical, entertainment, and informatics industries, which were largely responsible for getting TRIPS on the agenda, obtained much, if not most, of what was desired when the negotiations were launched. US industries sought multilaterally agreed minimum standards of IP protection in GATT member countries, an obligation to enforce such standards, and the creation of an effective multilateral dispute-settlement process. Much was achieved in terms of negotiating an agreement with substantive obligations and few loopholes. It is fair to say that developing countries agreed to substantially more than even an optimist might have hoped for in 1986 when the round began.

See Hoekman and Kostecki, Political Economy at 156 (cited in note 14).

36 See Steinberg, 56 Intl Org at 359–60 (cited in note 17) (recounting how American negotiators viewed the threat of exit together with the single undertaking as a negotiation “power play”).
contingent upon joining the WTO Agreement. This effectively put developing countries in the position of having to sign onto the TRIPS Agreement if they wanted to keep the benefits of the GATT Agreement they had previously enjoyed. The status quo before the conclusion of the Uruguay Round was off the table: developing states had to agree to the WTO’s single undertaking—and the heightened intellectual property rights standards that came with it—to maintain their access to American and European markets. Some commentators have described the exit of the US and the European Communities from the GATT 1947 Agreement together with the single undertaking requirement of the WTO Agreements as economic coercion. Richard Steinberg notes that while the formal rule of consensus decision-making gives legitimacy to GATT and WTO outcomes, this fiction of legitimacy is undermined by the “raw use of power that concluded the Uruguay Round, [which] may have exposed those fictions, jeopardizing the legitimacy of GATT/WTO outcomes and the decision-making rules.” All of the states that participated in the Uruguay Round negotiations, including those who opposed the TRIPS Agreement, ultimately joined the WTO.

B. TRIPS as Global Intellectual Property Policy

In addition to the complaints over the process by which the TRIPS Agreement was adopted, commentators have criticized the TRIPS Agreement as poor economic policy. Although intellectual property issues can be

37 For other examples of power states attempting to change the “reversion point” to improve their bargaining power, see generally Lloyd Gruber, Ruling the World: Power Politics and the Rise of Supranational Institutions chs 5–7 (Princeton 2000) (discussing how elimination of the status quo as a bargaining option influenced bargaining in the NAFTA negotiations); Thomas Oatley and Robert Nabor, Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basel Accord, 52 Intl Org 35 (1998) (discussing how threats to alter the reversion point shaped bargaining over the Basel Accord).

38 Sell, Private Power, Public Law at 172–73 (cited in note 3) (concluding that views of international agreement as mutually advantageous are insufficient to explain TRIPS, which was negotiated “in a broader context of economic coercion and asymmetrical power”). See also Benvenisti and Downs, 36 Case W Res J Intl L at 48–49 (cited in note 3) (arguing that TRIPS has perverse distributive effects that were achieved through economic coercion); Harris, 27 U Pa J Intl Econ L. at 736–38 (cited in note 3) (describing TRIPS as containing “grossly unjust terms” achieved through economic coercion).

39 Steinberg, 36 Intl Org at 342 (cited in note 17).

40 See id at 365–69 (noting that developing states ultimately signed onto the TRIPS Agreement and analyzing the various motives for their acceptance of the agreement).

41 See Alvarez and Bhagwati, 96 Am J Intl L at 127 (cited in note 2) (stating that the TRIPS Agreement “facilitates, even enforces with the aid of trade sanctions, what is in the main a payment by the poor countries (which consume intellectual property) to the rich countries (which produce it)”\).
characterized as trade issues, the GATT Agreement and TRIPS Agreement are fundamentally different from an economic standpoint. Most economists agree that in most circumstances, eliminating barriers to trade between nations is net welfare increasing for each nation and for the global economy. Indeed, economists argue that a state should adopt open trade policies even if others do not. As Paul Krugman puts it, “[i]f economists ruled the world, there would be no need for a World Trade Organization. The economist’s case for free trade is essentially a unilateral case: a country serves its own interests by pursuing free trade regardless of what other countries may do.”42 The GATT, then, at least to the extent it promotes freer trade, is in a state’s economic (if not political) interest. The issue of the optimal level of intellectual property protection, however, is not so straightforward.

Most economists agree that nations should adopt some intellectual property laws, although what the content of these laws should be is a matter of significant disagreement. Intellectual property rules involve distributional issues. The creator of the intellectual property is rewarded with a monopoly over that work for a period of time—such as fifty years for copyright—and consumers pay a higher price for these works during that period. The higher cost is a loss for consumers—they could have access to the work for less money without the intellectual property protection—but this transfer to the author is justified as an incentive for authors to produce intellectual property.43 But the benefits of having some intellectual property rights do not tell us what the optimal intellectual property rule is.44 The issue is difficult enough that some economists argue that states should move away from intellectual property rights altogether and simply provide government-issued prizes.45

43 See Peter S. Menell and Suzanne Scotchmer, Intellectual Property Law, in A. Mitchell Polinsky and Steven Shavell, eds, 2 Handbook of Law and Economics 1473, 1477 (Elsevier 2007) (discussing how intellectual property results in “deadweight loss to consumers” but also has its virtues, because “every invention funded with intellectual property creates a Pareto improvement”).
44 See id at 1477-78 (“The choice among incentive mechanisms, and even the optimal design of intellectual property laws, depends importantly on the nature of the creative process or, in economists’ jargon, on the model of knowledge creation.”).
45 See generally Brian D. Wright, The Economics of Invention Incentives: Patents, Prizes, and Research Contracts, 73 Am Econ Rev 601 (1983) (analyzing the choices between patents, prizes, and direct contracting for research services): Steven Shavell and Tanguy van Ypersele, Rewards versus Intellectual Property Rights, 44 J L & Econ 525 (2001) (discussing how under a rewards system, there are incentives to innovate without creating monopoly power of intellectual property rights); Michael Abramovitz, Perfecting Patent Prizes, 56 Vand L Rev 115 (2003) (giving an overview on how if the government could pay patent owners to place their discoveries in the public domain, it would encourage research and development to produce inventions while ensuring that everyone benefits from them).
Moreover, even if high intellectual property protection is good for developed countries, which tend to produce more intellectual property in the first place, it is far from certain that similar levels of protection are good for developing countries.\textsuperscript{46} There is little reason to believe that a uniform rule is optimal for all jurisdictions.\textsuperscript{47} Nations may value the trade-off between rewarding invention and consumer surplus differently and thus may maximize their national welfare by adopting a different level of intellectual property rights than other nations. These characteristics of intellectual property rules raise the possibility that the TRIPS Agreement is net welfare decreasing for many countries and perhaps the world—a concern that economists generally do not share about agreements such as the GATT that liberalize the movement of goods worldwide. This concern is at its highest in the case of public health and pharmaceuticals.\textsuperscript{48}

\textsuperscript{46} See Alvarez and Bhagwati, 96 Am J Intl L at 127–34 (cited in note 2) (arguing that states should be able to have different national laws on “trade and” issues such as intellectual property, labor law, and environmental regulation).

\textsuperscript{47} See generally Trebilcock and Howse, Regulation of International Trade at 437–38 (cited in note 4) (arguing that different intellectual property regimes will be optimal for different states); see also Suzanne Scotchmer, The Political Economy of Intellectual Property Treaties, 20 J L Econ & Org 415 (2004) (arguing that the nations negotiating TRIPS preferred a standard that benefited their own national interests rather than some globally optimally rule and that there is little reason to believe the outcome of these negotiations are economically efficient).

III. ENFORCING THE TRIPS AGREEMENT: DOMESTIC LAW REQUIREMENTS

The TRIPS Agreement presents novel enforcement issues at both the international and domestic level. This Section discusses how the standard model for trade law enforcement—a non-discrimination model—is poorly suited to a minimum standards intellectual property agreement. Unlike a nondiscrimination model, where states are free to select their own substantive rules, the minimum standards regime results in an externally imposed set of rules that have little domestic support. Negotiators anticipated that different enforcement procedures would be necessary and provided for domestic-level enforcement institutions. Rights-holders heralded these domestic measures as a significant achievement in ensuring the protection of intellectual property rights worldwide.\(^{49}\) As one noted scholar of intellectual property wrote, “[Developed countries] expect developing countries to implement [their] obligations concerning domestic, judicial and administrative enforcement of foreigners’ intellectual property rights, including detailed provisions governing the discovery of evidence, rights to counsel, injunctions, damages, and temporary restraining orders. These provisions mean business.”\(^{50}\) What rights-holders did not sufficiently appreciate was that these domestic enforcement institutions could suffer from the same lack of domestic support from which the substantive intellectual property laws suffer. The TRIPS Agreement failed to provide a metric for evaluating state enforcement efforts and thus allows governments to select their own preferred level of intellectual property protection. In effect, governments can modulate the effective level of intellectual property protections within their state by adopting higher or lower enforcement levels.

At the international level, the WTO dispute resolution system was supposed to be a backstop against anemic state enforcement efforts.\(^{51}\) Rights-holders expected that their home governments would bring international claims against governments that failed to vigorously protect intellectual property

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\(^{49}\) See Hoekman and Kostecki, *Political Economy* at 156 (cited in note 14) (stating that TRIPS is “noteworthy in the multilateral trade context in that it obliges governments to take positive action to protect intellectual property rights”).

\(^{50}\) Reichman, 29 Int'l Lawyer at 385 (cited in note 1).

\(^{51}\) The WTO dispute resolution process was designed to be mandatory, fast (completed in less than sixteen months), and able to authorize trade sanctions if the violation was not remedied within a reasonable period of time. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 124–27 (MIT 2d ed 1997). See also Dreyfuss and Lowenstein, 37 Va J Int'l L at 276–78 (cited in note 7).
rights. For instance, the intellectual property rights-holders anticipated that their governments could lodge a complaint against developing states for insufficiently preventing the unauthorized reproduction of copyrighted material or inadequately protecting patent rights in the respondent state's home market. Yet this secondary enforcement system is also poorly positioned to review government measures. The TRIPS Agreement's text fails to provide a baseline against which to review state enforcement procedures. In the one case where the WTO dispute resolution system considered state enforcement efforts, the dispute resolution panel gave the government broad leeway in setting its own level of intellectual property enforcement.

This Section explores all of these TRIPS enforcement issues in detail. Part A examines what the TRIPS text requires: the creation of certain domestic institutions, including a host of criminal and civil remedies, and yet no obligation for the state to dedicate resources to support these institutions. In essence, the TRIPS Agreement is institution-oriented, not outcome-oriented—the agreement addresses the issue of domestic enforcement in terms of available procedures and remedies but does not tackle the more central question of how to evaluate a state's enforcement practices. Part B discusses what the WTO dispute resolution system is prepared to demand from states. Negotiators envisioned that the WTO dispute settlement process would police weak domestic enforcement by developing states, yet the supranational system does not establish a baseline for enforcement absent in the TRIPS Agreement. The result is a review of the state's enforcement institutions. So long as the state has the requisite laws on the books, both substantively and procedurally, the state has fulfilled its enforcement obligations, even if the actual level of enforcement is weak. Part C examines the system of civil claims and whether a private enforcement system is an adequate substitute to public enforcement.

52 See Sell, Private Power, Public Law at 118 (cited in note 3) (discussing how private industry groups advocating for the TRIPS Agreement considered a strong dispute resolution process critical to achieving greater global compliance with intellectual property rights).

53 See Dreyfuss and Lowenfeld, 37 Va J Ind L at 282 (cited in note 7) (noting that "some of the complaints brought regarding the TRIPS Agreement will surely concern clear breaches—such as failure to sufficiently prevent trademark and copyright piracy, or refusals to protect particular technologies, such as health-related inventions"). See also Reichman, 29 Ind L at 385 (cited in note 1) (noting that "[f]or the first time, [developing countries] make it likely that states will lodge actions against other states before duly constituted international bodies, with a view to vindicating the privately owned intellectual property rights of their citizens against unauthorized uses that occur outside the domestic territorial jurisdictions").
A. The Requirements of the TRIPS Agreement

1. Differences in enforcing a non-discrimination rule and a minimum standard rule.

While states have engaged in dispute resolution over numerous issues regarding the GATT Agreement for a half century, the emergence of the TRIPS Agreement creates unique legal issues. There is a significant difference in the nature of the legal obligations created by the TRIPS Agreement and the GATT Agreement. The GATT Agreement is essentially a non-discrimination regime. States are under no obligation to adopt any specific measures—they can regulate goods or adopt whatever health and safety standards they prefer so long as the rules or regulations they do adopt are non-discriminatory. Under GATT rules, non-discrimination has two aspects. First, states cannot discriminate between members of the GATT. This “most favored nation” rule requires that states provide any benefit offered to one state to all members of the GATT. Second, states must give GATT member imports, after any required duties are paid at the border, the same treatment as national goods. Imports may not be taxed higher than domestic goods or subjected to different conditions of sale. By contrast, the TRIPS Agreement is a minimum standards regime. States are not left to decide on their own what levels of intellectual property requirements are ideal for their jurisdiction. Rather, the TRIPS Agreement mandates a baseline level of intellectual property rights.

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54 Other agreements under the WTO umbrella have altered this somewhat. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures now requires that states have some scientific evidence to support any health and safety regulations with regards to sanitary or phytosanitary goods. See World Trade Organization, Agreement on the Application of Sanitary and Phytosanitary Measures, Art 5 (1995).

55 There are several exceptions to the rule. The most important exception is for preferential trading arrangements, such as customs unions or free trade areas. This exception allows members of the EU to impose lower duties on imports from other EU states than they offer to American exports. Similarly, the exception allows members of NAFTA to offer preferential duty rates to one another. There are other exceptions as well, including the exception for preferential treatment of developing countries under the Generalized System of Preferences. See Trebilcock and Howse, Regulation of International Trade at 524–32 (cited in note 4).

56 See Dreyfuss and Lowenfeld, 37 Va J Int'l L at 276–79 (cited in note 7) (“In contrast to the traditional GATT provisions, the minimum standards propounded by the TRIPS Agreement are based on the Berne and Paris Conventions, treaties that are principally aimed at promoting innovation by curbing practices deemed to constitute free riding.”).

57 One can see why a non-discrimination regime was less than ideal for foreign holders of intellectual property rights who wished to export their goods. If a state offered no copyright for works of fiction, then the willingness of the state to offer this level of government regulation on a non-discriminatory basis was of little use to the foreign rights-holder. Without intellectual
This distinction is significant because it creates different domestic enforcement dynamics, as well as new legal issues for international monitoring of compliance. On the domestic enforcement side, the political economy rationales behind the enforcement of non-discriminatory rules and minimum standard rules are different. In the non-discrimination context, there must be some level of domestic political support for the national law. Without such domestic support, the government could simply repeal the law or replace the rule with a more popular alternative. As a consequence, there is reason to believe that the state will dedicate some resources to enforcing its own laws. For instance, the state may desire certain health and safety standards because such standards increase the government’s domestic political support. Even if the government fails to enforce its own laws adequately, this is of little concern for the international trade system. With an international non-discrimination regime, whatever level of enforcement the state selects is acceptable because there is not a positive obligation to adopt certain domestic legislation. The only requirement imposed by the non-discrimination regime is that the policy is not enforced selectively in a manner that disadvantages foreign goods.

A non-discrimination regime is also relatively simple to apply at the international level. Courts reviewing national actions have a straightforward

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58 The TRIPS Agreement establishes a floor but not a ceiling for intellectual property rights. States are free to go above TRIPS minimal standards, although few do. Although the TRIPS Agreement establishes minimal standards in terms of requiring a minimum, the level of intellectual property protection required is not substantively minimal. The Agreement’s floor is arguably quite high. It mirrors the levels of the intellectual property protection offered by developed states. As a result, the TRIPS Agreement, although not formally a harmonization agreement (where all states must adopt the same standard), has in practice harmonized most intellectual property laws because few states choose to provide protections above those set out in the TRIPS Agreement. See Annette Kür, International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?, 1 WIPO J 27, 28 (2009) (describing the TRIPS Agreement as having eliminated most differences between national intellectual property rules even though it is formally not a harmonization regime); Amy Kapczynski, Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector, 97 Cal L Rev 1571 (2009) (providing a case study of how India has used the flexibilities within the TRIPS Agreement—including subject matter restrictions, high obviousness thresholds, and patent opposition procedures—to maintain a patent law system that is TRIPS consistent but significantly different from American and European patent systems).

59 See Dreyfuss and Lowenfeld, 37 Va J Int L at 279–80 (cited in note 7) (noting that this difference in the nature of the legal regimes makes past GATT decisions unhelpful in resolving TRIPS disputes).

baseline for judging non-discrimination: the treatment of domestic goods. The state is not obliged to offer any specific treatment to its national goods, but if it chooses to do so, then that same treatment must be extended to foreign goods. For instance, in the United States–Section 337 case, the GATT panelists had to determine whether the US system for addressing alleged infringements of patent or copyright was discriminatory against imports. The panelists did not have to make an independent judgment regarding whether the US enforcement system was fair or justified by the governmental interest. Rather, the panelists could simply compare the system that the US provided for imports to the system established for domestic goods. To the extent that there were differences in the systems and any difference could be detrimental to imports, the US system failed the non-discrimination test.

In the minimum standards context, the political economy rationale behind domestic enforcement is different. Here, the government must adopt the policy regardless of its constituents’ preferences. The government may not have any domestic support for the policy but nonetheless enacts the statute because it is required to do so by international law. In this case, the simple enactment of the law is not a signal that the state is supportive of the policy: the state may put the law on the books but have little motivation to dedicate resources towards enforcing the policy. This political dynamic is predictable under the minimum standards regime, and, unlike the non-discrimination regime, a lack of enforcement matters. If the state fails to enforce its own domestic rules, then this is of concern to the international trade community because the state is arguably failing to maintain its positive obligation.

2. The requirements in the TRIPS text.

Broadly speaking, the goal of the TRIPS Agreement is to convince governments to enforce intellectual property laws domestically, but the specific enforcement obligation is much more narrowly defined. The Agreement states that:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement,

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61 In the most favored nation context, the baseline would be the treatment offered to other members of the WTO. If any member state’s goods were provided more favorable treatment than the complaining state, then there would be a finding of discrimination. See US–Tariff Act Section 337, WTO Doc No L/6439-365/345.

62 See id.

63 Id.
including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. This provision is a demand for states to make certain enforcement procedures available. The aim of having enforcement procedures is “to permit effective action against any act of infringement,” but the government’s legal obligation extends only to making the required procedures available. It is not an affirmative obligation to stop acts of infringement, but a requirement that states provide their legal systems the authority to protect intellectual property. The Agreement is extremely specific in terms of how the legal system should be set up. For instance, states must establish criminal sanctions, including imprisonment or monetary fines, for intentional violations of copyright or trademark law on a commercial scale. Member states must also create civil claims for rights-holders to enforce their intellectual property rights, including giving judicial authorities the power to order injunctive relief and award damages. In addition, there must also be an administrative system for customs authorities to hear claims from rights-holders that imported goods are illegally copyrighted or have an infringing trademark. States must also create a system of judicial review of all administrative decisions concerning intellectual property law.

This specificity in the design of the domestic legal institutions is in stark contrast to the TRIPS Agreement’s requirement for government enforcement actions, namely that the state has no obligation to expend resources on these procedures. The agreement is explicit that the government retains discretion with regards to its police and prosecutorial resources, stating, “Nothing in this

64 TRIPS, Art 41(1).
65 TRIPS, Art 41(1).
66 Sell discusses how many intellectual property holders believed that simply creating a system of domestic intellectual property laws with enforcement provisions would be sufficient to protect intellectual property rights abroad. See Sell, Private Power, Public Law at 139 (cited in note 3), quoting Charles S. Levy, Implementing TRIPS—A Test of Political Will, 31 I & Pol Int Bus 789, 790 (2000) (citing an intellectual property lawyer as predicting that the rule of law would be “so infectious that it would necessarily spur voluntary compliance by developing countries to implement effective protection”).
67 TRIPS, Art 61.
68 TRIPS, Arts 44 (injunctive relief), 45 (damages).
69 TRIPS, Arts 51–60. States are permitted to establish similar procedures for the violation of other intellectual property rights but are not required to do so. TRIPS, Art 51 (noting that the WTO members “may” establish customs required for other intellectual property infringements).
70 TRIPS, Art 41(4) (requiring that “[p]arties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in the Member’s law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of the case”).
Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.\textsuperscript{71} The obligation to establish procedures is an odd fit with the lack of any requirement to dedicate government resources to enforcement. As Stephen Holmes and Cass Sunstein have argued, laws are meaningless without the allocation of adequate government resources to their enforcement.\textsuperscript{72} States can establish domestic institutions, but without government funding and support, these institutions will be ineffective.

This is particularly true when discussing enforcement actions taken by the state. The TRIPS Agreement emphasizes the role of sufficiently high remedies to establish a system of deterrence.\textsuperscript{73} The agreement refers to the remedies themselves as constituting a deterrent,\textsuperscript{74} but remedies are only half of the picture. As Gary Becker observed, deterrence is a function of the expected penalty for engaging in the prohibited activity.\textsuperscript{75} The expected penalty is based on two factors: the criminal sanction and the probability of the state’s applying that sanction. Consider a system of enforcing parking laws.\textsuperscript{76} The state has control over both the fine for illegal parking and the amount of police resources dedicated to monitoring parking. If the government wishes to establish an expected penalty of $20 for illegal parking, it can do so through a mix of pricing fines and setting levels of monitoring. For instance, if the state sets the fine for illegal parking at $40, then it has to dedicate significant police resources towards monitoring illegal parking, because citizens’ expectations of the probability of the fine’s being applied must be 50 percent to maintain an expected penalty of $20. If the state wishes to reallocate its police resources to other areas, it can maintain the same level of deterrence by raising the price of a parking ticket. If

\textsuperscript{71} TRIPS, Art 41(5). The paragraph also clarifies that states are not required to have a separate judicial system for intellectual property law.

\textsuperscript{72} See generally Stephen Holmes and Cass R. Sunstein, \textit{The Cost of Rights: Why Liberty Depends on Taxes} (W. W. Norton 1999) (discussing how there are no rights without the allocation of government resources to support those rights).

\textsuperscript{73} See TRIPS, Art 41(1) (calling on states to have “remedies which constitute a deterrent to further infringements”); TRIPS, Arts 61 (requiring states to have remedies that are “sufficient to provide a deterrent”), 46 (requiring states to authorize courts to dispose of infringing goods without compensation to the infringer “[i]n order to create an effective deterrent to infringement”).

\textsuperscript{74} TRIPS, Art 46.


\textsuperscript{76} This example is drawn from A. Mitchell Polinsky, \textit{An Introduction to Law and Economics} 77–78 (Aspen 2d ed 1989).
the state decreases the level of police monitoring to ticket one in five illegally parked cars, the state can nonetheless maintain the $20 expected penalty for illegal parking by raising the fine on the ticket to $100. The level of deterrence remains the same even though the fine for illegal parking has increased 150 percent.

Shifting to the lens of behavioral law and economics does not change this basic finding that the combination of government monitoring and penalties influences actors’ beliefs about the desirability of undertaking actions. Actors may be risk-averse or boundedly rational and these decision biases may influence their calculations of the net benefits of a given activity.\textsuperscript{77} For instance, individuals may exhibit an optimism bias that leads them to believe that the probability that they will be ticketed is lower than their actual probability of detection.\textsuperscript{78} This decision bias may lead the actor to underestimate the expected penalty of parking illegally and thus engage in an activity more than a perfectly rational actor would find optimal. Alternatively, individuals may be risk adverse and weigh the penalty from a ticket more than their gain from parking illegally. Risk aversion may lead individuals to park illegally less often than is welfare maximizing (as determined by strict rationality assumptions).\textsuperscript{79} Decision biases can thus lead individuals to calculate the expected benefits of a course of action as higher or lower than would be strictly rational, but the fundamental variables in the calculation remain largely the same: government monitoring and penalties.

The relevance of this illustration to the domestic enforcement of the TRIPS Agreement is fairly direct. The state can establish substantial criminal sanctions for engaging in a prohibited action, but the level of deterrence is established by the combination of government monitoring and sanctioning.\textsuperscript{80} If the government has no obligation to dedicate police resources to monitoring violations or using prosecutorial resources to pursue these violations, then the government can decide to allocate its resources to other law enforcement priorities. Without government resources, the level of deterrence, even with


\textsuperscript{79} Id.

\textsuperscript{80} People comply with the law for reasons other than state sanctions. These reasons normally rely on ideas of legitimacy. If the members of a polity do not find the nation’s laws to be legitimate—perhaps because there is little civil society support for the rule—then sanctions are much more important.
substantial remedies, is low, if not non-existent. The same applies to administrative actions. If the government has no obligation to dedicate resources to pursuing administrative actions against private parties, then the level of deterrence will be low, even if the administrative remedies include the seizure of infringing goods.

All of this highlights the question of what the TRIPS Agreement requires of governments in terms of enforcement outcomes. If a state enacts the required laws and yet the territory continues to have a high level of intellectual property infringement (perhaps the same level as before the enactment of the TRIPS required legislation), is the state in compliance with its TRIPS obligations? The answer seems to be yes. The TRIPS Agreement does not establish a baseline by which to judge enforcement. Instead, the designers of the TRIPS Agreement opted to rely solely on the creation of domestic institutions. If these institutional requirements are met, then the state appears to be in compliance with the agreement even if the level of enforcement (or deterrence) is less than many rights-holders had expected.

If a government puts forward no police, prosecutorial, or administrative efforts into enforcing intellectual property rights, then there would be an issue of whether the state is complying with the regime in good faith. Similarly, if the government selectively enforced its law—for instance, enforcing only domestically held intellectual property rights or only criminally prosecuting foreign violators—then this could violate the WTO national treatment requirement. This Article does not argue that either of these situations would legally acceptable under the TRIPS Agreement. Rather this Article examines the much more common situation where a government puts forward some non-discriminatory enforcement efforts, but those efforts do not decrease the rate of intellectual property rights infringement or are not as robust as the efforts put forward by developed states. In these situations, this Article argues that there is not a violation of the TRIPS Agreement. Governments can comply with the

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81 There is always some probability that the government will prosecute a violation so the deterrence level will almost never be zero, but it can be quite low.

82 See Konstantina K. Athanassakou, China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO Under TRIPS, 39 Georgetown J. Int'l L. 217, 221–24 (2007) (exploring how the US, the EU, and Japan view China’s enforcement in terms of outcomes, while China focuses on transparency and procedures).

83 This may prove a good strategy for increasing the level of intellectual property enforcement in states that already have a history of intellectual property law. The TRIPS Agreement demands higher levels of intellectual property protection, and the state may simply maintain its current level of enforcement but demand the higher level of protection. Even here, however, the government could strategically alter its monitoring and prosecution of certain provisions if it wished to return to the pre-TRIPS level of enforcement.

84 TRIPS, Art 3.
agreement in good faith without achieving the level of enforcement established in developed states with similar laws or even decreasing the national level of intellectual property rights infringement.

The institutional design of the TRIPS Agreement leads to novel questions about the enforcement of a minimum standards regime to which this section now turns. How should a supranational body review a nation’s enforcement practices? The non-discrimination regime provides an obvious metric—the treatment of national goods—but a minimum-standards regime has no such comparison group. A baseline could be established in one of two ways: the agreement could establish a goal for domestic compliance or require that a certain level of resources be dedicated to the enforcement of the rules. The TRIPS Agreement is interesting in that the negotiators did not choose either of these approaches. Rather, the idea seemed to be that if the institutions are present, then enforcement would naturally spring from the existence of the rules.\(^{85}\) In the only case where a government’s enforcement efforts have been challenged at the WTO—the US complaint against China’s enforcement of intellectual property rights—the WTO dispute resolution system was deferential to government enforcement choices, emphasizing that governments have discretion in their use of remedies for intellectual property violations.\(^{86}\)

B. International Review of TRIPS Enforcement Obligations

One of the major advantages to rights-holders in establishing the intellectual property rules at the WTO was the access that they (or more specifically, their national governments) would have to a binding dispute resolution process that could answer exactly this question. Disputes over a state’s implementation of the TRIPS Agreement are within the jurisdiction of the WTO Dispute Settlement Body.\(^{87}\) The WTO has the jurisdiction to adjudicate whether states are fulfilling their obligations and is capable of authorizing trade sanctions if a state is in violation of trade rules. As of this writing, there have been twenty-nine complaints regarding the TRIPS

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\(^{85}\) See Sell, \textit{Private Power, Public Law} at 139 (cited in note 3), quoting Levy, \textit{31 L \& Pol Int Bus} at 790 (cited in note 66) (citing an intellectual property lawyer as predicting that the rule of law would be “so infectious that it would necessarily spur voluntary compliance by developing countries to implement effective protection”). For a discussion of the risks of bringing a WTO case against China because a claim of non-enforcement of intellectual property rights may be difficult to construct, see Athanasakou, \textit{39 Georgetown J Intl L} at 236–40 (cited in note 82) (describing the lack of relevant case law and on-going bilateral negotiations as the primary challenges to building a case).

\(^{86}\) See Section III.B.

\(^{87}\) TRIPS, Art 64.
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Agreement, nine of which have resulted in a panel report. The vast majority of these cases have involved facial violations, claims that the national legislation does not meet TRIPS requirements. For instance, the Canada–Patent Protection on Pharmaceutical Products case addressed the Canadian government’s policy of allowing generic drug makers to break patents before the end of the twenty-year period so that they could have a supply of the drug ready when the patent term ended. The WTO panel found that this policy violated the letter of the TRIPS Agreement even though generic drugs were not sold before end of the patent term.

These are the types of cases that the WTO dispute settlement system is best designed to address. The members of the WTO have signed onto a treaty that is textually specific with regard to the minimum national law requirements for intellectual property rights. Where a challenged domestic law fails to comport with those requirements, the WTO dispute resolution panels can quite easily enforce the plain language of the treaty and thereby fulfill its obligation not to “add to or diminish the rights and obligations provided in the covered agreements.” In these cases, the WTO’s Dispute Settlement Body recommends that the state bring its national legislation into compliance by removing the offending provision—for example, the provision that permits the drug companies to break a patent before the end of the patent term. Facial challenges are not only relatively easy to adjudicate, but they are also easy to monitor. The state’s subsequent actions are observable and verifiable—either the state modifies its laws or it does not. Any changes in subsequent years are similarly transparent. If the state reverts to its earlier law, other states and the WTO system can easily observe this change.

Adjudication is far more complicated when judging the state’s enforcement of its own intellectual property law, and the WTO dispute resolution institution

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88 See World Trade Organization, Dispute Settlement: The Dispute, Disputes by Agreement, online at http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement (visited Apr 11, 2011) (listing the complaints).
90 Id at § 7.38 (determining that the Canadian law was in violation of Article 28.1, which protects certain rights of patent holders).
91 DSU, Art 3(2) (“Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”).
is not particularly well designed to resolve these cases. Unlike facial challenges, the text of the TRIPS Agreement does not provide a clear standard for evaluating the sufficiency of a state’s actions in enforcing intellectual property protections. As discussed in the last section, the TRIPS Agreement is institution-oriented and provides little guidance for determining what (if any) enforcement outcomes the state must meet.

Because the GATT was based on a non-discrimination approach rather than a minimum standards approach, previous GATT panel decisions are of little guidance on the issue of determining how much enforcement of intellectual property law is enough. The approach of GATT panels was to rule against any government action that violated the GATT’s non-discrimination principles (unless specifically exempted under the GATT Agreement). The same zero-tolerance approach does not translate to evaluating the enforcement of a minimum standards regime. Certainly, the WTO dispute resolution system would not find every instance of non-enforcement of intellectual property laws to be a violation of the TRIPS Agreement. On a practical level, this would put every state in violation of the TRIPS Agreement. Even developed countries that dedicate significant government resources to enforcing intellectual property laws have some non-zero level of domestic violations. On a theoretical level, the concept of domestic enforcement of laws does not require eliminating all violations of a rule. Well-established ideas and practices, such as setting law enforcement priorities and prosecutorial discretion, all implicitly accept that domestic law enforcement will be less than perfect.

Once we depart from the GATT approach of zero tolerance, the critical issue becomes a qualitative judgment of what level of enforcement is adequate. This is a standard that the TRIPS Agreement does not establish and one that the dispute resolution system is in a poor position to provide. The dispute settlement system would have to create this standard independently. Any such

93 See Dreyfuss and Lowenfeld, 37 Va J Int’l L. at 279-80 (cited in note 7) (discussing how the difference in focus between TRIPS and GATT “means that participants in disputes involving intellectual property will be moving in largely uncharted waters. They will probably not receive much guidance from the case law that developed during the resolution of prior GATT disputes”).

94 See, for example, US–Tariff Act Section 337, WTO Doc No L/6439-368/346 at 5.11 (holding that Article III, “no less favorable” treatment requirement is generally applicable); GATT, Art XXIV (creating an exception for preferential trade agreements); GATT, Art XX (creating exceptions for a host of issues including morals, environmental preservation, and health and safety regulations).

95 Any Appellate Body or panel created standard would almost certainly alter the obligations of member states in contravention of DSU Art 3(2) (“Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”).

96 See Athanasakou, 39 Georgetown J Int’l L. at 240-41 (cited in note 82) (discussing ambiguity concerning what level of enforcement is required by the text of the TRIPS Agreement and
decision, however, would have a significant distributional impact on the costs of
the TRIPS Agreement to states by creating a threshold where the states had not.
These are issues that have traditionally been left to states to negotiate amongst
themselves, and the WTO Appellate Body (as well as the panels) will be
reluctant to invent such a substantive requirement (with such obvious
distributional effects) where the treaty is silent.

The WTO has thus far taken an approach that is deferential to
governments’ domestic enforcement choices. In the only case where intellectual
property rights enforcement efforts (rather than the existence of the domestic
institutions) has been at issue, the China–Measures Affecting the Protection and
Enforcement of Intellectual Property Rights (China–IPR) case, the WTO dispute
resolution panel largely affirmed the Chinese government’s enforcement of
intellectual property rights as consistent with the TRIPS Agreement. 97 The
complaining state, the US, brought a number of claims, two of which dealt
primarily with enforcement issues. 98

First, the US government challenged the Chinese policy of not criminally
prosecuting those intellectual property infringements below a certain quantitative
threshold. The TRIPS Agreement requires that criminal courts be granted the
authority to impose criminal penalties “in cases of wilful trademark
counterfeiting or copyright piracy on a commercial scale.” 99 The Chinese
criminal statute, however, did not provide for the prosecution of any
infringement below a quantitative threshold. 100 The US government maintained
that the threshold was a violation of the TRIPS Agreement because
infringement on a “commercial scale” could occur below the threshold. 101 The

considering the possibility that the WTO dispute settlement system would have to announce a
standard).

97 World Trade Organization, Report of the Panel, China–Measures Affecting the Protection and
For commentary on this decision, see James Mendenhall, ITO Panel Report on Consistency of
Chinese Intellectual Property Standards, 13 ASIL Insight (American Society of International Law 2009),
online at http://www.asil.org/insights090403.cfm (visited Apr 11, 2011). See also Tomer Broude,
It’s Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression,
Hebrew Univ Intl Research Paper No 22-09 (Oct 2009), online at

98 The US raised one facial enforcement claim, citing the Chinese government’s failure to provide
copyright protection to creative works that the government had banned. The panel found that the
failure to provide copyright was itself a violation and necessarily also entailed the denial of
enforcement procedures for the copyright. See China–IPR, WTO Doc No WT/DS362/R at
7.177–7.181.

99 TRIPS, Art 61.


101 This claim can be conceptualized as a good faith argument: the Chinese government was not
acting in good faith by publicly announcing that it would refuse to prosecute a certain class of
panel found that the Chinese statute was consistent with the TRIPS Agreement. It held that the term “commercial scale” meant more than commercial activity and would vary in different markets and that the US government had not demonstrated that the threshold was unreasonable for the Chinese marketplace. In the absence of evidence that the Chinese standard was inappropriate, the dispute settlement panel deferred to the Chinese government’s decision regarding the functioning of its criminal law system.

Second, the US government alleged that China’s customs measures regarding the seizure of infringing goods were inconsistent with the TRIPS Agreement. The challenged Chinese customs measures provided officials with several options for disposing of seized goods. The goods could be donated to social welfare organizations (namely, domestic charities), or sold to the intellectual property rights-holder. Where neither of these options was available, the customs measures directed that the good should be sold at auction if the infringing characteristics could be eradicated. If infringement could not be eradicated, the goods should be destroyed. The US government argued that the TRIPS Agreement requires that customs officials have the authority to order the destruction or disposal of infringing goods, and these customs measures

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102 See id at 7.395–7.682. See also Mendenhall, 13 ASIL Insight (cited in note 97).
104 See id at 7.193–7.197.
105 See id at 7.194.
106 TRIPS, Art 59:

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances (emphasis added).

TRIPS, Art 46:

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit
were in violation because it created a “compulsory sequence of steps” that
effectively deprived officials of the authority to order destruction or disposal.\textsuperscript{107}
The Chinese government responded that donating the infringing goods to social
welfare organizations was a legitimate means of disposal that moves the goods
out of the channel of commerce, thereby providing officials with the requisite
authority.\textsuperscript{108}

The panel determined that the customs measures were consistent with the
TRIPS Agreement because donations to social welfare groups effectively
“disposed” of the good by removing it from channels of commerce.\textsuperscript{109}Moreover, the panel found that the TRIPS Agreement’s requirement that a
remedy be “available” did not impose an obligation on the government to use
the remedy. So long as officials have the authority to order the disposal of the
good, the officials could choose not to do so.\textsuperscript{110} In the panel’s words, “the
obligation that Members’ competent authorities ‘shall have the authority’ to
make particular orders attaches to what the authorities are permitted by law to
order, not only to what they must order.”\textsuperscript{111} Thus, even if customs officials
choose to sell the goods to the rights-holder or auction the goods (so long as the
infringing aspects could be removed), the government’s actions would still be
consistent with the TRIPS Agreement because the official had the authority
to order the disposal of the goods.

The panel’s decision highlights that the TRIPS Agreement’s enforcement
provisions are institution-oriented, not outcome-oriented. So long as the state
has the correct set of legal remedies available, the government has fulfilled its
obligation even if it opts not to use its full enforcement power. The panel’s
decision further emphasizes the discretion that governments have in
enforcement actions. Governments must provide customs officials and other

\begin{footnotesize}
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\textsuperscript{107} See China-IPR, WTO Doc No WT/DS362/R at 7.328–7.329 (stating the US’s claims that
“because the auction method is mandatory, it deprives customs of the authority to order
destruction of infringing goods at a certain point within the purview of Article 59”).

\textsuperscript{108} See id at 7.189, 7.329. The US government argued that there was nothing preventing social
welfare organizations from selling the infringing goods and thus re-entering the goods into the
channels of commerce. The panel found that the US government had failed to show that such
donations were not removing the goods from the channels of commerce. The US government
further argued that this form of disposal would harm the rights-holder, but the panel again found
that the US had not demonstrated that there were any harms to rights-holders from these
donations. Id at 7.288–7.324.

\textsuperscript{109} Id at 7.278–7.279.

\textsuperscript{110} See id at 7.355–56.

\textsuperscript{111} China-IPR, WTO Doc No WT/DS362/R at 7.356.
\end{footnotesize}
judicial actors with certain powers, but the government is under no obligation to ensure that its agents actually use those powers. The failure to use the remedies demanded by the TRIPS Agreement does not necessarily violate the TRIPS Agreement’s obligation to “ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights.”

This holding is significant for developing states’ understanding of what their enforcement obligations entail. The government does not have an obligation to dedicate a set level of resources towards monitoring compliance with intellectual property law and does not have an obligation to use the remedies established in the TRIPS Agreement. In short, the state can adjust its effective level of intellectual property protection by providing low levels of monitoring as well as low penalties, and nonetheless remain in good faith compliance with the TRIPS Agreement’s enforcement provisions. Only where the TRIPS Agreement is specific that a certain remedy must be used does the state have an obligation to ensure that its agents impose those remedies.

C. Private Enforcement Through Civil Remedies

The TRIPS Agreement’s requirement that states establish a private law enforcement system may prove much more valuable to rights-holders than the public enforcement system. The agreement requires governments to provide private rights of action for intellectual property infringement, so that rights-holders can investigate and prosecute infringements on their own. States must provide access to the national judicial system and must give judges the authority to order compensatory damages, although the judges need not use this power. A robust civil law system could raise the effective level of intellectual property rights within developing states, although there are reasons to believe that the

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112 TRIPS, Art 41(1).

113 The panel found that Chinese customs measures were in violation of the TRIPS Agreement with regard to the narrower issue of auctioning goods with an infringing trademark. The TRIPS Agreement creates special rules for trademarked goods, requiring that “the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” TRIPS, Art 46. The Chinese measures had allowed trademarked goods to be auctioned off if the unlawful trademark was removed. See China–IPR, WTO Doc No WT/DS362/R at 7.394.

114 TRIPS, Art 42.

115 TRIPS, Art 45. Interestingly, the TRIPS Agreement does not make governments responsible for making sure that the national court system actually provides these remedies. Article 45.1 requires only that “[t]he judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury that the right holder has suffered.” See the discussion above for the China–IPR panel’s interpretation of this requirement. WTO Doc No WT/DS362/R at 7.356.
private law system will not fully substitute for a robust public enforcement system. Rights-holders can bring civil suits against producers or users of infringing intellectual property but face several hurdles, including identifying infringers and securing a remedy.

First, rights-holders must know which actors are infringing on their intellectual property. Often, rights-holders have only indirect knowledge that an infringement is occurring. American software companies frequently complain that their programs are widely copied in the Chinese marketplace, yet these companies often do not know who is illegally copying or using the software.\footnote{David Leonhardt, \textit{The Real Problem with China}, NY Times B1 (Jan 17, 2011) (citing the theft of American intellectual property in the Chinese market as the greatest economic conflict between the US and China); Timothy Geithner, \textit{The Path Ahead for the U.S.-China Economic Relationship} (Jan 12, 2011), online at http://www.treasury.gov/press-center/press-releases/Pages/s1019.aspx (visited Apr 9, 2011) (Secretary of the Treasury’s speech to Johns Hopkins School of Advanced International Studies stating the Chinese government’s treatment of intellectual property was one of the top economic concerns for the US government in its relationship with China). The Business Software Alliance, an industry group, argues that China has the highest market value of pirated software of any economy other than the United States. Business Software Alliance and IDC, \textit{09 Piracy Study}, 8 (2009) available online at http://portal.bsa.org/globalpiracy2009/studies/globalpiracystudy2009.pdf (visited Apr 9, 2011).}

Statements of losses are made based on estimates of how much software is being used worldwide.\footnote{The economic loss due to intellectual property violations is difficult to calculate. Such calculations require knowing the level of consumption of the illegally reproduced good (a number that is hard to quantify given that the activity is illegal and thus consumers are unlikely to report it) and the rate of substitution to protected goods if access to the illegally reproduced goods ends. The FBI and the US Customs and Border Protection each estimate that the US economy loses over $200 billion annually to worldwide illegal reproduction of American goods, but the Government Accountability Office and the FBI were unable to substantiate these figures. See US Government Accountability Office Report to Congressional Committees, \textit{Intellectual Property: Observations on Efforts to Quantify the Economic Effect of Counterfeit and Pirated Goods}, GAO 10-423, 15–19 (Apr 20, 2010) (“GAO Report”).} For instance, the Business Software Alliance, a software industry group whose members include Microsoft and Apple, maintains that software companies lost over \$7.5\ billion due to infringing software in the Chinese market in 2009.\footnote{\textit{09 Piracy Study} at 8 (cited in note 116).} The group produces this figure by estimating how much software is most likely being used worldwide and subtracting the number of software programs that were legally licensed during that period.\footnote{Id at 14.} While these estimates are suggestive of infringement, this indirect knowledge of infringement is insufficient to bring a civil suit. The rights-holder must demonstrate that specific actors were infringing on its software. This type of information can be difficult for rights-holders to obtain, particularly in
overseas markets. Without access to police resources, private companies may lack the information to protect their intellectual property.

Where rights-holders focus on producers of infringing material, the usefulness of civil enforcement will most likely depend on the types of infringements that are taking place. If the technology to produce infringing goods is inexpensive and widely available, such as the technology needed to reproduce copyrighted music or motion pictures, rights-holders may find that the costs of bringing private actions exceed the benefits. The costs of bringing a civil suit can be significant and the benefits of shutting down a single infringer are low because other black market entrepreneurs can take up any slack in the production of the infringing good. For instance, a civil suit against any single company that is illegally reproducing DVDs is unlikely to be cost effective because, even if the defendant company ceases its production, it remains very easy for other producers to enter the market and start selling illegally reproduced DVDs.

The situation may be different, however, where the technology needed to infringe on the intellectual property right is more expensive and leads to bottlenecks in production. In areas such as the patents on pharmaceuticals, private suits may be more cost-effective because the capability to reverse-engineer and reproduce pharmaceuticals is not as widely available. There may be only a few firms in the country with the capacity to produce the good. As a result, it is easier for rights-holders to determine who is producing the infringing good (lowering the costs of bringing the civil case) and there will almost certainly be fewer entrepreneurs available to replace them (increasing the benefits of ending that producer's infringement).

Rights-holders may also be disappointed in the remedies offered by the civil law system. As the China–IPR case clarifies, governments are under no obligation to ensure that judges impose the remedies included in the TRIPS Agreement. The agreement requires that a government provide courts with the authority to order remedies, such as injunctive relief and compensatory damages, but courts have no obligation to make use of this authority. Courts can systematically provide rights-holders with far lower remedies than those outlined in the TRIPS Agreement. So long as the government provides the court with authority to order high remedies, the state is not in violation of trade rules.

D. Conclusions on the Domestic Enforcement of TRIPS

The TRIPS Agreement provides governments with significant discretion in administering their domestic enforcement regimes. So long as all of the

necessary procedural requirements are enacted in domestic law—that is, so long as a procedure exists for making intellectual property claims and judicial bodies have the authority to impose certain sanctions—then the state is in compliance with WTO rules even if it dedicates few police or prosecutorial resources to protecting those intellectual property rights or if its judicial and administrative bodies offer only weak remedies. More broadly, this discussion highlights some of the unexpected consequences of exporting domestic institutions to other national jurisdictions. Intellectual property rights-holders (and the developed states that represented them) negotiated this institution-oriented approach to intellectual property rights because these institutions had functioned well in developed states.\footnote{See Sell, Private Power, Public Law at 139 (cited in note 3).} The hope was to change the legal culture in developing states by transplanting specific institutions, including specific intellectual property laws, enforcement procedures, and legal remedies.\footnote{Id.} However, this strategy failed to anticipate fully the importance of different national policy preferences on the functioning of these institutions. The export of an institution may not fundamentally change developing states' economic and policy preferences. As a consequence, different policy preferences mean that these institutions can and will function differently in emerging market states than in developed market states.

IV. TRIPS AS RETALIATION

The relationship between the TRIPS Agreement and enforcement of trade rules has a second aspect—the role of TRIPS in the enforcement of trade law at the WTO. Developing countries have long argued that the WTO dispute resolution system is inherently biased against them. This bias can be at either the merits stage of the adjudication—that the panels or the Appellate Body are biased against their claims—or at the remedy stage.\footnote{Andrea Bianchi and Lorenzo Gradoni, Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law 1 (International Centre for Trade and Sustainable Development Dec 2008).} Studies have not found evidence of systemic bias at the merit stage,\footnote{John Maton and Carolyn Maton, Independence Under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement, 10 J Int'l Econ L 317 (2007) (analyzing ten years of WTO dispute settlements and finding no statistical correlation between a party state's economic strength and the likelihood that it would prevail before either the Panel or the Appellate Body). However, there are theoretically oriented arguments why the Appellate Body might feel a political constraint in highly sensitive cases. See Richard H. Steinberg, Judicial Lawmaking at the WTO: Divorce, Constitutional, and Political Constraints, 98 Am J Int'l L 247, 249 (2004); Geoffrey Garrett and James McCall Smith, The Politics of WTO Dispute Settlement (UCLA International Institute Occasional} although developing countries...
may choose not to bring a complaint for a host of reasons. There is evidence, however, of bias at the remedy stage. This bias is not a result of the decision-making process of the DSB or panels, but arises out of the structure of the system itself. The WTO's remedy for compliance is to authorize the complaining state to impose retaliatory trade sanctions. While this right is equally available to all states, the capacity of states to retaliate depends on the size of the sanctioning state's market.125 Thus, the ability of the US to sanction Thailand by raising duties on Thai goods is greater than the ability of Thailand to sanction the US by raising duties on American goods. This system is not unique to the WTO—other international law systems, including the GATT, that use sanctions to enforce international rules similarly suffer from this power-based bias—but it is a significant handicap for developing states attempting to achieve even-handed trade law enforcement.126

This Section addresses the benefits to developing countries of using intellectual property as a means of enforcing WTO rules at the international level. Part A discusses the nature of WTO enforcement as a collective sanctioning regime and the disadvantages that this regime poses for developing states. Part B turns to the advantages of intellectual property retaliation to developing countries. As trade scholars have noted, retaliation through the TRIPS Agreement is both credible and effective. Part C discusses whether this form of retaliation qualifies as "piracy" and thus should be discouraged. Part D examines the political economy effects of TRIPS retaliation and how the threat of intellectual property sanctions has created new trade linkages in developed states. Intellectual property producers may find that their rights in foreign markets depend upon their government's compliance with broad range of trade rules.

A. Collective Sanctioning Regime

The WTO is effectively a collective sanctioning regime. If one member of the WTO violates trade rules and fails to remove its violating measure, then

Paper Series July 2002), online at http://escholarship.org/uc/item/4t952d7 (visited Feb 5, 2011) (discussing instances where the Appellate Body's legal analysis may be politically constrained).


126 Arvind Subramanian and Jayashree Watal, Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?, 3 J Int'l Econ L 403, 403–04 (2000). This bias has led several commentators to advocate the use of monetary damages rather than trade sanctions in WTO dispute resolution. See generally Marco Bronckers and Naboth van den Broek, Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement, 8 J Int'l Econ L 101 (2005); Kynn Anderson, Pecuniaries of Retaliation in WTO Dispute Settlement, 1 World Trade Rev 123, 133 (2002).
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complaining states are authorized by the WTO to retaliate through trade sanctions (referred to as the “suspension of concessions” in WTO parlance). In a collective sanctioning regime, the trade sanctions almost always target domestic groups that have significant political power. More times than not, the targets include domestic groups who were not beneficiaries of the violation. For instance, when the US sanctioned the EU for its ban on imports of hormone-injected beef, the targeted groups were not European beef producers but other agriculture producers, including producers of truffles and Roquefort cheese. Similarly, when the EU threatened sanctions on the US for its restrictions on steel imports, one of the threats was a 100 percent duty on American exports of citrus fruit. The point of the sanction in these cases is not based on some conception of the blameworthiness of the targeted domestic party. For instance, there was no claim that the targeted French cheese producers were instrumental in imposing a ban on American beef or that Florida citrus producers were major supporters of steel tariffs. Rather, these groups are targeted because they are politically powerful and the sanctions give them a reason to lobby domestically for change to the offending nation’s (or union’s) trade policy.

These trade sanctions work much like other systems of collective sanctions, including the sanctions on Iraq under Saddam Hussein. The goal is to influence domestic politics and achieve a change in national policy. The states imposing

127 DSU, Art 22(2).
130 Gary G. Yerkey, USTR Delays Release of ‘Carrotel’ List of Beef, Banana Trade Disputes with Europe, WTO Reporter (June 6, 2000).
131 Gary G. Yerkey and Joe Kirwin, EU Will Consider Delay in Sanctions Against U.S. in Steel Dispute, Officials Say, WTO Reporter (June 3, 2002).
132 See generally Levinson, 56 Stanford L Rev 345 (cited in note 128). See also Anderson, 1 World Trade Rev at 130 (cited in note 126) (criticizing WTO dispute resolution remedies because sanctions can target innocent parties).
the sanctions understand that “innocent” parties will be negatively affected but justify the sanctions based on the parties’ nationalities. Although the individual Iraqis targeted might even oppose the governing regime, they are legitimate targets because they are part of the Iraqi state. The same is true with WTO trade retaliation. The groups are targeted because they are understood to have influence with the government, not due to any individualized responsibility for the violation. The responsibility to abide by trade laws belongs to the nation, and, as citizens of the state, the group is a legitimate target.

While trade sanctions have long been part of international trade law,\textsuperscript{135} the current multilateral trade regime is notable for its regulation of trade sanctions.\textsuperscript{136} One of the major developments from the GATT to the WTO was the systematization of trade sanctions for violations of trade law. The WTO’s dispute settlement system not only has compulsory jurisdiction over all WTO disputes, it must authorize the use of trade sanctions before a plaintiff state can employ such sanctions. The WTO’s Dispute Settlement Body authorizes the level of sanctions (the total amount of sanctions permitted) as well as the form of the sanction (retaliation in goods, services, or intellectual property).\textsuperscript{137} This is a significant change from the GATT regime where states often enforced trade rules unilaterally: the state would make its own determination of whether another state violated trade rules and would select the level and form of trade

\textit{Multilateral Economic Sanctions} (Princeton 1993); David Corright and George A. Lopez, eds, \textit{Smart Sanctions: Targeting Economic Statecraft} (Rowman & Littlefield 2002); Nzelibe, \textit{6 Theoretical Inquiries} L at 224 (cited in note 129) (“If retaliation targets a wide range of industries, mobilization [by the affected industries within the targeted country] will be difficult because of free-rider problems. Therefore, the injured state has an incentive to engage in targeted retaliation and focus on a discrete group of powerful industries that it believes will put sufficient pressure on politicians in the scofflaw state.”).

\textsuperscript{135} See, for example, John Conybeare, \textit{Trade Wars: A Comparative Study of Anglo-Hanse, Franco-Italian, and Hawley-Smoot Conflicts}, 38 World Politics 147 (1985) (examining trade wars at various points in history from 1300 forward); John A. C. Conybeare, \textit{Trade Wars: The Theory and Practice of International Commercial Rivalry} 73 (Columbia 1987) (arguing that “modern” trade wars, characterized by bilateral increases in tariffs, began in the fourteenth century).


\textsuperscript{137} DSU, Art 22.4 (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”); DSU, Art 22.3 (establishing the hierarchy for the form of retaliation). There is a different remedy for prohibited and actionable subsidies. With prohibited subsidies, the Subsidies and Countervailing Measures Agreement (SCM Agreement) provides for “appropriate countermeasures.” Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Art 4.10, 33 ILM 1140 (1994). With actionable subsidies, the standard is “commensurate countermeasures.” SCM Agreement, Art 7.9.
sanctions to impose. The WTO Dispute Settlement Understanding now explicitly forbids such unilateral enforcement.

The existence of the TRIPS Agreement makes retaliation in intellectual property possible. The WTO allows states to suspend concessions made to a violating state as a means of retaliation. Under the GATT, states did not make any concessions to one another regarding intellectual property, only concessions regarding the trade in goods. As a consequence, retaliation was restricted to goods. The TRIPS Agreement expands the range of targets by including intellectual property issues in the trade bargain.

In an interesting twist, the demand that WTO retaliation include such cross-agreement retaliation came from the US government. The US government was concerned about the enforcement of the TRIPS Agreement. If cross-agreement retaliation was not permitted, then the US government would be permitted to retaliate for violations of the TRIPS Agreement only through that Agreement—specifically, the suspension of the violating state’s intellectual property rights. The US government was concerned that developing countries would not have sufficient intellectual property (or that the intellectual property lobby would not have sufficient political power) to make the sanctions effective. Thus, by linking intellectual property and the trade in goods (the trade in which developing countries are most politically sensitive), the developed states would have a more effective weapon against violations of the TRIPS Agreement. The Indian government resisted this linkage—arguing for retaliation to be limited to each agreement (that is, GATT to GATT and TRIPS to TRIPS). The result


139 See DSU, Art 23(2):

[M]embers shall (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding,...(c) [members shall] follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

140 DSU, Art 22.3(c) (explicitly permitting cross-agreement retaliation under certain conditions).

141 DSU, Art 22.4.


143 Andrew L. Stoler, *The WTO dispute settlement process: did the negotiators get what they wanted?*, 3 World Trade Rev 99, 103 (2004) (discussing how the United States demanded cross-agreement retaliation as a key negotiating objective and how some developing countries, including India and
was a compromise that allows cross-agreement retaliation when other forms of retaliation are not “practicable or effective” and the conditions are “serious enough.”

It is not obvious that these positions are contrary to each state’s interests or those of rights-holders in developed countries. The benefits to developed countries of enforcing the TRIPS Agreement in developing countries through the threat of tariffs on goods may be greater than the losses from having developing countries threaten intellectual property retaliation for developed country violations of GATT or other WTO agreements. The same logic applies in reverse for developing states. It is nonetheless notable that the US (and presumably the American intellectual property rights-holders involved in the negotiations) wanted to link compliance on intellectual property to compliance in other WTO agreements. Developed states insisted that producers of export goods in developing countries become the hostages for their government’s compliance with the TRIPS Agreement. The linkage goes both ways, however: intellectual property rights-holders in developed countries may find that they may suffer economic losses if their government fails to comply with all of the other WTO Agreements.

B. The Use of Intellectual Property in Sanctions

As trade scholars—including Arvind Subramanian, Jayashree Watal, and Henning Gross Ruse-Khan—have discussed, TRIPS retaliation has two distinct advantages over retaliation in goods for developing countries: it is both more credible and more effective. Intellectual property retaliation is more credible

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Brazil, argued against the inclusion of cross-agreement retaliation in the DSU because they feared that their inability to implement TRIPS requirements would lead to retaliation in goods; Gilbert R. Winham, The World Trade Organisation: Institution-Building in the Multilateral Trade System, 21 The World Economy 349, 354–55 (1998) (discussing the Indian government’s resistance to the idea of cross-agreement retaliation).

DSU, Art. 22(3) (explaining that “if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement”); DSU, Art 22(3)(d) (expanding on these conditions, stating “in applying the above principles, that party shall take into account: (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party; and (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations”).

because it is net welfare increasing for the sanctioning state and thus the target state is more likely to expect the sanctions to be applied. In addition, this form of retaliation is more effective for developing states because the state has a greater capacity to sanction and the sanctions often single out more politically powerful groups in the target state.

1. Credible sanctions.

The clearest advantage to retaliation in the TRIPS Agreement is that it is net welfare increasing for the developing state.146 This is notable because trade experts maintain that retaliation in goods is net welfare decreasing for the sanctioning state.147 Sanctioning goods, such as cars or food imports, raises the cost of that good to the nation’s consumers. There may be an increase in the state’s revenue from the higher tariffs rates of the sanctioned goods, but this gain will not be sufficient to offset the net losses to the nation’s consumers.148 As a result, sanctions on goods are economically costly for the sanctioning nation to impose.149 Indeed, trade lawyers frequently refer to the use of sanctions as “shooting yourself in the foot.”150

The “shooting yourself in the foot” analogy should not be taken too far. As many political economy studies demonstrate, governments strive to maximize their domestic support, which is imperfectly tied to the nation’s net economic welfare.151 Some economic policies such as export subsidies and strict quotas on textiles may be net welfare decreasing, but they can also be politically popular.152 In addition, the government, which is sanctioning a foreign state for

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146 Subramanian and Watal, 3 J Intl Econ L at 406-07 (cited in note 126); Ruse-Khan, 11 J Intl Econ L at 334-35 (cited in note 145).
147 Bronckers and Van den Broek, 8 J Intl Econ L at 103 (cited in note 126); Anderson, 1 World Trade Rev at 129 (cited in note 126).
148 A retaliatory tariff or quota has the same economic effect as any other tariff or quota. Both impose a loss of economic welfare on the state. See Paul R. Krugman and Maurice Obstfeld, International Economics: Theory and Policy ch 8 (Prentice Hall 8th ed 2008).
149 Peter van den Bossche, The Law and Policy of the World Trade Organization: Text, Cases, and Materials 223 (Cambridge 2005) (noting that “[r]etaliation measure are trade destructive and the injured party imposing these measures is also negatively affected by these measures”).
150 Bronckers and Van den Broek, 8 J Intl Econ L at 104 (cited in note 126).
152 Indeed, if the governments only took steps that aided the nation’s net economic welfare, then neoliberal economists would expect more unilateral trade liberalization and very low rates of noncompliance with WTO rules. See generally Krugman, 35 J Econ Lit 113 (cited in note 42).
violating trade law, may benefit from a “rally around the flag” effect. The domestic populace may be willing to bear the cost of sanctions to support the nation’s legal claim and may even provide the government with greater support for taking a strong position in its dispute with the foreign nation. Yet the possibility for the government to gain the political benefits of imposing sanctions without facing economic costs is significant. By eliminating the economic costs of sanctioning, the government is more likely to find that sanctioning violations of trade law is in the state’s interests.

Sanctioning other states for their violations of trade law through the TRIPS Agreement offers such a possibility. As discussed in Section II, intellectual property rights involve distributional transfers from the consumers of the good to the creators of the good. The intellectual property rights-holder has a monopoly over the good for a certain period of time and thus can charge higher prices. The consumer pays a higher price than she would on the competitive market and experiences a loss in consumer surplus. This loss is justified under the intellectual property regime as a means of rewarding the creator.

When states apply trade sanctions through the suspension of intellectual property rights, the sanctioning state refuses to respect the monopoly of the rights-holder. For instance, if the state decides to retaliate by suspending the patent rights on pharmaceuticals or the copyright on a theatrical film, it is producing this good without paying royalties to the intellectual property owner. The state can produce the good by either setting up manufacturing facilities itself or licensing private actors to manufacture a specific quantity of the good. The sanctioning state can then sell the goods in its internal market. Regardless of whether the state sells the good at a monopoly price (adding the profits to the state treasury), sells the goods at a competitive price (allowing the state’s consumers to benefit from the higher level of consumer surplus), or sells the good at some price in between, the economy of the state experiences a net

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154 See discussion in Section II.
156 The sanctioning state may also sell the goods in foreign markets. There is no restriction (at least in the WTO Agreements) that requires the sanctioning state to keep these goods from entering the global stream of commerce. Foreign states, however, may have domestic intellectual property rules that would exclude these goods. As discussed in Section IV.B.2 infra, these goods may still be sold abroad, either because the importing state decides to permit their entry or because the importing state’s customs authorities do not detect the goods.
welfare increase. The surplus that would have gone to the foreign intellectual property rights-holder is retained in the economy of the sanctioning state.

The domestic benefits of imposing intellectual property sanctions have the added benefit of being more credible to the target state. Much of a sanctioning state’s bargaining power when negotiating compliance in international trade disputes (or any international dispute) lies in its ability to threaten credibly to impose sanctions. When sanctions are costly to impose, the threat is undermined.157 The target nation knows that the sanctioning state would prefer not to impose sanctions. Even if sanctions are actually imposed, the target nation knows that the sanctioning state would prefer to remove the sanctions as soon as possible. The costliness of sanctions also influences settlement negotiations. The target nation will offer a lower settlement (less compliance with the rule or a lower side-payment) if the target nation believes that the threat of sanctions is not credible (or that the state will remove sanctions shortly) than it would if the threat were credible because the expected cost of the sanctions to the target nation is lower than it would be if the threat were credible.

In sum, retaliation in TRIPS allows developing countries to respond to violations of international trade law by developed states without bankrupting themselves in the process. The ability to respond to violations of trade law is not dependent on the economic surplus that the state is willing to sacrifice. In addition, the economic benefit from the suspension of intellectual property rights offers developing countries some compensation for the harm done by the violation of trade rules—something that retaliation in goods does not. The net welfare increasing nature of the sanctions also helps convince the target state that sanctions will actually be applied. By eliminating the self-injury aspect of the sanctions, the target state has less reason to believe that the sanctioning state will either not carry out its threat or will remove sanctions as quickly as possible.158

2. More effective sanctions.

Another major advantage of the TRIPS Agreement in trade retaliation is that it permits developing states to impose more effective sanctions: developing countries have both a greater capacity to sanction larger-market states and are able to target politically powerful interest groups.

Developing states often do not have the capacity to impose significant sanctions if retaliation is restricted to trade in goods.159 The ability to retaliate in goods is defined by the size of the sanctioning state’s import market. For

157 Subramanian and Watal, 3 J Ind Econ L at 405–06 (cited in note 126).
158 Id at 407.
159 Ruse-Khan, 11 J Ind Econ L at 330–33 (cited in note 145); Anderson, 1 World Trade Rev at 133 (cited in note 126) (discussing the retaliatory capacity of developing states).
instance, if a state imports only $50 million a year in imports from another nation (the nation targeted for sanctions), then the state’s capacity to sanction that nation is based on its ability to interrupt this trade. At the extreme, the sanctioning state can ban imports from the target nation, resulting in displaced trade of $50 million a year. This is the maximum extent of the sanctioning state’s capacity to retaliate—and is probably too economically disruptive to consider.

The possibility of intellectual property sanctions expands the capacity of developing states to retaliate.\textsuperscript{160} The ability to retaliate is no longer based on the size of the sanctioning state’s import market, but instead on its ability to reproduce intellectual property. For instance, the same state that has only $50 million of imports from its target nation can impose $100 million in sanctions by reproducing $100 million worth of software, music, or other intellectual property from that state. Here, the constraint on capacity to sanction is reproduction technology. Some developing states, such as India and Brazil, have the capacity to reproduce pharmaceuticals or software, while other developing states may not.\textsuperscript{161} But the technology constraint is relatively low for the reproduction of other types of intellectual property, such as music or films recorded onto CDs or DVDs. Almost all nations will have the technology necessary to copy CDs or DVDs and retaliate by (legally) reproducing these goods.

The size of the sanctioning state’s internal market is, in theory, a potential limit on the state’s ability to retaliate. However, this may not be important in practice. The WTO authorization to retaliate in intellectual property provides the sanctioning state with the legal justification (under international law) to modify its domestic laws governing foreign intellectual property rights. This permits the sanctioning state to sell these goods domestically and internationally. Yet importing states may have their own intellectual property laws, which would exclude these “retaliation-reproduction goods” from their own markets. While the WTO authorized retaliation gives the sanctioning state the ability to suspend parts of its intellectual property laws, it does not provide non-retaliating WTO members with the right to suspend their intellectual property laws. While this is a potential limitation in the abstract, it may not be much of a practical problem for the retaliating state. Customs agents in WTO member states may not be able to detect the entry of retaliation-reproduction goods into their markets. In addition, the retaliating state can export these good to states who are not members of WTO. As a consequence, the market for a retaliating state’s goods is most likely larger than its internal market.

\textsuperscript{160} Subramanian and Watul, 3 J Ind Econ L at 405 (cited in note 126).

\textsuperscript{161} Several developing states have the technology to reverse engineer pharmaceuticals. See Kapczynski, 97 Cal L Rev at 1576 (cited in note 58) (discussing India’s capacity to reproduce pharmaceuticals well before the entry into force of the TRIPS Agreement).
Not only do developing countries have more capacity to sanction in intellectual property, they may be able to hit higher value targets. When judging the effectiveness of the sanctions on the target state, the metric is not just the overall level of sanctions applied but also the political impact of the sanctions. The same level of sanctions applied to different domestic groups may have radically divergent effects on the government. The key to a collective sanctioning system, like the WTO, is selecting domestic targets that wield significant political influence. By selecting private parties within the target state with high levels of political influence, the effect of sanctions is greater even if the absolute dollar value of the sanctions remains constant.

Retaliation in intellectual property allows developing states to focus their economic sanctions selectively on the private parties who have significant domestic influence in developed states. Within the US and the EU, intellectual property industries, such as the pharmaceutical industry and the film industry, are some of the most politically mobilized industries. Comparatively, these firms may be in a better position to influence government action than industries that focus on the export of goods, such as citrus or automobile exporters. Thus retaliation in intellectual property may not only be net welfare increasing for the sanctioning state, it may also provide more influence over the government of the target state. These two characteristics—a greater likelihood of sanctions and more politically effective sanctions—raise the target state’s expected injury and thereby increases the probability that the developing country will convince the offending state to cease its violation or command a more advantageous settlement. The developing state does not actually need to impose these sanctions for the threat of intellectual property to be a potent weapon. Developed states may actually settle the dispute (and make more concessions than they would have without the threat of intellectual property retaliation) before any sanctions are imposed.

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162 Levinson, 56 Stan L Rev at 400 (cited in note 128) (reasoning that the efficacy of non-trade sanctions against governments depends upon penalizing a particular constituency sufficiently that the penalty generates political pressure from the constituency on the government); Nzelibe, 6 Theoretical Inquiries in L at 228 (cited in note 129).
163 See discussion in Section IV.A; Levinson, 56 Stan L Rev at 400 (cited in note 128) (discussing the ways that collective sanctions influence government behavior by targeting political constituencies).
166 Id.
167 See the discussion of the US–Subsidies on Upland Cotton case in Section IV.D.
C. Intellectual Property Retaliation as “Piracy”

It is worth discussing the idea that such sanctions are illegitimate because they are “piracy,” and so should be discouraged (either by the WTO or individual states) as a form of trade retaliation. The legitimacy of this form of trade retaliation goes to our understanding of what the role of trade retaliation is and what the limits should be. This Article discusses two common conceptions of why intellectual property retaliation may be illegitimate. The first concerns the fault of the intellectual property holder in the dispute. The second concerns the idea that “property” is being taken.

1. Targeting intellectual property rights-holders.

The first critique views intellectual property retaliation as unfair or illegitimate because it targets intellectual property holders for the trade actions of their home government. For example, when the Brazilian government announced that it would retaliate against illegal US cotton subsidies by suspending the patents on some American-owned drugs, the primary American pharmaceutical industry group, the Pharmaceutical Research and Manufacturers of America (PhRMA) responded by stating: “Upon review of the retaliation list issued by Brazil in the cotton dispute we find that there are products listed made by PhRMA member companies. We are disappointed that Brazil has gone down this path as pharmaceutical companies have no stake in this dispute or the US cotton program.”

There are two responses to this critique. The first reiterates that collective sanctions based on nationality is the standard means of retaliation in international trade law. In this sense, intellectual property retaliation is no different than other types of trade retaliation under the WTO’s collective sanctioning system. The very idea of a collective sanctioning regime, such as the WTO, is to inflict harm on those within the nation who can lobby for a change in policy, not necessarily those within the nation who are directly responsible for or benefit from the violation. Suspending intellectual property rules imposes an economic harm on the rights-holder just as raising tariffs hurts the exports of a targeted good. Producers of goods are denied access to foreign markets

168 PhRMA Statement on Brazil Cotton Dispute (PhRMA Mar 9, 2010), online at http://www.phrma.org/media/releases/phrma-statement-brazil-cotton-dispute (visited Apr 11, 2011).

169 Levinson, 56 Stan L Rev at 426 (cited in note 128) (arguing that collective sanctions are appropriate when the affected parties have the ability to control the behavior of the wrongdoer; such analysis can be applied to trade sanctions, to wit: if a politically powerful group allows a government to violate trade rules, it shares culpability for the violation and may be sanctioned until such time as it prompts the government to change its policy).
through higher tariffs, while producers of intellectual property are denied access through suspension of their intellectual property rights. Both experience a monetary loss due to the actions of their governments, not because of anything the individual or company has done. If it is illegitimate or unfair to retaliate in intellectual property because the intellectual property industry has nothing to do with the respondent state’s policy, then the entire WTO collective sanctioning system is illegitimate.

The second response to this critique examines how a state’s violation of trade rules is related to foreign suspension of intellectual property rights. This approach requires an understanding of the link between the TRIPS Agreement and other trade agreements. Intellectual property was formally made a part of the international trade system at the behest of developed states that wished to have greater access to foreign markets for their nation’s intellectual property exports.170 States who preferred lower domestic levels of intellectual property rights made a trade concession: they agreed to enact more stringent intellectual property law in return for trade concessions by other states, such as promises to liberalize the agriculture sector and the textile industry.171 The granting of greater intellectual property rights domestically was a political deal—one that is contingent upon other states’ continued compliance with their own trade obligations.172 Because the respect for intellectual property rights exists in foreign markets as a result of a political bargain between states, there is a relationship between intellectual property rights and other trade rules. This is true even if a particular intellectual property firm was not involved in creating the offending policy. For instance, pharmaceutical companies rarely involve themselves in the legislative process creating agriculture subsidies, yet the intellectual property rights-holder’s claim to access foreign markets is itself a result of the rights-holder’s home state’s actions. As a consequence, it is not arbitrary for the injured state to fail to maintain its part of the bargain if the rights-holder’s home state does not uphold its own trade obligations.

170 Peter Drahos and John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? 119 (Earthscan 2002). These states were acting in the interests of many domestic firms specializing in intellectual property who desired greater global protections for intellectual property. Hoekman and Kostecki, Political Economy at 156 (cited in note 14); Sell, Public Law, Private Power at 1–2 (cited in note 3).
172 See DSU, Art 22.3 (explicitly permitting retaliation in intellectual property rights under the DSU).
2. Piracy as theft.

A second critique of intellectual property retaliation is to characterize it as theft. This resonates with claims from the intellectual property industry that reproductions of intellectual property abroad are “piracy.” 173 This leads to the question of what “theft” means in this context. 174 The common conception of theft as taking a good and thereby depriving its owner of the use of that property does not apply. Intellectual property is non-rivalrous, meaning that the good can be reproduced without reducing the availability of the good to others. We could define piracy broadly as the reproduction of any material that is not authorized by the author. This is a broad definition because it divorces the idea of piracy from national law and vests the rights of intellectual property with the owner outside of any territory’s legal framework. This is almost certainly too broad for this discussion because such a definition is more expansive than any nation’s current intellectual property regime. For instance, this definition would make many reproductions that are currently legal in the US, such as reproducing material in the public domain, piracy as well.

More commonly, piracy connotes a more narrow definition: the reproduction of material in violation of property law. 175 This anchors the idea of piracy (as theft) to the nation’s property laws; intellectual property rights are territorially bounded. What is intellectual property theft in one nation may not be theft in another. 176 In addition, nations have no inherent obligation to offer


174 Ruse-Khan, 11 J Int'l Econ L at 339 (cited in note 145) (discussing some definitions of piracy).

175 The very idea of piracy is that pirates would become rich by appropriating goods in violation of property laws.

176 Drahoz and Braithwaite, Information Feudalism at 5–10 (cited in note 170) (discussing how intellectual property, such as pharmaceutical patents, receives markedly different protection in different countries).
intellectual property rights. In fact, such rights were explicitly viewed as trade concessions in the Uruguay Round of GATT negotiations.

Under this view, a nation’s decision to suspend intellectual property law clears the way for reproductions that are perfectly legal in that territory. Retaliation in intellectual property thus is not theft by the complaining government because the government is within its rights under national and international law to suspend intellectual property law. In short, there is no violation of national law (or international law). The use of the term “piracy” or “theft” in this context is simply a rhetorical flourish rather than a legal conclusion.

D. Political Economy Issue: Linking TRIPS and Agriculture

The prospect that developing countries will increasingly use intellectual property rules to enforce trade rules against developed states has interesting political economy implications. If developing countries begin to increase their use of the TRIPS Agreement as a lever to promote compliance, the target in developed countries will obviously be intellectual property-dependent industries, such as the pharmaceutical, motion picture, music, and software industries. These are politically mobilized groups with the lobbying power to significantly influence national trade policies. The more notable issue, though, is the likely target of developing countries’ enforcement efforts. Agriculture policies are a substantial liability to developed states under international trade rules. As a consequence, the relevant political battles within the US and the EU will most likely be between the titans of the new intellectual property industries and the well-organized lobbies supporting the older agriculture industry.

The beginnings of this new political economy battle can be seen in the wake of the United States—Subsidies to Upland Cotton dispute. In that recent case, the Brazilian government successfully challenged American subsidies for cotton farmers. This case was important because it was the first complaint by a developing country regarding a developed country’s agriculture policy. Before the Uruguay Round, trade in agriculture products was effectively unregulated by the GATT. The US demanded and received a waiver under GATT for

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177 There is no customary international law that requires states to offer such property rights. Indeed, the WTO treaty explicitly allows states to suspend intellectual property rights in response to trade violations by other nations. DSU, Art 22.3 (permitting retaliation in TRIPS).


agriculture products. Thereafter, all states in the GATT behaved as if that waiver applied to all states.\textsuperscript{180} The Uruguay Round agreements included an Agreement on Agriculture, which brought agriculture policy back into the realm of global trade rules. The agreement had significant limitations but imposed some important constraints that would require developed states, most notably the US and the European Communities, to alter their current agriculture policies.\textsuperscript{181} The Brazilian government’s complaint was the first to challenge whether a developed state had taken the necessary steps.\textsuperscript{182} The Brazilian government won the case, although it took four rulings (the panel decision, the Appellate Body review, a compliance panel decision, and an Appellate Body review of the compliance decision) and more than five years to achieve.\textsuperscript{183} The WTO later authorized the Brazilian government to retaliate against the US under both GATT and the TRIPS Agreement.\textsuperscript{184}

The Brazilian government announced its plans to retaliate in March 2010, in part by suspending intellectual property rights for a number of US firms, including suspending the patents for some pharmaceuticals held by American companies.\textsuperscript{185} This sets the stage to observe how these threats will influence the political economy of agriculture subsidies within the US. Currently, there are few political forces working against agriculture support. The taxpayers bearing the cost of cotton subsidies are generally a poorly organized group. The entry of pharmaceutical or software manufacturers into the political debate to oppose such subsidies, however, may alter the politics of domestic agriculture policy. These industries have the political clout to prompt lawmakers to revise aspects of the US subsidies, if the industries are sufficiently motivated.

Alternatively, the targeted industries may have sufficient influence to convince the respondent government to pay off both industries (the domestic industry receiving the subsidy and the foreign industry harmed by the subsidy).

\textsuperscript{180} Id; Jackson, World Trading System at 313–16 (cited in note 51) (discussing the US waiver in agriculture and the behavior of other GATT contracting parties).

\textsuperscript{181} Steinberg and Josling, 6 J Intl Econ L at 374–76 (cited in note 178).

\textsuperscript{182} For a sophisticated analysis of the legal issues in that case, see generally Andre Sapir and Joel P. Trachtman, Subsidization, price suppression, and expertise: causation and precision in Upland Cotton, 7 World Trade Rev 183 (2008).

\textsuperscript{183} The WTO has published a chronology of the dispute, online at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (visited Apr 11, 2011).

\textsuperscript{184} World Trade Organization, Decision by the Arbitrator, US—Subsidies on Upland Cotton, WTO Doc No WT/DS267/ARB/2. Brazil could retaliate against the US up to a value of US $147.3 million by modifying its rules regarding trade in goods. Id at 6.4. If the value of US violations exceeded that amount, Brazil could retaliate further in intellectual property. Id at 6.5.

\textsuperscript{185} Ed Taylor, Brazil Releases List of Intellectual Property Retaliation Measures in U.S. Cotton Dispute, WTO Reporter (Mar 16, 2010).
This latter course is the one the US government is currently pursuing in the cotton dispute. As of this writing, the Brazilian government has agreed to temporarily suspend its retaliation in return for an American promise to revise cotton policy when it enacts a new farm bill in 2012, in addition to providing an annual side-payment of $147 million to the Brazilian cotton industry. The result is that the US government is now supporting two nations’ cotton producers.

The United States–Upland Cotton Subsidies case also highlights how trade litigation may be an alternative to trade negotiations. If negotiations for greater market access in agriculture do not advance, then developing states may turn to litigation as a secondary strategy for reforming agriculture policies. There are indications that the Brazilian government may have been considering this strategy. During the cotton litigation, the Brazilian government temporarily delayed its request to the WTO to authorize its sanctions against the US when Doha negotiations appeared to be advancing. Brazil may have viewed a new Agreement on Agriculture to be a better resolution of its dispute than pursuing litigation. When the Doha negotiations collapsed in August 2008, the Brazilian delegation to the WTO renewed its request to impose trade sanctions on the US.

In sum, the intellectual property rights-holders in developed countries were the primary advocates for the inclusion of intellectual property rights in international trade law. The TRIPS Agreement has provided this group with significant benefits, but it has also held these private actors hostage for their governments’ compliance. Intellectual property holders may find themselves dragged into domestic political battles over issues that seem unrelated to intellectual property rights. Yet by linking the respect for intellectual property rights to other issues regarding market access, these private actors have, intentionally or unintentionally, positioned themselves in the front line of international trade disputes.

186 Ed Taylor, Brazil Suspends Sanctions Against U.S. Until 2012 in WTO Cotton Subsidy Dispute, WTO Reporter (June 18, 2010).
187 Ruse-Khan, 11 J Ind Econ L at 315 (cited in note 145) (noting the possibility of a wave of litigation against major economies’ agriculture policies if the Doha Round negotiations collapse).
188 Brazil could request authorization to suspend trade concessions as of June 2008. The government did not actually make the request until September 2008 after the collapse of the Doha Round negotiations in the summer of 2008.
189 Draho and Braitwaite, Information Feudalism at 121–47 (cited in note 170); Hoekman and Kostecki, Political Economy at 156 (cited in note 14); Ship, Public Law, Private Power at 97 (cited in note 3).
International trade rules exist in the realm of global power politics. Based on the text and the WTO’s recent dispute resolution decisions, developing states have significant discretion in deciding what enforcement resources to dedicate to intellectual property protection and in establishing penalties for rights violations. Yet developed states and intellectual property rights-holders continue to maintain that the TRIPS Agreement imposes a much more stringent obligation on developing states. This claim may be backed by traditional power-politics threats—namely, that developing states may lose trade preferences or foreign direct investment if they fail to adhere to a more rigid view of the intellectual property protections. Similarly, developing countries may formally have the right to retaliate against a developed country’s violations of trade rules in agriculture or other areas but nonetheless refrain from doing so out of fear of the backlash from developed countries. What is left is a potential separation between what the TRIPS Agreement actually requires of governments and what developed states claim the TRIPS Agreement requires. In this sense, the meaning of the TRIPS Agreement and WTO enforcement provisions is contested as a matter of general international politics, with the text of the Agreement and the rulings of the decisions of WTO dispute resolution bodies as only secondary considerations in the development of a state’s trade policy.

The possibility of the withdrawal of special trade preferences—benefits that developed states can extend to developing states under the WTO’s Generalized System of Preference (GSP)—due to fights over intellectual property rules is real. The US government withdrew GSP benefits from Argentina in 1997 over a disagreement regarding patent test data exclusivity. Similarly, the US government withdrew GSP benefits from South Africa in 1998 after South Africa announced its intention to make use of the TRIPS compulsory licensing provision to produce generic versions of several HIV/AIDS drugs.

The use of such power plays was not made possible, however, by the creation of the TRIPS Agreement. Before the TRIPS Agreement came into force, the US and European countries had also made continued access to GSP

190 Kapczynski, 97 Cal L Rev at 1627–30 (cited in note 58) (discussing the US’s various forms of unilateral retaliation for developing countries’ violations of intellectual property law implementation).

191 Sell, Private Power, Public Law at 135–36 (cited in note 3). Test data exclusivity refers to the use of the innovator’s data to seek market approval of a generic drug. The TRIPS Agreement requires that this data be protected against “unfair commercial use” but there are disagreements between developed and developing nations over what unfair commercial use entails. Id at 136.

192 Id at 151–53.
benefits conditional on the protection of American and European intellectual property. The US gave “great weight” to the developing countries’ history of respect for intellectual property rights when deciding whether to grant GSP preferences, even before developing states had any international trade obligations to do so. The European Communities also denied GSP benefits to Korea in 1984 (a decade before the entry into force of the TRIPS Agreement) for its failure to offer protection for European companies’ intellectual property. In addition, developed states applied unilateral sanctions against developing countries regarding intellectual property protections. The US imposed import restrictions on Brazil in 1988 for its failure to respect American grants of intellectual property rights and threatened India with similar sanctions.

Yet in spite of such threats (or use) of the denial of trade preferences, some developing states may have sufficient economic and political power to resist this political pressure. Most notably, China, Brazil, India, and South Africa appear to be in a position to make use of the full flexibilities that the TRIPS Agreement provides. For instance, in the 1998 dispute between the US and South Africa, the South African government resisted the US’s demand to end their HIV/AIDS medicines program. The South African government joined forces with an American AIDS advocacy group, ACT UP, and waged a public relations campaign to publicly embarrass the Clinton Administration for its resistance to national medicines programs. The Clinton Administration subsequently changed its position, reinstated South Africa’s GSP benefits, and publicly announced that it would not resist sub-Saharan countries’ efforts to compulsory license HIV/AIDS drugs. In a similar move, the Brazilian government adopted a free HIV/AIDS drug program for all registered AIDS patients. To decrease the cost of this program, the Brazilian government threatened to compulsory license certain HIV/AIDS drugs. To avoid compulsory licensing,

194 Id at 178.
196 Kapczynski, 97 Cal L Rev at 1589 (cited in note 58) (discussing the Indian government’s innovative use of TRIPS flexibilities in its implementation of the agreement).
198 Id.
Merck and Roche offered the Brazilian government a 40 to 60 percent price reduction on HIV/AIDS medicines.\(^{200}\)

India, Brazil, and China have also been willing to defend their intellectual property practices at the WTO. The Chinese government was largely successful in defending its intellectual property practices against the US in the China–IPR case. The Indian and Brazilian governments are also challenging the EU’s practice of seizing generic drugs, which the EU considers infringing, that originate in India and are destined for third-party markets.\(^{201}\) Brazil and India maintain that the shipment of these drugs is legal under the WTO 2003 Decision on TRIPS and public health and thus the EU’s practice of preventing these drugs from reaching third-party markets is illegal. These claims, if successful, would benefit developing countries that buy generic drugs, even though most of these countries are not party to the WTO complaint. Thus, even if not all developing states will fully take advantage of the flexibilities that the TRIPS Agreement offers, some large-market developing countries will be able to. The TRIPS Agreement is not necessarily welfare improving for developing countries, but it has developed in ways that grant some developing states greater bargaining leverage.

More generally, the TRIPS Agreement illustrates some of the surprising consequences of linking domestic politics and international law. The TRIPS Agreement is unusual in its domestic institution-oriented, rather than outcomes-oriented, approach. By creating a legal obligation to change national governmental structures, including the state’s substantive laws and enforcement procedures, rights-holders hoped to use international law to change the legal culture of developing countries, embedding within them a greater respect for higher levels of intellectual property rights into the fabric of the nation’s legal system. Yet mere existence of these new domestic institutions has not necessarily changed the fundamental policy preferences of national governments. Instead, these institutions operate differently in states with different economic interests, leading to lower level of intellectual property enforcement than in developed states with similar laws and enforcement procedures. In the process, however, intellectual property rights-holders have placed themselves in the midst of new political battles in their home states. The TRIPS Agreements creates a relationship between intellectual property rights and other trade obligations. It thereby invests intellectual property rights-holders in the outcomes of trade disputes regarding a wide range of other issues from agriculture subsidies to textile market access.

\(^{200}\) Id at 117.