

THE TRIPS BALLOON EFFECT

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This Article argues that much of the discomfort surrounding the current marriage of intellectual property rights (IPR) protection and global trade stems from the impossibility of ascertaining a static definition of either trade or intellectual property. In fact, the evolutionary nature of both fields renders fruitless any attempt at genuine stability where those fields intersect. Yet, the phrase “trade-related aspects of intellectual property rights” delineates the mandate of the World Trade Organization’s IPR agreement, TRIPS. Most critics of the TRIPS mandate’s breadth have focused on the historical meaning of the pertinent phrase at the time of negotiation. However, an historical focus ignores the most important part of the equation. The question is not what “trade-related aspects of IPR” meant then. The question, rather, is what the phrase means now, reflecting the evolution of that meaning through time. This Article posits that the two are not the same. Rather, marketplace externalities affecting both international trade and intellectual property transactions have expanded the original TRIPS mandate, creating a balloon effect. Parties’ lack of identification of the balloon effect has contributed in large measure to perceptions that TRIPS is overreaching and underperforming, and has driven much of the discontent behind recent regime-shifting away from the World Trade Organization (WTO). The Article posits that this forum-shifting is premature because it reflects a lack of critical analysis and understanding of the underlying causes of TRIPS discontent. The Article illustrates that TRIPS actually is better-equipped to deal with the balloon effect than its critics realize, because it contains specific textual mechanisms—currently under-utilized by parties—that can provide balance in a trade-dominant world. The Article calls for a re-examination of the TRIPS mandate in the context of the balloon effect, greater utilization of that Agreement’s assets in combatting the perceptions of overreaching and

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underperformance, and caution in forum-shifting through negotiation of new agreements likely to prove less effective and less malleable.

I. INTRODUCTION	472
II. TRADE'S FIRST MODERN SEISMIC SHIFT: THE ADVENT OF THE WTO	479
A. <i>Creation of an Expansive New Regulatory Body</i>	482
B. <i>TRIPS: What's in a Name?</i>	488
III. Technological Advances: Changes in Players, Pace, and Products	504
A. <i>Changes in Players</i>	499
B. <i>Changes in Pace</i>	504
C. <i>Changes in Products</i>	505
IV. THE BALLOON EFFECT	508
A. <i>WTO Discontentment</i>	509
B. <i>Criticisms of TRIPS</i>	516
C. <i>The Impact of the Balloon Effect</i>	522
V. LESSONS OF THE BALLOON EFFECT	526
A. <i>Re-examining TRIPS Capabilities</i>	527
B. <i>Approaching New Trade-IPR Agreements with Caution</i>	532
VI. CONCLUSION	538

I. INTRODUCTION

Regulation of international intellectual property law is at a crossroads. The fairly centralized governance of the field, centering around the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS or Agreement),¹ is starting to give way to increased fragmentation, as even former proponents of multilateralism turn to regional, plurilateral, and bilateral approaches to regulation.² This, the second major forum-shift of the modern in-

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [*hereinafter* TRIPS or the TRIPS Agreement].

2. *See, e.g.*, Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S. Kor., art. 18.10, June 30, 2007, modified Dec. 5, 2010, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [*hereinafter* KORUS FTA]; Anti-Counterfeiting Trade Agreement (not yet in effect), Chap. II, §§ 1, 2, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited Dec. 12, 2013) [*hereinafter* ACTA]; Katherine J. Strandburg,

tellectual property rights (IPR) era,³ has commentators abuzz, predicting the end of the IPR world as we know it.

The buzz, however, for all its bluster, is not a new phenomenon. Using trade regulation as a means to achieve domestic legal reform has been fraught with controversy from the start. Previous commentators have noted the burdensome nature of the substantive obligations within TRIPS, especially for less developed countries compelled to sign on to TRIPS in exchange for promised benefits under other World Trade Organization (WTO) agreements.⁴ Scholars have criticized TRIPS for being overbroad and intrusive, referencing the Agreement's requirements regarding domestic enforcement

Evolving Innovation Paradigms and the Global Intellectual Property Regime, 41 CONN. L. REV. 861, 907 (2009) (stating that "The WTO and the TRIPS Council are probably not the right places to make progress on a broader understanding of innovation policy in the first instance.").

3. The first being the regime shift from the World Intellectual Property Organization to the World Trade Organization. See Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 21 (2004) (arguing that three institutional features of GATT/WTO encouraged the shift from the WIPO to the WTO: negotiating leverage, link of IP protection to other areas, and the dispute settlement system); Bal Gopal Das, *Intellectual Property Dispute, GATT, WIPO: Of Playing by the Game Rules and Rules of the Game*, 35 IDEA 149, 158 n.45 (1994) ("Dissatisfaction with WIPO's ineffectiveness as a forum to end the impasse which ensued after the failed Paris Revision Conference, aggravated by the continued intransigence of the Developing [sic] countries, motivated the movement away from WIPO to GATT as the negotiating forum.").

4. In many cases, the *quid pro quo* for IPR protections came in the form of concessions regarding agricultural products or textiles. See Agreement on Agriculture art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410; Agreement on Textiles and Clothing art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 14. In addition to promises made regarding other trading sectors, TRIPS proponents made several Uruguay Round promises within the context of TRIPS, designed to soften the blow to developing countries. These include promises regarding technical assistance and technology transfer. TRIPS, *supra* note 1, arts. 7, 67. Several scholars argue that both the TRIPS-centered promises and the extra-TRIPS promises have failed adequately to materialize. See Susan K. Sell, *TRIPS was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447, 448, 478 (2011) (stating that "TRIPS was a beginning and not an endpoint"; "the existing system is far from perfect and may be doing more harm than good").

provisions as a threat to sovereignty.⁵ The widespread discontentment surrounding the TRIPS Agreement has manifested in recent years through extensive forum-shifting,⁶ both from those who champion a high degree of harmonization of intellectual property regulation and enforcement, and from those who wish to preserve the maximum flexibilities in implementation of intellectual property norms.⁷

Central to the controversies surrounding the TRIPS Agreement has been the ever-enigmatic determination of how far TRIPS should reach in regulating intellectual property rights.⁸ As the name of the Agreement explicitly indicates, the

5. See Molly Land, *Rebalancing TRIPS*, 33 MICH. J. INT'L L. 433, 461 (2012) (noting how the TRIPS Agreement's link to the WTO's dispute settlement body in particular interferes with the discretion that states should have in implementing obligations under the Agreement, and calling for a standard of review for TRIPS in particular that would promote increased deference to state policies surrounding intellectual property objectives).

6. One need look no further than recent headlines to see the forum shifting that is underway. Developed countries concluded a plurilateral "trade" agreement in 2010 purporting to set a new "TRIPS-plus" gold standard for domestic IPR enforcement. ACTA, *supra* note 2. The bilateral agendas of both the United States and the European Union have been rife with IPR components. See, e.g., Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, CARIFORUM-E.U., §§ 134.1, 139, Oct. 30, 2008, 2008 O.J. (L 289/I) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF> [*hereinafter* EU-CARIFORUM Agreement]; KORUS FTA, *supra* note 2, at art. 22.6. Most recently, several states have undertaken a new "regional" trade initiative called the Trans-Pacific Partnership (TPP). Although not primarily an IPR agreement, the TPP contains significant IPR components. Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing., May, 28, 2006 [*hereinafter* TPP Agreement], available at www.sice.oas.org/Trade/CHL_Asia_e/mainAgreemt_e.pdf. See also Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 259 (2011) ("The lack of success in using multilateral agreements to strengthen intellectual property protection and enforcement has led policymakers, industries, and commentators to push for greater use of nonmultilateral arrangements, including ACTA and the Trans-Pacific Partnership Agreement . . .").

7. Sell, *supra* note 4, at 448, 450 (noting that "the past fifteen years have been marked by ups and downs, victories and defeats both for those who seek to ration access to intellectual property and for those who seek to expand access."); Helfer, *supra* note 3, at 17 (noting that both politically powerful nations and less powerful nations may engage in forum-shifting).

8. Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L. 469, 470-72 (2002) (noting multiple international conflicts resulting from differ-

TRIPS Agreement is meant to regulate only those aspects of intellectual property rights that are “trade-related.” Scholars have noted a disconnect between the scope of obligations under TRIPS—unprecedented for a trade agreement—and the “trade-related” limitation in the agreement’s title.⁹ Indeed, some have opined that the supposed limitation was meaningless from the start.¹⁰ Commentators have accused the Agreement of exceeding the purported limitations in scope embodied in its title.¹¹

What previous commentaries have left virtually untouched is an acknowledgment that what is “trade-related” about IPR is not only difficult to define in historical context, but also has been impacted deeply by changes in the nature of both fields. In short, the meaning of the phrase “trade-related aspects of IPR” changes over time, as trade and intellectual

ent interpretations of the TRIPS provisions, specifically regarding what these provisions would allow and under what circumstances); Vishal Gupta, *A Mathematical Approach to Benefit-Detriment Analysis as a Solution to Compulsory Licensing of Pharmaceuticals Under the TRIPS Agreement*, 13 CARDOZO J. INT’L & COMP. L. 631, 633 (2005) (“As a result of ambiguity in the provisions, developing nations sought to relax the scope of intellectual property protection required under TRIPS while developed nations sought to choose a direction to enforce patent rights strongly.”).

9. See, e.g., Sean Pager, *Trips: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215, 271 n.7 (2006) (stating that TRIPS negotiators did not come to any reasonable understanding of what are “trade-related aspects”).

10. See, e.g., Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 844 n.186 (2008) (noting uncertainty in the scope of the phrase “trade-related” during the TRIPS negotiations).

11. Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT’L L. 275, 310 (1997) (noting possible tensions between certain applications of TRIPS and the goals of competition law); Pamela Samuelson, *Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. CULT. ECON. 95, 96 (1999) (stating that TRIPS “puts a trade ‘spin’ on intellectual property rules that have in the past been guided by a host of other principles”); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1076 (2007) (noting the existence of possible conflicts between the implementation of the TRIPS Agreement and the realization of economic, social, and cultural rights); J. Janewa Osei-Tutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1656–57 (2012) (stating that the value of intellectual property may include non-market-related value).

property evolve. Thus, the portion of IPR that was “trade-related” in 1994 may bear little resemblance to what is “trade-related” in 2014, given the massive shifts in logistical, economic, and technological considerations in international trade and intellectual property in the time period since the WTO was formed.

The Article argues that much of the controversy surrounding the TRIPS Agreement stems from the impossibility of ascertaining a static definition of either international trade or intellectual property. Building on the debates regarding whether there ever was any ascertainable limit to the “trade-related” mandate,¹² this Article explores how the unprecedented expansion of both IPR and international trade since the advent of TRIPS impacts views of what are “trade-related aspects of intellectual property rights.” The Article highlights the fact that marketplace externalities have affected both international trade and intellectual property since the TRIPS Agreement’s inception, vastly expanding the scope and reach of both fields. The Article highlights just a few of the pertinent changes that have altered the international trade and intellectual property landscapes over the last twenty years. These changes include, among many others, evolutions in the nature of the players in the international trade and IPR businesses, the pace of international trade and IPR-related transactions, and even the products traded.¹³ The resulting expansion of

12. See Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1018 (2009) (noting that, during a meeting of the TRIPS Negotiating Group, India held the opinion that “only the restrictive and anti-competitive practices of the owners of the IPRs could be considered as trade-related because they alone distorted or impeded international trade”); Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT’L L. & POL’Y 465, 473 (1994) (noting that developing nations believed the TRIPS Agreement to exceed the GATT mandate).

13. See NAM D. PHAM, EMPLOYMENT AND GROSS OUTPUT OF INTELLECTUAL PROPERTY COMPANIES IN THE UNITED STATES 5–7 (2011), http://www.the-globalipcenter.com/sites/default/files/reports/documents/employment_gross_output_of_ip_companies_in_the_us_-_jan_2011_low_res.pdf (noting the move away from public funding of research); GARTEN ROTHKOPF, GLOBAL INTELLECTUAL PROP. CTR., INTELLECTUAL PROPERTY PROTECTION AND GREEN GROWTH: ANALYSIS AND IMPLICATIONS FOR INTERNATIONAL CLIMATE NEGOTIATIONS 20 (Sept. 2009), available at <http://www.gartenrothkopf.com/research-and-analysis/custom-research-publications.html> (noting a move toward green technologies); INTERNATIONAL FEDERATION OF THE PHONO-

both fields has caused the original mandate of the Agreement to swell. This phenomenon, termed herein the balloon effect, has exacerbated the long-felt concern that the WTO's "trade-related" mandate with respect to regulation of intellectual property is too broad.¹⁴ The Article explains that the perceptions that the WTO is overreaching and underperforming in its regulation of intellectual property stem largely from the influence of the balloon effect.

Having identified the balloon effect and its influence on perceptions of the TRIPS Agreement's performance, the Article highlights some of the mechanisms built into TRIPS that give that Agreement better capabilities in coping with the balloon effect than have been recognized by commentators to date. These mechanisms include: a broad scope that presumes everything is trade-related, making TRIPS more prepared than other agreements to deal with a trade-dominant world; underutilized flexibilities that allow for consideration of non-economic factors even in the midst of determining the scope of an economically based set of obligations; indeterminate language that helps minimize the risks of becoming outdated; multilateral buy-in that alternate agreements lack; and recourse for members to an objective third party entity to resolve disputes. The Article encourages scholars and policymakers alike to recognize and use the tools in TRIPS to address the arguments raised by the Agreement's critics.

Having established that TRIPS is a more capable instrument than some policymakers give it credit for being, the Article criticizes the recent tendencies of parties on both sides of the IPR debate to move away from the TRIPS Agreement, and argues that those tendencies are premature and ill-examined. First, the Article posits that these moves are premature because they pre-date any serious analysis of why parties perceive the TRIPS Agreement to be operating sub-optimally. In short, the moves to other forums pre-date a serious look at the bal-

GRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2012, at 6 (2012), available at http://www.ifpi.org/content/section_resources/dmr2012.html (noting changes in the music industry due to digitization).

14. See Jamie Feldman, *Compulsory Licenses: The Dangers Behind the Current Practice*, 8 J. INT'L BUS. & L. 137, 166 (2009) (stating that "the current inclusion of broad undefined words in the TRIPS Agreement leaves too much wiggle room for WTO Members to issue compulsory licenses under questionable circumstances").

loon effect. By ignoring the balloon effect's role in perceptions of the TRIPS Agreement's performance, and rather simply jumping ship to other fora, policymakers are setting themselves up for reinventing the wobbly wheel. Second, the shifts in forum are ill-examined because they embrace quick fix approaches that are less equipped than TRIPS to deal with the balloon effect. Agreements aimed at "updating" standards for the Internet age through specific provisions designed to address the problem of the moment risk dating themselves before they can even come into force. These agreements also suffer from a lack of buy-in, and the absence of mechanisms to interpret the agreements or enforce their terms.

The Article calls on policymakers to recognize that, among extant and foreseeable IPR agreements, the agreement in the best position to weather market changes is, in fact, TRIPS. The flexibilities and malleable language in the Agreement provide the tools necessary for TRIPS to do its job in a changing world. Parties to the Agreement should better use the tools contained within the TRIPS Agreement to deal with a trade-dominant world, rather than abandoning the Agreement in favor of supposedly greener pastures. Only once WTO members recognize and use properly the tools built into TRIPS can they best ascertain what types of complementary mechanisms may be necessary.

Part II of this Article examines the WTO's advent and its stated mandate with respect to IPR. Part III explores selected ways in which both IPR and international trade have changed since the organization came into being. Part IV illustrates how the massive changes detailed in Part III have caused the balloon effect with respect to the TRIPS mandate, impacting perceptions of the Agreement's performance. Part V argues that the TRIPS Agreement actually is better equipped to deal with the balloon effect than commentators to date have realized, and encourages policymakers to use the tools inherent in the Agreement to achieve their goals. Part V also cautions against reliance on newer agreements to fix perceived shortcomings of TRIPS, as those new agreements are both subject to the same balloon effect and less equipped to deal with it. Part VI concludes that WTO members would be well-advised to revisit

and better utilize the tools contained in the TRIPS Agreement and to approach tendencies toward forum-shifting carefully.¹⁵

II. TRADE'S FIRST MODERN SEISMIC SHIFT: THE ADVENT OF THE WTO

International trade law has evolved throughout time, so it is inaccurate to imply that the late 20th century was the only era of massive change in trade practices.¹⁶ However, the advent of the WTO in 1994 signaled a type of shift in trade *regulation* that was unprecedented in the modern era. The establishment of a formal international institution to regulate trade was a monumental step away from the previous structure under the General Agreement on Tariffs and Trade (GATT).¹⁷

The GATT system had been focused solely on tariff regulation.¹⁸ The GATT's Uruguay Round¹⁹ negotiations changed

15. While the primary focus of this Article is on intellectual property law, the Article's analysis impacts subjects beyond IPR. Controversies surrounding the WTO have centered not just on its IPR mandate but on the organization's potential impact on labor, environmental, and human rights issues. Many scholars have debated not only how the extant WTO agreements may impact these issues, but also whether these issues should be explicitly included in the organization's mandate through new "trade and ___" agreements. The Article can shed light on the ongoing controversies surrounding trade's overlap with these important international concerns through its treatment of the expansion of trade law and the ramifications of IPR's pioneering substantive regulation within the organization.

16. Trade has been changing throughout history, in incredibly profound ways. However, the radical changes at the end of the 20th and beginning of the 21st centuries are among the most profound in history. So while they do not represent the only foundational changes to the field, they are among the leading in impact on the field. Furthermore, they happened just after the establishment of the WTO, and so impact one single institution in a way that is unprecedented in the field.

17. The GATT was not a formal organization at all. Instead, it was a framework of trade negotiations focused solely on tariff rates regarding trade in goods. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [*hereinafter* GATT]; David A. Gantz, *World Trade Law After Doha: Multilateral, Regional, and National Approaches*, 40 DENV. J. INT'L L. & POL'Y 321, 322 (2011–2012) (documenting expansions of international trade between 1994 and 2006).

18. GATT, *supra* note 17, art. I, ¶ 1; see John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207, 207 (1989) ("A principal obligation of the GATT is the 'tariff binding' which sets a maximum tariff rate for massive lists of products."); John W. Head, *International Business and Kansas Lawyers: An Update on International Trade Rules and How*

all of that, begetting a regulatory body designed to take a more robust role in governing members' trade practices. The resulting heightened potential for monitoring of domestic practices opened the door to substantive regulation in a system that had previously focused solely on numbers and process.²⁰ This broader role demanded a greater infrastructure to administer the entity's activities, leading to a much more constitutional approach to regulation than that of the GATT system, complete with an extensive bureaucracy.²¹

The WTO not only expanded greatly the tariff measures of its predecessor organization,²² but also intertwined trade rules and substantive regulation for the first time. Never before the WTO had a trade regulatory mechanism purported

They Affect Kansas, J. KAN. B. ASS'N, Jan. 1996, at 26, 28 (stating that the 1947 GATT agreement was a treaty aimed at lowering tariffs and other restrictions imposed by countries on articles imported into their territories); Debra Herz, *Effects of International Arbitral Tribunals in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 217, 220–21 (1996) (stating that the GATT negotiations from the Geneva Round to the Tokyo Round were all focused on establishing tariff schedules, regulating goods under tariff reductions, and achieving tariff concessions among parties).

19. GATT members began a new negotiation round in September 1986 in Punta del Este, Uruguay. The negotiations ultimately yielded the WTO, the expansion of the trading system into a number of new areas, including trade in services and intellectual property, and regulatory changes pertaining to the agriculture and textiles sectors. See *Understanding the WTO—The Uruguay Round*, WORLD TRADE ORGANIZATION (2013), http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

20. Sell, *supra* note 4, at 448 (noting that TRIPS was “the most comprehensive multilateral intellectual property agreement in history”); Jackson, *supra* note 18, at 207 (stating that “a principal obligation of the GATT is the ‘tariff binding’ which sets a maximum tariff rate for massive lists of products”); Herz, *supra* note 18, at 220–21 (stating that the GATT negotiations from the Geneva Round to the Tokyo Round were all focused on establishing tariff schedules, regulating goods under tariff reductions, and achieving tariff concessions among parties).

21. Paulsen K. Vandevent, *The Uruguay Round and the World Trade Organization: A New Era Dawns in the Private Law of International Customs and Trade*, 31 CASE W. RES. J. INT'L L. 107, 108 (1999) (noting the Uruguay Round's replacement of the loosely organized GATT with a more formally organized structure); Dan Nichols, *Use of WTO Panel Decisions in Judicial Review of Administrative Action Under U.S. Antidumping Law*, 1 INT'L L. & MGMT. REV. 237, 242 (2005) (stating that the Uruguay Round of 1994 set up a dispute resolution system superior to the old dispute resolution system under GATT).

22. The WTO's predecessor “organization,” the GATT, was not a formal organization at all. GATT, *supra* note 17, at *Preface*.

to establish substantive legal norms by which its participants were obligated to abide.²³ The WTO's marriage of trade and IPR embodies this shift. With the negotiation of the TRIPS Agreement,²⁴ the WTO negotiators took international trade law into a new era of substantive rulemaking. International trade law became more than numbers on a spreadsheet—it became a mechanism of legal reform within sovereign borders.

To its sudden foray into substantive regulation of domestic law, the WTO added another wrinkle: a formal enforcement mechanism.²⁵ The WTO's Understanding on the Settlement of Disputes (DSU)²⁶ signaled a sea change in how trade would be regulated in the post-Uruguay Round era. The addition of the DSU meant, for the first time, that individual sovereign members of the world trade community had meaningful, structured recourse against one another.²⁷ Never before had

23. William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1264 (1998) ("As Ambassador Michael Kantor stated, for the first time all WTO members must sign on to all the [Uruguay Round] Agreements and must play by the same rules."); George Cavros, *The Hidden Cost of Free Trade: The Impact of United States' World Trade Organization Obligations on United States Environmental Law Sovereignty*, 9 ILSA J. INT'L & COMP. L. 563, 565 (2003) ("For the first time, the WTO provided GATT members with a mechanism for international trade dispute resolution.").

24. TRIPS, *supra* note 1.

25. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1869 U.N.T.S. 401 (1994) [*hereinafter* DSU].

26. *Id.*

27. *Id.* art. 4 (members may request consultations); *id.* art. 5 (use of good offices, conciliation, and mediation to resolve disputes); *id.* art. 6 (establishment of panels); *id.* art. 21 (surveillance of implementation of rulings); *id.* art. 22 (temporary measures available in the event that the rulings are not implemented within a reasonable period of time); see William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 50 (1995) (stating that the WTO dispute settlement system has been effective); WARWICK COMM'N, THE MULTILATERAL TRADE REGIME: WHICH WAY FORWARD 32 (2007) ("The [dispute settlement system] has been a major success. It represents a substantive advance on the previous GATT regime."); Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 709 (2000) (stating that WTO members hailed these new dispute settlement procedures as "a decisive improvement over the procedures codified and practiced" under GATT 1947).

there been a formal mechanism for the bringing and settling of complaints about international trade practices.²⁸

This section explores the controversies surrounding the WTO's initial creation in 1994, out of the structure surrounding the GATT.²⁹ It discusses the dual expansion of the substantive mandate and the dispute resolution mechanism, and illustrates how these seismic shifts set the stage for the debates that have followed.

A. *Creation of an Expansive New Regulatory Body*

The WTO grew out of a long series of multilateral negotiations aimed at establishing a new framework for the governance of international trade.³⁰ The advent of the WTO coincided with an increasingly enthusiastic embrace of cross-border business and a drive to maximize comparative advantage among many nations by creating new standards and relationships in the evolving global marketplace.³¹ In addition to overhauling the structure of multinational trade relations and es-

28. Dreyfuss & Lowenfeld, *supra* note 11, at 278–79 (“[T]he GATT/WTO system is now clearly more adjudicatory than in the past, as well as richer than ever before in the subjects on which member states have come together.”); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward A More Collective Approach*, 94 AM. J. INT’L L. 335, 339 (2000) (arguing that the elaborate enforcement provisions of the DSU provide one of the “most developed enforcement regimes in international law,” and is a “step ahead” of GATT 1947 and other international enforcement mechanisms such as the International Court of Justice).

29. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [*hereinafter* WTO Agreement].

30. *Id.*; Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT’L L. 349, 350 (1995) (noting the “ambitious and comprehensive” nature of the Uruguay Round negotiations over a period of nearly eight years).

31. Press Release, World Trade Organization, High Rates of World Trade Growth Continue to Outstrip Output Growth: WTO Secretariat Sees Link to Globalization (Nov. 2, 1995), *available at* http://www.wto.org/english/news_e/pres95_e/pr029_e.htm (stating that over the period from 1950 to 1994, the volume of world merchandise trade increased at an annual rate of slightly more than six percent and world output by close to four percent); *see also* Press Release, World Trade Organization, WTO Secretariat Releases 2001 Annual Report (May 23, 2001), *available at* http://www.wto.org/english/news_e/pres01_e/pr226_e.htm (stating that for the 1990–2000 period, the value of commercial services trade increase with a six percent annual growth); Theresa Wilson, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 DRAKE L. REV. 141, 176 (1998)

establishing a new regulatory body, the Uruguay Round of negotiations saw a rapid expansion of the types of issues governed by international trade law.³² Prior to the advent of the WTO, trade governance had been restricted largely to trade in goods.³³ The WTO saw extension of this regulation into other sectors and areas of the law, including trade in services³⁴ and intellectual property rights.³⁵ Naturally, the expansion was cause for discomfort among some constituencies,³⁶ and the

(noting that “international trade becomes increasingly important in the later stages of the twentieth century”).

32. *See, e.g.*, Uruguay Round Agreement on Agriculture (AoA), WTO Agreement, *supra* note 29; Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, *supra* note 29; Agreement on Textiles and Clothing (ATC), WTO Agreement, *supra* note 29; Agreement on Technical Barriers to Trade, WTO Agreement, *supra* note 29; Agreement on Trade Related Aspects of Investment Measures (TRIMS), WTO Agreement, *supra* note 29; General Agreement of Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B; General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994) [*hereinafter* GATS] (basic services-related trade obligations applying to all member countries); TRIPS, *supra* note 1, and several other trade-expanding instruments.

33. *See* GATT, *supra* note 17 (dealing primarily with the production and exchange of goods).

34. GATS, *supra* note 32; GATS Training Module: Chapter 1 Basic Purpose and Concepts, *available at* http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1p1_e.htm (“The General Agreement on Trade in Services (GATS) is the first multilateral trade agreement to cover trade in services. Its creation was one of the major achievements of the Uruguay Round of trade negotiations, from 1986 to 1993. This was almost half a century after the entry into force of the General Agreement on Tariffs and Trade (GATT) of 1947, the GATS’ counterpart in merchandise trade.”).

35. TRIPS, *supra* note 1; John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT’L L. 157, 166 (1997) (noting that the primary focus of the Uruguay Round was meant to be on goods, the traditional purview of the GATT, and noting the “new” subjects of trade in services and IPR rights that were introduced during the round).

36. *See* William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT’L L.J. 427, 428 (1995) (noting concerns that the Uruguay Round agreements established an institution with too much power and inadequate safeguards for members to use to protect domestic interests); Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT’L L.J. 421, 484 (1998) (“Behind the leadership of India and Brazil, [developing countries] were opposed to putting services trade on the Uruguay Round agenda at all.”); William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001,

process yielded extensive debate regarding the degree of overlap with substantive areas of the law—perhaps previously regulated either at the national level or by other international organizations—that parties should tolerate.³⁷ The idea that a trade regulatory mechanism should administer substantive norms was new and was the subject of much discussion.³⁸ Thus, the Uruguay Round negotiators were, in the end, rather particular about the types of subject matter they permitted the WTO agreements to encompass.³⁹ For instance, it was not thought appropriate for the WTO to take part in direct regulation of matters relating to environmental standards or labor

2032 (1994) (“[I]t should be emphasized that the Uruguay Round-GATT 1994 agreement further limits United States companies’ ability to use unfair-trade-practice remedies under GATT and United States trade law.”).

37. *See, e.g.*, World Trade Organization, Ministerial Declaration on the Uruguay Round of 20 September, 1986, Part D (noting that intellectual property rights, especially the phenomenon of trade in counterfeit goods, should be addressed, but noting also that such efforts were to be without prejudice to the ongoing work of the WIPO).

38. Jackson, *supra* note 35, at 166 (noting that the focus on services and IPR in the Uruguay Round marked a departure from the GATT’s previous focus on goods).

39. *See* Meeting of the Negotiating Group of 10 June 1987, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods, MTN.GNG/NG11/2, para. 4 (“Some participants said that some of the issues raised in the submissions did not appear to be primarily trade-related and felt that the countries raising them should provide further clarification of their trade impact . . .” and “[s]ome participants said that they doubted that some of the issues raised . . . fell within the mandate of the Group.”); Meeting of the Negotiation Group of 2, 4, and 5 April 1990, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods, MTN.GNG/NG11/20, para. 7 (“Some other participants, in presenting their preliminary general comments, stated their disquiet that the proposal appeared to go beyond what they considered to be the trade-related aspects of intellectual property rights. They expressed concern about the implications of accepting that the GATT was competent to deal with any matter which had some impact on international trade, however indirect. The view was also expressed that the proposal went too far in the direction of the harmonisation of intellectual property law.”). *See also* Doris E. Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection or an Illusory Promise?*, 22 *AIPLA Q.J.* 531, 537 (1994) (“In fact, when the United States tabled a proposal with the Preparatory Committee seeking to include all intellectual property rights (including copyright) within GATT negotiations, the debate between the developed and developing countries regarding the jurisdictional scope of GATT gained renewed vigor.”).

issues.⁴⁰ However, the substantive regulation of intellectual property carried the day, and the TRIPS Agreement⁴¹ became a precedent-setting “substantive trade” agreement.⁴² A number of factors may have influenced the WTO negotiators’ decision to draft TRIPS as part of the Uruguay Round while foregoing meaningful regulation of other areas such as environ-

40. Trade Negotiations Committee Meeting at Ministerial Level, *Statement of Canada*, MTN.TNC/MIN(94)/ST/2 (Apr. 12, 1994) at 3–4 (noting that trade sanctions constituted a poor approach to environmental issues and other issues involving the interaction of trade and social policies, and noting that involving the WTO therefore in such matters would be a “misguided effort”); Trade Negotiations Committee Meeting at Ministerial Level, *Statement of Brunei Darussalam*, MTN.TNC/MIN(94)/ST/39/Rev 1 (June 21, 1994) at 2 (noting that “it would be unproductive at this juncture to make any attempt to force issues such as labour standards into the WTO agenda. In any case, there is a more appropriate forum outside GATT and WTO to better deal with the issue,” and noting that incorporating labor standards into the WTO could be used as a protectionist weapon wielded by developed states against developing states in the latter’s area of comparative advantage). *See also* Press Release, Uruguay Round Results Build Basis for Environmental Protection and Sustainable Development, GATT/1636 (June 10, 1994) at 2 (noting that many countries “retain serious concerns that within the subject of trade and environment hide dangerous manifestations of trade protectionism.”); David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT’L L. 11, 32 (1995) (noting the controversial nature of the link between trade and labor issues in the WTO).

41. TRIPS, *supra* note 1.

42. J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT’L L. 363, 366–67 (1996) (“The TRIPS Agreement is the most ambitious international intellectual property convention ever attempted. The breadth of subject matters comprising the ‘intellectual property’ to which specified minimum standards apply is unprecedented, as is the obligation of all WTO member states to guarantee that detailed ‘enforcement procedures as specified in this [Agreement] are available under their national laws.’”) (citations omitted); Laurence R. Helfer, *Adjudicating Copyright Claims Under the Trips Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 387 (1998) (“TRIPS’ uniqueness within the WTO stems from several sources: (1) its incorporation of preexisting intellectual property agreements which themselves have been diversely transposed into national laws; (2) its recognition that IPRs are ‘private rights’ belonging to the individuals and firms who own intellectual property; (3) its imposition of both ‘positive’ obligations on member states to protect IPRs within their national legal systems as well as “negative” limitations on states’ power to interfere with those rights; and, perhaps most importantly, (4) its special character as a ‘minimum rights’ agreement that does not compel states to create a rigidly uniform intellectual property code but rather permits them to balance intellectual property protection and the public interest.”).

ment and labor. Whatever the reason, IPR had the dubious honor of being the first substantive area significantly regulated through trade measures, putting the TRIPS Agreement in a position that was both groundbreaking and somewhat perilous.

Perhaps the foray into substantive regulation would have been less significant had it not been coupled with the other earth-shattering development to emerge out of the Uruguay Round—the Understanding on the Settlement of Disputes (DSU).⁴³ The advent of the DSU meant that, for the first time, international trading partners had direct, regulated recourse against one another for violation of trade agreements.⁴⁴ The DSU, more than any other aspect of the Uruguay Round negotiations, changed the way nations viewed international trade regulation by moving the fundamental mechanisms of that regulation from the informal to the formal.⁴⁵

The DSU provides a mechanism through which a member alleging that another WTO trading partner is out of compliance with any WTO agreement may bring a complaint before an adjudicatory body.⁴⁶ The affected parties must first engage in consultations in an effort to resolve the matter without further action.⁴⁷ If the parties fail to resolve their dispute through consultations, the complainant may request that the Dispute Settlement Body (DSB) establish a panel to resolve the matter.⁴⁸ The parties submit written briefs⁴⁹ and meet in

43. DSU, *supra* note 25.

44. Dreyfuss & Lowenfeld, *supra* note 11, at 327–28; Ctr. Int’l Dev. Harvard Univ., *Dispute Settlement Summary*, Global Trade Negotiations Home Page, <http://www.cid.harvard.edu/cidtrade/issues/dispute.html> (last visited Nov. 12, 2013) (stating that the WTO’s “binding authority distinguishes [it] from most other intergovernmental institutions,” giving it “unprecedented power” in resolving trade-related international conflicts).

45. See Dreyfuss & Lowenfeld, *supra* note 11, at 327–28 (outlining the mechanisms created by the DSU).

46. DSU, *supra* note 25, arts. 4–25.

47. *Id.* art. 4.

48. Ad hoc panels are composed of a team of three experts suggested by the WTO Secretariat and selected by the parties. If the parties are unable to agree, they may ask the Secretariat to choose the panelists. For a full description of the process of choosing panelists, see *id.* art. 8.

49. *Id.* art. 12. Third party members who have declared an interest in the case may also make submissions. *Id.* art. 10.

Geneva for oral arguments,⁵⁰ following which the panel renders a decision. The WTO panel members then discuss the panel decision and adopt it⁵¹ unless a party to the dispute notifies the DSB that it intends to appeal the decision.⁵² Either party may appeal the panel's decision, delaying the vote at the DSB.⁵³ If appealed, the case goes to a standing Appellate Body for review of issues of law.⁵⁴ The Appellate Body decision is final; there is no mechanism for further appeal.⁵⁵ The DSB then adopts the decision unless there is a consensus not to do so,⁵⁶ and the losing party then has a reasonable period of time to implement the decision.⁵⁷

While the system is geared at every turn to encourage amicable resolution without intervention by an adjudicatory body, the system does enable an adjudication option. The availability of this option affects the dynamics, both of negotiation and implementation of WTO agreements. Thus, the advent of an adjudicatory option changed the landscape significantly from the GATT consensus-based, loosely regulated infrastructure. The change was especially profoundly felt in the realm of intellectual property, which had not even been part of the previous GATT structure. The combination of new substantive regula-

50. *Id.* art. 12(10).

51. *Id.* art. 16.

52. *Id.* The standing Appellate Body consists of seven elected representatives serving staggered terms. Typically, three Appellate Body representatives hear any given case. Although nationals of parties to the dispute are not automatically disqualified from serving on a case involving their homelands, all Appellate Body members must avoid direct or indirect conflicts of interest. *Id.* art. 17.

53. *Id.* art. 17(4).

54. *Id.* art. 17(6).

55. *Id.* art. 17(14). Of course, the parties are welcome to settle the matter at any point up until adoption by the Dispute Settlement Body.

56. *Id.* art. 16.

57. "Reasonable" is a subject of negotiation between the parties and usually hovers around fifteen months. *Id.* art. 21. One should note that implementation of the commitment, per the guidance of the DSB, is preferable to the alternatives, which include compensation and trade sanctions. One of the significant aspects of the DSU is that it does allow parties to impose sanctions in the absence of compliance or other suitable compensation. Parties are obligated to approach the imposition of sanctions logically—starting with the sector in which the violation has occurred. However, in cases in which sanctions in that sector would be ineffective, the injured party may impose sanctions in other sectors. This option could lead to cross-sectoral sanctions under other WTO agreements. *Id.* art. 22.

tion of IPR through TRIPS and adjudicatory “teeth” through the DSU put intellectual property in an interesting position. Suddenly, intellectual property rights had a meaningful international enforcement mechanism for the first time.⁵⁸

B. *TRIPS: What’s in a Name?*

The sub-section above highlights the move toward regulating substantive obligations and away from mere regulation of tariffs that came with the Uruguay Round and the establishment of the WTO. The substantive field in which WTO regulation gained the most traction was intellectual property rights. Indeed, the standout substantive agreement coming out of the Uruguay Round was the TRIPS Agreement.⁵⁹ This sub-section explores the advent of TRIPS and the forces that led to its negotiation.

Prior to the advent of the WTO, multilateral regulation of IPR was solely the mandate of the United Nations’ World Intellectual Property Organization (WIPO).⁶⁰ The longstanding leader in IPR regulation,⁶¹ the WIPO was the singular dominant force in the field by 1986, when the Uruguay Round of GATT negotiations commenced.⁶² The WIPO traditionally

58. Previous intellectual property instruments, such as the Paris Convention and the Berne Convention, subjected disputes to the jurisdiction of the International Court of Justice. *See* Berne Convention for the Protection of Literary and Artistic Works art. 33(1), *opened for signature* Sept. 28, 1979, 828 U.N.T.S. 221 [*hereinafter* Berne Convention]; Paris Convention for the Protection of Industrial Property art. 28(1), *opened for signature* July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [*hereinafter* Paris Convention]. However, the dispute settlement provisions of these agreements were, somewhat tellingly, never used.

59. TRIPS, *supra* note 1.

60. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 [*hereinafter* WIPO Convention].

61. The WIPO, upon its inception, began administering both the Berne and Paris Conventions, which were themselves established in the late nineteenth century. *See* Berne Convention, *supra* note 58; Paris Convention, *supra* note 58.

62. *See Contracting Parties > WIPO Convention*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=1 (last visited Dec. 12, 2013) (documenting state accession to the WIPO Convention). Interestingly, although membership in the WIPO Conventions was strong, the Berne Convention was missing one key member—the United States. The United States joined in 1989, ostensibly as a prelude to the

had focused on harmonization of substantive norms, and its agreements reflected that emphasis.⁶³

By the time of the Uruguay Round of negotiations, the WIPO was robust in its harmonization efforts. However, frustrations with the organization abounded, especially among developed, IPR-producing nations.⁶⁴ First, the governance of the organization had become quite fractured by the mid-1980s.⁶⁵ Coalitions bonded together against one another, making it difficult to get anything at all accomplished.⁶⁶ Second, developed countries had become weary of the WIPO's lack of focus

TRIPS negotiations. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1989), *available at* <http://www.copyright.gov/title17/92appk.html> (implementing the Berne Convention); DAVID J. BRENNAN, *RETRANSMISSION AND U.S. COMPLIANCE WITH TRIPS 307* (2003) (“As such, the Senate Report indicated that US advocacy for Berne standards to be inserted within the GATT framework would be ‘seriously undermined’ if the US remained outside the Berne Union.”).

63. *See, e.g.*, Berne Convention, *supra* note 58, arts. 2, 6*bis*, 9 (citing the types of works protected, establishing rules concerning moral rights protection, and discussing possible exceptions to reproduction rights); Paris Convention, *supra* note 58, arts. 5, 6*bis* (establishing rules concerning patent working requirements and well-known mark protection).

64. DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT 12* (2013) (“From the perspective of developed countries, 1984 marked a realization that they had failed in their attempts to strengthen the enforcement mechanisms of the Paris and Berne conventions. Moreover attempts to introduce common dispute settlement provisions to cover all WIPO treaties had failed because signatories did not formally ratify the measures envisaged. By the mid-1980s it became clear that the differences between developed and developing country viewpoints of how national interests could best be represented through international intellectual property systems were polarised.”); Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 121–22 (1994) (noting that U.S. dissatisfaction with the WIPO forum led to a push for TRIPS); Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT SOC'Y U.S.A. 18, 19 (1994) (noting U.S. dissatisfaction with the WIPO “culture”).

65. Cordray, *supra* note 64, at 137–38; Oman, *supra* note 64, at 20–21.

66. Matthews, *supra* note 64, at 12; Oman, *supra* note 64, at 20–21, 24 (“To its credit, the W.I.P.O. Secretariat tried valiantly to update the Paris Convention, as well as the Berne Convention, but they couldn't bring enough raw muscle to the bargaining table. The powerful presence and forceful personality of the Director General moved the reform process along much further than it would have gone otherwise, but in the end we failed to lock in higher levels of protection because we were unable to reach a political consensus among the various factions [The U.S.] saw the requirement of unanimity in the W.I.P.O. as both a strength and a weakness, but also as a fact of life that led to gridlock.”).

on IPR enforcement norms and practices.⁶⁷ In short, IPR holders were growing restless with the ongoing negotiation of substantive norms that had no hope of being enforced, either at the national level or the international level.⁶⁸

The lack of focus on enforcement stemmed from two fundamental facts about the WIPO's regulation of IPR. First, WIPO IPR agreements require little or nothing of their signatories in the way of domestic enforcement procedures—that is, measures taken in-country to ensure that IPR is respected by individual citizens and entities.⁶⁹ Instead, the WIPO agreements focus on harmonizing substantive standards, not on how those standards are to be enforced. Second at issue was the WIPO transnational enforcement mechanism itself.⁷⁰ WIPO, as part of the United Nations, refers disputes arising under its agreements to the International Court of Justice (ICJ).⁷¹ The ICJ, while a groundbreaking institution in its own

67. Sell, *supra* note 4, at 450 (noting U.S. frustration with the lack of enforcement mechanisms in the WIPO, leading to the push for TRIPS); Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of Trips*, 20 HASTINGS INT'L & COMP. L. REV. 661, 677 (1997) ("The WIPO system facilitated the creation of IPRs at the international level, but it did not assure their enforcement."); Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277, 320 (2001) ("Driven by the industrialized countries' desire to stem piracy, substantive intellectual property norms needed to be accompanied by an enforcement mechanism, and WIPO provided no such enforcement mechanism.").

68. Sell, *supra* note 4, at 450 (noting U.S. frustration with the lack of enforcement under the WIPO mechanism).

69. Charles R. McManis, *Taking TRIPS on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, 41 VILL. L. REV. 207, 227 (1996) ("[T]he earlier Paris and Berne Conventions . . . merely established a system of private international law, whose substantive provisions are enforced (if at all) by the domestic courts of member countries in disputes between private parties."); Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 24 n.98 (1999) ("Although the Berne Convention and other international documents dictate important aspects of national copyright protection, it remains true that copyrights are creatures of domestic, territorially confined bodies of domestic law.").

70. See Jennifer Mills, *Alternative Dispute Resolution in International Intellectual Property Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 227, 235 (1996) ("In recent years, WIPO has been viewed as deficient in dispute settlement because few enforcement mechanisms exist within the WIPO structure.").

71. Berne Convention, *supra* note 58, art. 33.

right, suffers from weaknesses that led developed countries to conclude that it is a poor forum in which to litigate IPR disputes.

First, the ICJ is a discretionary forum—a state must volunteer to submit to the Court’s jurisdiction, over and above the state’s decision to submit to the subject agreement.⁷² Second, the ICJ has traditionally engaged in non-economic, rather than economically-focused, matters.⁷³ Third, the ICJ lacks authority to appoint judges with particular subject matter expertise.⁷⁴ Fourth, litigation before the ICJ is costly⁷⁵ and time-consuming,⁷⁶ making the forum ill-suited to the resolution of rapidly-moving topics like IPR.⁷⁷ Fifth, the ICJ has no implementation mechanism for its decisions, such as a means to invoke sanctions for noncompliance; instead, the court relies on voluntary implementation.⁷⁸

72. See Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 McGEORGE L. REV. 179, 187 (2009) (“However, just like other international courts, the ICJ is a court of limited jurisdiction, and its competence extends only to cases where there is consent by all parties to the dispute.”).

73. Statute of the International Court of Justice art. 36, ¶ 2(a)–(d), June 16, 1945, 33 U.N.T.S. 993.

74. Instead, judges are appointed for lengthy terms after election by the entirety of the United Nations. See e.g., *id.* arts. 3–15 (laying out the membership of the court at fifteen judges, no two of whom may share nationality, elected by the U.N. General Assembly and Security Council for nine year terms).

75. Cesare P.R. Romano, *International Justice and Developing Countries: A Qualitative Analysis*, LAW & PRAC. INT’L CT. & TRIBUNALS 539, 552 (2002), available at http://www.pict-pcti.org/publications/PICT_articles/Devlp_Coutrs/Developing_Countries_Part2.pdf.

76. Whaling in the Antarctic (Australia v. Japan), Order of 13 July 2010, I.C.J. Reports 2010, p. 400, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=64&case=148&code=aj>. Even cases quickly resolved in the first order are subject to re-litigation years later. See, e.g., Temple of Preah Vihear (Cambodia v. Thailand) Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6; Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 537.

77. Of course, these criticisms could well apply to most international organizations, including the WTO.

78. Jesse Townsend, *Medellin Stands Alone: Common Law Nations Do Not Show a Shared Postratification Understanding of the ICJ*, 34 YALE J. INT’L L. 463, 467 (2009); U.N. Charter art. 94, para. 1–2 (“1. Each Member of the United Nations undertakes to comply with the decision of the International Court

Given the frustrations with the WIPO and perceptions that the ICJ was a poor fit for IPR dispute resolution, countries wanting more rigorous IPR norms at the international level saw an opportunity in the WTO to raise the standard of IPR harmonization through a newly negotiated agreement. Countries in positions of power perceived that a new IPR agreement was necessary, and they felt that housing this agreement within the WTO had its advantages.⁷⁹ First, any WTO IPR agreement would be part of a larger package. By promising concessions in other trade sectors such as agriculture and textiles, developed countries could extract greater commitments from developing countries on IPR than were possible outside the multifaceted trade context.⁸⁰ Second, unlike the WIPO, the WTO was designed to hold states more meaningfully accountable for their implementation of provisions to which they agreed, through its evolving adjudicatory mechanism and the possibility of cross-sectoral retaliation in cases of noncompliance.⁸¹ The combination of leverage for concessions and a promise of enforcement of those concessions was an attractive package for those frustrated by the contemporary state of IPR global regulation.⁸² Thus, the TRIPS Agreement was born.

of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”).

79. See Helfer, *supra* note 3, at 20 (stating that two factors motivated the United States and the European Commission to shift intellectual property lawmaking from WIPO to GATT: the dissatisfaction with treaty negotiations hosted by WIPO, and the desire to adopt more stringent intellectual property standards).

80. *Id.* at 22 (“Developing nations agreed to include intellectual property within the newly created WTO in exchange for securing access to the markets of industrialized states for their agricultural products, textiles, and other goods.”); Sell, *supra* note 4, at 451 (“The U.S. was able to wield the carrot of increased market access and potential future investment along with the stick of economic coercion in order to get developing countries to sign on to much higher standards of intellectual property protection.”); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *Nw. J. INT’L L. & Bus.* 398, 465 (1996–1997) (noting the possibility of linking intellectual property protection to other issue areas within the GATT/WTO system).

81. DSU, *supra* note 25, art. 22.

82. See Petersmann, *supra* note 80; Helfer, *supra* note 3.

The advent of the TRIPS Agreement thus shifted the balance of power on international IPR regulation away from the WIPO into the newly formed trade organization.⁸³ Scholars have spent significant effort analyzing this blatant forum-shifting exercise by developed⁸⁴ countries.⁸⁵ The immediate criticism was that the WTO's linking of IPR with other trade sectors such as agriculture and textiles permitted extortion by developed countries,⁸⁶ who used their superior bargaining power

83. WIPO, in turn, retained significant IPR administrative authority, but was asked to share regulatory power with the newly formed trade organization. Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) [*hereinafter* WIPO-WTO Cooperation Agreement]; *see also* TRIPS, *supra* note 1, art. 68 (“In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.”).

84. Note that the terms “developed” and “developing” country are used herein for convenience. The author believes that dividing intellectual property interests along the fuzzy lines of these overbroad categories is dangerous, in that it promotes a view of intellectual property that lacks an ideal level of nuance. However, given the prevalent use of these terms in the literature to date, this Article uses them pending development of viable alternative terminology.

85. Helfer, *supra* note 3, at 4 (“[R]evisionist readings of TRIPS’s negotiating history now stress the power-based bargaining strategies that industrialized countries employed to coerce developing states into agreeing to treaty terms about which they had little understanding, let alone meaningful input.”); *see* Sell, *supra* note 4, at 450 (noting the shift from WIPO into the GATT mechanism due to frustrations over WIPO paying “too much attention” to developing countries, and the lack of WIPO enforcement mechanisms); *see also* JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 565 (2000) (arguing that “[f]orum-shifting is a strategy that only the powerful and well-resourced can use”).

86. J.H. Reichman, *Compliance with the Trips Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT’L L. 363, 374 (1996) (noting the trade-offs made between agriculture and textiles on the one hand and IPR protection on the other); Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal Trips Regime in a Multicultural World*, 47 AM. BUS. L.J. 455, 506 (2010) (arguing that “[t]he TRIPS Agreement represents a successful culmination of several attempts by developed nations to consolidate their monopoly position over the global economy”); Kristen Riemenschneider, *Philosophy, Trade, and AIDS: Current Failures to Obtain a Substantive Patent Law Treaty*, 11 VA. J.L. & TECH. 5, 21–22 (2006) (noting that developing countries took issue with the negotiation of IPR norms in the trade context due to power imbalances).

to extract infeasible promises from developing countries eager for a piece of the international trade pie.⁸⁷

Proponents of the forum shift argued that the cross-sectoral linkages are indeed the beauty of the WTO, allowing at last for negotiations that encompass multiple sectors and thereby have a chance to offer benefits to everyone.⁸⁸ In short, countries interested in greater IPR protection used the trade-offs available during the Uruguay Round to extract IPR commitments from other countries by offering benefits in other sectors of greater import to those countries.⁸⁹

Whatever the pros and cons of subsuming IPR into a mechanism employing a cross-sectoral approach, many argued that the hook between IPR and trade was not intuitive.⁹⁰

87. Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT'L ECON. L. 681, 725 (2006) (noting the power imbalances at play during the TRIPS negotiations); Sell, *supra* note 4, at 450 (noting that "rich states with large markets" could use potential access to those markets as a bargaining point to extract commitments on intellectual property protection); Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 740 (1996) (arguing that "developing countries may have gotten some 'benefits' in the agreements over textiles and agriculture," but TRIPS nevertheless may hamper the attainment of development objectives).

88. Helfer, *supra* note 3, at 82 (arguing that the regime shifting may "open up lawmaking to new perspectives," "create new venues for states to bargain," and "generate new forms of cooperation among intergovernmental bodies with different institutional strengths."); Sell, *supra* note 4, at 449 (arguing that the "horizontal forum-shifting provides some opportunities for crusaders for expanded access to intellectual property"); Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123, 129 (2004) (stating that the "integrationist regime shifting strategy has helped developing countries to increase their bargaining power within the WTO and WIPO").

89. See Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1071 (1994) (noting that the wide range of issues on the table during the Uruguay Round facilitated an outcome in which each participant had some of its objectives fulfilled); John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 13 (1992) (stating that agriculture and textiles were trade-offs for services and intellectual property rights).

90. See Reichman, *supra* note 86, at 374 (noting differences of opinion about whether the trade concessions for IPR gains were material to developing countries); Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 CHI.-KENT L. REV. 385, 390 (1996) (noting a recent United Nations study that failed to find a correlation between IPR protection and foreign investment in developing countries); see Dreyfuss &

TRIPS proponents justified the Agreement's negotiation by emphasizing that the TRIPS mandate was limited to "trade-related" aspects of IPR.⁹¹ In other words, proponents argued that any displacement of the WIPO function by TRIPS was minimal, as TRIPS would only regulate those aspects of IPR that were "trade-related."⁹² This limitation presumably left primary responsibility for non-trade-related aspects of intellectual property rights to the WIPO.⁹³

But what does it mean to regulate "trade-related" aspects of intellectual property rights? Which aspects of IPR are "trade-related," and which are related to something else? And, perhaps just as importantly, how has the reasonable view of

Lowenfeld, *supra* note 11, at 279 (noting that since "a country's refusal to protect against copyists leaves all innovators operating within that country on something of an equal footing, the absence of intellectual property protection is not a direct barrier to international trade.").

91. Meeting of 25 March 1987, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods, MTN.GNG/NG11/1, para. 8. ("Some participants stressed that the Group should abide strictly by the mandate given to it by the Ministerial Declaration and that this related to trade in goods only. Some of these participants were of the view that the mandate did not provide for an exercise to set standards of protection of intellectual property rights or to attempt to raise the levels of such protection through the strengthening of enforcement procedures.").

92. Pager, *supra* note 9, at 271 n.7 (noting the attempt, perhaps unsuccessful, to limit the scope of TRIPS through the Agreement's title); see C. O'Neal Taylor, *Linkage and Rule-Making: Observations on Trade and Investment and Trade and Labor*, 19 U. PA. J. INT'L ECON. L. 639, 667 (1998) (stating that TRIPS was named to "emphasize the only acceptable linkage: the rules covered in each agreement were 'trade-related.'").

93. Note that, even with the TRIPS Agreement in place, WIPO retains significant IPR-related powers, especially in the administrative and interpretive realm. However, the organization was asked to share authority on IPR generally with the WTO. WIPO-WTO Cooperation Agreement, *supra* note 83; see also TRIPS, *supra* note 1, pmbl. ("Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization . . ."). See Elaine B. Gin, *International Copyright Law: Beyond the WIPO & TRIPS Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 790 (2004) ("WIPO's jurisdiction in copyright law is much more comprehensive, compared to TRIPS' jurisdiction, which is restricted to those aspects of copyright that are 'trade-related.'") Therefore, "it may be more suitable to address the issue of moral rights in WIPO, because such rights are not related to trade."); Cordray, *supra* note 64, at 125-30 (illustrating the comparisons between WIPO and WTO provisions).

what is “trade-related” changed since the advent of TRIPS in 1994?

Some have speculated that “trade-related” was mere lip service, and that there was no intent for the WTO’s mandate on IPR to be limited in any meaningful way.⁹⁴ Indeed, it is hard to see how the structure of TRIPS is at all more limited than the major IPR agreements that preceded it.⁹⁵ In fact, it is more expansive in scope, and imposes more onerous requirements than the WIPO agreements.⁹⁶ Thus, it is difficult to discern how “trade-related” was meant as a limiting factor, even in 1994.

Whether or not the original intent was to limit the TRIPS Agreement’s mandate in comparison with prior IPR agreements⁹⁷ (and there is no real evidence of such intent), the TRIPS Agreement has proven through the years to be expansive in scope and demand. And, in 2014, the Agreement seems to reach into almost every aspect of IPR law and regulation.

94. See Pager, *supra* note 9, at 217 n.7 (“Nor did the TRIPS Agreement limit its focus to the ‘trade related aspects’ of IP as its title suggests. Not only did the regulatory harmonization imposed by TRIPS go well beyond any reasonable understanding of that phrase, TRIPS does not even address some of the most obvious points at which IPR and trade do overlap, such as the reimportation of gray market goods.”); Mark C. Lang, *What A Long, Strange “TRIPS” It’s Been: Compulsory Licensing from the Adoption of TRIPS to the Agreement on Implementation of the Doha Declaration*, 3 J. MARSHALL REV. INTELL. PROP. L. 331, 333 n.12 (2004) (recognizing the need for new rules concerning “the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights”) (quoting TRIPS, *supra* note 1, pmb.).

95. Helfer, *supra* note 42, at 358–60 (stating that the core “minimum standards” of TRIPS continue and extend the basic structure of the Berne, Paris, and Rome Conventions); Daniel J. Gervais, *The Protection of Databases*, 82 CHI.-KENT L. REV. 1109, 1116 (2007) (stating that “the TRIPS provision is broader in scope than Article 2(5) of the Berne Convention, which applies strictly to collections of literary and artistic works”).

96. TRIPS, *supra* note 1, arts. 41–61 (providing an effective enforcement mechanism that is absent in Berne and Paris). See John Linarelli, *What Do We Owe Each Other in the Global Economic Order?: Constructivist and Contractualist Accounts*, 15 J. TRANSNAT’L L. & POL’Y 181, 207 (2006) (noting that TRIPS was the first international trade agreement to denote minimum standards of protection, and that those standards were fairly rigorous).

97. These are the primary WIPO agreements. Paris Convention, *supra* note 58; Berne Convention, *supra* note 58.

III. TECHNOLOGICAL ADVANCES: CHANGES IN PLAYERS, PACE, AND PRODUCTS

Whatever “trade-related aspects of intellectual property rights” meant in 1994, it is almost certain that the phrase means something different now. Both trade and IPR have seen revolutionary changes since the conclusion of the Uruguay Round, leading to significant expansion of the fields’ boundaries. In addition to affecting the fields individually, the expansion of both has critically impacted the intersection of the two fields in ways that have irretrievably changed the meaning of the phrase “trade-related aspects of IPR.” This section discusses just a few of the significant changes impacting trade and IPR, and the fields’ intersection, since 1994. The changes highlighted in this section represent only a part of the evolution; while not exclusive, they illustrate the phenomena that have caused the TRIPS balloon effect.

The common trigger behind many of the significant changes is technological advancement. The rise of the Internet and the concomitant, vast advances in telecommunication have impacted both international trade and intellectual property by fundamentally altering the nature of daily business transactions.⁹⁸ The first major change concerns the players involved in both international trade and IPR transactions. Greater accessibility of both the international trade market-

98. The term “international trade” is used in this section to describe the broad field of international commercial transactions. Among lawyers, “international trade law” and “international business transactions” are used to differentiate between two sets of legal mechanisms for regulating international commercial transactions. The former, “international trade law,” generally refers to the mechanisms employed among states to regulate governmental practices affecting international business. The latter, “international business transactions,” often refers to the legal mechanisms employable by individuals and entities in regulating individual transactions. However, this bifurcation in legal mechanisms ignores the reality that both bodies of regulatory law ultimately impact the same set of international commercial transactions. This Article explores how the WTO and other government-to-government mechanisms—the “international trade law” bodies—are faring in the face of the massive expansion of such transactions. In other words, how are “international trade law” mechanisms handling the vast expansion in “international trade”? While one certainly could envision that analyzing the legal mechanisms that traditionally fall under “international business transactions” could be a worthy undertaking, such exploration is beyond the scope of this Article.

place and IPR production has led to unprecedented participation by small and medium-sized enterprises (SMEs) and individuals in core aspects of both fields.⁹⁹ This shift in players, in turn, has sharpened competition and vastly expanded the volume of transactions in both fields. Complementing the vastly increased volume of transactions is the second highlighted change: a change in pace. Technological advances have allowed for more seamless air travel, more accessible communication without travel, and instantaneous electronic transactions.¹⁰⁰ These changes have quickened the pace of a typical international transaction exponentially. Finally, technological advances have affected the very products that are being traded, especially in the IPR realm. Specifically, many copy-

99. SMEs have been gradually but steadily boosting their share of U.S. merchandise exports. The SME share of exports hit 30.6% in 1997, up from 26.4% in 1987 and 29.5% in 1992. See INT'L TRADE ADMIN, U.S. DEP'T OF COMMERCE, SMALL & MEDIUM SIZED EXPORTING COMPANIES: A STATISTICAL PROFILE 1 (1999); see also Llewellyn Joseph Gibbons, *Creating a Market for Justice: A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 2, n.3 (2002) ("E-commerce transactions are unique for a variety of reasons. First, the nature of e-commerce makes it possible for a very small Internet 'start-up' to begin doing business and to reach a worldwide market with very little initial cost . . ."); Mary Shannon Martin, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 128, 128, 132 (2002) ("Both traditional business sectors ('bricks-and-mortars') as well as Internet start-ups ('dot-coms') are benefiting from the e-commerce explosion. The number of 'small' merchants (i.e. those with annual sales from \$100,000 to \$10 million) on the Internet is projected to increase from 17,500 in 1999 to 2.6 million in 2004. Another report estimates that the number of small- and medium-sized businesses on the Internet has grown by 78% from 1999 to 2000 alone . . . Fifth, the nature of e-commerce uniquely facilitates the rapid growth of international business transactions, both large and small.").

100. See generally MARK ZANDI, VIRENDRA SINGH & JUSTIN IRVING, THE IMPACT OF ELECTRONIC PAYMENTS ON ECONOMIC GROWTH 3 (2013), available at http://corporate.visa.com/_media/moodys-economy-white-paper.pdf ("Greater usage of electronic payments added \$985B in global economic growth (2008–2012)"); Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 ABA J. LAB. & EMP. L. 487, 489 (2010) ("Decreasing transportation costs for goods have played a key role in expanding international trade in goods and in allowing multinational businesses to develop internationally-integrated production chains.").

right-protected products have gone digital since 1994.¹⁰¹ Thus, increases in volume and pace affect these products all the more. Add to those matters the difficulties of enforcement against online infringement, and what results is a perfect storm of circumstances for a completely changed industry.¹⁰²

These changes—in the players, the pace, and the products—mean that the marketplaces of trade and intellectual property that the WTO was established to regulate no longer exist. This section explores the specific ways in which these changes have affected the intersection of trade and IPR. The next section, in turn, explores how the fundamentally altered landscape that results has impacted discussions about the trade-IPR union as well as the WTO's efficacy as a regulatory body.

A. *Changes in Players*

When the WTO was established in 1994, the major players on the international trade circuit were governments and large

101. Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575, 575–76 (2000) (noting the particular challenges of managing a marketplace in which the Internet plays a leading role); INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2012, at 6 (2012), available at http://www.ifpi.org/content/section_resources/dmr2012.html (noting the transition of music to digital formats); Matthew Garrahan, *Warner in Online Move to Stop DVD Piracy*, FINANCIAL TIMES (Oct. 2008), <http://www.ft.com/intl/cms/s/0/4085db1a-92f5-11dd-98b5-0000779fd18c.html#axzz27dNMUMSG> (noting a shift by a major movie studio to online release); Tim Walker, *The Big Question: First Music, Now Film—So Can the Entertainment Giants Defeat Piracy?*, THE INDEPENDENT (Apr. 9, 2009), <http://www.independent.co.uk/extras/big-question/the-big-question-first-music-now-film-ndash-so-can-the-entertainment-giants-defeat-piracy-1666150.html> (discussing the BitTorrent phenomenon and the additional IPR enforcement challenges its prevalence in the online market creates).

102. See Graeme W. Austin, *Importing Kazaa—Exporting Grokster*, 22 SANTA CLARA COMP. & HIGH TECH. L.J. 577, 610–11 (2006) (discussing the impact of digitization of copyrighted files and its effect on the scope of the marketplace for copyrighted works); Sell, *supra* note 4, at 448 (“Changes in technology—and particularly the digital revolution—have presented new regulatory challenges.”); Garrahan, *supra* note 101 (recognizing that the shift to online releases of copyright-protected products opens a door to increased levels of digital online piracy); Walker, *supra* note 101 (discussing how the online digital music phenomenon has led to obstacles for enforcing existing regulations and creating a different business framework for record companies).

multi-national corporations.¹⁰³ This was so, in part, because the level of resourcing required to engage in international business transactions was substantial. Start-up costs to break into the international market were prohibitive, and maintenance costs (maintaining relationships with suppliers and customers) were daunting.¹⁰⁴ It follows logically that only organizations (such as governments) and enterprises with a significant amount of liquid capital could participate in such a market.

The rise and accessibility of the Internet changed all of that. Whereas previously, significant international deals were reserved for those who had the means to travel, the Internet has obviated much of the need to do so.¹⁰⁵ The online nature of a wide swath of transactions means that a small business owner can sit in her living room in southern California and close a deal with a distributor in India. The ability to access

103. Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?*, 17 TUL. J. INT'L & COMP. L. 299, 322 n.97 (2009) ("Only WTO members and not private entities may initiate a dispute settlement proceeding under the WTO Agreements.").

104. See GREATER RICHMOND PARTNERSHIP INC., U.S. STARTUP MODEL FOR INTERNATIONAL FIRMS (2011), available at http://www.grpva.com/publications/international_business_model.pdf (last visited Dec. 12, 2013) (laying out comparative costs for either a two or ten person firm to start in the United States in a variety of different cities, with two person costs estimated from \$162,053 to \$510,279 and ten person firms from \$495,695 to \$1,077,404). See also THE WORLD BANK, COST OF BUSINESS START-UP PROCEDURES, <http://data.worldbank.org/indicator/IC.REG.COST.PC.ZS> (last visited Dec. 12, 2013) (comparing the cost of starting up a business in a country as a percentage of that country's Gross National Income per capita).

105. David Biello, *Can Videoconferencing Replace Travel?*, SCI. AM. (Mar. 18, 2009), <http://www.scientificamerican.com/article.cfm?id=can-videoconferencing-replace-travel> ("Several companies, including Cisco Systems, LifeSize, Polycom and Siemens, among others, have been working on such technology for years—and the cost-cutting reality of the present economic crisis is helping to speed its adoption. It is unlikely that videoconferencing can replace all travel, but organizations are turning to it more and more as the technology's downside—shaky connections, dropped calls and disorienting lags—largely has been eliminated."); *Business Travel: The Rise of Video Conferencing*, TRAVEL WKLY. (Oct. 16, 2008) ("Over the past few years the technology for video and web conferencing has got its act together—no longer does it freeze or crash as soon as you overload the data line, as it did in the early 1990s. Now travel management companies are predicting an increase in its usage over the next two years.").

potential customers, suppliers, and distributors across the globe, without having to get on an airplane and fund an international trip, means that smaller players can get in the game. The Internet has made physical or geographical bars to access less relevant,¹⁰⁶ thus opening up international business to a much larger subset of individuals and enterprises than could previously compete.¹⁰⁷

Indeed, for the first time in history, almost everyone wants to expand her business beyond her immediate locale.¹⁰⁸ Gone are the isolationist attitudes of the Cold War era.¹⁰⁹ Gone are the hurdles—i.e., language, transportation, communication technologies—that kept small and medium-sized enterprises from engaging in global business.¹¹⁰ Gone are the days, therefore, in which the only players in the game—and therefore the only participants interested in international trade regulatory institutions—were sovereign state governments and large, multinational corporations.

In addition to gaining greater accessibility to international trade, small and medium-sized enterprises and individuals have blossomed in the context of intellectual property transactions. It is easier than ever to establish a business that will use a trademark, or produce a creative or inventive prod-

106. Gibbons, *supra* note 99, at 2 n.3; Weiss, *supra* note 100, at 489.

107. Martin, *supra* note 99, at 128, 132.

108. Brian Stelter, *Netflix Expanding to Central and South America*, N.Y. TIMES BLOGS, MEDIA DECODER (Jul. 5, 2011, 9:31 AM), <http://mediadecoder.blogs.nytimes.com/2011/07/05/netflix-expanding-to-central-and-south-america/> (“Each country represents a new market, where we have global process knowledge and technology, but no brand or content until we invest locally,” the two men wrote in the letter.”); Michael J. Wolf, *Here Comes Another Wave of Media Mergers*, WALL ST. J., Feb. 21, 2002, at A18 (“An array of new technologies is now coming to market, combining elements of broadband technology, wireless devices, personal video recorders, telephony and other interactive services. Consolidation should create media platforms with the leverage and scale to introduce services widely and economically. While all the bugs and kinks—not to mention intellectual property issues—have been agonizingly slow to resolve, a whole new set of service offerings are now realizable.”).

109. See Anna Lanoszka, *The Promises of Multilateralism and the Hazards of “Single Undertaking”: The Breakdown of Decision Making Within the WTO*, 16 MICH. ST. J. INT’L L. 655, 662 (2008) (noting that the idea of uniting East and West in a single trading bloc was unfathomable during the Cold War era).

110. Weiss, *supra* note 100, at 489.

uct that will qualify for copyright or patent protection.¹¹¹ One no longer needs a record label to release a song.¹¹² One no

111. Bilal Kaiser, *How the Web Makes Starting a Business Easier Than Ever*, LEGALZOOM.COM, <http://www.legalzoom.com/business-management/starting-your-business/how-web-makes-starting> (last visited Dec. 12, 2013) (“With today’s wide-spread Internet use, however, the dream of starting a business is accessible to more people than ever. Many high-cost business essentials of 20 years ago have been replaced by low-cost, online alternatives or made obsolete by new technologies. Today, having the right idea—and the right business skills—can be enough to get started.”); Zack O’Malley Greenburg, *Why It’s Never Been Easier To Be a Successful Inventor*, FORBES MAG. (June 6, 2012, 6:00 PM), <http://www.forbes.com/forbes/2012/0625/investment-guide-12-internet-adrian-van-anz-invent-own-profits.html> (“From instructive message boards that explain machining to YouTube videos that show how to do aluminum extrusions, there’s never been more information available to those looking to create something. Advancements like the 3-D printer make it possible to produce prototypes without an assembly line Just as important, the advent of crowdfunding and social media has streamlined the process of bringing ideas to market.”); John Herrman, *How to Start an Online Business*, POPULAR MECHANICS (Mar. 1, 2011), <http://www.popularmechanics.com/technology/how-to/tips/how-to-start-an-online-business> (“In years past, starting a business was a complex, expensive and risky affair, but online tools have smoothed out many of the logistical bumps in the process. We’ve gathered wisdom from ordinary joes who made good by using the Internet to sell their wares. Here’s how to get started.”).

112. *Just Say ‘No’ To Record Labels*, WIRED (Jan. 26, 2004), <http://www.wired.com/entertainment/music/news/2004/01/62050> (“Rock veterans Peter Gabriel and Brian Eno are launching a provocative new musicians’ alliance that would cut against the industry grain by letting artists sell their music online instead of only through record labels By removing record labels from the equation, artists can set their own prices and set their own agendas”); Julie Snyder, *Going It Alone*, INDUSTRY STANDARD (May 8, 2001), <http://www.aimeemanninprint.com/2001/is050801.htm> (“Skipping the glitz that comes with touring on a major label has its challenges, but that’s part of the price you pay for controlling your work and keeping a bigger cut of the profits. At a time when the entire music-industry landscape is in flux—with artists and labels alike trying to hammer out issues over copyright and compensation for digital use—former major-label artists like Brooke Aimee Mann and others are finding that going independent and using technology to their advantage can pay off both financially and creatively.”); *No Record Label, But Amanda Palmer Raises Over \$100k in Just Six Hours on Kickstarter*, TECHDIRT (Apr. 2012), <http://www.techdirt.com/blog/casestudies/articles/20120430/11150918717/no-record-label-amanda-palmer-raises-over-100k-just-six-hours-kickstarter.shtml> (“Once again, it seems that lots of artists are figuring out cool and creative ways to make money these days, even as the old industry continues whining. Of course, what’s notable is that these new ways don’t seem to involve those old indus-

longer needs a publisher to produce a book.¹¹³ One can market a major IPR-dependent product to consumers around the world, with less of the investment and infrastructure that were required a decade or two ago.

Of course, with that global, versatile IPR market come myriad challenges, including skyrocketing risks of infringement. While communication technologies allow business transactions across borders with ease, those technologies do not solve the associated problems that result from less control. Despite all of the technological advances that we as a society have witnessed in recent years, control remains local. Thus, as SMEs expand their IPR-based businesses beyond their local markets, they become increasingly vulnerable to infringements. Likewise, costs increase (hopefully in a favorable proportionality to their returns). One of these costs is enforcement, and enforcement is more costly and more difficult from far away than it is up close.¹¹⁴ So with multiplying opportunity quotients come multiplying risk quotients.

And multiplying is a common theme. The changes in technology and the increasing involvement of SMEs in both international trade and IPR transactions have resulted in a skyrocketing of the sheer volume of both international trade and IPR-related transactions since the advent of the WTO. It is only natural that trade should have expanded in the wake of

try players—or their ridiculous deals where they get the copyright and keep the vast majority of income.”).

113. Bernard Starr, *Legal Issues in Self-Publishing: What Authors Need to Know*, HUFFINGTON POST (Dec. 24, 2012, 7:21 AM), http://www.huffingtonpost.com/bernard-starr/self-publishing_b_2340231.html (“Self-publishing continues its exponential growth. More and more authors are choosing this route for presenting their work to the public, encouraged by impressive success stories, including accounts by bestselling writers who have moved over from traditional publishing to take advantage of greater profits and better control of their works.”); Rita Braver, *Authors Exercise Their “Write” to Self-Publish*, CBS NEWS (Dec. 9, 2012, 9:21 AM) (“It’s one of the strongest trends in publishing, with estimates that more than 200,000 books were self-published last year—authors like Bond, by-passing the traditional publishing houses.”).

114. CHRISTINE GREENHALGH ET. AL., INTEL. PROP. OFF. OF THE U.K., INTELLECTUAL PROPERTY ENFORCEMENT IN SMALLER U.K. FIRMS 48 (Oct. 2010), available at <http://www.ipeg.eu/blog/wp-content/uploads/Intellectual-Property-Enforcement-in-Smaller-UK-Firms-October-2010.pdf> (“The costs of UK and overseas attorneys, the problems and costs of the language barrier and the distances involved all compounded the problems IPR owners faced in dealing with foreign infringers.”).

the WTO's establishment, but one can guess that none of the WTO negotiators accurately predicted how the volume of trade and IPR transactions would be affected by the impending technological earthquake. Not long after the advent of the WTO, the technological shifts impacting both trade and IPR made "trade-related aspects of IPR" a much more all-encompassing phrase than it was in 1994. With so many diverse players in both the trade and IPR games, the field of play is vast.

B. *Changes in Pace*

As the volume of transactions has increased, so has their speed. Technological advances have revolutionized the ways that parties communicate, making minute-by-minute communication across vast distances a reality.¹¹⁵ This new reality, in turn, leads to a profound temporal shift in trade-related transactions.

The GATT,¹¹⁶ out of which the WTO arose, was primarily concerned with regulating imposition of tariffs on goods—concrete objects, loaded onto ships, unloaded in harbors, inspected by Customs officers and distributed by truck, train or barge. There is a certain pace that comes with all that bulk, and regulating something that moves that slowly is the type of task that the WTO negotiators presumably had in mind.

Today's marketplace features an entirely different pace. There is no waiting for orders and bills to be shipped around the world, as paperwork evaporates into the cyber world. Instant relationships, instant deals, and instant action are the norms. Technology has impacted production of goods, streamlining processes of manufacture, shipping, and delivery.¹¹⁷

This pace has impacted IPR-dependent industries just like it has impacted industries in other sectors. However, when one adds these changes in pace to the changes in the products

115. Ki Mae Heussner, *The Top 10 Innovations of the Decade*, ABC NEWS (Dec. 1, 2009), <http://abcnews.go.com/Technology/AheadoftheCurve/top-10-innovations-decade/story?id=9204931> (listing innovations in online communications, including dates of launch of text messaging, Wikipedia, Friendster, Apple's iPhone, and others); Max Fraad Wolff, *Changing Communication, Changing World*, HUFFINGTON POST (Aug. 22, 2011, 12:53 PM), http://www.huffingtonpost.com/max-fraad-wolff/changing-communication-ch_b_932800.html (noting the role of online communications in political battles).

116. GATT, *supra* note 17.

117. Gibbons, *supra* note 99, at 2 n.3; Weiss, *supra* note 100, at 489.

highlighted below, the combination causes a magnifying effect that makes the changes in pace more impactful in the intellectual property world. Thus, while faster transactional pace is a universal phenomenon in the Internet age, in some ways it also has affected certain IPR sectors disproportionately.

As overwhelming as the marriage of trade and IPR may have been in 1994, the combination becomes even less manageable when taking into account the disproportionate impact that technologically-driven changes have had on trade in IPR goods. How can an organization built for concrete goods that take weeks to ship hope to keep up with a world in which transactions are executed in a matter of seconds?

C. *Changes in Products*

The massive changes in the players and pace of international trade-related transactions have no doubt affected international intellectual property just as much as they have affected other fields. The same advances in manufacturing, transportation, and telecommunications that make it easier to harvest and transport wheat also make it easier to make and transport pharmaceuticals, DVDs, and Nike® shoes.

However, the technological impact on IPR does not stop there, especially in the copyright realm. With regard to many copyright-dependent products, technology has drastically changed the products themselves. The digitization of many copyright-protected products has affected models of manufacture and creation, distribution, and everyday use.¹¹⁸ Both copying and dissemination of digital copyright-protected works—even dissemination across great distances—is inexpensive and extraordinarily easy.

The vision of “intellectual property” during the TRIPS negotiations presumably included the current technologies of the time—videocassettes of movies, compact discs of music, hard copies of books, Louis Vuitton® handbags, bulk shipments of medicines, and more.¹¹⁹ The elaborate manufactur-

118. See, e.g., Claire Cain Miller & Julie Bosman, *E-Books Outsell Print Books at Amazon*, N.Y. Times (May 19, 2011), <http://www.nytimes.com/2011/05/20/technology/20amazon.html> (noting that electronic book sales on Amazon have begun outstripping hard copy sales).

119. Doris Burke, *Charting the Mytunes Revolution*, CNN MONEY/FORTUNE MAG., http://money.cnn.com/galleries/2007/fortune/0707/gallery.music_

ing and distribution processes involved in disseminating hard goods dictated a certain type and style of regulation, and the WTO was set up to be effective at that type and style of regulation.

In many copyright sectors, those elaborate manufacturing and distribution processes simply are no longer part of a realistic picture of intellectual property creation and distribution. While hard copy distribution of copyrighted materials still is a significant portion of international trade in certain copyright-protected items,¹²⁰ an increasing portion of copyrighted goods is digital files, created easily using advanced technologies.¹²¹ Technological advances also have changed distribution methods affecting all IPR disciplines by allowing for increased trading over the Internet, either of files embodying IPR-protected works or of orders for physical goods.¹²² And technology has,

sales. fortune/index.html (last visited on Nov. 17, 2013) (listing U.S. music sales over a number of years); U.S. INDUSTRIAL OUTLOOK 1994, U.S. DEP'T OF COMM 31-4 (Feb. 1, 1994) ("Total cassette revenue increased in 1993 to between \$13 billion and \$18 billion."); DVDs would overtake VHS sales in 2002. *DVD Sales Top VHS Sales For First Time*, SILICON VALLEY BUS. J. (Jan. 9, 2002, 11:38 AM), <http://www.bizjournals.com/sanjose/stories/2002/01/07/daily34.html>.

120. David Streitfeld, *Little Sign of a Predicted E-Book Price War*, N.Y. TIMES, Dec. 23, 2012, at B1 ("Adult e-book sales through August were up 34 percent from 2011, an impressive rate of growth if you forget that sales have doubled every year for the last four years. And there have been more recent signs of a market pausing for breath."); Miller & Bosman, *supra* note 118 (noting that electronic book sales on Amazon have begun outstripping hard copy sales); Eddie Wrenn, *Is the Kindle Really Killing the Book?*, THE DAILY MAIL, (Sep. 18, 2012, 10:38 AM), <http://www.dailymail.co.uk/sciencetech/article-2205109/Is-Kindle-really-killing-book-Digital-book-sales-soar-188-physical-sales-hold-steady.html> ("Spurred on by the explosive success of devices such as the Amazon Kindle reader, fiction e-books saw a growth in sales of 188 percent for the first half 2012, compared to the same period last year, the Publishers Association said.").

121. See, e.g., Miller & Bosman, *supra* note 118.

122. Austin, *supra* note 102, at 577 (noting the nature of P2P filesharing as a global phenomenon); Tom Colohue, *The Effects of the Internet: Music Distribution*, DOTTEDMUSIC.COM, <http://dottedmusic.com/2009/lifestyle/the-effects-of-the-internet-music-distribution/> (noting the effects of the Internet on word of mouth recommendations of music, as well as direct music sales); Jesse C. Bockstedt, Robert J. Kauffman & Frederick J. Riggins, *The Move to Artist-Led On-Line Music Distribution: A Theory-Based Assessment and Prospects for Structural Changes in the Digital Music Market*, INT'L J. OF ELECTRONIC COMM., Spring, 2006, at 7 ("The MP3 audio format and the wide distribution network that have become available via the Internet are driving changes in the

in some ways, made it more difficult to enforce rights, by increasing the quality of counterfeit and pirated goods¹²³ as well as the communication channels that allow infringement-based enterprises to operate across borders.¹²⁴ In short, technological advances have revolutionized the intellectual property field by changing the products themselves, the methods of distribu-

recorded music market structure and simultaneously are having a significant impact on the players in the traditional recorded music value chain.”); Robert H. Wright, *Escaping Davy Jones’ Locker: How the Motion Picture Industry Can Stop Digital Piracy Without Unnecessary Litigation*, 6 U. PITT. J. TECH. L. & POL’Y 1, 17 (“Nevertheless, as evolving Internet-based technology transformed the Internet into a viable means of distributing motion pictures to others, movie studios soon realized that the Copyright Act did little to address the growing threat posed by digital pirates.”); WORLD INTELLECTUAL PROPERTY ORGANIZATION, *INTELLECTUAL PROPERTY ON THE INTERNET: A SURVEY OF ISSUES* 24–39 (Dec. 2002) (noting the effects of digitization among copyrighted works in particular).

123. Jenny T. Slocum & Jess M. Collen, *The Evolving Threat and Enforcement of Replica Goods*, 33 W. NEW ENG. L. REV. 789, 795 (2011) (“However, the creators of replica goods remain current with technology and the latest trends of counterfeit detection, and so they mimic even the security details. Unless a consumer is well informed about the particular characteristics of the authentic product, it is difficult to discern whether a product is real or fake . . .”).

124. Doris Estelle Long, “Globalization”: *A Future Trend or a Satisfying Mirage*, 49 J. COPYRIGHT SOC’Y U.S.A. 313, 334–35 (discussing the ease with which pirate and counterfeiting operations adapt operations in the face of modern technologies); see also *Software Piracy on the Internet: A Threat to Your Security*, BUSINESS SOFTWARE ALLIANCE (Oct. 2009), <http://portal.bsa.org/internetreport2009/2009internetpiracyreport.pdf> (“For example, the US Federal Trade Commission (FTC) recently shut down a notorious rogue Internet service provider that was operating under various names and dedicated exclusively to recruiting, knowingly hosting, and participating in the distribution of spam, child pornography, and other harmful electronic content, including spyware, viruses, and Trojan horses. According to the FTC, the service provider even established a forum to facilitate communication between criminals.”); Michele Coscia & Viridiana Rios, *How and Where Do Criminals Operate? Using Google to Track Mexican Drug Trafficking Organizations*, DEPT. OF GOV., HARVARD UNIVERSITY (Oct. 23, 2012), available at http://www.gov.harvard.edu/files/videos/CosciaRios_GoogleForCriminals.pdf (“Members of . . . criminal organizations regularly share information of their operations, activities and rivalries on websites. They communicate with their allies, threaten their enemies and brag about their achievement in forums and discussion boards.”).

tion, and the modes of enforcement against counterfeiting and piracy.¹²⁵

Thus, the WTO—an organization set up to regulate a world that no longer exists—faces unexpected challenges in attempting to carry out the organization’s IPR mandate. How does an organization set up for DVDs and barges effectively regulate a ballooning trade of complex, technology-driven but easily copied and disseminated products in a digital marketplace?

The next section discusses how the above-detailed changes, among others, have affected the scope of the TRIPS Agreement. In light of the metamorphoses that characterize the intersection of trade and IPR, what are “trade-related aspects of intellectual property rights” in 2014?

IV. THE BALLOON EFFECT

This section posits that the multiple recent changes in trade and IPR, combined with the ill-defined mandate of TRIPS, create a TRIPS balloon effect that is affecting perceptions of the Agreement’s performance in regulating international intellectual property law. As a result of the ballooning nature of both trade and IPR since the TRIPS Agreement came into being, the WTO has encountered some degree of difficulty in its attempts to regulate “trade-related aspects of intellectual property rights.” The decision to conclude the TRIPS Agreement without a clearly defined mandate set the Agreement up for some of the criticisms that it has faced in ensuing years. Specifically, in the newly expanded marketplace, the TRIPS Agreement’s tasks now may be unfairly broad, presenting challenges to a large, bureaucratic, government-based organization that was founded on principles of regulation of a marketplace that looked very different at the time of negotiation. Acknowledging the balloon effect helps explain some of the perceptions of overreaching and underperformance that have haunted the TRIPS Agreement through the years. Identifying the problem can not only help TRIPS find a productive way forward, but it also can shed light

125. See Austin, *supra* note 101, at 578–80 (discussing the jurisdictional issues raised in attempting to enforce copyright in a digital world); Sell, *supra* note 4, at 448 (noting challenges resulting from the digital revolution).

on how to properly delineate future trade-IPR agreements and WTO agreements in other sectors.

A. *WTO Discontentment*

The WTO's founders thought they knew what trade was. While the GATT period¹²⁶ certainly saw massive evolution of technologies, improvements in communication and transportation mechanisms, and shifting attitudes toward international relations,¹²⁷ it is hard to imagine that the GATT negotiators had any true notion of what was coming when they met to begin the Uruguay Round in 1986.¹²⁸ The Uruguay Round commenced during the Cold War, after all, and the period preceding it had not been characterized by an overriding sense of trust among nations and willingness to cede authority to international institutions.¹²⁹ Nor had that period in time featured a strong desire for transnational codependence.¹³⁰ Thus, the

126. This agreement was the primary multilateral trade instrument between 1947 and 1994. GATT, *supra* note 17.

127. Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 705–6 (1994) (noting the shifts in political attitudes and military strategizing surrounding the rise of the Cold War during the GATT period); David P. Fidler, *Libertad v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297, 305 (1997) (noting the emergence of free trade as a hot item on the international agenda in the post-Cold War era).

128. See generally Ministerial Declaration on the Uruguay Round, *supra* note 37, pt. 1 (noting that the original intent of the Uruguay Round was to “preserve the basic principles and to further the objectives of the GATT”); Lanoszka, *supra* note 109, at 662 (noting that the creation of a new organization was not even on the minds of the GATT negotiators when the Uruguay Round began, and that the proposal for such an organization did not even materialize until 1990, only later to be taken seriously).

129. See Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 556 n.3 (1996) (noting two significant groups of nations operating outside of the GATT system prior to the Uruguay Round—the Soviet bloc and the major oil producers in the Middle East); Robert Howse, *Moving the WTO Forward—One Case at a Time*, 42 CORNELL INT'L L.J. 223, 224 (2009) (noting in particular how the political shifts characterizing the end of the Cold War influenced the formation of the WTO's Appellate Body).

130. See Lanoszka, *supra* note 109, at 662 (noting that the “Cold War mentality naturally influenced the start of the Uruguay Round in the mid-1980s when the possibility of uniting the economic interests of the West camp and the Eastern Bloc under a global trade organization was not yet seriously contemplated.”).

Uruguay Round itself forms an interesting microcosm—the world looked very different in 1994, when the Uruguay Round ended, than it had in 1986, when it began.¹³¹ The WTO, some may say, was a timely institution, and others have explored whether the WTO helped pave the way to meaningful economic interdependence following the Cold War, or whether the end of the Cold War paved the way for the WTO.¹³² Either way (and it is probably both), the WTO came along at a time when nations were looking for a different model of governance than that which had dominated the post-World War II twentieth century. The different world that the WTO helped to achieve in the wake of the Cold War solidifies its standing as one of the most important international institutions of all time.

Despite the optimism inherent in the creation of such a groundbreaking entity, in the nearly twenty years since the signing of the Marrakesh Agreement,¹³³ the WTO has come repeatedly under fire for its shortcomings.¹³⁴ Part of the backlash was immediate and pointed to problems inherent in the

131. See W. Michael Reisman, *The Vision and Mission of the Yale Journal of International Law*, 25 YALE J. INT'L L. 263, 269 (2000) ("There are remarkable differences between the Zeitgeist of 1974 and that of 2000. Then, international law was frozen by the Cold War and virtually every decision that was taken was distorted by the geo-strategic security considerations each side brought to that conflict. Economic self-determination was a powerful force, as many newly independent states, using command economy models, insisted on rights of expropriation and challenged many of the basic postulates that, later ascendant, were to make possible the transnational movement of capital and a vibrant world economy.")

132. See Bradford W.C. Pirie, *Russia's Economic Future: A Step Towards Economic Recovery or Merely a Detour Towards Economic Absorption?*, 4 J. INT'L L. & PRAC. 571, 571 (1995) ("During the Cold War era the world as a whole has seen that political alliances are strong and necessary for security, but they are no longer the strongest alliance possible. The most powerful arrangement has shifted from one centered around political ideologies to one of economic cooperation. This is apparent from the formation of the WTO, and the importance given to this organization.")

133. WTO Agreement, *supra* note 29.

134. See Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 134 (2001) (noting that the WTO Dispute Settlement Process is an ineffective mechanism through which to achieve compliance from superpower nations); Larry A. DiMatteo et. al., *The Doha Declaration and Beyond: Giving A Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANS-

process of negotiation.¹³⁵ Others claim that the cross-sectoral trade-offs lauded as a crowning characteristic of the WTO have not produced the benefits for developing countries over time that were promised during the Uruguay Round.¹³⁶ Still others

NAT'L L. 95, 159 (2003) (criticizing the WTO's weak approaches to labor and environment issues).

135. Many, for instance, have criticized the perennial lack of transparency in the organization. See Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations A Voice in the WTO?*, 12 TRANSNAT'L LAW. 427, 433 (1999) (noting that the "WTO lacks transparency because private parties in the form of individuals, corporations and NGOs can never be sure of a position that a state will endorse before the WTO."); John Ragosta, Navin Joneja & Mikhail Zeldovich, *WTO Dispute Settlement: The System is Flawed and Must be Fixed*, 37 INT'L LAW. 697, 751 (2003) (stating that the WTO lacks transparency regarding judicial procedural rules); Thomas L. Friedman, *Foreign Affairs; Evolutionaries*, N.Y. TIMES, July 20, 2001, at A5 (describing the protestors' aims in gathering at the Seattle WTO Ministerial as a protest against globalization); Stephanie Gutmann, *Half a Century of Student Protest*, N.Y. TIMES, Nov. 11, 2001, at A4 (stating that 30,000 to 50,000 people gathered in Seattle to protest the first WTO Ministerial). Set up as a government-to-government mechanism, the WTO has not to date included non-government groups. Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 331-32 (1996) (noting that nongovernmental organizations are not included in the WTO but should be given opportunities to participate in WTO work); Daniel Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion*, 1 J. INT'L ECON. L. 123, 123 (noting that non-governmental organizations, especially environmental groups, are excluded from the WTO); Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461, 510 (1998) (noting that "drafters of the World Trade Organization's charter discarded any plans to deeply involve nongovernmental organizations"). Furthermore, its proceedings are confidential. The WTO does not release documents submitted, so those documents remain secret unless released by the party that drafted them. See DSU, *supra* note 25, art. 4.6 ("consultations shall be confidential"); *id.* art. 13.1 ("[p]anel deliberations shall be confidential"); *id.* art. 18.2 ("[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential," and "Members shall treat as confidential information submitted by another Member to the panel . . . which that Member has designated as confidential."); Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT'L L.J. 1, 17 (2009) (noting that the WTO dispute settlement proceedings generally are confidential, even though particular countries can agree to open the proceedings to the public).

136. See Francis Gurry, *Globalization, Development, and Intellectual Property: New Challenges and New Opportunities*, 99 AM. SOC'Y INT'L L. PROC. 291, 294 (2005) (noting that "[s]ince the entry into force of the TRIPS Agreement,

decry the fact that the much-lauded dispute settlement mechanism has largely featured cases between developed countries,¹³⁷ with little action initiated by developing countries. Furthermore, while the cases that the DSB has heard have produced some significant outcomes, an equal number of cases have featured vague, two-sided outcomes,¹³⁸ or lack of solid resolution.¹³⁹

Any institution, especially one attempting to please a wide variety of constituencies at an international level, is bound to come under some criticism from outside parties. However, the last decade has witnessed a growing discontent *within* the WTO—among the very governments that were responsible for its founding.¹⁴⁰ One need look no further than the Doha

there has been a growing sentiment amongst a number of developing countries that the underlying trade-off in the Uruguay Round is working to the disadvantage of developing countries.”); *cf.* Reichman, *supra* note 86, at 374 (citations omitted) (noting the concerns that the trade-offs for which developing countries bargained may not have materialized but cautioning not to jump to quick conclusions on that score: “While opinions differ about the overall value of these concessions . . . the growing ability of the developing countries to penetrate developed markets for manufactured goods of all kinds should not be underestimated. Even if the developing countries gave up considerably more than they received with respect to intellectual property, they may obtain considerably more than they bargained for from the lowering of tariffs and nontariff barriers generally under GATT 1994.”).

137. *See, e.g.*, Panel Report, *Canada—Certain Measures Affecting The Renewable Energy Generation Sector*, WT/DS412/R (Dec. 19, 2012); Panel Report, *United States—Anti-Dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy*, WT/DS424/R (Apr. 1, 2011); Panel Report, *European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WT/DS389/R (Jan. 16, 2009).

138. Note the recent TRIPS dispute between the United States and China, with both sides claiming victory after the issuance of the Panel Report. *See* Press Release, Office of the U.S. Trade Representative, United States Wins WTO Dispute Over Deficiencies in China’s Intellectual Property Rights Laws (Jan. 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c>; Li Mofeng, *China Wins the WTO IP Dispute*, IT Shi dai zhou kan [IT Times Weekly], 8th ed., 2009; *see also* Richard Wachman, *Airbus and Boeing both Claim Victory*, THE GUARDIAN, May 19, 2011, at 27.

139. *See* Panel Report, *United States—Section 110(5) of US Copyright Act*, WT/DS160/R (Jan. 26, 1999) (The Panel found the United States to be in violation of its TRIPS obligations, but there has been no meaningful action to date to address the lack of compliance.).

140. *See* Bryan Mercurio, *The WTO and its Institutional Impediments*, 8 MELB. J. INT’L L. 198, 227 (2007) (noting that public criticism leads to discontent

Round of negotiations¹⁴¹ to see the high levels of dissatisfaction with the WTO—not from outsiders but from those that are at the very core of the organization.¹⁴² Given this internal strife, it appears that WTO norm-making essentially has come to a standstill.¹⁴³ Few significant norms have emerged from WTO negotiations in recent years, and WTO leaders are trying to hold the Doha round of negotiations together with a string.¹⁴⁴ Not only is there a development-related divide at the

from government officials and WTO Member governments); David A. Yocis, *Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations*, 76 N.Y.U. L. REV. 1259, 1260 n.6 (2001) (noting discontent within the European Union following the beef hormones dispute); Association of the Bar of the City of New York, *Symposium: The Greening of the World Trade Organization?*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 147, 160 (2002) (noting that the WTO triggers discontent through perceptions that its rules limit members' ability to regulate in a way that reflects domestic values).

141. Indeed, this is the very next round following the founding Uruguay Round.

142. Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT'L L.J. 345, 361 (2009) (stating that “lack of trust seems to be an important impediment toward progress in the Doha Round”); Richard W. Stevenson, *Measuring Success: At Least the Talks Didn't Collapse*, N.Y. TIMES, Nov. 15, 2001, at A12 (noting a lack of cooperation by WTO members during the Doha Conference, as well as the tendencies of members to “sacrifice the long-term economic potential of trade to the immediate political imperative of protecting domestic constituencies.”); Editorial, *Saving the Doha Round*, N.Y. TIMES, Apr. 15, 2011, at A26 (noting that the Doha round witnessed a lack of agreement in broader negotiations between rich countries and big developing countries); Christopher Rhoads & Scott Miller, *Leading the News: G-8 Leaders Fail to Make Progress on Trade Talks*, WALL ST. J., June 4, 2003, at A3 (noting that some members are not satisfied with Doha's main focus on improving economies of developing countries).

143. See Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOY. U. CHI. INT'L L. REV. 5, 88 (2008) (noting that the Members were unwilling to negotiate in the Doha round on eliminating non-tariff barriers related to non-trade issues); Amir H. Khoury, *The “Public Health” of the Conventional International Patent Regime & the Ethics of “Ethicals”: Access to Patented Medicines*, 26 CARDOZO ARTS & ENT. L.J. 25, 36 (2008) (noting the tension between developed and developing countries during the Doha Round as a result of “the divergence between the ex ante promise and ex post deficiencies” of TRIPS).

144. In the Report of the Trade Negotiation Committee on October 2012, Director-General Pascal Lamy noted that the weak global economy hinders the Doha Agenda, but still encouraged the Members to “explore any and all options, small as they may be, for incremental progress on the negotiating agenda.” WTO Director-General, *Report to the General Council* (Oct. 3, 2012),

Doha negotiating tables, but there are serious disagreements among developed powers.¹⁴⁵ The combination of these two divides has led to a faltering round of negotiations.¹⁴⁶ These stumbles are exacerbated by what seems to be an increasing loss of faith in the system, as a mix of fatalism¹⁴⁷ and posturing pervades the general sentiment at the negotiations.

The growing internal dissatisfaction has manifested itself not only in the form of gridlock within the WTO norm-making mechanisms, but also in increasing forum-shifting by a variety of WTO Members.¹⁴⁸ This phenomenon has been especially pronounced in the IPR realm. Matters that perhaps the original negotiators would have envisioned being included in ongoing WTO negotiations have been extracted by interested par-

available at http://www.wto.org/english/news_e/news12_e/gc_rpt_03oct12_e.htm.

145. See Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/1 (June 1, 1999) (the United States as complainant); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (May 13, 2003) (the United States as complainant); Panel Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (Mar. 17, 1999) (the European Union as complainant).

146. See Bhala, *supra* note 143, at 6 (“Schisms are the unifying theme in Doha Round negotiations. The divisions transcend the traditional and now simplistic one between rich and poor Members of the World Trade Organization (WTO). Disunion exists among the wealthy, among the developing, and among the least developed. Recently Acceded Members (RAMs) vie with one another, splintering from each other, and from small, vulnerable economies (SVEs). Fundamentally different views on economic or legal doctrine drive some splits. Self-interest, sometimes naked, sometimes veiled, underlies other rifts. Ephemeral factions and coalitions form episodically, on an ad hoc basis, depending on the topic. Nearly all issues on the negotiating table are intrinsically highly technical, and their inter-linkages exacerbate the complexities.”).

147. Why negotiate these norms when they are not going to be enforced, anyway?

148. See Helfer, *supra* note 3, at 55 (noting that countries interested in protecting traditional knowledge may move to biodiversity or human rights regimes rather than seek amendment to TRIPS); Sell, *supra* note 4, at 453 (noting the move by some countries to bilateral and regional trade agreements in order to enforce higher standards of IPR protection); Weerawit Weeraworawit, *Formulating an International Legal Protection for Genetic Resources, Traditional Knowledge and Folklore: Challenges for the Intellectual Property System*, 11 CARDOZO J. INT’L & COMP. L. 769, 782 n.17 (2003) (noting the desire of some WTO members to move certain issues back to the WIPO).

ties and moved to other fora.¹⁴⁹ Many of these alternative fora have been other “trade-related” initiatives—bilateral, regional, and even plurilateral in nature.¹⁵⁰ Other issues have gravitated toward fora with a less trade-focused agenda.¹⁵¹ Shifts in both directions have been deliberate, leading to the question: Why have the very parties who, only twenty years ago, went to the trouble of establishing a groundbreaking, complicated, and expensive new IPR international regulatory mechanism, shown such a stark inclination to abandon that mechanism for alternatives?

This Article posits one possible answer to the question just posed.¹⁵² In short, the nature of international trade law has changed more radically since 1994 than it did between 1947 and 1994. Thus, the institution that was set up to govern trade as it was viewed in the Uruguay Round is perceived to be ill-equipped to deal with trade as it is defined in 2014. While the fall of the Berlin Wall, the unraveling of the USSR, the thawing of the Cold War and the resulting removal of political barriers to greater economic interdependence paved the way for the WTO,¹⁵³ the rise of the Internet almost immediately threatened to undermine the fledgling institution. In short, the Internet has so drastically changed international trade that the WTO was faced with a seismic shift in the international trade environment within a few years after its inception. That is a difficult way to come of age.

The WTO’s regulation of intellectual property provides a solid case study of the phenomena leading to institutional dis-

149. Helfer, *supra* note 3, at 55; Weeraworawit, *supra* note 148.

150. See Sell, *supra* note 4, at 448 (noting the ratcheting up of IPR standards through the use of bilateral, regional, and plurilateral instruments).

151. *Id.* at 450 (noting the “horizontal forum-shifting” by developing countries, moving toward the World Health Organization (WHO) and the Convention on Biological Diversity (CBD) to try to make progress on health issues).

152. Surely, there are many, and the Article does not purport to provide an exclusive explanation for the shift away from the WTO. As in anything, multiple factors are at play.

153. David T. Shapiro, Note, *Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 GEO. WASH. J. INT’L L. & ECON. 97, 112 (1997) (“The liberalized trading regime and more powerful enforcement mechanisms of the WTO, however, reflect the end of the Cold War and the dawning of a new age of economic cooperation and development.”); Fidler, *supra* note 127, at 305.

contentment, as it highlights well the dynamism of the marketplace that the WTO is trying to regulate. Perhaps, given intellectual property's unique position within the WTO framework, and the profound effects that the described marketplace changes have had on intellectual property sectors as well, the TRIPS Agreement provides one of the most vivid examples of the WTO's struggle to adapt to a world of international trade that did not exist at the time of the institution's formation.

B. *Criticisms of TRIPS*

Allegations that the TRIPS Agreement is overreaching and underperforming abound in WTO and IPR-focused literature. These allegations seem to center around three common themes. First, critics point to the disconnect between the claim that the Agreement regulates only "trade-related aspects" of IPR and the reality that it is by far the most comprehensive IPR agreement in existence.¹⁵⁴ The TRIPS Agreement incorporates virtually all substantive norms contained in previous significant IPR agreements,¹⁵⁵ and builds on them by incorporating additional substantive norms¹⁵⁶ and by adding a groundbreaking section on domestic enforcement measures.¹⁵⁷ TRIPS gathers together under one umbrella agreement more types of obligations, applied to more types of subject matter, than any multilateral IPR agreement in existence. Some commentators have had difficulty reconciling the comprehensive nature of the TRIPS approach with a notion that its scope

154. Pager, *supra* note 9, at 217 n.7 (noting the lack of any particular understanding of the scope of "trade-related aspects"); Michael C. Shue, *United States v. Martignon: The First Case to Rule That the Federal Anti-Bootlegging Statute is Unconstitutional Copyright Legislation*, 60 U. MIAMI L. REV. 131, 135 (2005) (noting the incorporation of a variety of substantive and procedural norms in TRIPS, even after the TRIPS negotiators had articulated a narrower vision of the Agreement); Yu, *supra* note 12, at 990 (noting the lack of vision regarding the TRIPS mandate during the negotiations).

155. TRIPS, *supra* note 1, arts. 2, 9.

156. *See, e.g., id.* arts. 35–39 (providing protection for layout designs of integrated circuits and augmenting Paris Convention standards applied to protection of undisclosed information).

157. *Id.* arts. 41–61; Long, *supra* note 124, at 345 (discussing the attempt through TRIPS to harmonize domestic enforcement practices).

could somehow be limited, leading to allegations that the Agreement is overreaching its intended mandate.¹⁵⁸

Second, some claim that the Agreement's situation in a trade-focused framework results in the overemphasis of economic considerations, to the detriment of noneconomic factors.¹⁵⁹ These critics feel strongly that IPR is not simply an economic tool, to be treated as one of many commodities for trading. They emphasize that IPR also is a human rights tool that can be useful in promoting education, cultural preservation,¹⁶⁰ and personal development and growth.¹⁶¹ Considering IPR as a human rights tool may, in fact, change perceptions of the optimal balances of protection and use. For instance, viewing IPR as a tool for knowledge acquisition may beget a different view toward protecting educational materials than viewing

158. Note that comprehensiveness and overreaching are not the same thing. Just because the TRIPS Agreement is the most comprehensive multilateral trade agreement in existence does not mean that it lacks all limit to its scope. Thus, comprehensiveness is not *per se* overreaching.

159. See, e.g., Osei-Tutu, *supra* note 11, at 1645, 1646 (stating that the “weakness of trade-based intellectual property is that it obscures the divergent ways in which nations value their intellectual property,” including “the political, cultural, and economic differences and motivations of the various actors in the international community.”); Graeme Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1230 (2009) (noting that human rights and similar considerations are not often taken into account in trade-based decision making).

160. See generally Doris Estelle Long, “Democratizing” Globalization: Practicing the Policies of Cultural Inclusion, 10 CARDOZO J. INT’L & COMP. L. 217 (2002) (discussing the relationship between intellectual property protection and cultural preservation); David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 156, 171 (George R. Stewart et al. eds., 1994) (“[A] truly successful IP system must be culturally-specific and responsive to the different economic and social realities of each country.”); *id.* at 171 (“[I]t cannot be taken for granted that a Western IP system will be either beneficial to or successful in other countries with different cultures.”).

161. Osei-Tutu, *supra* note 11, at 1641 (noting the possible divergence of education-related goals and IPR enforcement goals); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI-KENT L. REV. 841, 887 (1993) (noting that IPR affects “what [people] may do, how they may speak, and how they may earn a living”).

IPR simply as a trading commodity.¹⁶² Considering the need for education in developing countries, one can argue that more lenient standards of protection for educational materials may further the non-economic goals of greater global access to knowledge.¹⁶³ Many have made similar arguments with respect to patent protection of pharmaceuticals.¹⁶⁴ Critics argue that countries should not be obligated to treat pharmaceuticals simply as another trade commodity; overriding societal concerns demand consideration of other factors in decisions about IPR protection.¹⁶⁵ In the view of these critics, the Agreement is overreaching because its commodity-driven rhetoric overpowers other considerations, such as human rights considerations, that should factor into sovereign states' decisions about regulating IPR. Likewise, the Agreement is underperforming because it fails to look at IPR policies holistically.¹⁶⁶ The Agreement unnecessarily bifurcates IPR analysis

162. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2893–96 (2006) (noting the key contribution of education to human rights and the importance of knowledge goods as a component of the basic right to education); Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT'L L. 1, 6, 23–24 (2009) (discussing the potential role of copyright law in affecting access to educational materials). Even this view can be controversial, as others would argue that optimal protection of intellectual property rights is indeed the best way to ensure the continued production of high quality creative materials. See Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 89 (2008) (emphasizing that the building of creative industries is an essential component of economic development).

163. See Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 827 (2007) (noting the onerous nature of the term "piracy" as applied to unauthorized copying of textbooks in particular circumstances and calling for new models of making educational materials available).

164. Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 28–30 (2002) (noting that TRIPS provisions "increasingly present barriers to medicine access"); Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 778 (2009) (arguing that the "international copyright system should place greater emphasis on human rights objectives and norms"); Samuelson, *supra* note 11, at 96.

165. Hoen, *supra* note 164, at 28–30 (citing criticisms of TRIPS for its contributions to the denial of access to medicines); Wong, *supra* note 164, at 778; Samuelson, *supra* note 11, at 96.

166. For a comprehensive look at the need for more holistic approaches, even to IPR's impact on economic development, see generally Chon, *Intellec-*

through its emphasis on economic considerations. Those levying this criticism view optimal performance of any agreement regulating intellectual property as one that takes into account the full spectrum of IPR considerations, including both economic and noneconomic concerns.

Finally, allegations of both overreaching and underperformance surround the TRIPS enforcement section in particular. The Agreement's enforcement text was designed to require WTO members to ensure that they have in place adequate procedures concerning IPR enforcement at the domestic level.¹⁶⁷ Some believe that this section of the agreement overreaches in treading too heavily on WTO members' decision making about their own domestic laws and practices.¹⁶⁸ These critics say that the TRIPS enforcement language, by seemingly *requiring* affirmative acts, rather than following the trade norm of simply *limiting* state action, reaches too far into what should be the purview of those sovereign states in regulating domestic practices.¹⁶⁹

tual Property and the Development Divide, *supra* note 162; Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, *supra* note 163.

167. TRIPS, *supra* note 1, arts. 41–61 (laying out enforcement procedures and obligations).

168. See Denis Borges Barbosa, Margaret Chon & Andrés Moncayo von Hase, *Slouching Towards Development in International Intellectual Property*, 2007 MICH. ST. L. REV. 71, 81 ("What kind of development should the WTO prioritize through TRIPS? Related to this question is the degree of intrusion upon domestic sovereignty to which member states agreed in TRIPS, in return for greater access to markets."). Note that concerns about the intrusiveness of TRIPS on domestic decision making are not limited to the enforcement text. See Harris, *supra* note 87, at 736–37 (expressing concerns about the TRIPS patent provisions' effects on local priorities with regard to public health).

169. Anu Bradford, *When the WTO Works, and How it Fails*, 51 VA. J. INT'L L. 1, 16 (2010) ("The TRIPS Agreement imposes positive obligations on states to undertake regulatory reforms, going well beyond the scope of issues that the WTO traditionally addresses."); Debra Jean Hamilton, *Emerging Issues in Information Technology*, 90 AM. SOC'Y INT'L L. PROC. 276, 280 (1996) ("[TRIPS] establishes strong domestic enforcement obligations for the first time"); Patricia L. Judd, *Toward A Trips Truce*, 32 MICH. J. INT'L L. 613, 621–22 (2011) (stating that TRIPS "not only contains substantive IPR obligations," but also imposes "unprecedented minimum standards for domestic enforcement—obligations to provide for laws that address prevention of IPR infringement in the domestic marketplace") (internal citation omitted); see Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [*hereinafter* *China-IPR*].

By contrast, proponents of more rigorous IPR protection claim that the TRIPS domestic enforcement¹⁷⁰ text is underperforming, in that it does not provoke adequate enforcement mechanisms at all.¹⁷¹ Instead, they claim, the indeterminate language of TRIPS ultimately renders the enforcement text meaningless, in that it fails in practice to require any action at all.¹⁷² For instance, TRIPS enforcement measures may

Panel Report]; Judd, *supra*, at 616–19 (analyzing a Request for Consultations brought by the United States challenging China’s domestic criminal law for falling short of its enforcement obligations under Article 61 of TRIPS); see generally Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046 (2011) (analyzing the claims in the case).

170. Use of the phrase “domestic enforcement” is deliberate here. One of the groundbreaking portions of the TRIPS Agreement was the section on WTO Members’ obligations to enforce laws domestically. See TRIPS, *supra* note 1, arts. 41–61 (laying out enforcement procedures and obligations). TRIPS was the first multilateral intellectual property agreement to mandate such enforcement obligations, and the reader should not confuse these domestic enforcement obligations with the larger consideration of “international” state to state enforcement through the Dispute Settlement Body (DSB). See DSU, *supra* note 25.

171. See Long, *supra* note 124, at 350 (noting that TRIPS has failed categorically to achieve “effective” enforcement measures at the domestic level, as required by article 41); TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 4 (2008) (noting that “it has become apparent to some national governments, and regional organizations that the ‘aggressive’ enforcement provisions of TRIPS, particularly the border measures, have fallen short of expectations of providing an effective system of thwarting international movement of infringing goods”); Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement’s Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67, 96 (2012) (stating that “the minimum enforcement standards required by TRIPS were criticized by scholars as being too vague and difficult to enforce in practice.”); Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 134 (2001) (opining that the WTO Dispute Settlement Process is an ineffective mechanism through which to achieve compliance from superpower nations).

172. Wesley A. Cann, Jr., *On the Relationship Between Intellectual Property Rights and the Need of Less-Developed Countries for Access to Pharmaceuticals: Creating a Legal Duty to Supply Under a Theory of Progressive Global Constitutionalism*, 25 U. PA. J. INT’L ECON. L. 755, 811 (2004) (“[T]he TRIPS Agreement imposes a set of minimum intellectual property standards, but it does not impose the judicial history of the western world.”); see also Carlos M. Correa, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 124–25 (2000) (noting that certain

require that a WTO member “provide for” procedures and penalties for commercial scale counterfeiting and piracy,¹⁷³ but *providing for* procedures and penalties and *using* procedures and penalties may not be the same thing.¹⁷⁴ The TRIPS enforcement text, originally lauded by IPR proponents as a groundbreaking set of requirements, may fall short of expectations by requiring measures on paper but not necessarily requiring full implementation or use of those measures.¹⁷⁵ Furthermore, IPR proponents claim, the TRIPS language is outdated.¹⁷⁶ The TRIPS negotiators naturally did not include language about the cutting edge technologies of today in the instrument, as those technologies did not exist in 1994.

All of the criticisms of the TRIPS Agreement have a certain degree of validity. The Agreement is not perfect, and it is not a panacea when it comes to international regulation of IPR. Understanding the role that the balloon effect plays in the allegations of TRIPS overreaching and underperformance

provisions may allow WTO members to diverge from the levels of IPR protection that some countries advocate); Kimberly A. Czub, *Argentina's Emerging Standard of Intellectual Property Protection: A Case Study of the Underlying Conflicts Between Developing Countries, TRIPS Standards, and the United States*, 33 CASE W. RES. J. INT'L L. 191, 218 (2001) (noting that the TRIPS Agreement is not rigid—instead, it “lets countries establish their own structure for administering and enforcing [intellectual property] rights.”).

173. TRIPS, *supra* note 1, art. 61.

174. Judd, *supra* note 169, at 618.

175. What the TRIPS text does and does not require has been subject only to minimal testing before the DSB, and therefore is largely up to debate. The only DSB case in which the TRIPS enforcement text has been considered is a 2007 case between the United States and China. In that case, the DSB panel ruled that the United States had failed to meet its burden of proof in an allegation that China's criminal measures were insufficient to comport with article 61 of TRIPS. The U.S. allegation centered around China's employment of criminal thresholds. The DSB opinion makes it clear that context is a very important part of determining TRIPS violations, and seems to leave China (and other WTO members) a great deal of discretion in determining how to implement the laws. Various aspects of the opinion raise questions about how much effective *implementation* of a law is required in order to satisfy the TRIPS standard. *China-IPR Panel Report*, *supra* note 169. For a more detailed discussion of the *China-IPR* case and its ramifications for the TRIPS enforcement text, see Judd, *supra* note 169, and Yu, *supra* note 169.

176. See, e.g., Bitton, *supra* note 171, at 101 (noting the push for ACTA among developed countries due to perceptions that TRIPS provisions were outdated and failed to address piracy and counterfeiting adequately).

can pave the way toward ameliorating some of the concerns raised about the Agreement. The next subsection illustrates how the balloon effect has influenced perceptions of TRIPS performance.

C. *The Impact of the Balloon Effect*

While the literature is replete with allegations of TRIPS overreaching and underperformance,¹⁷⁷ few have taken the time to dig below the surface to understand *why* commentators and parties may perceive that TRIPS overreaches and underperforms. Much of the criticism has overlooked one of the primary underlying causes of TRIPS discontentment—the fact that the balloon effect forces the Agreement to try to regulate a world for which it was not designed. Focusing on the balloon effect leads to inspection of the TRIPS Agreement using a new lens.

First, the balloon effect is partly responsible for the perception that TRIPS seems to reach *all* aspects of IPR, and is thus overreaching in the face of its supposed restriction to only “trade-related aspects” of IPR. In a global economy in which trade has come to encompass a wide variety of aspects of daily life, it would be difficult for any set of negotiators or adjudicators to parse out which aspects of IPR are *not* trade-related. While “trade-related aspects” seems to have been interpreted through the years to mean almost *all* aspects of IPR, the parallel expansion of both trade and IPR is more to blame for this phenomenon than overreaching by the TRIPS negotiators. More of intellectual property is now trade-related than it once was. More of almost *everything* is trade-related than it once was. International trade has been couched by scholars as a driving force in human rights,¹⁷⁸ in international politics,¹⁷⁹ and in

177. Dreyfuss & Lowenfeld, *supra* note 11, at 310; Samuelson, *supra* note 11, at 96; Yu, *supra* note 11, at 1076 (noting possible conflicts between the implementation of the TRIPS Agreement and the realization of economic, social, and cultural rights).

178. Pengcheng Gao, *Rethinking the Relationship Between the WTO and International Human Rights*, 8 RICH. J. GLOBAL L. & BUS. 397, 398 (2009) (“Generally speaking, freedom and equality operate as the fundamental principles of the WTO. Specifically, the direct objective of the WTO, the promotion of free trade and equal transactions among Members, was erected upon these tenets.”); Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT’L L. REV. 1399, 1415–16 (2003) (“In recent years, however, the global

international armed conflict.¹⁸⁰ If international trade has played an increasing role in areas traditionally focusing largely on non-economic considerations, it is no wonder that it would have burgeoned with respect to a field like intellectual property, which has a significant natural economic component. In this respect, TRIPS may actually be *underreaching*, not *overreaching*. In fact, it would be difficult for TRIPS to overreach a mandate that has expanded like a balloon since that mandate was pounded out at the negotiating table.

In fact, TRIPS no doubt has had a hard time keeping up with such a broad, and growing, mandate, and this in part explains the accusations of underperformance by those who

community has devoted increasing attention to examining the relationship between human rights and trade. In particular, the ‘social, cultural and economic rights’ emerging in international law might provide just and effective controls on trade that would dovetail with many of the ‘trade prerequisites’ discussed above.”); Andrew T.F. Lang, *Re-Thinking Trade and Human Rights*, 15 TUL. J. INT’L & COMP. L. 335, 389 (2007) (“It is also very common to see human rights as offering a normative framework for substantively re-orienting trade policy and the trade regime. The core claim is that human rights norms, principles, and rules can help to guide trade policymakers as they re-design the international trading system and make difficult trade policy choices.”).

179. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 835 (1995) (“Each of these is grounded in an international relations theory of trade policy, each regards international trade policy formation as influenced, if not dictated, by domestic politics, and each has profoundly different implications for the operation of the WTO legal system.”); Antonio F. Perez, *To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers—Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World*, 20 HASTINGS INT’L & COMP. L. REV. 331, 353–54 (1997) (“In practice, the economic sources of national power have played a large role in U.S. defense policy, as has the need to address the balance between means and ends in the conduct of U.S. defense and foreign policy. In recent years, historians have given greater attention both to the role played by economic competition in laying the groundwork for political and military supremacy, and in particular to the role of relative economic rates of growth.”).

180. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION IX* (2000) (“One is my Golden Arches Theory—that no two countries that both have McDonald’s have ever fought a war against each other since they each got their McDonald’s.”); Eric Engle, *I Am My Own Worst Enemy: Problems and Possibilities of European Foreign Policy Vis-A-Vis the United States*, 18 ST. THOMAS L. REV. 737, 740 (2006) (“Thus, financial stability and economic interdependence came to be seen correctly as keys to preventing war.”).

would like to see a more consistent IPR-enhancing role for the Agreement. Given the sheer volume of trade-related IPR transactions, and the blossoming of international business transactions in the global marketplace, it is asking a lot of TRIPS for it to regulate all of those transactions. Upon pausing and considering the now vast expanse of the trade world, one wonders how one agreement can even remotely hope to regulate all “trade-related aspects of intellectual property rights.” Furthermore, given the rapid advances in technology since the TRIPS Agreement’s inception, it would be difficult for any agreement to be forward-looking enough to directly address potential IPR issues related to those technologies. This phenomenon relates directly to the ballooning of IPR in the current age.

Finally, critics are correct that TRIPS emphasizes economic considerations first and foremost. It is, after all, a trade agreement. The balloon effect plays a role in this criticism as well. As both trade and IPR play more of a pervasive role in daily lives, trade is going to interact more with other considerations. In this way, as explained in Part V below, the balloon effect creates an opportunity for trade-IPR transactions to influence other societal goals. But this influence is not necessarily negative or exclusionary. In fact, it is possible for this influence to be a positive one. With respect to this criticism more than any other, TRIPS is underutilized. As explained below, the Agreement has a number of tools that allow trade to have a positive effect—not an obliterating or diminishing effect—on other societal considerations.

The sheer number of things that trade law can do in this day and age is overwhelming. The dissemination of intellectual property today is pervasive. The regulation at the intersection of a powerful, growing regulatory area with a pervasive set of goods presents both an opportunity and a challenge. This phenomenon results in an Agreement with great potential to influence the world, but with great risk of underperforming. It is up to WTO members to decide what this Agreement should do, in the face of virtually unlimited possibilities.

Unfortunately, WTO members do not seem to agree about which tasks should be prioritized. Indeed, there is frequent tension among various constituents’ goals. For instance, there is a tension in the Agreement between the goal of implementing a balanced approach to intellectual property protection that allows significant discretion by members in imple-

mentation, and the goal of achieving some degree of IPR harmonization and certainty in the implementation of those harmonized standards. Different WTO members may wish to see one of those goals prioritized over the other. The lack of consensus among parties concerning the fundamental goals of the Agreement causes impasse at almost every TRIPS-related meeting, as the parties fight over which of various competing goals the Agreement should work on accomplishing more effectively.¹⁸¹

With the raging internal tug-of-war over priorities and the resulting impasses in norm-making and interpretation, it is hardly a surprise that the TRIPS Agreement is perceived by those on both sides of the IPR debate to be underperforming. In short, TRIPS is being asked to do something that is well beyond what it was originally designed and negotiated to do. It is being asked to adapt to a vastly changed world, and to do so with a set of constituents that do not agree on what the Agreement's priorities in that world should look like.

The daunting task facing an Agreement that was designed for one era and fought over in the next has led to many of the symptoms of discontent that have been highlighted in the TRIPS literature. Groups on all sides of the intellectual property debate have encouraged their government representatives to shift their efforts away from TRIPS and onto other initiatives.¹⁸²

With this overt and increasing forum-shifting, questions start to arise about the continued role of TRIPS as the foundational agreement on which modern international intellectual property hinges. However, as these questions are raised, it is important to ensure that those advocating a lesser role for the TRIPS Agreement in modern regulation are not doing so prematurely. Looking at the TRIPS Agreement through a lens that takes into account the gargantuan task that it was asked to undertake helps explain some of its perceived shortcomings.

181. See, e.g., Khoury, *supra* note 143, at 36 (noting the specific tensions in TRIPS discussions during the Doha Round to date); Bhala, *supra* note 143, at 88 (highlighting particular barriers to progress in the Doha Round).

182. Sell, *supra* note 4, at 449 (noting that forum-shifting has brought about some successes both for those who wish to expand access to others' intellectual property, and for those who wish to restrict such access); Helfer, *supra* note 3 (noting that both relatively strong and relatively weak parties engage in forum-shifting).

Understanding that the very foundation of the TRIPS Agreement was built on a fault line, and that the worlds of international trade and intellectual property have had more than one earthquake since then, can help with our understanding of factors contributing to the Agreement's perceived overreaching and underperformance. That information equips policy-makers to use the Agreement's provisions in a way that makes it helpful in today's age. Those policymakers are also better equipped to design a structure of complementary mechanisms that avoids some of the pitfalls already experienced in the context of TRIPS, while also preserving the role of TRIPS in the overall system. Determining which alleged TRIPS shortcomings stem inherently from the WTO structure and which arise from externalities that may plague all institutions and mechanisms, including the alternate fora so pervasively sought by various interest groups in recent years, is key to building a series of mechanisms that can serve the future of intellectual property.

V. LESSONS OF THE BALLOON EFFECT

Recognizing that some of the perceptions of the TRIPS Agreement's overreaching and underperformance arise in part from the balloon effect has three potential benefits. First, identifying the balloon effect compels us to examine closely whether the Agreement has the mechanisms necessary to cope with its expanding girth. Second, understanding the TRIPS experience encourages us to proceed with caution in fashioning mandates of other trade-IPR agreements, lest they experience the same phenomenon. Third, learning the lessons that TRIPS has to teach us sheds light on the WTO's general suitability for substantive regulation. This section speaks to the first two, IPR-centered issues.¹⁸³

First, this section posits that TRIPS is better equipped than any other extant IPR agreement to handle the balloon effect. The reason the criticisms of overreaching and underperformance have been so prevalent is that WTO members have failed effectively to identify the goals of TRIPS and use the mechanisms featured in the Agreement. Thus, this Article

183. The third issue is the subject of a forthcoming work.

calls for a re-examination of the TRIPS Agreement's ability to handle the balloon effect.

Second, this section sounds a warning regarding the other trade-IPR agreements currently in the process of negotiation or ratification. It warns that those agreements not only are likely to be impacted by the balloon effect, but also are less equipped than TRIPS to handle it. Thus, the Article calls for re-evaluation of the current trend of forum-shifting away from the WTO and cautions against solving immediate problems at the expense of longer-term visions.

A. *Re-examining TRIPS Capabilities*

As I have argued elsewhere,¹⁸⁴ the TRIPS Agreement is not the dinosaur that some perceive it to be. Sure, it does not have overt, cutting edge provisions on tackling Internet enforcement. Neither does any other instrument. In fact, trying to tackle such an ever-changing phenomenon as Internet enforcement through a treaty is ill-advised. No treaty, large or small, bilateral or multilateral, regional or multinational, can hope to keep up with recent and ongoing technological changes. What TRIPS does have is a malleability that can aid it in keeping up with the times.¹⁸⁵ It does not need specific Internet-oriented provisions to be relevant in an Internet age. In fact, given the perceived necessary specificity of those provisions to tackle the problem of the moment, such provisions may actually prove disadvantageous, falling by the wayside as the specific tactics and technologies they address become outdated.

The beauty of the TRIPS language is its indeterminacy. TRIPS provisions allow for a great deal of tailoring to local circumstances, and to the context in which IPR problems arise. Much of this indeterminacy is aimed at preserving discretion of WTO members in the face of what appears to be a fairly intrusive approach to regulation.¹⁸⁶ However, its use is not limited to minimizing the intrusiveness of the language. As

184. Judd, *supra* note 169, at 615.

185. *Id.*; GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 9–14 (2012).

186. And, indeed, this very discretion is part of the key to combatting one of the criticisms of overreaching.

I have argued elsewhere, a recent Dispute Settlement Body (DSB) panel decision indicating the importance of context in interpreting TRIPS obligations¹⁸⁷ is likely to benefit both IPR minimalists as they seek to balance IPR interests with other societal goals, as well as IPR maximalists who seek to apply TRIPS obligations in the Internet age.¹⁸⁸

The lack of specificity in the Agreement's terms makes TRIPS less susceptible than more detailed agreements to being outdated. For instance, the TRIPS domestic enforcement obligations, while groundbreaking, are notoriously broad, specifying only that WTO members must provide tools for "effective action" against infringements.¹⁸⁹ Effective action against Internet piracy of digital files containing copyrighted works may look different from effective action against trademark counterfeiting involving luxury goods. The TRIPS obligations as to criminal penalties only provide that they must be "provided. . .to be applied in cases of wilful [*sic*] trademark counterfeiting and copyright piracy on a commercial scale,"¹⁹⁰ without defining "provide," "to be applied," "wilful" [*sic*], or "commercial scale."¹⁹¹ Thus, TRIPS has a chameleon-like quality that helps it conform to the age in which it is applied.

Likewise, while approaching intellectual property regulation in an overtly and broadly trade-related manner, TRIPS nevertheless has the tools to avoid over-commoditizing IPR. It is logical that the mere association of IPR with such an economically-defined field as international trade may steer the rhetoric in a direction that seems to emphasize economic concerns to the detriment of other considerations.¹⁹² However,

187. *China-IPR Panel Report*, *supra* note 169, at 47–48.

188. *See* Judd, *supra* note 169, at 642 ("A reading of the TRIPS enforcement text that bases compliance on implementation . . . helps the Agreement engender the flexibilities that are necessary to fight IPR infringement in a global, internet-based, technology-driven marketplace.")

189. TRIPS, *supra* note 1, art. 41(1).

190. *Id.* art. 61.

191. *See* Judd, *supra* note 169, at 647 n.148 (noting that there is a lack of clarity surrounding obligations under Art. 61 and that "commercial scale" is a relative standard).

192. *See* Osei-Tutu, *supra* note 11, at 1645 ("Trade-based intellectual property has emphasized a commodity-oriented approach to intellectual property that tends to negate the non-economic contributions of patent and copyright laws."); *see also* Kevin Fayle, *Sealand Ho! Music Pirates, Data Havens, and the Future of International Copyright Law*, 28 HASTINGS INT'L & COMP. L. REV.

the TRIPS Agreement itself does not fall into that trap, at least not presumptively. The Agreement's language leaves ample room for non-economic considerations in matters of compliance and enforcement.¹⁹³ In fact, TRIPS goes out of its way to preserve discretion for WTO members to take into account other factors in fashioning and enforcing IPR norms.¹⁹⁴ Much of the enforcement text specifically preserves discretion for members to adjust for local resourcing and priorities.¹⁹⁵ The Agreement also contains a number of flexibilities that spell out balancing factors that members can and should take into account. For instance, articles 7 and 8 of the Agreement specifically provide for balancing of IPR enforcement with other societal priorities,¹⁹⁶ and the opening article of the Agreement leaves wide berth for members to implement the Agreement as they wish.¹⁹⁷ While often criticized by those wanting more predictable and rigorous protection from TRIPS,¹⁹⁸ the Agree-

247, 248 (2005) (noting the tie between the commoditization of copyright and the involvement of multinational corporations in the production of copyrighted products).

193. See, e.g., TRIPS, *supra* note 1, arts. 7, 8, 30.

194. See, e.g., *id.* arts. 1(1), 7, 8, 13, 17, 30, 41(5).

195. *Id.* art. 41(5). For a general discussion of the importance of allowing states to preserve this "self-determination," see Graeme W. Austin, *Valuing "Domestic Self-Determination" in International Intellectual Property Jurisprudence*, 77 CHI.-KENT L. REV. 1155, 1158-60 (2002).

196. TRIPS, *supra* note 1, art. 7 (speaking of the concomitant goals of social welfare and technology transfer); *id.* art. 8 (noting that members may implement TRIPS in such a way as to "promote the public interest in sectors of vital importance to their socio-economic and technological development").

197. *Id.* art. 1(1) ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.").

198. Peter K. Yu, *TRIPS and its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 496 (2011) [*hereinafter* Yu, *Achilles Heel*] ("If the weakening of TRIPS language was not enough, less developed countries successfully demanded the inclusion of limitations and exceptions in the TRIPS Agreement. The most notable exception in the enforcement area is Article 41.5 of the TRIPS Agreement, which states explicitly that a WTO member is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement."); Bitton, *supra* note 171, at 101; Nicholas R. Monlux, *Copyright Piracy on the High Seas of Vietnam: Intellectual Property Piracy in Vietnam Following WTO Accession*, 37 AIPLA Q.J. 135, 155 n.95 (2009) ("Additionally, there are terms in the TRIPS agreement, such as 'effective action' or 'expeditious remedies,' that are not clearly elucidated in TRIPS and that subsequently may provide member countries, specifically lesser developed ones

ment's broad language and flexibilities provisions may be its greatest asset in a marketplace that is changing rapidly.¹⁹⁹ The problem is that the Agreement's adherents fail to utilize these tools maximally.²⁰⁰

In grappling with the issues arising in a trade-dominant world, TRIPS benefits from the inherent assumption in its language that virtually all of IPR is trade-related. This implication actually helps the Agreement adapt to the world in which almost everything *is* trade-related. The seeming overreaching by the Agreement's original negotiators²⁰¹ turns out to be an asset in the age that has followed the Agreement's negotiation. The TRIPS language was ahead of its time, portending a world

like Vietnam, a way to avoid TRIPS violations through ambiguous language.”); Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239, 248 (2012) [*hereinafter* Yu, *What Enforcement?*] (criticizing TRIPS for being “obsolete from inception” regarding digital challenges and noting ambiguous language throughout the agreement); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 S.M.U. L. REV. 975, 981 (2011) [*hereinafter* Yu, *Fears of ACTA*] (noting that “many developed countries and intellectual property rights holders consider the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) inadequate and outdated . . .”).

199. This is, in part, what Rochelle Dreyfuss and Graeme Dinwoodie highlight in their recent book touting the “neofederalist” structure of the TRIPS Agreement. They laud the structure that the Agreement features as resilient and elastic in that it provides a common framework but allows for significant national variation. This same attribute also allows the TRIPS Agreement to deal more effectively with the balloon effect foisted upon it by outside forces through the years. *See generally* DINWOODIE & DREYFUSS, *supra* note 185.

200. The potential result of more extensive use of these tools by WTO members is difficult to predict. Most of the tools, given the lack of use to date, remain untested in the dispute settlement realm. There is also a tension between the balanced approach that greater use of these tools would engender—thus answering critics who want a more holistic approach to determining the scope of intellectual property rights—and the desire for more predictable and rigorous intellectual property protection expressed by intellectual property proponents. This tension would be for DSB panels to resolve, and one can question whether such panels would reach resolutions that would please all parties. However, the point is not that every wish will be granted in every case. The point is that the WTO has the *mechanisms* to balance these various interests in an ostensibly objective way. No other entity has those types of mechanisms in place.

201. Monlux, *supra* note 198, at 183–84 (noting criticisms of the TRIPS Agreement as overly broad); Yu, *What Enforcement?*, *supra* note 198, at 242 (criticizing the indeterminate language contained in the TRIPS enforcement provisions).

that came into being after its negotiation. As it turns out, trade has permeated almost everything in a way that it did not in 1994.

Can the TRIPS Agreement be improved? Of course it can. No agreement is perfect. The TRIPS constituencies harbor too many opposing viewpoints for the instrument to please everyone all the time.²⁰² But opposing views are not the point, nor are they the end of the story. The important message is that the Agreement has the capability to address each of those constituencies' concerns. Reconciling those concerns is not the Agreement's job; it is the constituents' job. Those constituents' failures to reconcile objectives for an Agreement that can accommodate several objectives does not reflect poorly on the Agreement they negotiated—it reflects poorly on them. The Agreement they negotiated is solid and multifaceted, in that it provides for a world in which trade plays a significant role while allowing for balancing factors through the broad language of its obligations, the flexibilities it features and the discretion afforded to WTO members to comply with the Agreement's mandates in ways that preserve their non-economic priorities. Given this solid foundation, policymakers should focus on discrete suggestions for improvements to the TRIPS Agreement, realizing the value in the language that the Agreement features, rather than being so quick to move discussions to venues that lack these features. Understanding the forces at play upon the TRIPS Agreement, and pausing to consider the balloon effect, can help policymakers understand the dynamic nature of the Agreement in a changing world, and encourage WTO members to take advantage of the tools that make the Agreement so malleable.

By understanding that trade and IPR both have morphed significantly since the Uruguay Round, parties can understand that the perceived overexpansion of TRIPS is a natural outgrowth of those marketplace changes. Given this information, parties should do a number of things. First, they should be more cautious about criticizing TRIPS for overreaching and underperforming, rather focusing their efforts on resourcing the WTO to deal with the vastly expanded mandate that TRIPS encompasses in 2014. There is no evidence that the expansion

202. This, of course, is true with regard to every law and every international instrument that has ever existed.

that has characterized the intersection of trade and intellectual property since 1994 is likely to slow down any time soon. The parties likewise should study how the pervasiveness of “trade” in all things can be an advantage for those with specific goals for TRIPS. For instance, perhaps trade itself can be an effective vehicle through which to address cultural values. TRIPS provides the mechanisms through which to address those values within the realm of a trade-focused agreement. The perceived over-breadth of the TRIPS Agreement gives proponents of greater use of TRIPS flexibilities an opportunity to illustrate how those flexibilities provide balance in the midst of an agreement that encompasses all.

B. *Approaching New Trade-IPR Agreements with Caution*

Fundamentally, TRIPS is still the most effective IPR regulatory instrument in existence. Parties on both sides of the IPR debate have been too quick to abandon the Agreement for supposedly greener pastures.²⁰³ The forum-shifting away from TRIPS that has taken place betrays a lack of understanding of the fundamental forces affecting the Agreement’s performance to date, as well as a tendency to overlook its capability and resilience.

Furthermore, the propensity to jump ship at the first sign of trouble sets IPR policymakers up for the second (or third, or fourth) verse of the same song. Instead of exploring the reasons behind the TRIPS Agreement’s supposed overreaching and underperformance, WTO members have been too quick to create alternate fora for negotiation. This semi-abandonment of TRIPS echoes the much-criticized abandonment of the WIPO in favor of TRIPS²⁰⁴ just twenty years ago. Unless IPR negotiators learn to pause long enough to take a critical look at extant mechanisms, try to improve them, and at a mini-

203. Sell, *supra* note 4, at 450 (recounting multiple instances of forum shifting by various IPR factions); Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade?: ACTA Border Measures and Goods in Transit*, 26 AM. U. INT’L L. REV. 645, 705 (2011) (noting concerns expressed about the tensions between TRIPS and the regional and plurilateral agreements recently under negotiation).

204. Yu, *What Enforcement?*, *supra* note 198, at 248 (noting the immediate return to WIPO to try to address Internet-related matters following the conclusion of the TRIPS Agreement); Helfer, *supra* note 3, at 24 (noting immediate concerns of TRIPS by developing countries).

num, endeavor to understand why those mechanisms fall short of optimal, international IPR regulation is doomed to a recurrent reinventing of the wobbly wheel.

Recent agreements have made a concerted effort to “update” standards for the technological age.²⁰⁵ While this may be a laudable goal, it is unlikely to succeed. As previously mentioned, whether any international instrument can be in a good position to promote relevant and sustainable norms in a quickly changing environment is highly questionable. The much-touted (and much-maligned) Anti-Counterfeiting Trade Agreement (ACTA)²⁰⁶ has been in process since 2007, and is not yet in effect. Some may question whether the agreement will get off the ground at all—its failure to do so in several years speaks to the lack of buy-in that characterizes many of these new negotiations. Meanwhile, many of the 2007-era problems that ACTA was envisioned to solve probably are themselves outdated already.²⁰⁷ The “updates” in ACTA, in the Trans-Pacific Partnership Agreement (TPP) currently being negotiated,²⁰⁸ and in bilateral free trade agreements (FTAs)²⁰⁹

205. Yu, *Fears of ACTA*, *supra* note 198, at 978 (“From the standpoint of international intellectual property development, ACTA is rather important, as it is likely to lock in or raise the international standards for intellectual property protection and enforcement in both developed and less-developed countries.”); Masaaki Kotabe, *Evolving Intellectual Property Protection in the World: Promises and Limitations*, 1 U. PUERTO RICO BUS. L.J. 1, 15 (2010) (“In 2007 a select handful of the wealthiest countries began a treaty-making process to create a new global standard for intellectual property rights enforcement, the Anti-Counterfeiting Trade Agreement . . .”).

206. Anti-Counterfeiting Trade Agreement (ACTA), FOREIGN AFFAIRS, TRADE AND DEVELOPMENT CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/acta-text-acrc.aspx?lang=eng> (last visited Nov. 18, 2013).

207. See Khaliunaa Garamgaibaatar, *The Anti-Counterfeiting Trade Agreement: Copyrights, Intermediaries, and Digital Pirates*, 20 COMM.LAW CONSP. 199, 207, 214 (2011) (noting that the Digital Millennium Copyright Act, on which some of the ACTA provisions are based, is itself outdated).

208. Trans-Pacific Partnership: Intellectual Property Rights Chapter, *available at* <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf> (last visited Dec. 12, 2013) (leaked draft from Feb. 10, 2011). Fact Sheet, Office of the U.S. Trade Representative, The U.S. in the Trans-Pacific Partnership, *available at* <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>; Department of Foreign Affairs and Trade (Australian Government), Trans-Pacific Partnership Agreement Negotiations, *available at* <http://www.dfat.gov.au/fta/tpp/>.

tackle the latest, greatest piracy and counterfeiting phenomena at issue at the time of their negotiation.²¹⁰ Like TRIPS, they all are snapshots of moments in time. However, unlike TRIPS, they may lack a malleability that will help them sustain. Their very specificity may contribute to their irrelevance.

Likewise, none of the recent trade-IPR agreements has a mandate that is any clearer or more narrowly defined than the TRIPS mandate. Thus, each of these agreements is likely to be subject to the same externalities that have caused so much of the criticism of the TRIPS Agreement. In short, the balloon effect is not TRIPS-specific; it will affect any trade-IPR agreement in the same way if the boundaries of subsequent agreements are not more specifically drawn. To the extent that parties to IPR negotiations wish to engage in extra-TRIPS negotiation, they should be wary of this effect. As illustrated in the subsection above, TRIPS has certain mechanisms that—if properly used—can help the Agreement to cope with the balloon effect. Those mechanisms may be missing from the more specific agreements.

Finally, the new agreements suffer from a lack of enforceability. While many of the bilateral FTAs have enforcement mechanisms built in, there is no evidence of these mechanisms being used in any meaningful way. Plus, these mechanisms are

209. See, e.g., U.S.-Australia Free Trade Agreement, U.S.-Austl., Jan. 1, 2005, 44 I.L.M. 544, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf; KORUS FTA; *supra* note 2; ASEAN-Australia-New Zealand Free Trade Agreement, Austl.-N.Z., Feb. 27, 2009, available at <http://www.dfat.gov.au/fta/aanzfta/contents.html>.

210. And not always well, as evidenced by the utter lack of internet service provider liability provisions in ACTA, for instance. Fact Sheet, European Commission, The Anti-Counterfeiting Trade Agreement, Nov. 2008, available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_14083_6.11.08.pdf (“Today, we face a number of new challenges: the increase of dangerous counterfeit goods (pharmaceuticals, food and drink, cosmetics or toys, car parts) which impact on consumer protection and public health; the speed and ease of digital reproduction; the growing importance of the Internet as a means of distribution; and the sophistication and resources of international counterfeiters.”); Miriam Shapiro, Office of the U.S. Trade Representative, The Role of the Anti-Counterfeiting Trade Agreement (ACTA), available at <http://petitions.whitehouse.gov/response/role-anti-counterfeiting-trade-agreement-acta> (“As you may know, the proliferation of counterfeit and pirated goods poses considerable challenges for legitimate trade and economic development.”).

only employable as to the specific parties to those agreements. ACTA, by contrast, seems to have no enforcement mechanism at all.

It may be that parties do not intend for the more recent agreements to have the type of staying power that TRIPS engenders. There seems to be a tactic on both sides of the aisle to negotiate instruments with little more than persuasive power as a means of generating norms that will eventually be absorbed into the mainstream. This is a very different type of “forum-shifting” than that at issue in the WIPO-WTO shift, in that the original regime is the ultimate target. The WIPO-WTO shift was blatant, driven by powerful countries that were unabashedly seeking to move the debate into a new arena.²¹¹ The recent spate of forum-shifting, by those powerful countries and others, takes on a different tone, in that the very act of forum-shifting seems to target the integration of new norms into the old forum. ACTA provides an example. There seems little reason for the European Union, Japan, the United States, and a few carefully selected other countries to negotiate piracy and counterfeiting norms, especially when most of the parties claim that the ACTA norms negotiated will result in no change in their law.²¹² If treaties do not bring about changes in the laws and obligations of the major parties, what is their pur-

211. Helfer, *supra* note 3, at 20 (“Two factors motivated the United States and the EC, in response to pressures from their respective intellectual property industries, to shift intellectual property lawmaking from WIPO to GATT. The first related to dissatisfaction with treaty negotiations hosted by WIPO. The second focused on institutional features of the GATT that facilitated adoption of more stringent intellectual property protection standards that these states favored.”); Sell, *supra* note 4, at 450–51 (noting frustration by the United States, the European Union, and Japan over WIPO mechanisms, prompting the push for treatment of intellectual property in the GATT and then the WTO).

212. Fact Sheet, Office of the U.S. Trade Representative, ACTA: Meeting U.S. Objectives (Oct. 2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/september/acta-meeting-us-objectives> (“Significantly, the ACTA is consistent with existing U.S. law, and does not require any change to U.S. law for its implementation in the United States.”); Directorate-General for Trade of the European Commission, What ACTA is About, available at http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_149003.pdf (“ACTA will not change the existing EU legislation. ACTA does not create new Intellectual Property Rights, but concerns procedures and measures to enforce existing rights and to act against large scale infringements, often pursued by criminal organisations.”).

pose? Here, the purpose seems to be to get the negotiated norms into existence so that those norms subsequently can be applied to the countries to which those negotiators would *really* like the standards to apply.²¹³

The norm-generation aspect of the new IPR agreements is not limited to the pro-protection agenda. Developing countries are doing the same thing. They may not have the “country club” lure for the developed countries eventually to join in their instruments, but they are trying to establish norms that they can then argue are part of the mainstream and should help with interpretation of TRIPS and other obligations.²¹⁴

Thus, both sides are playing the same game. Some predict that these tactics will open the door to greater transference between the WTO and other organizations’ norms, and that WTO dispute resolution panels eventually will incorporate some of these new norms and interpretations into their deci-

213. Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247, 250 (2009) (“The United States, the European Union, Japan, and Switzerland began the push for ACTA’s adoption; other countries invited to participate include Australia, Canada, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, and the United Arab Emirates. Argentina, Brazil, and China have not been invited to participate in initial negotiations. What this implies is that countries with stronger interests in IP exporting will be responsible for drafting the language of ACTA, while countries that sign on later will not have any influence over its terms.”); Andrew Rens, *Collateral Damage: The Impact of ACTA and the Enforcement Agenda on the World’s Poorest People*, 26 AM. U. INT’L L. REV. 783, 789–90 (2011) (“ACTA is being negotiated outside all of existing multinational frameworks and would create an entirely new international organization. Once the parties settle on the provisions, the rules will be applied to developing countries, especially emerging economies. According to the European Commission Trade Office, ‘[t]he ultimate objective is that large emerging economies, where [IP rights] enforcement could be improved, such as China or Russia, will sign up to the global pact.’”).

214. Muria Kruger, *Harmonizing TRIPS and the CBD: A Proposal from India*, 10 MINN. J. GLOBAL TRADE 169, 178 (2001) (“Because the CBD attempts to give more protection to biodiversity, much of India’s proposal for amending the TRIPs agreement involves harmonization of the two agreements by incorporating provisions of the CBD into TRIPS.”); Meetal Jain, Note, *Global Trade and the New Millennium: Defining the Scope of Intellectual Property Protection of Plant Genetic Resources and Traditional Knowledge in India*, 22 HASTINGS INT’L & COMP. L. REV. 777, 779 (1999) (discussing India’s efforts to reconcile TRIPS demands and CBD standards).

sions about TRIPS compliance.²¹⁵ Others have argued that all of this extra-TRIPS negotiation results in nothing more than fragmentation that will fray the intellectual property system until it simply is incoherent.²¹⁶

There may be a place for extra-TRIPS negotiations—we need not be afraid of them—but many of the current efforts underway are premature and have not been contemplated carefully enough. The negotiators of these new instruments have been too quick to abandon a pretty solid TRIPS forum in favor of platforms that are less worthy. While the treaties being negotiated may be touted as solving the problem of the moment, this sort of temporary approach will not lead to the improvement of international intellectual property regulation as a whole. Neither will it solve the balloon effect. Many of the efforts being poured into these negotiations are reactive rather than proactive. Without pausing long enough to ascertain why TRIPS may be overreaching or underperforming, parties on both sides of the debate are abandoning it, hoping to negotiate a new agreement that fixes the problem. However, those parties have not identified what the problem is. And without identifying what the problem is, prospects of fixing it in the next iteration of trade negotiations are not bright.

Thus, policymakers should proceed with caution in negotiating extra-TRIPS agreements. The twenty years' worth of experience with TRIPS provides a helpful lens through which

215. Rao Geping, *The Law Applied by World Trade Organization Panels*, 17 TEMP. INT'L & COMP. L.J. 125, 126 (2003) (“ . . . the Panels must decide whether only the law formulated in the covered agreements of the WTO is available, or whether other international law outside the WTO agreements could be incorporated into the trade regime.”); John Ragosta, Navin Joneja & Mikhail Zeldovich, *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 INT'L LAW. 697, 700 (2003) (“The very nature of the WTO Agreements makes the prospect of binding dispute resolution very dubious. Most of the negotiated provisions themselves are unclear, which leaves an arbitrator with two choices: simply to dismiss cases as being beyond the purview of WTO norms, or to create some obligation where none existed before.”).

216. Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 21–22 (2007) (noting the increasingly fractured nature of IPR regulation, with results that impact abilities to form cohesive policies and tendencies to impose norms across borders despite evidence that one size does not fit all); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 22 (2004) (noting the impact of the fragmentation on the developed world).

parties can critically evaluate the need for extra-TRIPS measures and design those measures in ways that truly add to the body of norms that TRIPS engenders. Paying attention to the lessons that experience has to offer helps international IPR regulation proceed in a way that avoids some of the fragmentation concerns expressed by commentators in recent years.²¹⁷

Finally, identifying the TRIPS balloon effect has serious ramifications, not just for international trade regulation's role in the intellectual property world but also for larger questions of WTO legitimacy and the organization's suitability to regulate other substantive areas such as environmental law and labor law. Although this Article uses intellectual property as the vehicle for illustrating phenomena growing out of and affecting the current WTO mandate, the issues highlighted also apply beyond the IPR context. Particularly given the continued quest by some environmental advocates and labor standards advocates to get in the WTO game,²¹⁸ the story of intellectual property regulation within the WTO—as the first attempt at regulation of a substantive area of law within an organization with a more natural bent toward procedure and quantification—can be informative for specialists in these other fields. This question is the subject of a forthcoming piece.

VI. CONCLUSION

This Article argues that the rapid expansion of both international trade and intellectual property explains many of the perceptions of overreaching and underperformance levied

217. See, e.g., Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85, 102 (2007) (“[W]hat developing countries most need is a period of calm and stability in which to devise intellectual property strategies consistent with both the TRIPS Agreement and the needs of their own emerging national and regional systems of innovation.”); Yu, *supra* note 216, at 21–22.

218. Mark Edward Foster, Note, *Trade and Environment: Making Room for Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393, 443 (1998) (“If the United States . . . is going to continue its support for the existing regime, the existing regime must recognize that room must be made for the use of environmental trade measures.”); Marcy Nicks Moody, Note, *Warning: May Cause Warming: Potential Trade Challenges to Private Environmental Labels*, 65 VAND. L. REV. 1401, 1411 (2012) (noting the “myopic” focus of the WTO on what are perceived to be core trade matters, to the exclusion of environment and labor).

against the TRIPS Agreement. Understanding the resulting TRIPS balloon effect helps to contextualize the Agreement's perceived flaws in a way that paves the road forward with respect to both TRIPS and other trade-IPR agreements.

In a world in which transactions, large and small, are almost all "trade-related," any organization would have difficulty handling a mandate defined by that phrase. The expansions in international trade law alone are monumental. The effects of these expansions are exacerbated in the context of intellectual property rights because the nature of intellectual property likewise has undergone radical change since the advent of the TRIPS Agreement.²¹⁹ Indeed, today's contemporary marketplace offers no meaningful limit to "trade-related aspects of intellectual property rights."

The beauty of the TRIPS Agreement is that it contemplates this reality. In other words, the criticism leveled against the TRIPS negotiators—that they constructed an agreement that assumed that all aspects of intellectual property rights were trade-related—turns out to work in the Agreement's favor. What was perhaps overreaching in 1994 reflects a marketplace reality in 2014.

What critics of the TRIPS Agreement have overlooked is that the Agreement itself is quite capable of handling the complications of the balloon effect. Those who would abandon the Agreement because of perceptions that its provisions are outdated in the Internet era or perceptions that TRIPS is incapable of taking into account noneconomic considerations are overlooking the Agreement's potential. The rush to fill perceived gaps in the TRIPS language risks creating agreements that are in fact less effective than TRIPS. Those abandoning TRIPS overlook the role of its built-in structure and flexibilities in keeping the Agreement up to date in changing times. They also overlook the power of those same provisions to bal-

219. Radical change is especially pervasive in copyright-dependent sectors due to the massive changes in product form and methods of dissemination that have resulted from the push toward the digital. This digitization phenomenon, and the attendant impact on "trade-related intellectual property" when it comes to digital products, explains why most of the criticisms that treaties in general and TRIPS in particular are outdated focus on the copyright provisions, and why recent attempts at raising standards beyond what TRIPS provides for have also been largely focused on copyright provisions. *See supra* Part III.

ance the Agreement in the face of over-commoditization tendencies or rhetoric. The tools that the TRIPS Agreement has to combat the shortcomings foisted upon it by the balloon effect are superior to comparable tools in the shiny new agreements being negotiated.

Those who would abandon TRIPS in favor of “updated” instruments also risk short-sightedness. Instruments negotiated to fix the latest and most threatening problem risk being dated before they are even implemented. Part of the TRIPS Agreement’s beauty lies in its lack of specificity. In treaties regulating quickly-changing fields, specificity is not generally a good thing. Furthermore, these knee-jerk agreements suffer from other shortcomings that make them less effective than TRIPS in moving the international IPR agenda forward—including a lack of buy-in and a lack of enforceability.

This Article calls on parties to pause long enough to recognize the market-based reasons behind perceptions of the TRIPS Agreement’s overreaching and underperformance. Furthermore, the Article calls on parties to understand the ways the TRIPS language deals with those market forces helpfully, making the Agreement the best mechanism to fight concerns about over-commoditization of intellectual property in a trade-centered world. Finally, the Article calls for caution in forum-shifting away from TRIPS in favor of agreements that are less equipped to deal with the balloon effect, and also suffer from their own peculiar shortcomings. Once parties better understand the forces affecting TRIPS performance and fully utilize TRIPS tools, they can move toward either amendments to the Agreement or negotiation of complementary mechanisms that contribute to a cohesive and coherent view of international intellectual property regulation rather than creating fly-by-night alternatives that repeat—or worse, further fray—international IPR history.