
CREIGHTON INTERNATIONAL AND COMPARATIVE LAW JOURNAL



Vol. 2

Fall/Winter 2011

No. 1

BOARD OF EDITORS

NICOLE N. BOHE
Editor-in-Chief

CHRIS T. JACKMAN
Lead Articles Editor

ALEXANDRA KRAUS
Lead Articles Editor

JEREMIAH D. ELLIOTT
Student Articles Editor

ERIN K. HURLEY
Student Articles Editor

MOIRA C. RITTERBUSH
Student Articles Editor

GENERAL STAFF

JENNIFER M. ARBAUGH
SEAN P. LYNCH

KRISTINA DAY
SEAN D. SCHAEFFER

ADAM J. KAVAN
ZACHARY M.H. WEFEL

FACULTY COMMITTEE

BRUCE E. ARONSON
RANETA J. MACK
SEAN WATTS

MICHAEL J. KELLY
STEPHEN C. SIEBERSON
DAVID P. WEBER

ANN C. KITCHEL

Creighton International and Comparative Law Journal

Published two times per year by the Creighton University School of Law

Vol. 2	Fall/Winter 2011	No. 1
--------	------------------	-------

INTRODUCTIONi

ARTICLES

The Integration of Cultural Arguments in the Provocation
Doctrine in Rulings of the Israeli Supreme Court

Guy Ben-David 1

Decision-Making Patterns at the First Trial of
International Criminal Court: A Perspective on the ICC

Aldo Zammit Borda 30

The Regulatory Powers of the Federal Reserve and the
European Central Bank in the Wake of the Financial
Crisis of 2007–2009

Michele Cea..... 54

Fishing TRIPS: A Look at the History of the Agreement
on Trade-Related Aspects of Intellectual Property

Emir Aly Crowne 77

FISHING TRIPS: A LOOK AT THE HISTORY OF THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY

EMIR ALY CROWNE*

INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property¹ (“TRIPS”) is the new worldwide playing field for standardized intellectual property. Since 1995 TRIPS has set out the minimum standards required from members of the World Trade Organization. In practical terms, these members represent most of the countries in the world.²

This Article examines the history of TRIPS and the factors that account for its modern existence and pervasiveness. In passing, the Article addresses the issue of patentable subject matter.

PRE-TRIPS STANDARDS FOR INTELLECTUAL PROPERTY

Intellectual property standards were historically imposed on developing countries and others as a result of empire-building and colonization.³ For example, England’s copyright laws were extended to include ‘his Majesty’s dominions’ in 1911.⁴ Article 19 of the Berne Convention originally provided the colonial powers⁵ the right to accede to the Convention “at any time for their colonies or foreign possessions.” As a result, colonies were drawn into the Berne Convention but not on their own volition. The Berne Convention, which presumably served the interests of literate, wealthy Europeans, became the copyright standard for most colonies. Therefore, even after colonies gained independence, they were still

* *Emir Aly Crowne is an Associate Professor of Law at the University of Windsor, Faculty of Law.*

¹ Marrakesh Agreement Establishing the World Trade Organisation: Agreement on Trade-Related Aspects of International Property Rights, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

² As of July 23, 2008, there are 153 members. *See Understanding the WTO: The Organization – Members and Observers*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Aug. 15, 2011).

³ Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 765, 766 (2002).

⁴ *Id.*

⁵ Major colonial powers (France, Germany, Spain the United Kingdom, the Netherlands and Portugal) all ratified the Berne Convention.

beholden to copyright systems that reflected the interests and priorities of their former masters.

Indeed, long before TRIPS, patents, trademarks and copyrights were the primary focus of international intellectual property rights. The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works were concluded at the end of the 19th century to provide international frameworks for the protection of certain intellectual property laws.⁶ However, these conventions lacked 'teeth.' They provided no effective sanctions for non-compliant signatories, nor did they provide binding dispute resolution mechanisms to address such non-compliance.⁷ Membership to these conventions did little to eliminate the inconsistent patchwork of intellectual property standards that existed worldwide.

In 1988, WIPO conducted a study for the TRIPS Negotiating Group during the Uruguay Round, which revealed that of the ninety-eight (98) signatories to the Paris Convention, from both developing and developed countries,

forty-nine excluded pharmaceutical products from protection, forty-five excluded animal varieties, forty-four excluded methods of treatment, forty-four excluded plant varieties, forty-two excluded biological processes for producing animal or plant varieties, thirty-five excluded food products, thirty-two excluded computer programs and twenty-two excluded chemical products.⁸

This suggests the Paris Convention did nothing to harmonize standards of industrial property protection; in fact, the WIPO Study suggests the complete opposite.⁹

As with other international conventions, an obstacle to widespread acceptance and adoption were the needs of the 'latecomers,' most notably the developing countries. During the 1960s and the 1970s, developing countries sought to update these conventions to secure greater access to foreign technologies with a

⁶ These treaties are administered by the World Intellectual Property Organization ("WIPO"), which replaced the United International Bureau for the Protection of Intellectual Property in 1971. For a full list of WIPO-administered agreements, see *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/treaties/en/> (last visited Aug. 15, 2011). For a full list of WIPO-administered agreements, see *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/treaties/en/> (last visited Aug. 15, 2011).

⁷ See DANIEL J. GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (3d ed. 2008).

⁸ Drahos, *supra* note 3, at 768 (citing WIPO, EXISTENCE, SCOPE AND FORM OF GENERALLY INTERNATIONALLY ACCEPTED AND APPLIED STANDARDS/NORMS FOR THE PROTECTION OF INTELLECTUAL PROPERTY (1988), available at http://www.wto.org/gatt_docs/English/SULPDF/92050186.pdf [hereinafter WIPO Study]).

⁹ See Drahos, *supra* note 3, at 765.

view towards promoting their own development.¹⁰ Like all powerless latecomers, they were unsuccessful.

For example, signatories started to revise the Paris Convention in 1980, but such revisions were never completed. Developing countries sought to include provisions relating to the compulsory licensing of any patented technology.¹¹ The United States opposed this proposed revision because it “amounted to little more than expropriation of U.S. intellectual property rights.”¹² So while the developing countries pursued strategies “for the adoption of lower and more flexible standards of intellectual property protection”; the developed world pursued the opposite agenda.¹³ Dissatisfied with the progress of their agenda, the developed world, initially represented almost exclusively by the United States, looked elsewhere to promote and further its cause.

PREPARING THE FIELD: PLANNING FOR TRIPS

The United States’ disappointment with the World Intellectual Property Organization (“WIPO”), and the conventions it administered, led to a forum shifting strategy in the 1980s. In particular, the United States feared that developing countries would defeat its desire for higher standards for intellectual property in forums like the United Nations Conference on Trade and Development (“UNCTAD”), the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), and WIPO.¹⁴ The General Agreement on Tariffs and Trade (“GATT”), on the other hand, “was a forum in which the United States was the single most influential player.”¹⁵ There the United States began to pose the problem of intellectual property protection as a ‘trade-related’ issue with its solution lying in the GATT. And in September 1986, contracting parties to the GATT meeting in Punta del Este, Uruguay, agreed to include trade-related aspects of intellectual property rights, including trade in counterfeit goods, as a subject for negotiations in the forthcoming trade round referred to as the “Uruguay Round”; until this time, intellectual property rights were considered an obstacle to free trade.¹⁶

GATT proved seductive to the United States and other developed countries for several reasons. First, worldwide intellectual property standards could be promulgated more efficiently through the

¹⁰ Drahos, *supra* note 3, at 768.

¹¹ *Id.* at 769.

¹² *Id.*

¹³ See Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 7 (Carlos M. Correa and Abdulqawi A. Yusuf eds., 2d ed. 2008).

¹⁴ See generally Drahos, *supra* note 3, at 769.

¹⁵ *Id.*

¹⁶ See generally, Drahos, *supra* note 3, at 773–74.

GATT than in WIPO administered conventions.¹⁷ Through the GATT, all of the important intellectual property rights could be incorporated into a single document; a document that could also be incorporated by reference in other conventions or agreements between countries. Indeed, because ratification of TRIPS is a requirement for membership in the World Trade Organization (“WTO”),¹⁸ any country seeking easy access to the international markets must enact the minimum standards set out in TRIPS. Opting out of TRIPS is simply not an option.

The economic advantage gained through WTO membership furthered the political and legal agenda of globalizing intellectual property laws through TRIPS. Indeed, developing countries were already endeared to the WTO because of its “promis[e] to lower trade barriers and eliminat[e] regimes of unilateral trade sanctions.”¹⁹ TRIPS was simply the additional wrapping to a wanted gift. Even developed nations, such as Russia and China, that were hesitant or unwilling to join other international conventions found the prospect of WTO membership a more powerful economic incentive than their own political pride.

Second, the Uruguay Round’s broad agenda allowed for linkage-bargain diplomacy, as opposed to WIPO, which exclusively focused on intellectual property rights.²⁰ At the Uruguay Round, the United States and other developed countries could negotiate intellectual property rights, satisfying the industries that were heavily dependent upon such rights, like pharmaceuticals and brand name goods, in exchange for concessions in textiles and agriculture, which are industries central to the economies of developing countries.

Third, and perhaps a bit indelicately, GATT provided a more “developed world-friendly agency as compared with the UNCTAD.”²¹ The UNCTAD was the United Nation’s most prominent forum for analyzing and promoting trade and intellectual property rights. This forum was designed in part to help developing countries negotiate international intellectual property norms that would have been more responsive to their needs, like technology transfers. However, strong opposition from the developed world brought an end to these noble motives.²² Commentators rightly note that the UNCTAD “found itself deliberately marginalized in the 1980s and the victim (as was WIPO)

¹⁷ GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCES INDUSTRIES: A TWENTIETH CENTURY HISTORY* 198 (2003).

¹⁸ It was during the Uruguay Round that the GATT framework was turned into the World Trade Organization, which is discussed in greater detail later in this Article.

¹⁹ Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 Minn. L. Rev. 249, 249 (2003).

²⁰ Dutfield, *supra* note 17.

²¹ *Id.* at 199.

²² Abdulqawi A. Yusuf, *supra* note 13, at 6.

of a successful forum-shifting strategy led by the USA²³ in their quest for strengthening intellectual property interests that favored developed nations at the expense of others.

And finally, as suggested earlier, GATT had well-established enforcement and dispute resolution mechanisms that were not available in WIPO.²⁴

PICKING THE TEAM: THE PLAYERS BEHIND TRIPS

The United States culminated its program of intense lobbying at the Uruguay Round by including intellectual property rights; in its pursuit for such rights, the United States received support from the European Union, Japan, Canada and other developed nations. As early as the GATT's 1973–1979 Tokyo Round, which preceded the Uruguay Round, trade in counterfeit goods was a serious issue. The Levi Strauss Corporation and other trademark holding firms formed the 'Anti-Counterfeiting Coalition' and wanted to include an anti-counterfeiting code in the Tokyo Round's agenda.²⁵ Although parties failed to agree upon rules to stop trade in counterfeit goods, they continued to pursue a discipline provision for trading counterfeit goods.

In 1984, the Group of Experts on Trade in Counterfeit Goods was created to further examine the matter of counterfeit goods.²⁶ The group agreed that "joint action was probably necessary," although it could not "agree on whether GATT was the appropriate forum."²⁷ The Group raised concerns as to whether additional standards were necessary, whether these standards would impede legitimate trade, and whether WIPO, as opposed to GATT, was the appropriate forum for the issues.²⁸ Regardless of these concerns, the item "trade-related aspects of intellectual property rights, including trade in counterfeit goods" eventually made it to the GATT negotiating table in the Uruguay Round, primarily due to the economic influence of several major players present at the table.

Prior to the Uruguay Round, the United States government aggressively promoted higher intellectual property standards on behalf of domestic groups. These domestic groups, which included key governmental agencies and other institutions, wanted to pursue their trade policy agendas. The most important entities dealing with trade are Congress, the Office of the United States Trade Representative ("USTR"), and the United States International Trade Commission ("ITC"). Each entity serves an important purpose in the United States' trade relations. The USTR incorporated intellectual property rights into the country's international trade diplomacy, which

²³ Dutfield, *supra* note 17, at 199.

²⁴ *Id.*

²⁵ *Id.* at 197.

²⁶ Gervais, *supra* note 7, at 8–9.

²⁷ *Id.* at 9.

²⁸ *Id.* at 9–10.

reflected demands made by producer interest groups.²⁹ The ITC provided trade expertise to the government and “determine[d] the impact of imports on U.S. industries.”³⁰ Additionally, the 1974 Trade Act established the Advisory Committee on Trade Policy and Negotiations (“ACTPN”) “to enable the private sector to advise the government on trade policy and multilateral negotiations.”³¹

Pfizer’s CEO, Edmund Pratt, and IBM’s CEO, John Opel, lead the ACTPN in recruitment efforts that resulted in the Pharmaceutical Manufacturers Association and the Chemical Manufacturers of America joining the ACTPN and giving their perspectives on trade policy and negotiations.³² The ACTPN educated members of Congress and USTR officials on intellectual property rights and their significance and importance for the United States’ economy. The Committee also sought to persuade the USTR that it was in the United States’ interest “to pursue [intellectual property] demands coming from the ACPTN at the GATT.”³³ The ACPTN sought to make intellectual property rights the main priority for United States trade policy.

The United States then formed an international alliance with other developed countries. The parties established the Intellectual Property Committee (“IPC”) in 1986 to garner the support of the European and Japanese governments and businesses.³⁴ Executives of United States-based multinational corporations were the primary base for IPC’s membership as they had sizeable intellectual property portfolios to protect.³⁵ Between 1986 and 1996, IPC corporate membership fluctuated from eleven to fourteen participants.³⁶ “In 1986, the IPC included Bristol-Myers, CBS, Du Pont, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto and Pfizer.”³⁷ In 1994, CBS, Du Pont and General Motors withdrew from membership, but Digital Equipment Corporation, FMC, Procter & Gamble, Rockwell International and Time Warner all joined the IPC.³⁸

The IPC enjoyed a close relationship with the USTR, Congress, the Union of Industrial and Employers’ Confederations of Europe (“UNICE”), and Keidanren, which are two international business associations; given these relationships, the IPC was able to

²⁹ Dutfield, *supra* note 17, at 200.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 200–01.

³³ *Id.* at 201.

³⁴ *Id.* at 202.

³⁵ SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 96–108 (2003).

³⁶ *Id.* at 96, n.1.

³⁷ *Id.* at 2 n. 1.

³⁸ *Id.* at 96 n. 1.

package intellectual property as a ‘trade-related’ issue.³⁹ This package would eventually evolve into the TRIPS Agreement.

However, even with the support of the European Community and Japan, the IPC and the United States had to minimize resistance from the developing countries.⁴⁰ “The countries most active in their opposition to [this U.S.-led] agenda were India, Brazil, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia”—the Group of Ten.⁴¹ The next section outlines how the United States dealt with this opposition.

PRACTICE MAKES PERFECT: REFINING THE TRIPS NEGOTIATION STRATEGY

Although the Group of Ten initially resisted the GATT forum, political pressures led to eventual acquiescence. The United States employed “a coercive trade-based strategy, threatening trade sanctions and the denial of trade benefits for countries whose IP regimes were deemed unacceptably weak.”⁴² Through Section 301 of the Trade Act of 1974 (“Trade Act”),⁴³ the United States specifically included the failure to protect intellectual property as one of the “unfair trade practices” that could result in an investigation by the United States Trade Representative (“USTR”) and possible sanctions. Section 301 also authorized the USTR to initiate its own investigations so as to protect U.S. firms from retaliatory action by foreign governments.⁴⁴ The United States used Section 301 to link “its negotiating objectives on the protection of high technology to intellectual property trade barriers.”⁴⁵ A recent WTO Dispute Settlement Panel Report found that Section 301 did not violate the provisions of the Agreement establishing the WTO or its annexed agreement—at least not in principle.⁴⁶

The United States further strengthened the authority of the USTR through other changes to the Trade Act, most notably the ‘Special 301’ report.⁴⁷ By design, this annual report was intended to help the USTR “identify those foreign countries that [] deny adequate and effective [protection of] intellectual property rights, or deny fair

³⁹ Dutfield, *supra* note 17, at 198, 202.

⁴⁰ *Id.* at 202.

⁴¹ Drahos, *supra* note 3, at 773; SELL, *supra* note 35, at 108.

⁴² SELL, *supra* note 35, at 13.

⁴³ Trade Act of 1974, 19 U.S.C. § 2411 (2006) [hereinafter *Trade Act*].

⁴⁴ SELL, *supra* note 35, at 133-34.

⁴⁵ Drahos, *supra* note 3, at 772.

⁴⁶ WTO PANEL ON UNITED STATES, UNITED STATES - SECTIONS 301-310 OF THE TRADE ACT OF 1974 350 (Dec. 22, 1999, adopted Jan. 15, 2000), available at http://www.wto.org/english/tratop_E/dispu_e/dispu_settlement_cbt_e/als1p1_e.htm.

⁴⁷ See Omnibus Trade and Competitiveness Act (1988), 19 U.S.C. § 2242 (2006).

and equitable market access to United States persons that rely upon intellectual property protection.”⁴⁸

Then there were the Generalized System of Preferences (“GSP”), initially developed under GATT, which permitted certain developed countries to reduce or eliminate tariffs for goods emanating from developing countries. It was intended to be a relaxation of the ‘most favored nation’ principle whereby GATT members are obliged to treat imports from all members, including tariffs, levies, etc., the same as they would treat imports from their ‘most favored’ trading partners. However, “in deciding whether a developing country’s products were to gain preferential treatment under the [GSP] system,” the President of the United States was required to give ‘great weight’ to that country’s protection of foreign intellectual property rights.⁴⁹

With these new powers, the United States used the Special 301 reports to target developing countries that were either resisting its intellectual property agenda at the GATT or leading the developing world in terms of intellectual property goods. For example, the United States targeted South Korea and Brazil’s patent laws.⁵⁰ South Korea’s patent laws only permitted process patents on foods, chemicals and drugs with a twelve-year period of protection from the date of publication. Similarly, the United States targeted Brazil’s laws because it excluded pharmaceutical products and processes entirely from patentability. In the Korean case, the United States threatened sanctions and removal of trade benefits provided under the GSP system.⁵¹ In the Brazilian case, the United States imposed actual sanctions.⁵² These countries were effectively coerced into changing their patent laws to conform to the United States’ demands. Five out of ten developing countries that resisted the inclusion of intellectual property in GATT were targeted for Special 301 treatment.⁵³ The two leaders in this group, Brazil and India, were placed on the “Priority Watch List,” while other countries, Argentina, Egypt and Yugoslavia, were put on the less serious—though implicitly nefarious—“Watch List.”⁵⁴

Indeed, bilateral agreements were not unique to these countries. The United States successfully formed bilateral copyright agreements with Indonesia and Taiwan, protected computer software within Colombia’s copyright law, and had Saudi Arabia adopt laws governing patents.⁵⁵ With the USTR actively pursuing complaints by American firms and businesses pursuant to the Special 301 provision,

⁴⁸ *Id.* at § 2242(b)(1)(A).

⁴⁹ Drahos, *supra* note 3, at 773.

⁵⁰ SELL, *supra* note 35, at 109.

⁵¹ *Id.*

⁵² *Id.* at 108.

⁵³ Drahos, *supra* note 3, at 774.

⁵⁴ *Id.*

⁵⁵ *Id.*

developing countries lessened their solidarity and resistance to TRIPS.

The United States effectively bullied the developing countries, and others, to the GATT negotiating table.⁵⁶ They each knew that resisting the United States could result in further Section 301 sanctions.⁵⁷ Yet the countries had little say on what items would be included at the GATT negotiating table. The primary purpose of their presence at GATT was to insure they complied with standards set forth by the United States.

In 1984 the European Community also enacted its own version of Section 301 in the Council Regulation 264/84.⁵⁸ However, unlike the United States, the European Commission found it difficult to agree upon the use of this tool.⁵⁹ Nonetheless, the regulation facilitated the European Commission's pursuits against those violating intellectual property rights, such as record piracy in Indonesia and Thailand.⁶⁰ Furthermore, it allowed the European Commission to suspend South Korea's GSP privileges when they "fail[ed] to provide satisfactory intellectual property protection."⁶¹ During this time, the United States targeted Japan when it sought to adopt a "*sui generis* form of protection for computer software"; this may help explain why Japan itself shied away from exerting pressure on developing countries in intellectual property issues.⁶²

In addition to the above incidents, there are other multilateral or regional trade agreements where the United States contributed to the standard setting agenda.⁶³ For example, the United States, Canada and Mexico successfully negotiated the North American Free Trade Agreement ("NAFTA") that provided for heightened awareness of intellectual property rights and more consistent standards. NAFTA, having been completed two years prior to the conclusion of the Uruguay Round, helped the ratification of TRIPS not only by drawing to attention to intellectual property rights as a 'free trade' issue, but also by undermining the cohesion of the Latin American opposition.⁶⁴ Latin American countries considered these intellectual property standards as an 'admission price' for becoming members of NAFTA.

Countries that were not targeted by the United States were nonetheless concerned that the increasing number of free trade agreements, such as NAFTA, would severely hinder them from

⁵⁶ Dutfield, *supra* note 17, at 202.

⁵⁷ See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242(b)(1)(C).

⁵⁸ Drahos, *supra* note 3, at 773.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 776.

⁶⁴ SELL, *supra* note 35, at 110.

obtaining access to the intellectual property market.⁶⁵ Supporting the TRIPS Agreement was perceived as a method to obtain broader market access.⁶⁶

GAME DAY: NEGOTIATING TRIPS

The inclusion of intellectual property standards at the Uruguay Round was a masterfully orchestrated coup. At the Ministerial Conference, which launched the Uruguay Round in September 1986, the Ministers included “trade-related aspects of intellectual property rights, including trade in counterfeit goods” as a subject for negotiation.⁶⁷ The entire agenda item reads as follows:

In order to reduce the *distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights*, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.⁶⁸

In addition to the above agenda items, the parties also established the ‘Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods’ negotiating group under the Group of Negotiation on Goods.⁶⁹ In 1987, the Ministers decided that the initial phase of the Uruguay Round would cover:

identification of relevant GATT provisions and examination of their operation on the basis of suggestions by participants for achieving the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Gervais, *supra* note 7, at 11 (internal quotations omitted). The expression “including trade in counterfeit goods” was included to address the (unsuccessful) work carried out in the Tokyo Round. *Id.* at 12.

⁶⁸ *Id.* at 11 (emphasis added).

⁶⁹ General Agreement on Tariffs and Trade, Sept. 20, 1986, Doc. MIN.DEC ,7-8, *available at*: http://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf. Saying that the negotiations sought to “clarify” existing GATT provisions was a bit disingenuous. It was clear the negotiations were intended to give rise to a new set of standards relating to intellectual property.

Negotiating Objective and of factual information by the secretariat as required. Initial examination of the specific suggestions and of the procedures and techniques that might be used to implement them.

Examination of the matters to be dealt with in this area on the basis of the report of the Group of Experts..., of other work already undertaken in the GATT and of papers by participants setting out their suggestions for achieving the negotiating objectives. Other factual information as required.

Consideration of the relationship between the negotiations in this area and initiatives in other fora.

Collection of information from relevant sources.⁷⁰

The negotiations initially focused on identifying the existing intellectual property norms and the trade-related gaps therein.⁷¹ Negotiations progressed slowly between 1987 and 1989; by the end of 1988, a number of parties, including the United States, Switzerland, the European Community, Japan, the Nordic countries and Canada, wanted a far-reaching agreement.⁷² Several “developing countries [including Thailand, Mexico and Brazil] expressed serious concern about the possible over-protection of intellectual property rights.”⁷³ In their view, over-protection of intellectual property rights could impede the transfer of technology and increase the cost of agricultural and pharmaceutical products. The developing countries “argu[ed] for a narrow interpretation of the Ministerial mandate.”⁷⁴

Despite the efforts of the developing countries, the Ministers agreed that future discussion on TRIPS should encompass:

- (a) the applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
- (d) the provision of effective and expeditious procedures for the multilateral prevention and

⁷⁰ General Agreement on Tariffs and Trade: The Uruguay Round – Decisions of 28 January 1987, Feb. 5, 1987, GATT/1405, at 21, available at http://www.wto.org/gatt_docs/English/SULPDF/91260225.pdf.

⁷¹ Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 Fordham L. Rev. 505, 507–08 (2005).

⁷² Gervais, *supra* note 7, at 14. See also Drahos, *supra* note 3, at 771.

⁷³ Gervais, *supra* note 7, at 13.

⁷⁴ Drahos, *supra* note 3, at 773.

settlement of disputes between governments,
including the applicability of GATT procedures;

(e) transitional arrangements aiming at the fullest
participation in the results of the negotiations.⁷⁵

Most notably, the mandate of the TRIPS negotiation group included coverage of the “availability, scope and use” of intellectual property rights. This meant that all substantive aspects of intellectual property law could be discussed by this group. The Ministers further agreed the TRIPS Agreement would also cover enforcement and dispute settlement mechanisms for intellectual property issues. However, consideration would be given to “concerns raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including developmental and technological objectives.”⁷⁶

The Ministers emphasized the “importance of reducing tensions in [the area of intellectual property] by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures.”⁷⁷ One commentator rightly views this statement as an implicit reference to the unilateral coercion mechanisms employed by the United States.⁷⁸ Lastly, the Ministers decided that “negotiations should be conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organizations.”⁷⁹

Following the mid-term meeting, the TRIPS negotiation group discussed “national treatment, most-favored nation, dispute settlement, non-discrimination and reciprocity.”⁸⁰ Australia proposed, for the first time, the “Berne-plus” and “Paris-plus” approach—namely, that the standards contained in the principle intellectual property conventions⁸¹ be incorporated by reference in a GATT agreement.⁸² India proposed that GATT rules should only apply when a party could prove a trade distortion.⁸³ India also “requested more

⁷⁵ Multilateral Trade Negotiations: The Uruguay Round, Apr. 21, 1989, MTN.TNC/11, at 21, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92070013.pdf.

⁷⁶ *Id.*

⁷⁷ *Id.* at 22.

⁷⁸ *Id.*

⁷⁹ *Id.* at 22.

⁸⁰ Gervais, *supra* note 7, at 16.

⁸¹ Specifically, the Paris Convention, the Berne Convention, the International Convention for the Protection of Performers, the Rome Convention for Producers of Phonograms and Broadcasting Organisations, and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms. *See id.*

⁸² *See generally* Multilateral Trade Negotiations: The Uruguay Round – Communication from Australia, Jul. 10, 1989, MTN.GNG/NG11/W/35, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92070118.pdf.

⁸³ *See* Multilateral Trade Negotiations: The Uruguay Round – Standards and Principles Concerning the Availability Scope and Use of

favorable treatment for developing countries,” since national treatment and most-favored nation treatment principles only applied to trade in material goods.⁸⁴ Another major item on the negotiating table was the compulsory licensing of patents. Whereas Brazil and South Korea were in favor, Austria and Hong Kong argued for restrictions in the licensing procedures.⁸⁵

The next stage of the negotiation involved a number of developed countries presenting what they envisioned the TRIPS Agreement would encompass. “[Draft texts emanated] from the European Community, the United States, Japan, Switzerland, and Australia.”⁸⁶ The proposal submitted by the European Community was closely followed by the United States, the common structure of which served as the basis for the final agreement, subject to a few changes.⁸⁷ The proposals detailed the acquisition and enforcement of intellectual property rights and the application of basic principles such as national treatment and most-favored nation.⁸⁸ Additionally it included “provisions regarding the enforcement of those rights before national courts and custom authorities.”⁸⁹ The proposals also brought future TRIPS disputes under the GATT/WTO dispute-settlement mechanism.⁹⁰

In reaction to the drafts proposed by the developed countries, more than a dozen developing countries proposed their own draft agreement.⁹¹ This draft focused on the need to “maintain flexibility to implement economic and social development objectives.”⁹² It contained two separate agreements: one dealt with “rules on counterfeit goods and border measures” and the other dealt with broader policy objectives of intellectual property rights.⁹³

Trade-Related Intellectual Property Rights, Jul. 10, 1989, MTN.GNG/NG11/W/37, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92070115.pdf.

⁸⁴ Gervais, *supra* note 7, at 16.

⁸⁵ *Id.* These States wanted restrictions such as procedures for judicial review, a limitation to the domestic market, non-exclusivity and “appropriate compensation for the right holder whose industrial property was subject to the compulsory licence.” *Id.*

⁸⁶ Gervais, *supra* note 71, at 508.

⁸⁷ Gervais, *supra* note 7, at 17.

⁸⁸ *See* Multilateral Trade Negotiations: The Uruguay Round – Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, Mar. 29, 1998, MTN.GNG/NG11/W/68, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92100042.pdf.

⁸⁹ Gervais, *supra* note 71, at 508.

⁹⁰ *Id.*

⁹¹ *Id.* The countries include, namely, Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, Uruguay, Pakistan and Zimbabwe. *Id.*

⁹² *Id.*

⁹³ Abdulqawi, *supra* note 13, at 9–10.

There remained a wide gap between developed and developing countries, with important divisions also existing among developed countries. To put the negotiations on a single track, the Chairman crafted a document that identified the main proposals by the author's country and set out the substantive differences between the proposals.⁹⁴ Following these discussions, the Chairman drafted his report for the Group of Negotiation on Goods.⁹⁵ This report adopted the proposals drafted by the United States and European Community and ultimately created a composite text. Proposals put forth by the developed countries became the "A" text of the draft, while the proposal put forth by the developing countries became the "B" text of the draft.⁹⁶ The Chairman expected parties to negotiate within the scope of this collated text.

At this juncture, the Chairman convened regular, but informal, sessions with the main stakeholders; these informal sessions were in addition to the formal monthly sessions already in place. Among these informal groups, the most notable was the group of "10+10" which consisted of both developed and developing countries. These informal groups were key in ensuring that negotiations progressed despite political agendas and stalemating. It was within these informal groups, especially the first three listed below, where the real negotiations took place.⁹⁷

A list of these informal groups are as follows:

1. The US and the European Community.
2. The US, the European Community and Japan.
3. The US, the European Community, Japan and Canada (Quad).
4. Quad "plus" (membership depended on issue, but Switzerland and Australia were regulars in this group).
5. Friends of Intellectual Property Group (larger group included the Quad).
6. "10+10" (and variants thereof such as "5+5" and "3+3"). The United States and the European Community were always part of such group if the issue was important. Other active members included Japan, the Nordic States, Canada, Argentina,

⁹⁴ Uruguay Round Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Jun. 12, 1990, GATT/AIR/3022, *available at* http://www.wto.org/gatt_docs/English/HTM/3022.RFT.HTM. *See also* Gervais, *supra* note 7, at 18.

⁹⁵ Multilateral Trade Negotiations: The Uruguay Round - Chairman's report to the Group of Negotiation on Goods, Jul. 23, 1990, MNT.GNG.NG11/W/76, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92110034.pdf.

⁹⁶ Gervais, *supra* note 71, at 508.

⁹⁷ Drahos, *supra* note 3, at 771-72.

Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand).

7. Developing Countries. For example, the Andean Group—Bolivia, Colombia, Peru and Venezuela; Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay combined to submit a draft text in 1990.

8. Group 11: the entire TRIPS negotiating group. About forty (40) countries were active in this group.⁹⁸

In most cases, TRIPS negotiators incorporated existing international norms by reference. These norms were modified by consensus when necessary to account for modern situations.⁹⁹ By October 1990, the updated draft “contained standards in all fields of intellectual property and a provision that stated that [these standards] constituted the ‘minimum requirements.’”¹⁰⁰

During the Brussels meeting of the Uruguay Round, negotiators made progress on TRIPS under Minister Anita Grandin, the Chairperson of Swedish Trade. The major issues included “the protection of pharmaceutical products by patents; dispute settlement; the nature and duration of transitional arrangements for developing nations; [and] the protection of geographical indications.”¹⁰¹ Although all parties disagreed on some issues,¹⁰² powerful developed countries made few concessions.¹⁰³ For example, since the United States could not accept the Rome Convention because it protects neighboring rights, which the United States does not recognize, the TRIPS Agreement was worded to create an exception to the Rome Convention.¹⁰⁴ Apparently, when in Rome, don’t do as the Romans do.

Developing countries also opposed including trade secrets in TRIPS and reiterated the need to account for developing countries’ developmental and technological objectives.¹⁰⁵ They also argued in favor of compulsory patent licensing and exceptions to patentability.¹⁰⁶ Despite these concerns, developing countries were

⁹⁸ *Id.*

⁹⁹ Gervais, *supra* note 71, at 509.

¹⁰⁰ Gervais, *supra* note 7, at 22.

¹⁰¹ *Id.* at 23.

¹⁰² Including moral rights, the protection of biotechnological inventions, plants varieties and geographical indications. However, as noted by Gervais, these issues “were solved either by introducing exceptions (as in Article 9 on moral rights or Article 27 on biotechnology) or by vague undertakings to negotiate further, as in Article 24 (concerning geographical indications).” Gervais, *supra* note 71, at 509 n.23.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Multilateral Trade Negotiations: The Uruguay Round – Meeting of Negotiating Group of 10-21, Oct. 8, 1990, MTN.GNG.NG11/25, at 2, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92110158.pdf.

¹⁰⁶ Multilateral Trade Negotiations: The Uruguay Round – Meeting of the Negotiating Group of 1 November 1990, Nov. 14, 1990,

generally forced to accept and implement a completely new set of intellectual property norms into their national laws. TRIPS' Articles Seven and Eight allegedly address the concerns of the developing countries; furthermore, these concerns could be addressed in the transitional period provided to implement TRIPS. The developing countries accepted TRIPS after significant concessions in other topics of negotiation, "such as tariffs on tropical fruit or textiles."¹⁰⁷ They accepted TRIPS as part of the total package even though it required such concessions.

Another key issue was the protection of existing intellectual property. Although the Chairman proposed that intellectual property existing at the time of entry into force of the agreement should be protected, the United States' pharmaceutical industry was concerned with protecting pending patents.¹⁰⁸ The parties could not reach an agreement on this point. Furthermore, certain "North-North" issues also made their way into the spotlight. For example, Japan disagreed with an "exclusive long-term rental right on sound recordings," as Japanese law prohibited rentals for a maximum of one year.¹⁰⁹

Following these discussions, the Chairman and Secretariat prepared a new version of a draft TRIPS Agreement, titled "Draft Final Act embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations."¹¹⁰ This draft eliminated the alternatives and summarized the results of the negotiations. In effect, the final agreement mirrored the "A" text of the previous draft—embodying the norms that were accepted by developed countries.

In sum, the drafters chose to:

- grant national treatment, which is unusual in the field of intellectual property, and most-favored nation treatment subject to a number of limitations and exceptions;
- exclude moral rights (art. 6) of the Berne Convention;
- provide a rental right, but allow Japan and others to maintain a system combining a short exclusive right followed by a remuneration right;
- protect "new or original" industrial designs;
- provide special protection under geographical indications) for wines and spirits, thus allowing for a separation of these appellations;
- provide patent protection of 20 years from filing, in line with practice in a majority of countries, with the

MTN.GNG/NG11/27, at 1, *available at*
http://www.wto.org/gatt_docs/English/SULPDF/92110262.pdf.

¹⁰⁷ Gervais, *supra* note 71, at 509.

¹⁰⁸ Gervais, *supra* note 7, at 25.

¹⁰⁹ *Id.*

¹¹⁰ *See generally* Multilateral Trade Negotiations: The Uruguay Round – Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 20, 1991, MTN.TNC/W/FA, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92130093.pdf.

notable exception of the United States (17 years from grant);

- impose patentability of inventions in all fields, with a possible exclusion for plants and animals; and,
- impose a general transitional period of one year from entry into force, with an additional four years for developing countries and another five for least-developed participants.¹¹¹

The text received positive reactions for the most part. However, the United States' pharmaceutical industry expressed concern about the transitional period afforded to developing countries. In their view, it would be difficult to obtain bilateral agreements since such transitional periods (or delays, according to them) have now been 'officially' condoned in this multilateral instrument.¹¹² India remained concerned about restrictions on compulsory licensing of patents despite the transitional period, "in particular where a patent was not 'worked' in another country."¹¹³

The Uruguay Round formally concluded in Marrakesh, Morocco in April 1994.¹¹⁴ And from this, the TRIPS Agreement materialized.

¹¹¹ Gervais, *supra* note 7, at 26.

¹¹² *Id.* at 26–27.

¹¹³ *Id.* at 27.

¹¹⁴ A review of TRIPS would be incomplete without mention of the Doha Development Round, which began in Qatar in November 2001 and is still ongoing

There are three main concerns with respect to TRIPS this time around:

First, paragraph 17 stressed TRIPS should be implemented and interpreted "in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration." Doha WTO Ministerial 2001: Ministerial Declaration, Nov. 20, 2001, WT/MIN(01)/DEC/1, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. *See also* Doha WTO Ministerial 2001: Declaration on the TRIPS Agreement and Public Health, Nov. 20, 2001, WT/MIN(01)/DEC/2, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

Second, the Declaration seeks to address "North-North" issues concerning geographical indications on wines and spirits. Lastly, TRIPS council will "examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments..." Doha WTO Ministerial 2001: Ministerial Declaration, Nov. 14, 2001, WT/MIN(01)/DEC/1, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

The Doha Round is intended to address the concerns of developing countries, but with the collapse of talks in 2008, "progress" may be nothing more than a mirage in the deserts of Doha.

THE MVP: TRIPS AND PATENTABLE SUBJECT MATTER

Aside from the concerns discussed above, the TRIPS provisions relating to patentable subject matter reveals considerable ambiguity. For example, Article 27(1) of TRIPS states that:

[P]atents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application... patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.¹¹⁵

One commentator argues that TRIPS creates a subject matter eligibility threshold: there must first be an invention, then it must be new, involve an inventive step, and be capable of industrial application.¹¹⁶ However, I do not read TRIPS as creating this threshold. I read Article 27(1) as striving to grant patents over ‘anything’ insofar as it is new, inventive and industrially applicable. To be an invention under TRIPS it must be new, inventive and industrially applicable; there is no subject matter eligibility threshold. TRIPS establishes minimum thresholds. It cannot, by design, establish a subject matter eligibility threshold.

If we accepted that TRIPS did indeed establish a subject matter eligibility threshold, it would mean that inventions could only be protected in a “field of technology.” The dictionary definition of “technology” is “the application of scientific knowledge for practical purposes” or “the branch of knowledge concerned with applied sciences.”¹¹⁷ Therefore on this understanding, TRIPS appears to confine subject matter eligibility to the ‘hard’ sciences. This would seemingly preclude inventions in the useful arts and perhaps even fields like computer science, agriculture, applied mathematics and engineering.

¹¹⁵ Uruguay Round Agreement: TRIPS – Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights, WTO, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Aug. 26, 2011).

¹¹⁶ Luigi Palombi, *Patentable Subject Matter, TRIPS and the European Biotechnology Directive, Australia and Patenting Human Genes*, 9 UNSW L.J. Forum Genetics & Law, 26, 26 (2003). See also Daniel J. Gervais, *The TRIPS Agreement: Interpretation and Implementation*, 21 European Intellectual Property Review, 156, (1999).

¹¹⁷ See *Oxford Dictionaries* (2011), <http://www.askoxford.com> (last visited Aug. 26, 2011). The Cambridge Advanced Learner’s Dictionary also defines “technology” as the “the practical, especially industrial, use of scientific discoveries.” See *Cambridge Dictionaries Online* (2011), <http://dictionary.cambridge.org/> (last visited Aug. 26, 2011).

Articles 27(2)¹¹⁸ and 27(3)¹¹⁹ list additional permissive exclusions from patentability. Both of these sub-sections state that “Members *may* exclude [certain inventions] from patentability...”¹²⁰ There is nothing mandatory about the exclusions.

TRIPS intended to set out the minimum requirements for intellectual property, albeit in the economic and political guise of promoting an even playing field in international trade. It is arbitrary to create a subject matter eligibility threshold that denies protection to an invention in one country, while permitting it another. Where domestic legislation codifies few exceptions to patentability, it is not the task of the courts to second-guess that legislative intent. If the subject matter in question can be made to fit within definition of invention, even if slightly uncomfortably, then the courts should aim to breathe life into the bare, and sometimes dated, words of the patent statute. Inventions should be rejected on the traditional grounds of novelty, inventiveness and utility. And even where domestic legislation provides for exceptions to patentable subject matter, these exceptions must be construed narrowly if patent law is to further its own aims of protecting innovation, promoting public disclosure and competitiveness in the global market.

¹¹⁸ Article 27(2) states that “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.” Uruguay Round Agreement: TRIPS – Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights, WTO, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Aug. 26, 2011). I have always found it curious that patents could be allowed for inventions which, when exploited, would be contrary to domestic law. How could such inventions be industrially applicable?

¹¹⁹ Article 27(3) states that “Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.” Uruguay Round Agreement: TRIPS – Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights, WTO, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Aug. 26, 2011).

¹²⁰ *Id.* (emphasis added).

**WARMING DOWN WITH DEEP STRETCHES: STANDARD SETTING
POST-TRIPS**

The permissive exclusions of plant and animal varieties, or the biological processes for their production, from patentable subject matter in TRIPS arose at the behest of the European Community negotiators—as did the permissive exceptions to patentability for morality or public policy concerns.¹²¹ Unsurprisingly, the United States is not satisfied with this state of affairs given its liberal approach to patentable subject matter and the limited role that morality plays, if any, on determinations of patentability. Enter Section 301 and Special 301 which resume their significance in bilateral negotiations with countries whose intellectual property standards may be TRIPS-compliant but still lower than those of the United States, which are so-called TRIPS-Plus standards.¹²² In many ways, TRIPS-Plus agreements usurp the role that the world's trading community played in setting agreeable minimum intellectual property standards. It is nothing more than economic and political coercion in the guise of trade.

For example, the United States–Jordan bilateral trade agreement indicated that “Jordan shall take all steps necessary to clarify that the exclusion from patent protection of ‘mathematical methods’ in Article 4(B) of Jordan’s Patent Law does not include such ‘methods’ as business methods or computer-related inventions.”¹²³ Here, the United States asked Jordan to adopt a definition of “methods” that constitutes more than the minimum standard set out in TRIPS. This effectively forced Jordan to recognize business methods and computer software as patentable subject matter, despite the fact that, until recently,¹²⁴ even law in the United States questioned the patentability of business methods, as seen in *Bilski*.¹²⁵

Another example is the United States–Bahrain Free Trade Agreement, which provides that “each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances,

¹²¹ SELL, *supra* note 35, at 111.

¹²² Dutfield, *supra* note 17, at 203.

¹²³ Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area, at 1, paragraph 5, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset_upload_file120_8462.pdf.

¹²⁴ *Bilski v. Kappos*, 561 U. S. ____ (2010) [hereinafter *Bilski*]. See also, Emir A. Crowne, and Francesco [Frank] Santaguida, *Scotus Denies Bilski Patent Application, Leaves Door Open for Business Method Patents* (July 26, 2010), available at <http://ssrn.com/abstract=1836044>.

¹²⁵ *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008). See also Emir A. Crowne-Mohammed *Can You Patent That? A Review of Subject Matter Eligibility in Canada and the United States*, 23 Temple Int'l and Comparative L.J., 311 (2009).

and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).¹²⁶ Article 14 of TRIPS, on the other hand, provides that “in respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation.”¹²⁷ It further states that “producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.”¹²⁸ Whereas TRIPS limits the rights of performers to performances fixed on phonograms, the United States–Bahrain Free Trade Agreement provides performers with a much broader right. Under this bilateral agreement, the performer has the right to “authorize and prohibit all reproductions... in any manner or form, permanent or temporary.”¹²⁹

One author suggested that these agreements are perfectly lawful under the WTO. He said that a WTO panel would likely conclude that the demand of TRIPS-Plus norm in trade agreement would be a violation of TRIPS.¹³⁰ He observed that traditionally WTO or GATT laws allowed for flexibility in negotiations, and therefore there is also room for ‘Plus’ agreements to be negotiated within the TRIPS framework.¹³¹

Even in the absence of economic coercion, developing countries are often put on the TRIPS-Plus path with the help of WIPO. Two resolutions passed by the General Assembly of WIPO in 1994 and 1995 now require the International Bureau of WIPO to provide assistance to WIPO Members on TRIPS-related issues.¹³² Additionally, a Cooperation Agreement between the WTO and WIPO in 1995 allowed the latter to provide its intellectual property expertise to developing country WTO members, irrespective of whether those countries were members of WIPO.¹³³

Article 4 of the WTO-WIPO Cooperation Agreement states as follows:

¹²⁶ United States and Bahrain Sign Free Trade Agreement, Jan. 11, 2006, at Article 14.4, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf.

¹²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), *available at* <http://www.worldtradelaw.net/uragreements/tripsagreement.pdf>.

¹²⁸ *Id.*

¹²⁹ United States – Bahrain Free Trade Agreement, *Article 14.4: Obligations Pertaining to Copyright and Related Rights*, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf.

¹³⁰ Gervais, *supra* note 71, at 526.

¹³¹ *Id.*

¹³² Drahos, *supra* note 3, at 776.

¹³³ Gervais, *supra* note 71, at 506.

The International Bureau shall make available to developing country WTO Members which are not Member States of WIPO the same legal-technical assistance relating to the TRIPS Agreement as it makes available to Member States of WIPO which are developing countries. The WTO Secretariat shall make available to Member States of WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPS Agreement as it makes available to developing country WTO Members.¹³⁴

One commentator noted that the demand for these services has been high. "From 1996 to 2000, 214 draft laws on intellectual property were prepared by the International Bureau for 119 developing countries...During that same period, [the International Bureau] also commented on or drafted amending provisions for 235 drafts laws received from 134 developing countries."¹³⁵

In addition to drafting laws for developing countries, the International Bureau provides workshops aimed at helping developing country draft their own legislations and provide other meetings, seminars, and training courses.¹³⁶ It is interesting to note that WIPO officers are careful about providing advice and drafting laws on TRIPS-related issues.¹³⁷ WIPO does not provide advice or laws that are aimed at helping developing countries develop their economies, but rather focus on keeping it out of trouble.¹³⁸ The best way to avoid a dispute is to put the developing country on the TRIPS-Plus path.¹³⁹ Moreover, bilateral agreements with the United States has brought some developing countries to WIPO seeking TRIPS-Plus laws so as to satisfy the demands made by the United States.¹⁴⁰ These factors all combine to provide the International Bureau with a strong incentive to provide advice and laws that are of a TRIPS-Plus nature.¹⁴¹

CONCLUSION

This Article illustrated that TRIPS itself does not set a subject matter eligibility threshold. TRIPS cannot say that an invention means a new machine, manufacture, process, etc., because TRIPS is only designed to set out the minimum standards for intellectual property rights. The lack of a subject matter eligibility

¹³⁴ TRIPS: Agreement - WTO-WIPO Cooperation Agreement, *available at* http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm.

¹³⁵ Drahos, *supra* note 3, at 776-77.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

threshold at an international level should serve as further evidence of the need to assess patents against other hallmarks of patentability, such as novelty, inventiveness and utility. To echo the words of the Supreme Court of Canada's dissent in *Harvard College v. Canada (Commissioner of Patents)*:

The check on the indiscriminate grant of patents lies in the established criteria of utility, novelty and non-obviousness. Those are the criteria judged by Parliament to be relevant to its statutory purpose, which is to encourage ingenuity by rewarding its disclosure...The definition of invention should be read as a whole and expansively with a view to giving protection to what is novel and useful and unobvious.¹⁴²

From an economic and political perspective, this trend of regulating and permitting increased worldwide intellectual property standards may be troubling. But from a subject matter eligibility perspective, it merely reinforces the notion that judicial constrictions of the term "invention" will lead to inconsistent approaches to patentable subject matter between trading partners, which will ultimately give rise to trade disputes and unequal treatment.

¹⁴² *Harvard College v. Canada*, [2002] 4 S.C.R. 45, at ¶ 40, 59. A similar sentiment was also echoed by Justice Kennedy in *Bilski*, he writes:

in order to receive patent protection, any claimed invention must be novel, §102, nonobvious, §103, and fully and particularly described, §112. These limitations serve a critical role in adjusting the tension, ever present in patent law, between stimulating innovation by protecting inventors and impeding progress by granting patents when not justified by the statutory design. *Bilski v. Kappos*, 561 U.S. ____ (2010).