

Developing Countries and International Intellectual Property Standard-Setting

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I. INTRODUCTION

Lying at the heart of this article is a simple question. To what extent can developing countries influence outcomes in the international intellectual property standard-setting process?

Some developing countries are arguably worse off than in the past. During the Cold War, least-developed countries (LDCs) had the benefit of India and Brazil's leadership of a broad coalition of developing countries, a coalition that mainly expressed itself in the form of the Group of 77 (G77). The G77 has faded in importance. It is also not clear that India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did. In part, this is because some Indians believe that India has something to gain from parts of the intellectual property regime, such as copyright and geographical indications. China remains an unknown quantity as a leader. Processes of modernization (and modernity) are fragmenting what was once a more unified bloc of countries.

Does it matter if the capacity of developing countries to influence the standard-setting process remains weak? This question raises a complex set of normative and empirical questions about the role of intellectual property rights in the development process. Since intellectual property rights are but one micro-tool of national policy, it is difficult to isolate their importance as a variable in development. If, as the World Bank has suggested, development is about expanding the ability of people "to shape their own futures", then we have a *prima facie* normative reason to be concerned about the loss by developing countries of national sovereignty over standards that impact on sectors such as agriculture, food, environment, health and education.¹

The remainder of this article is divided into the following sections. Section II describes the position of developing countries prior to conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),² and Section III outlines

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¹ World Bank, *The Quality of Growth*, Oxford University Press, New York, 2000, xxxiii.

² TRIPS was concluded as part of the Final Act of the Uruguay Round negotiations. The Uruguay Round was concluded on 15 December 1993 and the Final Act signed on 15 April 1994. TRIPS came into operation on 1 January 1995.

a theory of democratic bargaining and evaluates the TRIPS negotiations according to the claims of the theory. Section IV outlines the role of the World Intellectual Property Organization (WIPO) in the continued global expansion of intellectual property rights. Section V offers an overview of developing country initiatives in the international standard-setting process, while Section VI describes the role of civil society in the global politics of intellectual property. Section VII argues that developing countries should move more strongly in the direction of self-help and contains some suggestions along that line, and Section VIII contains the conclusion.

II. STANDARD-SETTING PRIOR TO THE TRIPS AGREEMENT

The international movement of intellectual property standards has been from developed to developing countries. It has largely been a spread from key Western States with strong intellectual property exporting lobbies to developing countries. There are some exceptions to this. Prior to the beginning of liberalization in Vietnam in 1986, its intellectual property laws were modelled on those of the former Soviet Union.

In most cases, the transplant of intellectual property laws to developing countries has been the outcome of empire building and colonization. For example, in parts of pre-independent Malaysia, it was English copyright law that applied. When in 1911 the United Kingdom enacted the Copyright Act of 1911, its operation was extended to include "his Majesty's dominions". In the case of pre-independent Malaysia, the 1911 Act was restricted to the Straits Settlement. Later, when British collecting societies began to worry about copying, representations were made to the Colonial Office and to the Board of Trade to have the Federated Malay States, North Borneo and Sarawak enact copyright law based on the 1911 Act.³ These States passed copyright laws in the 1930s based on the 1911 Act. Copyright policy was firmly in the grip of London, especially London publishers.⁴

Patent law in the Philippines also reveals the forces of empire at work. While the Philippines remained a Spanish colony, it was Spanish patent law that applied. After December 1898, when the United States took over the running of the Philippines, patent applications from there went to the U.S. Patent and Trademark Office and were assessed under U.S. law.⁵ Up until 1947, when the Philippines created an independent patent system, it largely followed U.S. patent law, adopting, for example, the first-to-invent rule. In 1997 the Philippine Congress passed the Intellectual Property Code of the Philippines in order to comply with TRIPS.

The case of the Philippines illustrates that many developing countries for most of

³ K.L. Tee Khaw Lake, *Copyright Law in Malaysia*, Butterworths Asia, Malaysia, 1994, 2-5.

⁴ On the way in which London publishers used copyright to divide world markets, see C. Clark, *Commentary*, in W.R. Cornish (ed.), *Copyright in Free and Competitive Markets*, ESC Publishing, Oxford, 1986, 127.

⁵ E.B. Astudillo, *Intellectual Property Regime of the Philippines*, in Arthur Wineburg (ed.), *Intellectual Property Protection in Asia*, 2nd edition, Lexis Law Publishing, Charlottesville, Virginia, 1999.

their history have never exercised a meaningful sovereignty over the setting of intellectual property standards. The direction of Korean patent law was affected by military conflict. In 1910 the Japanese replaced Korean patent law with their patent law. In 1946 Korea acquired another patent law as a consequence of U.S. military administration. In the 1980s, South Korea was amongst the first to have its intellectual property laws targeted by the United States under U.S. trade laws. India had a patent law before many European countries, having acquired one in 1856 while under British colonial rule.

Colonialism had a profound impact on the expansion of copyright. Four major colonial powers ratified the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1887, the year in which it came into force—France, Germany, Spain and the United Kingdom. Under Article 19 of the Berne Act for the Berne Convention, these States had the right to accede to the Convention “at any time for their Colonies or foreign possessions”. Each of these colonial powers took advantage of Article 19 to include their territories, colonies and protectorates in their accession to the Convention.⁶ Colonies continued to be drawn into the Berne Convention, especially after another two colonial powers, the Netherlands and Portugal, joined it in 1914.

The Berne Convention was run to suit the interests of copyright exporters. Each successive revision of the Berne Convention brought with it a higher set of copyright standards. By the time many countries shed their colonial status, they were confronted by a Berne system that was run by an Old World club of former colonial powers to suit their economic interests. Former colonial powers continued to watch over their former colonies. When eleven Sub-Saharan States joined the Berne Convention, they were:

“... so totally dependent economically and culturally upon France (and Belgium) and so inexperienced in copyright matters that their adherence was, in effect, politically dictated by the ‘mother country’ during the aftermath of reaching independence.”⁷

After World War II, many developing countries became independent States. Some of them began to review the operation of the intellectual property systems that had been left to them by their colonizers. So, for example, after India’s independence, two expert committees conducted a review of the Indian patent system. They concluded that the Indian system had failed “to stimulate inventions among Indians and to encourage the development and exploitation of new inventions”.⁸ Interestingly, India did not choose to abandon patent law as a tool of regulatory policy but instead to redesign it to suit her own national circumstances—a country with a low research-and-development (R&D) base, a large population of poor people and some of the highest drug prices in the world.

⁶ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, Centre for Commercial Law Studies, London, 1987, 791.

⁷ A.H. Lazar, *Developing Countries and Authors’ Rights in International Copyright*, in *Copyright Law Symposium*, Vol. 19, Columbia University Press, New York and London, 1971, 1, at 14.

⁸ S. Vedaraman, *The New Indian Patents Law*, 3 *International Review of Industrial Property and Copyright Law* 39, 1972, at 43.

Passed in 1970, India's new patent law followed the German system of allowing the patenting of methods or processes that led to drugs but not allowing the patenting of the drugs themselves. Patent protection for pharmaceuticals was only granted for seven years, as opposed to fourteen years for other inventions. This law became the foundation stone for a highly successful Indian generics industry.

India was not the only country that began to reform its patent law. During the 1970s, Brazil, Argentina, Mexico and the Andean Pact countries all passed laws that saw patent rights in the pharmaceutical area weakened. Developing country generics manufacturers also became a threat to the Western pharmaceutical cartels that had dominated the international pharmaceutical industry. Mexico's entry into the manufacture of steroids in the 1960s, for example, contributed to the end of the European cartel that had dominated production up until then.⁹

Developing countries, in adjusting their intellectual property laws to suit their national interests, were only doing what they had observed developed countries doing. So, for example, fearing the might of the German chemical industry, the United Kingdom changed its patent law in 1919 to prevent the patentability of chemical compounds. A study undertaken by WIPO in 1988 for the negotiating group that was dealing with TRIPS in the Uruguay Round revealed that, of the ninety-eight Members of the Paris Convention for the Protection of Industrial Property (Paris Convention), 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.¹⁰ These numbers include developed as well as developing countries. They also show that the Paris Convention did not stand in the way of States adopting quite different standards of industrial property protection. Additionally, they reveal that TRIPS principles do not reflect a harmonization that had already occurred at the national level.

During the 1960s and 1970s, developing countries began to ask questions about the international standards of intellectual property that had emerged in previous decades, particularly in relation to the two main conventions—the Paris Convention and the Berne Convention. The theme of these questions was always the same. Were the international standards tilted too far towards the appropriation of knowledge rather than its diffusion? Developing countries sought adjustments to both the international copyright regime and the international patent regime. In both cases they were unsuccessful. Their attempts to adjust copyright rules to meet their needs in mass

⁹ G. Gereffi, *The Pharmaceutical Industry and Dependency in the Third World*, Princeton University Press, Princeton, New Jersey, 1983.

¹⁰ WIPO, *Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property*, WO/INF/29, September 1988, issued as GATT Document MTN.GNG/NG11/W/24/R.EV.1.

education precipitated a crisis in international copyright in the 1960s.¹¹ Similarly, their attempts to revise the Paris Convention broke down.

The fiercest debates took place over the revision of compulsory licensing of patented technology.¹² For the United States, developing country proposals for exclusive compulsory licensing amounted to little more than expropriation of U.S. intellectual property rights. The revision of the Paris Convention that had begun in 1980 was never completed. In the eyes of such key industry players as Pfizer, WIPO had failed to secure the higher patent standards that the large pharmaceuticals players wanted. Even more dangerously, countries such as India, Brazil, Argentina and Mexico had shown that developing countries could lower standards of patent protection and still have a thriving generics industry. In the words of Lou Clemente, Pfizer's General Counsel, "Our experience with WIPO was the last straw in our attempt to operate by persuasion."¹³

The disappointments of the 1970s led the United States to adopt a strategy of forum shifting in the 1980s.¹⁴ In such fora as WIPO, the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Educational, Scientific and Cultural Organization, the United States faced the problem that developing country blocs could defeat its proposals on intellectual property. It began to argue that the issue of intellectual property protection should become the subject of a multilateral trade negotiation within the General Agreement on Tariffs and Trade (GATT). The GATT was a forum in which the United States was the single most influential player. Largely due to the efforts of the United States and U.S. big business, the Ministerial Declaration which in 1986 launched the Uruguay Trade Round listed the trade-related aspects of intellectual property rights as a subject for negotiation.¹⁵

III. THE TRIPS NEGOTIATIONS AND DEMOCRATIC BARGAINING¹⁶

TRIPS, it might be argued, was an agreement that was produced as a result of bargaining amongst sovereign and equal States all having the capacity to conclude

¹¹ C.F. Johnson, *The Origins of the Stockholm Protocol*, 18 Bulletin of the Copyright Society of the U.S.A., 1970-1971, 91.

¹² D.M. Mills, *Patents and the Exploitation of Technology Transferred to Developing Countries (in Particular, those of Africa)*, 24 Industrial Property, 1985, 120.

¹³ See Pfizer, *Protecting Intellectual Property in a Global Marketplace*, Harvard Business School, 1992, 8.

¹⁴ For an account of U.S. forum shifting, see J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, Chapter 24.

¹⁵ See P. Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 Prometheus 6, 1995; S.K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 International Organization, 1995, 315.

¹⁶ There is a growing body of literature on the negotiations. See, for example, J.C. Ross and J.A. Wasserman, *Trade-Related Aspects of Intellectual Property Rights*, in Terence P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993, 2241; D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, Sweet & Maxwell, London, 1998; Jacques J. Gorlin, *An Analysis of the Pharmaceutical-Related Provisions of the WTO TRIPS (Intellectual Property Agreement)*, Intellectual Property Institute, 1999; Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, Oxford University Press, New Delhi, 2001.

treaties and which agreed to TRIPS as part of a larger package of trade-offs that contained gains for all. This line of defence becomes stronger if one can show that some form of democratic bargaining on TRIPS did take place amongst States. Conversely, if the TRIPS negotiations do not meet the minimal conditions of democratic bargaining, this raises questions about the Agreement's efficiency, as well as its legitimacy. The theory of democratic bargaining argues that efficiently defined property rights are more likely to emerge if at least three conditions are met:¹⁷

- Firstly, all relevant interests have to be represented in the negotiating process (the condition of representation).
- Secondly, all those involved in the negotiation must have full information about the consequences of various possible outcomes (the condition of full information).
- Thirdly, one party must not coerce the others (the condition of non-domination).

The first condition of democratic bargaining requires that developing country interests were represented at the TRIPS negotiations. On the face of it, this condition seems to have been met. Not all developing States participated in the TRIPS negotiations, but key developing country leaders on intellectual property, most notably India and Brazil, did send negotiators. Lying behind representation in democratic bargaining is the idea that the representatives have some continuity of voice in the process. In other words, exclusion must not be practised. Here, the track record of the GATT was not very good from a developing country perspective. This was one of the reasons why the United States had chosen it as a forum for intellectual property.

In the Tokyo Round, the European Economic Community, the United States, Japan, Switzerland, New Zealand, Canada, the Nordic Countries and Austria on 13 July 1978 released a "Framework of Understanding" setting out what they believed to be the principal elements of a deal. Developing countries reacted angrily, pointing out that they had been left out of a process that was laying the foundations for a final agreement. The then-Director-General of the GATT, Olivier Long, recognized the problem of exclusion in his report but defended this behaviour as a practical necessity.¹⁸ The deeper problem with this process was that it involved a strategy in which a non-representational inner circle of consensus was expanded to create larger circles until the goals of those in the inner circle had been met.

¹⁷ The theory of democratic bargaining is presented in P. Drahos and J. Braithwaite, *Information Feudalism*, Earthscan, U.K., forthcoming, 2002.

¹⁸ GATT, *The Tokyo Round of Multilateral Trade Negotiations: Report by the Secretary-General of GATT*, Geneva, 1979.

The TRIPS negotiations saw the use of circles of consensus reach new heights.¹⁹ GATT negotiations had developed a traditional pattern, known as the “Green Room” process:

“In the ‘Green Room’ process, negotiators from all engaged countries face each other across the table (traditionally in the Green Room on the main floor of the WTO Building) and negotiate. Drafts are exchanged and progress is noted as differences are narrowed and brackets are removed in successive drafts.”²⁰

This Green Room process had, in the case of TRIPS, been profoundly shaped by the consensus-building exercise that the private sector had undertaken outside of the Green Room. The European Commission was brought around to the U.S. view on the importance of securing a code on intellectual property. The Quad States (the United States, the European Community, Japan and Canada) were all enrolled in support of the U.S. business agenda, as were their business communities. Then there were the meetings of the Friends of Intellectual Property Group in such places as Washington, D.C., where the United States circulated draft texts of a possible agreement.

After the negotiations on the details of TRIPS began in 1990, and especially after the breakdown of the Uruguay Round talks in Brussels over agriculture in 1991, further groups were created within the TRIPS negotiations to move the process towards a final deal, most notably the “10+10” Group, which consisted of a mix of developed and developing countries. As the TRIPS negotiations descended into higher levels of informality, the “10+10” was contracted or expanded to “3+3” or “5+5” or a Group of 25, depending on the issue. It was in these informal groups that much of the real negotiating was done and where the consensus and agreement that mattered was obtained. A list of these groups in roughly their order of importance would be:

1. The United States and the European Community.
2. The United States, the European Community and Japan.
3. The United States, 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 (a larger group that included the Quad).
6. “10+10” (and the variants thereof such as “5+5” and “3+3”). The United States and the European Community were always part of any such group if the issue was important. Other active members were Japan, the Nordic States, Canada, Argentina, Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand.
7. Developing country groups. 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.

¹⁹ This part of the article draws on the discussion of the negotiations contained in Drahos and Braithwaite, *supra*, footnote 17.

²⁰ Gorlin, *supra*, footnote 16, at 4.

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

It was the first three circles of consensus that really mattered in the TRIPS negotiations. Through the use of these circles, the TRIPS process became one of hierarchical rather than democratic management. Those in the inner circle of groups knew what TRIPS had to contain. They worked on those in the outer circle until the agreement of all groups to a text had been obtained. TRIPS was much more the product of the first three groups than it was of the last five. LDCs were not a part of any of the groups that mattered.

The use of circles of consensus also makes it difficult to claim that the second condition of democratic bargaining (full information) was fulfilled. It can be seen from the list of groups that the United States and the European Community could move amongst all the key groups. This allowed them to soak up more information than anyone else about the overall negotiations. Whenever they needed higher levels of secrecy, they could regroup into a smaller negotiating globule. The claim that the TRIPS negotiations were a model of transparency is difficult to defend. In truth, it was the transparency of a one-way mirror. This arrangement of groups also allowed the United States and the European Community (represented by the European Commission) the fluidity to build a consensus when and where it was required. For certain issues, such as how royalties from collective licensing were to be divided, they retreated to the bilaterals. Even though they were not always able to secure an agreement between themselves, their disagreement did not derail the TRIPS process itself.

It is also worth observing that all States were in ignorance about the likely effects of TRIPS in information markets. That there would be trade gains for the United States was beyond doubt, but the real-world costs of extending intellectual property rights and their effects on barriers to entry in markets were not at all clear. Multinationals and better information about the strategic use of intellectual property portfolios (since this was private information) in various markets around the world than did most governments.²¹

It is the third condition of democratic bargaining, the absence of coercion, on which TRIPS lies most exposed. The United States, in its Trade and Tariff Act of 1984, had begun adapting Section 301 of its 1974 Trade Act to its objectives on intellectual property, as well as linking its negotiating objectives on the protection of high technology to intellectual property trade barriers.²² (Section 301 is a national trade enforcement tool that allows the United States to withdraw the benefits of trade agreements or impose duties on goods from foreign countries.) In 1988 there were

²¹ For example, the first attempt to measure the welfare losses of applying the TRIPS patent period of twenty years to patents already in existence for a country was an Australian study, a study that was made after TRIPS came into operation; see N. Gruen, G. Prior and I. Bruce, *Extending Patent Life: Is it in Australia's Economic Interests?* Commonwealth of Australia, Industry Commission, Staff Information Paper, June 1996.

²² See Section 305 of the Trade and Tariff Act of 1984.

further significant changes to the U.S. Trade Act of 1974 in the form of what came to be known as the “Special 301” provisions. These require the United States Trade Representative (USTR) to identify foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. intellectual property rights holders.²³

Also significant were the changes to the system of Generalized System of Preferences (GSP) that the 1984 Act brought. The U.S. President, in deciding whether a developing country’s products were to gain preferential treatment under the GSP system, had to give “great weight” to its protection of foreign intellectual property rights.²⁴ For many developing countries, gaining access to the closed and subsidized agricultural markets of developed countries was the main game. The whole point of the GSP system was to improve this access.²⁵ At a meeting of the GATT Committee on Trade and Development in November 1985, some developing country representatives had suggested that the United States was using its GSP system in a way that was “quite alien to the spirit and purpose of the generalized system of trade preferences in favour of developing countries”.²⁶

The European Community also enacted something similar to Section 301 in 1984 (the new commercial policy instrument—Council Regulation 264/84), but the European Commission found it difficult to obtain consensus on its use. The Commission moved against Indonesia and Thailand for record piracy and suspended South Korea’s GSP privileges for failing to provide satisfactory intellectual property protection. Japan did not target developing countries bilaterally on the intellectual property issue. Japan itself experienced pressure in 1984 from U.S. trade officials who wanted Japan’s Ministry of International Trade and Industry to drop its proposals for a *sui generis* form of protection for computer software.²⁷

When the United States began to push for the inclusion of intellectual property in a new round of multilateral trade negotiations at the beginning of the 1980s, developing countries resisted the proposal. The countries that were the most active in their opposition to the U.S. agenda were India, Brazil, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.²⁸ After the Ministerial Declaration of 1986 which opened the GATT Uruguay Round, these countries continued to argue for a narrow interpretation of the Ministerial mandate on the negotiation of intellectual property.

²³ See 19 U.S.C. 2242.

²⁴ See Section 505 of the Trade and Tariff Act of 1984.

²⁵ For the history of the GSP system, see T. Murray, *Trade Preferences for Developing Countries*, Macmillan, London and Basingstoke, 1977.

²⁶ *Report of Committee on Trade and Development (L/5913) (1984–1985)*, Basic Instruments and Selected Documents, General Agreement on Tariffs and Trade, 32nd Supplement, 21, 26.

²⁷ See Tohru Nakajima, *Legal Protection of Computer Programs in Japan: The Conflict between Economic and Artistic Goals*, 27 *Columbia Journal of Transnational Law*, 1988–1989, 143.

²⁸ J.A. Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 *Stanford Journal of International Law* 57, 1987, at 81.

Breaking the resistance of these “hard liners” was fundamental to achieving the outcome that the United States wanted. Special 301 was swung into action in the beginning of 1989. When the USTR announced the targets of Special 301, five of the ten developing countries that were members of the hard line group in the GATT found themselves listed for bilateral attention. Brazil and India, the two leaders, were placed in the more serious category of the Priority Watch List, while Argentina, Egypt and Yugoslavia were put on the Watch List.²⁹ U.S. bilateralism was not confined to these countries. By 1989 USTR fact sheets were reporting other successes: copyright agreements with Indonesia and Taiwan, Saudi Arabia’s adoption of a patent law and Colombia’s inclusion of computer software in its copyright law. Opposition to the U.S. GATT agenda was being diluted through the bilaterals. Each bilateral the United States concluded with a developing country brought that country that much closer to TRIPS.

The negotiations on TRIPS are often said to have begun properly in the second half of 1989, when a number of countries made proposals, or the first part of 1990, when five draft texts of an agreement were submitted to the negotiating group.³⁰ A more sceptical view is that the negotiations were by then largely over. Developing countries had simply run out of alternatives and options. If they did not negotiate multilaterally they would each have to face the United States alone. *Table 1* shows that the United States used its Section 301 process to target bilaterally the developing countries that were resisting its intellectual property agenda at the GATT and playing a leadership role in the developing world on intellectual property. The poorest developing countries were left alone in this process.

In the GATT, developing countries were not part of the circles of consensus that set the agendas. Furthermore, if they resisted the United States multilaterally, they could expect to be on the receiving end of a Section 301 action. This was anything but a veiled threat by the United States. Its 1988 Trade Act made resisting the United States in a multilateral forum part of the conditions that could lead to a country being identified as a Priority Foreign Country and therefore the subject of a Special 301 investigation.³¹ There could be no clearer articulation of a threat than to enact it as law. At least if developing countries negotiated multilaterally, there was the possibility that they would be able to obtain some limits on the use of Section 301 actions. This, at any rate, was what they were being told by developed country negotiators and the GATT Secretariat.

Table 1 needs to be read against the background of statements made by senior U.S. trade officials at the time of the TRIPS negotiations. For example, the USTR, Clayton Yeutter, stated publicly that the Section 301 investigation of South Korea in 1985 was intended to send a message to GATT Members.³² Such countries as Singapore and

²⁹ F.M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 *Vanderbilt Journal of Transnational Law* 689, 1989, at 708–709.

³⁰ See, for example, Gervais, *supra*, footnote 16, at 15; Gorlin, *supra*, footnote 16, at 2.

³¹ See 19 U.S.C. 2242(b)(1)(C).

³² See the report of Yeutter’s speech in *BNA’s Patent, Trademark & Copyright Journal*, Vol. 32, 1986, 736.

TABLE 1: U.S. TRADE ACTION AGAINST KEY DEVELOPING COUNTRIES IN THE GATT, 1984–1993

Developing country members of the "hardliners" opposing intellectual property in the GATT or active in the "10 + 10" TRIPS Negotiating Group, or both ¹	Years in which a developing country was the subject of a petition, ² listed, investigated or had penalties imposed under U.S. Section 301 or the Generalized System of Preferences (GSP) programme
Argentina	1988–1993
Brazil	1985, 1987–1993 (1988 ³)
Chile	1988–1993
Colombia	1989–1993
Cuba	n.a.
Egypt	1989–1993
Hong Kong ⁴	n.a.
India	1989–1993 (1992 ³)
Indonesia	1989, 1990
Malaysia	1989, 1990, 1993
Mexico	1987 ³ , 1989
Nicaragua	n.a.
Nigeria	n.a.
Peru	1992, 1993
Singapore ⁴	n.a.
South Korea ⁴	1985, 1989, 1992, 1993
Tanzania	n.a.
Thailand	1989 ³ –1993
Uruguay	n.a.
Venezuela	1989–1993
Yugoslavia	1989–1991

Source: Compiled by the author.

Notes: ¹ The developing country members that were active in the "10 + 10" Group during the TRIPS negotiations were identified with the kind assistance of Adrian Otten of the World Trade Organization. The countries active in this group were Argentina, Brazil, Chile, Colombia, Egypt, Hong Kong, India, Indonesia, Malaysia, Mexico, Peru, Singapore, South Korea and Thailand.

² Under U.S. trade law, a person may file a petition complaining of discriminatory conduct by a State in relation to intellectual property and requesting the USTR to investigate. For example, in February 1988, the Pharmaceutical Manufacturers Association (PMA) filed a petition under Section 301 complaining of Chile's denial of product protection for pharmaceuticals. The petition was withdrawn in April 1988 by the PMA.

³ Year in which penalties were actually imposed.

⁴ Countries that were given favourable GSP packages because they had improved their intellectual property protection. The positive effects of the linkage between GSP and intellectual property on East Asian countries was noted by members of the House Energy and Commerce Subcommittee on Oversight and Investigations when they toured the region in 1986: see the report of BNA's Patent, Trademark & Copyright Journal, Vol. 32, 1986, 38–39. When Singapore was taken off the GSP programme by the United States in 1989 because it no longer met the criteria, Singaporean officials expressed disappointment, saying that in 1987 they had been given a GSP package because they had made improvements in intellectual property: see *Four Pacific Rim Nations are Graduated from GSP Status*, BNA's Patent, Trademark & Copyright Journal, Vol. 35, 1988, 282, at 283.

n.a. = not applicable.

Hong Kong began in the 1980s to reform their intellectual property laws, knowing that if they did not they ran the strong risk of losing GSP benefits in the U.S. market. The risk of losing GSP benefits was real. Yeutter, for instance, had written to a U.S. Senator stating that, if Mexico did not make a substantial changes on intellectual property, "I will not hesitate to recommend a significant reduction in Mexico's future level of GSP benefits."³³ In 1987 Mexico did lose GSP benefits to the sum of US\$ 500 million.³⁴

IV. WIPO AND THE GLOBAL EXPANSION OF INTELLECTUAL PROPERTY

The linkage between intellectual property and the trade regime, which was forged in the 1980s, has significantly contributed to the globalization of intellectual property norms. More and more countries have adopted intellectual property standards that are set down in an international agreement of some kind. In essence, there is a global ratchet for intellectual property that consists of waves of bilateral agreements on intellectual property (beginning in the 1980s) followed by occasional multilateral or regional standard-setting exercises (for example, the North American Free Trade Agreement (NAFTA), TRIPS and the WIPO Copyright Treaty).³⁵ Each bilateral or multilateral treaty never derogates from existing standards and very often sets new ones. The principle of minimum standards plays a vital role in this strategy. Each bilateral or multilateral agreement dealing with intellectual property contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favourable treatment.³⁶ This means that each subsequent bilateral or multilateral agreement can establish a higher standard.

WIPO plays an important role in expanding the empire of intellectual property. The General Assembly of WIPO passed two resolutions, one in 1994 and the other in 1995, requiring the International Bureau of WIPO to provide assistance to WIPO Members on TRIPS-related issues. In addition, there is a co-operation agreement between WIPO and the World Trade Organization in which WIPO assumes obligations to provide legal/technical assistance to developing country WTO Members on TRIPS matters whether or not those countries are members of WIPO.³⁷

Demand for the services of the International Bureau by developing countries has been high. Consider the following figures. From 1996 to 2000, 214 draft laws on intellectual property were prepared by the International Bureau for 119 developing countries (including some regional organizations). The International Bureau, during the

³³ *Id.*

³⁴ Watal, *supra*, footnote 16, at 24.

³⁵ For an analysis of the bilateral aspects of the globalization process, see P. Drahos, *BRTs and BIPs—Bilateralism in Intellectual Property*, 4 J.W.I.P. 6, November 2001, 791.

³⁶ See, for example, Article 1702 of NAFTA, Article 1.1 of TRIPS and Article 4.1 of the U.S.–Jordan Free Trade Agreement.

³⁷ Agreement between the World Intellectual Property Organization and the World Trade Organization, 1995, Article 4.

same period, also commented on or drafted amending provisions for 235 draft laws received from 134 developing countries (including some regional organizations).³⁸

The work of the International Bureau extends well beyond the drafting of laws for developing countries. Other forms of assistance include the provision of workshops for developing country drafters on the drafting of legislation and many meetings/seminars/training courses held in Geneva or in developing countries.

The provision of draft laws and legal advice to developing countries carries with it a burden of moral responsibility. LDCs in particular do not have local experts to evaluate the suitability of model international laws for local economic, social and cultural conditions. LDCs often lack drafting expertise and are reliant upon outside legal drafters who may be brought in on a consultancy basis from those Western legal systems to which the relevant LDC has historical links. The problem is especially acute in the case of intellectual property since there are very few people who possess both the specialized technical skills of legislative drafting and expertise in intellectual property law. Various Articles of TRIPS, for example, create drafting/policy options for a country. A country that has no sophisticated pharmaceutical R&D base and which is experiencing an AIDS crisis would want to take full advantage of the exceptions from patentability in Article 27.3, especially those in Article 27.3(a) allowing for the exclusion of therapeutic method patents, i.e. the exclusion of new uses of old drugs. It would also want to retain the option of parallel importation so that it could source drugs from the cheapest markets.

The interviews carried out at WIPO by the author for the purpose of another study revealed that WIPO officers were sensitive to the responsibilities they had in the provision of advice and draft laws on TRIPS issues.³⁹ However, the interviews also revealed a structural dynamic at work. The inclination on the part of the International Bureau was to provide laws and advice to a developing country that would avoid any danger of that country becoming involved in dispute resolution (“We don’t want them to get into the trouble with the WTO,” as one WIPO official put it). Obviously, the way in which to guarantee this is to provide TRIPS-plus models. On top of this, the majority of WIPO’s non-governmental organization (NGO) membership is comprised of intellectual property owners rather than users. Few owner NGOs are focused on the needs of developing countries. Some developing countries themselves come to WIPO seeking TRIPS-plus laws because of bilateral agreements with the United States that require such laws. 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.

³⁸ See *WIPO’s Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement from 1 January 1996 to 31 December 2000*, WIPO, Geneva, June 2001.

³⁹ See Study Paper 8, prepared for the U.K. Commission on Intellectual Property Rights, available at: <<http://www.iprcommission.org>>.

The WIPO standard-setting process in both copyright and patents goes through the same basic Stages:⁴⁰

1. A working group of experts issues a report (convened by a Standing Committee).
2. The report is considered by the Standing Committee. The Committee is comprised of WIPO Member States from different country regions, such as Africa, Asia-Pacific and so on. There are usually five Members from each region. The Committee cannot make binding decisions.
3. The Standing Committee formulates recommendations for consideration by the WIPO General Assembly.
4. A diplomatic conference is held.

As one travels from Stages 1 to 4, the process of standard-setting becomes more representative. Paradoxically, there is progressively less opportunity to influence the standard-setting process than at the working group Stage. By the time of the diplomatic conference, the standards have obviously been drafted and WIPO itself will, through the relevant standing committee, have carried out a massive consensus building exercise in order to ensure the success of the diplomatic conference. Obviously, there is no guarantee of success at a diplomatic conference since an effective veto coalition may emerge (as it did in the case of the proposed database treaty).

Stage 1 is just as important a site of influence as the other Stages, since it is at this stage that the framing of many of the issues takes place. Generally, the working groups in Stage 1 have no or poor representation from developing countries and especially from LDCs. From the interviews conducted at WIPO, it emerged that the problem here was that developing countries lacked experts. Much, of course, depends on the kind of filters that are applied to determine the possession of expertise. The epistemic community that has been the main influence on intellectual property standard-setting has been dominated by those with legal knowledge.⁴¹ Generally, when WIPO searches for "experts", it is looking for legal expertise. In a patent law standard-setting exercise, for example, it would not generally seek a non-legal expert in biodiversity or economic development, even though many developing countries would have such expertise and would certainly see it as relevant to such an exercise. (For example, the Organization of African Unity's (OAU) model law on access to biological resources was drafted with a high level of scientific expertise.⁴²) At the point of a diplomatic conference, WIPO does provide generous financial assistance for representatives from LDCs to attend, but generally these representatives, if they speak, speak for the record at such an event.

⁴⁰ A brief discussion of the work of the Standing Committee of Patents is to be found in WIPO SCP/1/2, 4 May 1998.

⁴¹ Braithwaite and Drahos, *supra*, footnote 14, at 74–75.

⁴² *The OAU's Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, Organization of African Unity, Scientific, Technical Research and Research Commission, Professor J.A. Ekperere, Project Coordinator, PMB 2359, Lagos, Nigeria, November 2000.

V. DEVELOPING COUNTRIES AND THE STANDARD-SETTING PROCESS

Some economists have argued that countries ought to be able to have intellectual property standards that line up with their comparative advantage.⁴³ Developing countries have, over the last forty years, persistently argued for international rules that facilitate the transfer of technology and give them some control over the conduct of multinationals. The trend, however, has been in the opposite direction. By way of illustration, consider the following key events in the history of intellectual property standard-setting:

- The attempts to modify the Berne Convention to take into account the educational and developmental needs of developing countries in the field of copyright during the 1960s and 1970s failed. The Stockholm Protocol never came into force and the Appendix to the Paris Act of the Berne Convention produced no real improvement in access to copyright materials.
- Since the copyright crisis, the scope of copyright law and patent law has increased, most notably to include software (see, for example, Articles 10.1 and 27.1 of TRIPS) and the use of the Internet (see, for example, Articles 7 and 8 of the WIPO Copyright Treaty).
- Attempts by developing countries to change the compulsory licence provisions of the Paris Convention during the 1970s failed and the negotiations concerning the Convention came to an end during the 1980s. Patent law in the main patenting jurisdictions (the United States, Japan and the EU) has steadily expanded to meet the needs of large industry players concerned with the industrial application of biological science. The use of compulsory licences as a regulatory tool has become harder rather than easier.
- The work by UNCTAD on the Code of Conduct for the Transfer of Technology, which had begun in 1976, came to a halt in the mid-1980s.
- Work on the UN Code of Conduct for Transnational Corporations, which had begun in 1975, eventually ground to a halt in 1993.
- TRIPS commenced operating in 1996. It is an Agreement that represents the successful completion of an international business agenda for the global strengthening of intellectual property law. TRIPS contains only modest concessions to the development needs of developing countries.
- Continued bilateralism by the United States and the EU in the 1990s is removing the flexibility that exists in TRIPS on matters such as compulsory

⁴³ See M. Trebilcock and R. Howse, *The Regulation of International Trade*, Routledge, London and New York, 1995, cited in O. Lippert, *One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights through the Free Trade Area of the Americas*, 9 *Fordham Intellectual Property, Media & Entertainment Law Journal*, 241, 1998, at 267.

licensing, scope of patentability and membership of international intellectual property conventions.

The picture that emerges is one in which higher and higher standards of intellectual property protection are being globalized (as well as a trend towards using encryption technology to protect information) with little or no attempt to build into those standards transfer of technology obligations. In those cases where transfer of technology obligations are to be found in international conventions, they are framed in soft language and surrounded by provisions obliging members to respect intellectual property rights.⁴⁴ Developing countries are largely left to pursue their agendas within the interstices of an intellectual property paradigm dominated by the United States and the EU.

When developing countries have been successful as a veto coalition on intellectual property, that success has triggered a strategy of forum shifting. For example, WIPO's Treaty on Intellectual Property in Respect of Integrated Circuits (1989) was successfully criticized in 1986 by a group of developing countries led by Brazil. Ultimately, provisions of this treaty were incorporated into TRIPS. The TRIPS provisions are more favourable to the intellectual property owner than the provisions that developing countries were campaigning for in the WIPO Treaty. (See, for example, Article 31(c) of TRIPS.) Significantly, the U.S. Register of Copyrights, Ralph Oman, made the following observation about the WIPO treaty process in 1985:

"In the United States of America, WIPO had always been considered an extremely important international forum. A concern was, however, increasingly felt that the intellectual property treaties administered by WIPO provided rights without remedies and had no 'teeth', and that it was therefore necessary to turn to GATT for the enforcement of intellectual property rights."⁴⁵

VI. THE EMERGING GLOBAL POLITICS OF TRIPS

During the TRIPS negotiations, civil society NGOs and African States were not significant players. The two most striking features in terms of actors involved in the post-TRIPS scene have been the engagement of international NGOs in TRIPS issues and the leadership of the Africa Group on health and biodiversity issues. The Organization of African Unity, Ethiopia, Kenya, the Third World Network and the Institute for Sustainable Development have been prime movers in developing model legislation for African States which sets out regulatory principles for the ownership and use of biological resources and related local community knowledge. The model law initiative has informed the position of the African Group on intellectual property issues within the Council for TRIPS. The Special Sessions of the Council for TRIPS on the issue of intellectual property rights and access to medicines, the first of which was held in June 2001, were inspired by a proposal from the African Group that was discussed and agreed to at a Council for TRIPS meeting in April 2001. This initiative ultimately culminated

⁴⁴ See, for example, Article 16 of the Convention on Biological Diversity.

⁴⁵ Ralph Oman, quoted in BNA's Patent, Trademark & Copyright Journal, Vol. 32, 1986, 275.

in the Declaration on the TRIPS Agreement and Public Health at the WTO Ministerial Conference in Doha, Qatar (Doha Declaration) in November 2001.

There is little doubt that the rise in influence of the Africa Group has been enabled by a partnership with NGOs from civil society. The death toll in Africa from HIV/AIDS has created one of the greatest international public health crises in history.⁴⁶ By bringing details of this crisis before mass Western publics, NGOs have forced companies and governments to respond with various initiatives, including a dialogue in the Council for TRIPS concerning the impact of TRIPS on the sovereign capacity of States to pass public health measures to meet the crisis. Outside of the debates in the Council for TRIPS, an alliance between civil society and developing countries has seen a range of responses from the R&D-based pharmaceutical industry (including the dropping of the lawsuit against South Africa in April 2001, voluntary drug donations, price drops in AIDS drugs, etc.), the involvement of other international organizations in the debate (for example, the UN Commission on Human Rights) and policy proposals from key developed country actors (the tiered pricing option being advocated by the European Commission⁴⁷).

The Doha Declaration is a concrete success to which developing countries and NGOs can point. Whether it represents a significant shift in the power of developing countries to influence the standard-setting process in intellectual property remains to be seen. The history of intellectual property standard-setting summarized in Section V of this article suggests that one should be careful about reading too much into Doha as a precedent for the future. Other areas of intellectual property standard-setting of current interest to developing countries are characterized by high levels of dialogue with no apparent concrete outcomes in sight. This is true, for example, of the debates over the protection of traditional knowledge in the Council for TRIPS and in WIPO's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore. A similar point might be made about the discussions in the Council for TRIPS concerning the relationship between TRIPS and the Convention on Biological Diversity (CBD). When developing countries put forward specific standards designed to solve a free-riding problem, as Colombia did in the case of the Patent Law Treaty on the issue of the obligation of patentees to declare the source of genetic resources,⁴⁸ the standards tend not to come to life as enforceable ones. Instead, a dialogic solution is found.

The simple truth is that, on intellectual property issues that really matter to it, the United States has been able to utilize webs of coercion, whereas on the issues that matter

⁴⁶ See *Report on the Global HIV/AIDS Epidemic: Waking up to Devastation*, June 2000, available on the UNAIDS Website: <<http://www.unaids.org>>.

⁴⁷ See, for example, Communication from the Commission to the Council and the European Parliament, *Programme For Action: Accelerated Action on HIV/AIDS, Malaria and Tuberculosis in the Context of Poverty Reduction*, COM (2001) 95.

⁴⁸ Colombia proposed that Article 6 of the Patent Law Treaty contain the following paragraph: "When necessary, and if the invention has been obtained from genetic and/or biological resources, any Contracting Party may demand that a copy of the document issued by the competent national authority attesting the legality of access to those resources be submitted to the Office." The proposal was withdrawn. The WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore is examining this issue, amongst others.

to them, developing countries have had to work through webs of dialogue.⁴⁹ These webs of dialogue have, in the case of intellectual property, become denser as a result of the participation of civil society and previously marginalized States, such as those in the Africa Group. They have also delivered some gains to developing countries. There is little doubt, for example, that large pharmaceutical companies are far more sensitive to the problem of bio-piracy and have developed such self-regulatory responses as codes of conduct to deal with the problem. In other areas, such as technology transfer, dialogue has, for the time being, delivered little. The lack of progress within the WTO on these issues saw them included in a Declaration on the Fourth WTO Ministerial at Doha, Qatar, issued by the G77 and China.⁵⁰

The presence of NGOs from civil society working on a range of intellectual property issues provides scope for an alliance between developing States and NGOs, but the possibility of such coalitions emerging and securing successful outcomes should not be overestimated. An alliance of minority factions is difficult to build. It requires unity amongst developing countries. Once intellectual property becomes mediated through the dollars-and-cents mentality of trade gains and losses, achieving that unity becomes more and more difficult. The Africa Group's position of a prohibition on the patenting of life is not supported by other developing countries. Some intellectual property issues will divide rather than unite developing countries, geographical indications being one example.

Different NGOs also see the issues differently. For example, "seed" NGOs are strong opponents of patenting, while health NGOs recognize a role for patents. Western NGOs are at their most effective when they can capture Western media interest and publicity. It has taken literally millions of deaths in Africa in order for the Western media to become interested in the links between patents, price and AIDS drugs (despite the fact that cartelism in the pharmaceutical industry has been a problem for the health care systems of developing countries for decades).⁵¹ Many Western viewers will watch a documentary about AIDS deaths in Africa but are probably less likely to watch a documentary about the history of technology transfer from developed to developing countries. The effectiveness of civil society NGOs in an alliance of minority factions is affected by their capacity to foment mass public concern through the Western media.

Even if, as in the case of the AIDS crisis, developing countries can unite and form a partnership with such Western NGOs as *Médecins Sans Frontières* (MSF) and Oxfam to run an effective global campaign on an intellectual property issue, they can nevertheless be defeated in the context of TRIPS. In the WTO, each State has a vote and there are procedures for voting but, as the WTO Agreement itself states, the "WTO shall continue the practice of decision-making by consensus".⁵² This practice of consensus makes it

⁴⁹ See Braithwaite and Drahos, *supra*, footnote 14, Chapter 23.

⁵⁰ See Paragraphs 12 and 13 of the Declaration of the G77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar, Geneva, 22 October 2001.

⁵¹ For the history, see Gereffi, *supra*, footnote 9.

⁵² See Article IX.1 of the Agreement Establishing the World Trade Organization.

easier for any one country, if it so chooses, to block a standard-setting initiative put forward by others. Moreover, a powerful player, such as the United States, can more easily bear the costs of resisting consensus than can weaker players.

VII. SELF-HELP

A. *Dealing with the Global Intellectual Property Ratchet*

Developing countries are prepared to sign bilateral agreements with the United States and the EU containing provisions on intellectual property in order to gain access to U.S. and EU markets or to avoid losing access. Despite the likely long-term losses that such provisions inflict on developing country consumers and industry, such agreements may bring personal and political triumphs to some individuals and groups in developing countries. There is not much that developing countries can do about U.S. and EU bilateralism on intellectual property. Developing countries could propose that the Council for TRIPS become a forum in which States begin to address distortions that are occurring in global information markets because of excessive levels of intellectual property protection. The Council for TRIPS might, for example, make it a practice to request Members that are seeking to raise intellectual property standards beyond those agreed to multilaterally to explain the case for doing so. The onus ought to be put on States to explain in the Council for TRIPS why they are departing from intellectual property standards that have the multilateral endorsement of the world's trading community.

A second strategy for developing countries to consider is a more determined use of the WTO Trade Policy Review Body (TPRB). Continued bilateralism by the United States and the EU has broader implications for the stability of the WTO system. The objectives of the TPRB include an "increased transparency and understanding of countries' trade policies" as well as "to enable a multilateral assessment of the effects of policies on the world trading system".⁵³ It would be entirely appropriate for developing countries to begin reporting on and debating the effects of the global intellectual property ratchet on development within the context of the TPRB. More specifically, each developing country could begin to gather data that related specifically to the impact of TRIPS or TRIPS-plus standards on its industrial and trade performance. Amongst other things, developing countries could report on patenting trends in their countries, export and import royalties in all areas of intellectual property and levels of foreign investment in industries dependent upon intellectual property protection.

In this context, it is worth noting the need for new data categories so that countries can better assess the impact of intellectual property standards on their economies. An Australian report suggested, for example, that information should be collected on the following:

⁵³ These statements of objectives are to be found on the WTO's Website: <<http://www.wto.org>>.

- the total value and level of internal exploitation (as estimated by patent holders), sealing and renewal rates of patents; and
- the ways in which these figures vary depending on the size of firms, the industry in which they operate, their ownership and location and the place of patent registration.⁵⁴

B. *A Developing Country Quad?*

The tough lines that have emerged from the metropolises of the West on the rules for the production and flows of knowledge suggest that developing countries will have to be very tightly organized in any future negotiations involving TRIPS. In particular, they should give consideration to creating a developing country counterweight to the Quad. In the Uruguay Round, developing countries had no equivalent to the Quad, meaning that they had no counterweight to its agenda-setting powers or its capacity to manage the crucial stages of a trade negotiation. The emergence of such a countervailing power would bring WTO negotiations closer to the ideal of democratic bargaining.

One possibility is that four developing country leaders (for example, India, Brazil, Nigeria and China) could form a group that would represent developing country interests in the hard or final stages of a multilateral trade negotiation. Each of these countries could chair a Working Group on some of the key negotiating issues of a given trade round. There could, for example, be a Group on Services and Investment, a Group on Intellectual Property and Biotechnology, a Group on Agriculture and Goods and another on Competition, Environment and Labour (or whatever emerging issues there were in that trade round). Other developing countries could join one of these four Groups, perhaps with some taking responsibility for forming a Working Party on some aspect of the negotiations for which that Group had overall responsibility. For example, an African country could take responsibility for forming a Working Party on intellectual property and biodiversity within the Intellectual Property and Biotechnology Group. One advantage of this structure would be that the expertise of developing countries would be pooled, thereby reducing the capacity problems that they faced in the last round. The Cairns Group, for example, became the “third force” in the negotiations on agriculture.⁵⁵ A “third force” is needed by developing countries in a number of areas, including intellectual property.

The loose group structures currently employed by developing countries do not maximize the capacities of developing countries nor do they provide the kind of leadership that is needed during the course of a multilateral trade round. Loose groups of developed countries are more susceptible to divide-and-conquer tactics of strong

⁵⁴ See Gruen, Prior and Bruce, *supra*, footnote 21, at 31.

⁵⁵ For an account, see R.A. Higgott and A.F. Cooper, *Middle Power Leadership and Coalition Building: Australia, the Cairns Group and the Uruguayan Round of Trade Negotiations*, 44 International Organization, 1990, 589.

States. It is true that the formal group structure outlined above would be more costly to organize, but the gains in terms of capacity and leadership would be much greater.

C. *Rethinking the Role of WIPO*

There is, one might observe, a fundamental tension between the work of an international organization like WIPO, that exists to promote the propertization of information, and LDCs that are not in a position to meet the increased costs that such propertization generally brings. Developing countries, which form a majority of the membership of WIPO, could begin a process of reconsidering the role that it plays in development assistance. A first step would be a genuinely independent cost-benefit analysis of WIPO's current development-related expenditures. A second step might be to investigate the way in which WIPO, a Member of the UN family, could play a greater role, especially financially, in UN development initiatives.⁵⁶ The treaty registration services that WIPO runs and the rising demand for those services mean that the Organization has, in effect, a large and permanent income stream. Thinking of creative ways in which to integrate WIPO's considerable assets into a broader development agenda should be a fundamental priority.

Since the conclusion of TRIPS, developing countries have not been effective within WIPO in questioning the orthodoxy that more and more Western-style intellectual property norms are better and better for developing countries. The Africa Group, which has been so effective in the Council for TRIPS, does not have a similarly successful counterpart in WIPO. This has much to do with the fact that developing countries send representatives from intellectual property offices who, while having a technical knowledge of patent or trademark administration, have no knowledge of intellectual property as a tool of regulatory and development policy. The result is that the heterodox debate over intellectual property and development never takes place within WIPO's conference rooms.

The impact of this international orthodoxy is different for different developing countries. Developing country leaders such as India and Brazil have sufficient analytical resources to generate an evaluation and debate about the development impacts of Western intellectual property systems.⁵⁷ LDCs lack the analytical resources to generate the national debates, with the result that Western intellectual property models are received with very little public discussion or analysis. For LDCs, the main problem becomes how to project compliance with international standards to watching U.S. trade officials and U.S. companies when these countries can only, at best, afford to staff their local intellectual property offices with a handful of people.

⁵⁶ At the Third United Nations Conference on the Least-Developed Countries held in Brussels, Belgium, 14-20 May 2001, a Programme of Action for the Least-Developed Countries for the Decade 2001-2010 was adopted.

⁵⁷ By way of example, see the sometimes stinging critiques of India's participation in the WTO system in V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, *Peoples' Commission on GATT*, Centre for Study of Global Trade System and Development, New Delhi, 1996.

The key to developing countries having a more constructive influence in WIPO on development issues lies in a more coordinated national regulatory approach to intellectual property. International standard-setting in intellectual property affects such areas as health, agriculture and food. Given the importance of WIPO in the international standard-setting process, developing countries should send regulatory experts from such areas to WIPO meetings. This is, of course, a long-term strategy. Changing the quality of intellectual property regulation in WIPO to produce better outcomes for LDCs depends on changing the nature and power of the epistemic community that currently shapes that regulation.⁵⁸

D. NGOs—From Campaigns to Committees

NGOs have been the single most important factor in raising the issue of the impact of international intellectual property standards on developing countries. In many ways, it has been through their efforts that TRIPS has become symbolic of the problems of globalization and of the WTO itself. As one USTR official observed in an interview conducted by the author, NGOs, through the medicines campaign especially, have “got Prime Ministers and Presidents talking about TRIPS”.

However, to remain effective in the long run on intellectual property issues, NGOs will have to become more engaged in the intellectual property policy process itself. Amongst other things, this means gaining membership of those policy advisory committees that inform the thinking of key national patent offices. Typically, such committees draw their members from the biggest users of the patent system—the multinational companies—as well as patent law experts. The result is a policy community dominated by a narrow, insular, technocratic culture that is disconnected from the broader welfare issues raised by patent monopolies and that fails completely to take into account development issues. It is from this community that WIPO draws the individuals who sit on the various WIPO expert committees that draft new standards for adoption at diplomatic conferences. WIPO, through its recruitment of experts, promotes and sustains an international jurisprudence of intellectual property that isolates intellectual property as a regulatory tool in relation to development issues in health, the environment, food and agriculture. It is an Anglo-American-German jurisprudential game in which developing countries are the most marginal of marginal players.⁵⁹

⁵⁸ See Braithwaite and Drahos, *supra*, footnote 14, at 501–504.

⁵⁹ When developing countries do depart from Western models, as in the case of the OAU Model Law, (*supra*, footnote 42), they encounter the disciplinary force of WIPO. The GRAIN Website contains an interesting account of what happened when WIPO commented on the OAU's Model Law: “In his immediate reply to the submissions of WIPO and UPOV, Dr Tewolde Berhan Egziabher, head of Ethiopia's Environmental Protection Authority, reminded everyone that the two agencies were invited by Africa's Trade Ministers to contribute to the furtherance of the OAU process. They were not invited, he said, to change the essence of the Model Law. After all, the central features of the Model Law—those relating to community rights and access to genetic resources—had already been approved at the highest level: by the Heads of African States.” See *IPR Agents try to Derail OAU Process*, Genetic Resources Action International (GRAIN), June 2001, available at: <<http://www.grain.org/publications/oau-en.cfm>>.

It is vital that NGOs seek membership of intellectual property policy committees, both nationally and internationally, as part of a long-term engagement with the international standard-setting process. To date, NGOs have neglected this longer-term game. The NGO *Médecins Sans Frontières*, for example, which has been so important in the campaign over access to medicines, has a seat at WIPO, but to date has not occupied it.⁶⁰ The time has come for some NGOs to shift from the romance of campaigns to the dullness of occupying seats on the many committees that work on international standards, including on intellectual property.⁶¹

E. *Developed Countries*

Obviously, developed countries can lend support to some of the initiatives described above. Reforming patent office regulation with a view to integrating it into a broader social regulatory agenda should be high on the list of priorities, as should be a review of WIPO's development role. Similarly, lending support for the admission of the Convention on Biological Diversity Secretariat to the Council for TRIPS as an observer would help to support developing country policy objectives on the overlap between intellectual property and biodiversity.

More fundamentally, developed countries might look to the behaviour of their own trade negotiators when it comes to dealing with LDCs. In the trade negotiator's world, careers are built by bringing back to capitals deals containing trade gains. If that means inflicting trade losses on others, so be it. The trade negotiator listens to the concentrated voices of organized business, not the voices of the poor, because those concentrated voices whisper, siren-like, of trade gains to be won and losses to be avoided. Hard tactics are used by U.S. and EU negotiators to drive hard bargains with developing countries. In this subculture of threat and coercion, developing country negotiators do not retaliate, not because of any inherent moral superiority, but because there is no reciprocity of coercive bargaining power:

"The United States can credibly threaten trade sanctions, foreign aid withdrawal, flight of investment and refusal to transfer technology to an African State. The African State cannot credibly threaten the United States with any of these things."⁶²

The United States leads in these kinds of tactics, and the EU plays the role of quiet supporter, complaining about U.S. aggressive unilateralism during the 1980s but sending in its negotiating teams to obtain a bilateral deal on intellectual property after U.S. teams had finished with a developing country under the Section 301 process described earlier. The EU has its own version of Section 301 and, like the United States, it pushes and prods developing countries into TRIPS-plus agreements.⁶³

⁶⁰ Personal communication with MSF.

⁶¹ Drahos and Braithwaite, *supra*, footnote 17, Chapter 12.

⁶² *Id.*

⁶³ For details, see GRAIN, in co-operation with SANFEC, "*TRIPS-plus*" *Through the Back Door: How Bilateral Treaties Impose much Stronger Rules for IPRs than the WTO*, July 2001, available at: <<http://www.grain.org>>.

States, of course, are not unitary actors. Those working in development, environmental and health ministries of the EU and the United States probably have a much better understanding of the way in which intellectual property standards are likely to impact on the welfare of the poor in LDCs and what to do about it, but these ministries are not the dominant ones in a trade negotiation. As a trade round wears on, they become even more marginalized players; trade ministries, with their culture of hard bargaining, become the voice of the unitary State. The upshot of this trade culture are deals on intellectual property that do not in any real sense take into account the welfare impacts on the poor in developing countries.

It may be that in the Doha multilateral trade round there is a greater opportunity for development ministries in both developing and developed countries to play a lead role. The new round is being described as a “development round” and the Doha Ministerial Declaration does state that the needs and interests of developing countries are being placed at the heart of the work programme outlined in the Declaration. One way to give meaningful expression to such sentiments is to devise some sort of development test based on core development indicators employed by such institutions as the World Bank.⁶⁴ The test could be used to provide guidance to trade negotiators as to the possible development impacts of trade deals on intellectual property in such areas as health, education and agriculture. Development ministries could act as advocates for the application of such a test.

VIII. CONCLUSION

A summary of international intellectual property standard-setting might be that it has been dominated by Western States and intellectual property owners. Since World War II, the dominant mechanism of standard-setting has become economic coercion, of which TRIPS is the most potent multilateral expression. Prior to TRIPS, developing countries were able to base some of their development strategies on free riding, either because they were not members of international intellectual property conventions or because there was no effective mechanism of compliance in the conventions that they had joined. TRIPS makes the pursuit of free-riding strategies more difficult. Continued bilateralism by the United States, especially on intellectual property rights, is further limiting the possibility of such strategies.

The reality of standard-setting for developing countries is that they operate within an intellectual property paradigm dominated by the United States and the EU and by international business. Developing countries are encircled in the standard-setting

⁶⁴ The World Bank gathers information on hundreds of development indicators from more than 130 countries. Using data from such areas as health, poverty rates, education, agriculture and balance of payments, it should in principle be possible to devise a wide-ranging test that would estimate the effects of emerging trade deals on a country's development prospects. Such an approach would of necessity be somewhat rough, but it would be a means by which to inject into the trade bargaining process evidence and data as to the development impact of trade deals.

process. TRIPS sets minimum standards. Bilaterally, the bar on intellectual property standards continues to be raised. When developing countries turn to WIPO for assistance, more often than not they are put on a TRIPS-plus path.

NGOs, after States and business, have become a force in the global politics of intellectual property rights. NGOs function as an analytical resource for developing States and as possible partners in a global coalition of minority factions, but these kinds of coalitions are difficult to put together, are issue-specific and predominantly rely on a crisis of some kind to be truly effective. They do not threaten the standard-setting dominance of the United States and the EU, especially when these are united on the direction in which global regulation should travel.

Given the track record of the United States and the EU, developing countries can expect very few concessions on intellectual property issues in either a bilateral or multilateral context. They will have to look to self-help on these issues and operate on the assumption that the global intellectual property ratchet will continue to be worked by the United States and the EU in their economic interests, with only minimal consideration being given to the interests of developing countries.