

# BARGAINING AND INTELLECTUAL PROPERTY TREATIES: THE CASE FOR A PRO-DEVELOPMENT INTERPRETATION OF TRIPS BUT NOT TRIPS PLUS

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## I. INTRODUCTION

International Intellectual Property (IP) agreements have received voluminous comment<sup>1</sup> because they present a com-

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1. Westlaw searches of the various multilateral trade agreements in the “Journals and Law Reviews” database bear this out: “TRIPS Agreement” produced 3,101 results, while “TRIMS Agreement” (investment) yielded 114 results, and “GATS” (services) 653 results. A search for “TRIPS Agreement”

pulling tension. On one hand, IP protection results in significant short-term transfers of economic rents from IP-importing developing countries to IP-producing developed countries.<sup>2</sup> This concern is made particularly salient by the fact that IP protection can dramatically increase the price of medicines that are necessary to fight public health crises in the developing world.<sup>3</sup> On the other hand, even if IP protection is not a natural right,<sup>4</sup> the refusal by developing countries to grant protection to the developed countries' IP is a form of free-riding, which reduces the total production of innovation globally.<sup>5</sup> The free-riding problem is compounded because the in-

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with "fair" in the same sentence produced 199 results, while the same search for GATS and TRIMS produced 1 result total.

2. The transfers are a result of developing world consumers paying monopoly prices for intellectual property that was previously available at closer to cost. For a full discussion, see Part III.A, *infra*.

3. A UN study reports, for example, that 150 mg of the HIV drug fluconazole costs \$55 in India, where it is unlicensed, compared to \$697 in Malaysia and \$817 in the Philippines, where it is patented. U.N. High Comm'r for Human Rights [UNHCHR], Sub-Comm'n on the Promotion and Prot. of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, ¶ 44, U.N. Doc. E/CN.4/Sub.2/2001/13, June 27, 2001.

4. In the United States at least, IP is understood as a form of government regulation used instrumentally to encourage innovation. U.S. CONST. art. I, § 8 ("The Copyright Clause"). The traditional justification is that regulation is necessary to address the market failure that results from innovation being a non-rivalrous public good. See Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 615 (1962); cf. Daniel Gervais, *TRIPS and Development*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 3, 12 (Daniel Gervais ed., 2007) [hereinafter Gervais, *TRIPS and Development*] (noting that "[t]he piracy discourse cannot be elevated to a level of a theory, however, and is more properly viewed as a lobbying tool, one especially powerful in the US Congress where private property has sacrosanct status").

5. See Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 *VAND. J. TRANSNAT'L L.* 689, 697-98 (1989) (describing this free riding as part of the "intellectual property problem"); Jerome H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 *N.Y.U. J. INT'L L. & POL.* 11, 53 (1996) (noting the free rider problem) [hereinafter Reichman, *From Free Riders*]; Alan O. Sykes, *Public Health and International Law: TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution,"* 3 *CHI. J. INT'L L.* 47, 49, 62 (2002) (same).

ability of producers to earn rents from developing country consumers causes underinvestment in precisely the medicines and technologies that developing countries need most.<sup>6</sup>

Although these are essentially “policy” considerations, they are relevant to the interpretation of IP treaties because these agreements contain provisions that either explicitly incorporate policy concerns, or are vague to the point of inevitably inviting them.<sup>7</sup> Furthermore, by issuing the *Declaration on the TRIPS Agreement and Public Health*<sup>8</sup> (Doha Declaration) in 2001, World Trade Organization (WTO) members themselves raised the issue of policy-driven interpretation of the major multilateral IP treaty, the Agreement on Trade Related Aspects of Intellectual Property (TRIPS).<sup>9</sup> The Doha Declaration called on the WTO to adopt a “pro-development” interpretive posture that provides flexibility<sup>10</sup> for developing countries when construing TRIPS provisions relating to access to medicines and public health.<sup>11</sup>

Proponents of a strict interpretation of IP treaties make an argument, in addition to the free-riding concern, that must be taken seriously: developing countries themselves agreed to

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6. Sykes, *supra* note 5, at 62.

7. See Part IV, *infra*.

8. World Trade Organization [WTO], Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

9. WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M.1197 (1994) [hereinafter TRIPS]. The major features of TRIPS are comprehensive minimum standards for IP protection, Most Favored Nation (“MFN”) treatment, provisions covering domestic enforcement procedures, and the applicability of WTO dispute settlement procedures. A succinct overview is provided in U.N. Conference on Trade and Development [UNCTAD], *The TRIPS Agreement and Developing Countries*, Tbl.1, U.N. Doc. UNCTAD/ITE/1 (1996) [hereinafter UNCTAD, *The TRIPS Agreement*].

10. A pro-development interpretation is often referred to as a “flexible” interpretation because it avoids narrow construction of the text and broadens the circumstances where protection is not extended to intellectual property. See Section IV, *infra*.

11. The Doha Declaration is quoted at length and discussed in Section IV, *infra*.

these provisions, and agreements are meant to be kept.<sup>12</sup> This claim implies that a highly textual interpretation that narrowly construes the terms of provisions best represents the original agreement and intentions of the parties. As a corollary, “flexible” interpretations, such as the one endorsed by the Doha Declaration, constitute a readjustment of the original agreement, at least to some degree. This Note adopts these assumptions but nevertheless arrives at a different conclusion.<sup>13</sup>

This Note argues that, while a pro-development interpretation is warranted for the multilateral TRIPS agreement, it should not be applied to recent bilateral treaties known as “TRIPS Plus.”<sup>14</sup> This case is made despite the fact that TRIPS Plus treaties appear on their face to be more detrimental to developing countries because they provide for more extensive protection of IP. Indeed, this thesis is in conflict with most of the academic and journalistic criticism of IP treaties, the bulk of which maintains that either: (a) TRIPS was a “fair deal” while TRIPS Plus treaties “go too far”;<sup>15</sup> or (b) TRIPS was bad for developing countries while TRIPS Plus agreements are even worse.<sup>16</sup>

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12. See Sykes, *supra* note 5, at 59 (arguing that adherence to trade agreements after the fact is important because if parties deviate from the commitments, the value of their commitments is diminished in the future).

13. Of course, there is a wide-ranging literature on “purposive,” “teleological,” or “evolutive” interpretation of international legal instruments, which focuses less on the plain meaning of terms and attempts to anticipate the broader policy goals of the drafters. See, e.g., RICHARD GARDINER, *TREATY INTERPRETATION* 250-301 (2008) (providing an overview of evolutive interpretation); JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 65-74 (2006) (discussing teleological interpretation).

14. “TRIPS Plus” treaties raise IP protection above the baseline level set by TRIPS. See Section II, *infra*, for a more detailed explanation and comparison of the two types of treaties.

15. See, e.g., Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 215, 235-37 (Lorand Bartels & Federico Ortino eds., 2007) (urging developing countries to resist overly broad TRIPS Plus treaties); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. TECH. J. 125, 129 (2004) (“Rather than signal an end to the aggressive unilateralism that characterized pre-Uruguay Round intellectual property strategies, the new bilateralism is rightly viewed as a means to roll back both substantive and strategic gains of the TRIPS Agreement for developing countries.”).

16. See, e.g., Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827 (2007) (discussing how the international intellectual property move-

The thesis of this Note inverts this conventional wisdom by focusing on the conditions under which the agreements are made rather than on a facial reading of their terms. More specifically, the Note evaluates whether there were information asymmetries or political or economic coercion between the parties during the negotiating process. These findings are then tested against a cost-benefit analysis of IP treaties that seeks to gauge their actual economic effects. In those cases when formation of the agreement is undermined by information asymmetries or economic coercion, this Note challenges, or suggests an exception to, the principle that agreements must always be kept in accordance with a narrow construction of their terms.<sup>17</sup>

This Note does *not* argue that the bargaining history of these treaties legally *compels* a pro-development interpretation pursuant to the Vienna Convention articles on interpreta-

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ment is enclosing individual countries' policy space); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003) (arguing that TRIPS and other international intellectual property agreements reflect the interests of private industry in developed countries).

17. The general principle of international law that agreements should be kept is referred to as *pacta sunt servanda*, and is codified in the Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Treaties have long been analogized to contracts in the literature, which provides further justification for the presumption that terms of a treaty should be scrupulously honored. See, e.g., Jeffrey Dunoff & Joel Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 28-30 (1999) (explaining and defending the contract-treaty analogy). The enforcement of contracts according to their terms is justified on grounds of both efficiency and fairness: rational parties will tend to contract into mutually beneficial arrangements, and at the same time, it is unjust for one party to realize the benefit of the agreement while depriving the other party of their bargained-for gain. The freedom of contract principle has limitations, however, and courts will sometimes intervene to rescind a contract, modify its terms, or—importantly for purposes of this paper—adopt a new interpretive position. See CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 517, 537 (6th ed. 2007) (discussing judicial responses to contracts that are perceived to create unjust outcomes, including the origins of the doctrines of duress and undue influence at early common law). While domestic courts may intervene on any number of equity grounds, this paper restricts itself to the proposition that the presumption of efficiency and fairness which underpins the principle of *pacta sunt servanda* and freedom of contract is only threatened when *procedural* defects, either coercion or lack of information, are present in the formation of agreements.

tion<sup>18</sup> or coercion.<sup>19</sup> The claim instead is that policy arguments based on reference to a “Uruguay Round Bargain”—arguments that implicitly or explicitly fall back on the normative and instrumental justifications of *pacta sunt servanda* and freedom of contract principles<sup>20</sup>—are not applicable to the interpretation of TRIPS. At the same time, the Doha Declaration does provide the WTO with the legal grounds to take a “flexible” or “pro-development” interpretive posture.

On a more general level, this Note questions two frameworks through which international economic agreements are commonly understood. What could be termed the “dim view” relies on the structuralist arguments of dependency theory, and holds that the uneven distribution of power in the international economy necessarily means that agreements between poor and rich nations are coercive and exploitative.<sup>21</sup> The “sanguine view,” which usually relies on theories of the rational actor, assumes that international agreements are voluntary transactions between rational parties seeking mutual gain, and concludes that when a weaker nation enters into an agreement with a more powerful nation it receives some benefit.<sup>22</sup> The following analysis seeks to demonstrate, by focusing on the specific conditions of the bargaining process, that in some cases rational states will enter into agreements that are to their disadvantage and in other cases they will not.

The paper proceeds as follows: Part II presents the relevant legal background of treaties and WTO jurisprudence. Part III.A analyzes the bargaining process of TRIPS and offers

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18. Vienna Convention, *supra* note 17, arts. 31, 32.

19. *Id.* arts. 51, 52. The argument that the Uruguay Round was “coercive” in the sense of Article 52 is implausible, as that Article does not apply to political or economic duress and is instead an application of the general prohibition on the use of force, which is embodied in the UN Charter Article 2(4). In any event, application of Article 52 would require the rescission of TRIPS in its entirety, something that no parties to the treaty seriously suggest.

20. *See supra* note 17.

21. *See, e.g.,* Susan Marks, *Exploitation as an International Legal Concept*, in *INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES* 281-307 (Susan Marks ed., 2008) (analyzing problems in the international system as the products of “exploitation” by powerful groups).

22. *See, e.g.,* Sykes, *supra* note 5, at 59–60 (“[D]eveloping countries accepted the commitments of TRIPS because it was in their mutual interest when coupled with the concessions that they received on other issues.”).

an overview of the substantive cost-benefit outcomes for developing countries. Part III.B applies the same analysis to bilateral TRIPS Plus treaties and argues that the bargaining process was defective in the case of TRIPS, but not TRIPS Plus. Part IV describes the legal basis for a pro-development interpretation of TRIPS along the lines suggested by the Doha Declaration, and presents reasons why it would be inappropriate to take such an approach to TRIPS Plus treaties. Part V considers the effects a pro-development interpretation of TRIPS would have on developing countries, the United States, and the WTO. Part VI concludes.

## II. LEGAL BACKGROUND

### *The Multilateral Treaty*

The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>23</sup> (TRIPS) in 1994 set minimum standards for international IP as part of the larger Uruguay Round of negotiations for the General Agreement on Tariffs and Trade (GATT). The Uruguay Round also established the World Trade Organization (WTO) and concluded multilateral agreements on trade in goods, services, and investment.<sup>24</sup> TRIPS has since gone unmodified by subsequent rounds of WTO trade talks, with a significant exception being the failed Doha Round's<sup>25</sup> non-binding ministerial interpretation in 2001, known as "The Doha Declaration."<sup>26</sup> The Doha Declaration was signed by all WTO members and affirmed that TRIPS provisions relating to access to medicines and public health should be interpreted by the WTO to provide flexibility for

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23. TRIPS, *supra* note 9.

24. GATT still exists as the umbrella agreement covering trade in goods. TRIMS, the Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186 (1994), and GATS, the General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 (1994), were the other major Uruguay trade agreements.

25. Negotiation "rounds" in the GATT are named after their location, and can span several years. The most recent round in Doha, Qatar began in 2001 and was more or less abandoned by the parties in 2008 after failing to make substantive progress on trade agreements. This widely acknowledged "failure," however, does not bear on the legal status of the Doha Declaration.

26. Doha Declaration, *supra* note 8. Paragraph 5 addresses the specific provisions that are to be interpreted and is reproduced in part in Section IV, *infra*.

developing countries. The Doha Declaration paragraph 4 provides:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

Doha Declaration Paragraph 4 captures the essence of what a "flexible" or "pro-development" interpretation of TRIPS would mean.

### *Bilateral Treaties*

While TRIPS remains the global baseline for IP protection, since 2001 an increasing number of bilateral and plurilateral<sup>27</sup> free trade agreements (FTAs),<sup>28</sup> particularly those negotiated by the United States,<sup>29</sup> have contained so-called "TRIPS Plus" provisions.<sup>30</sup> These provisions generally serve to increase the terms of IP protection, remove existing flexibili-

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27. The term "plurilateral" is used here to describe trade agreements that include several state parties, typically within a single region. "Multilateral" refers to much larger treaties with near global membership.

28. See Okediji, *supra* note 15 (discussing the post-TRIPS resurgence in bilateral agreements).

29. The U.S. has signed and approved FTAs with Jordan (2001), Singapore (2003), Chile (2003), Morocco (2004), Australia (2004), DR-CAFTA (Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) (2005), Bahrain (2006), Oman (2006), and Peru (2007). FTAs with Colombia, Korea, and Panama have been signed but not yet approved by the U.S. Congress. Full texts of the FTAs are available at [www.ustr.gov](http://www.ustr.gov).

30. Recent FTAs concluded by Japan and the E.U. contain fewer TRIPS Plus provisions. MAXIMILIANO SANTA CRUZ, INT'L CENTER FOR TRADE AND SUSTAINABLE DEV., INTELLECTUAL PROPERTY PROVISIONS IN EUROPEAN UNION TRADE AGREEMENTS 10 (ICTSD Issue Paper No. 20, 2007). But it is not clear whether these countries are less aggressive on IP, or simply free-riding off the MFN mechanism of TRIPS.



ties in TRIPS, or expand IP protection to new areas.<sup>31</sup> “Plus” refers to the fact that these provisions raise the level of IP protection above the multilateral TRIPS baseline.

### *WTO Jurisprudence*

The WTO Dispute Settlement Body (DSB) adjudicates disputes brought by member states and has rendered over one hundred decisions to date. However, the legal status of several important but ambiguous provisions of TRIPS,<sup>32</sup> and the ultimate interpretive weight to be afforded to the Doha Declaration,<sup>33</sup> have not been decisively addressed in DSB decisions. Thus, WTO jurisprudence is unsettled with respect to whether or not it adopts a pro-development interpretation of TRIPS.

More precisely, the WTO faces an interpretive “fork in the road” on the question of development issues and TRIPS. On one side, there is the unclear legal weight of the Doha Declaration and the WTO’s silence or hedged answers with respect to provisions that potentially carry a pro-development slant. At the same time, WTO interpretation has traditionally been aggressively textual and, in the IP context, closely aligned with the enforcement of rights-holders’ interests. This opening in the decisional law is heightened by the fact that the WTO does not have an official policy of adherence to precedent and the principle of *stare decisis*. This Note proposes that the WTO actively resolve this open question of interpretation by recognizing

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31. Mercurio, *supra* note 15, at 219. For an overview of TRIPS Plus provisions in U.S. FTAs, see generally CARSTEN FINK & PATRICK REICHENMILLER, TIGHTENING TRIPS: THE INTELLECTUAL PROPERTY PROVISIONS OF RECENT US FREE TRADE AGREEMENTS 4 (World Bank Trade Note No. 20, 2005), available at <https://resources.worldbank.org/INTRANET/TRADE/Resources/Pubs/TradeNote20.pdf>.

32. See Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000) (explicitly leaving open the question of how important Objectives Article 7 and Principles Article 8 are to interpretation). There has been no decision on the scope of compulsory licenses in Article 31.

33. *Id.*, ¶ 7.15 (finding that “interpretation may go beyond the negotiating history of the TRIPS Agreement proper and also inquire into that of the incorporated international instruments on intellectual property”). Sykes, *supra* note 5, at 54 (speculating that the Doha Declaration “is likely to be persuasive authority in the interpretation of TRIPS in the event of a dispute”). There is no DSB decision on point which settles *how* persuasive the Doha Declaration should be considered to be.

ing the flexibilities built into certain TRIPS provisions and affirmed by the Doha Declaration.<sup>34</sup>

### III. JUSTIFICATION FOR A PRO-DEVELOPMENT INTERPRETATION

This Part, which focuses on the presence of information asymmetries or political-economic coercion in the bargaining process, discusses why a pro-development interpretation of IP provisions is warranted on non-legal grounds for TRIPS but not for TRIPS Plus agreements. The justification for a pro-development interpretation of TRIPS rests on two premises: first, that the agreement was not freely and fairly entered into by developing countries, given the lack of information on their part and economic coercion by the United States; and second, that as consequence of these procedural defects in the formation of TRIPS, the substantive economic outcome of the agreement disproportionately favored developed countries, particularly the U.S.

In contrast, subsequent to TRIPS, developing countries have agreed to bilateral TRIPS Plus provisions under conditions in which these procedural defects were absent. Furthermore, although the economic outcomes of FTAs containing TRIPS Plus provisions are mixed and hard to ascertain, they do not appear to be as one-sided as in the case of TRIPS and the Uruguay Round. In any case, *pacta sunt servanda* and freedom of contract principles provide a powerful presumption that agreements that are fairly formed should be kept free from judicial intervention.<sup>35</sup>

#### A. *TRIPS and the Uruguay Round Agreements*

##### 1. *The Bargaining Process*

###### *Information Asymmetry*

The U.S. approached the Uruguay Round with a very sophisticated understanding of the type of IP agreement it wanted. It was equipped with information from extensive industry lobbying and drafting, set the agenda almost immediately, and forged an agreement on key North-South issues soon after. Developing countries approached the Uruguay

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34. How this is to be done as a legal matter is explained by a close reading of the relevant legal documents in Section IV, *infra*.

35. See note 17, *supra*.

Round not knowing that IP would be a significant issue, not having a particularly coherent agenda, and armed only with trade, not IP, experts.

The idea of linking IP measures with a new multilateral trade round had first been raised four years before the Uruguay Round, at a 1982 GATT ministerial conference. Before the 1986 Uruguay Round, international IP was the province of the World Intellectual Property Organization (WIPO), an agency of the United Nations. Initially, discussions at the 1982 ministerial indicated that there was no consensus that IP was a trade-related issue, or that IP encompassed anything beyond a few anti-counterfeiting issues.<sup>36</sup> However, between the 1982 ministerial and the 1986 Uruguay Round meeting at Punta del Este, the United States began to initiate bilateral negotiations on IP with a handful of Asian countries.<sup>37</sup> The disparities in information and expertise were acute at this early stage. For example, when the U.S. began IP talks with South Korea in 1984, no law schools in South Korea taught IP law, and there were no Korean IP law experts.<sup>38</sup> South Korea's lack of expertise on IP issues was typical of developing countries at the outset of TRIPS negotiations.<sup>39</sup> As Gervais writes:

This expertise and resource asymmetry put them at a disadvantage when discussing detailed and arcane drafting points, especially those linked to the specific history of existing treaties such as the Berne and Paris Conventions.<sup>40</sup>

The more informed developing countries, such as Egypt, Brazil, and India,<sup>41</sup> exercised greater resistance during the negotiations. The U.S. responded to this resistance with unilateral actions, described in the section on "coercion" below.

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36. J.P. SINGH, *NEGOTIATION AND THE GLOBAL INFORMATION ECONOMY* 83-84 (2008).

37. Namely, Taiwan (1983), Singapore (1984), and South Korea (1984). Donald P. HARRIS, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT'L ECON. L. 681, 734 (2006).

38. Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6, 15 (1995).

39. Gervais, *TRIPS and Development*, *supra* note 4, at 10 (observing that "most developing countries in the negotiations had no experts in international intellectual property norms").

40. *Id.*

41. *Id.*

Meanwhile, during the interim between 1982 and 1986, the U.S. Trade Representative (USTR), with the close collaboration of domestic industry, crafted a fairly sophisticated IP negotiating agenda for the United States.<sup>42</sup> USTR-private sector committees<sup>43</sup> commissioned economists<sup>44</sup> and drafted carefully articulated positions on IP issues and negotiation strategy. Impressively, these USTR-private sector committees managed to forge a wide consensus with industry in Japan and Europe on the importance of IP protection in the six-month run-up to Punta Del Este.<sup>45</sup> The later draft proposals of these countries closely followed those of the U.S.,<sup>46</sup> although IP had not been high on their trade agendas before the Uruguay Round. The vigorous collaboration between industry and government during the early 1982-1986 period was a major cause of the information gap between the parties during subsequent negotiations.

Under these circumstances, the negotiating parties took a crucial step with the 1986 Punta Del Este Ministerial Declaration, which decisively linked IP protection with the trade regime of the GATT. While most of the Declaration merely addressed updates to preexisting GATT provisions on trade in counterfeit goods, the entirety of what was to become TRIPS was made possible by the last phrase of the Declaration's first paragraph: "the negotiations shall aim to clarify GATT provi-

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42. See generally Susan Sell, *Industry Strategies For Intellectual Property and Trade: The Quest for TRIPS, and Post-TRIPS Strategies*, 10 CARDOZO J. INT'L & COMP. L. 79 (2002) [hereinafter Sell, *Industry Strategies*].

43. Specifically, the Advisory Committee for Trade Negotiations, headed by Pfizer's Edmund Pratt, provided a main channel for the executive branch to solicit private sector views on trade policy. *Id.* at 84. In March 1986, Pratt and Opel formed the Intellectual Property Committee (IPC), which closely coordinated industry positions with that of the USTR throughout the negotiations. JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 17 (2001).

44. In 1985, IBM CEO John Opel commissioned economist Jacque Gorlin, who produced a detailed articulation of the multilateral IP strategy in a 1985 report. Sell, *Industry Strategies*, *supra* note 42, at 89.

45. Drahos, *supra* note 38, at 13.

46. DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 15-16 (2d ed. 2003) [hereinafter GERVAIS, *THE TRIPS AGREEMENT*] ("Similarity between the two texts [US/EC] suggested that transatlantic consultations had preceded the tabling of both documents.").

sions and elaborate as appropriate new rules and disciplines.”<sup>47</sup> This eventually proved to be the language necessary to move international IP protection out of the WIPO/UN and into the GATT/WTO and allow what originally were expected to be very narrow negotiations at the Uruguay Round to cover every aspect of IP protection. It is doubtful that developing countries appreciated the significance of this text or its possible consequences at the time.<sup>48</sup>

Despite some differences, the two initial submissions of the U.S.<sup>49</sup> and the E.U.<sup>50</sup> in 1987 contained the essential elements of the final TRIPS Agreement.<sup>51</sup> In June 1988, the “trilateral group,” consisting of U.S., European, and Japanese industry committees, released its “Basic Framework of GATT Provisions on IP.”<sup>52</sup> This proposal, which closely tracked the industry drafts circulated during the 1982-1986 period, outlined a plan for minimum standards of protection and enforcement and dispute settlement provisions,<sup>53</sup> and reflected proposals that the U.S. and E.U. had submitted as well. While resistance to the U.S./E.U. proposal soon emerged, particularly from the developing countries in the so-called “Group of Ten,”<sup>54</sup> by 1989 such opposition had been overcome.<sup>55</sup> The

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47. General Agreement on Trade and Tariffs [GATT], Ministerial Declaration of 20 September 1986, pt.I.D, MIN(86)/W/19, 25 I.L.M. 1623 (1986) (emphasis added); see also GERVAIS, *The TRIPS Agreement*, *supra* note 46, at 11.

48. SINGH, *supra* note 36, at 87 (“In the case of IPRs [referring to the Ministerial Declaration], the developed countries had slipped in an agenda without the developing countries taking much notice.”); WATAL, *supra* note 43, at 21 (“Many developing countries agreed to this text, believing that they could limit the negotiations primarily to trade in counterfeit goods and other such trade-related aspects. This was a misreading not only of the text but also of the writing on the wall.”)

49. *Communication from the United States*, MTN.GNG/NG11/W/14 (Oct. 20, 1987).

50. *Guidelines Proposed by the European Community for the Negotiations on Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/16 (Nov. 23, 1987).

51. WATAL, *supra* note 43, at 23.

52. Basic Framework of GATT Provisions on Intellectual Property, Statement of Views of the European, Japanese, and United States Business Communities, MTN.GNG/NG11/W/26, June 1988; see also Sell, *Industry Strategies*, *supra* note 42, at 92-93.

53. Sell, *Industry Strategies*, *supra* note 42, at 93.

54. This group consisted of Argentina, Brazil, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia.

“Basic Framework” was still intact, and the only remaining points of negotiation centered on “North-North” issues.<sup>56</sup>

Although developing countries came to realize that the early Uruguay Round drafts were to their disadvantage,<sup>57</sup> they were unable to modify their terms significantly for a few reasons. First, developing countries were plagued by coordination problems and a lack of expertise, which made their few counter-proposals vague and unworkable.<sup>58</sup> Second, some countries acquiesced because of expected gains in other areas, such as agriculture, textiles, and clothing. But most importantly, the U.S. coerced negotiating countries into passivity with targeted unilateral trade measures, discussed below.

### *Coercion*

The United States’ sophisticated industry planning and lobbying, superior technical resources, and ability to control the negotiating agenda all speak to the claim that developing countries were “caught off-guard” by TRIPS bargaining, and were disadvantaged as a result. However, this is only one part of what led to the imbalanced outcome of TRIPS; leaving aside how skillful or incompetent certain parties were, it is clear that coercive U.S. unilateralism was also a critical ingredient.

The U.S. exerted trade pressure on uncooperative developing countries through the Section 301 mechanism of the Trade Act of 1974<sup>59</sup> and the Generalized System of Prefer-

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55. Sell, *Industry Strategies*, *supra* note 42, at 95.

56. *Id.*, at 95.

57. According to Singh, developing countries “presented an almost transnational coalition opposing TRIPS at the end of the round.” SINGH, *supra* note 36, at 113.

58. W/71, the major counter-proposal, did not include a specific length for patent terms. *Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay*, MTN.GNG/NG11/W/71 (May 14, 1990).

59. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411(a) (2006)). Section 301 allows the USTR to take retaliatory trade action against a foreign country, including: (1) withdrawing benefits a foreign country enjoys because of a trade agreement with the United States; (2) entering into new agreements to eliminate the offending action; and (3) imposing duties or other import restrictions against goods or an economic sector of the foreign country.

ences (GSP).<sup>60</sup> Thus, developing countries were not negotiating on whether to modify the international IP status quo. Instead, their best alternative to a negotiated agreement was becoming the object of unilateral threats and sanctions from the U.S., making “TRIPS, with its international legal backing . . . the better of the two bad alternatives.”<sup>61</sup>

The timing and use of Section 301 and the GSP by the U.S. in the period leading up the Uruguay Round and during the negotiations proper clearly indicate that they were used to induce agreement on international IP. In 1984, the “International IP Alliance” (IIPA), an inter-industry trade group, successfully lobbied to apply Section 301 actions to intellectual property matters through the Trade and Tariff Act of 1974.<sup>62</sup> Section 301 could now make tariff benefits under the GSP contingent on a trading partner’s IP protection. Section 301 was immediately (and successfully) used in 1985 in bilateral negotiations with South Korea over patent protection for pharmaceuticals.<sup>63</sup> In 1987, the U.S. responded to Mexico’s refusal to enact legislation to protect pharmaceutical patents by revoking \$500 million in GSP benefits.<sup>64</sup> The 1988 Omnibus Trade and Tariff Act was further strengthened by requiring the USTR to identify IP violators on an annual three-tiered “watch list” and to self-initiate investigations within thirty days of identification.<sup>65</sup>

The United States used Section 301 and the GSP to the detriment of several developing countries that were vital to the Uruguay Round of negotiations. Brazil amended its domestic copyright law in 1987 in response to a Section 301 investigation initiated in 1985, and it was subject to another investigation in 1988.<sup>66</sup> In October 1988, the U.S. increased tariffs to “100 per cent ad valorem on, *inter alia*, exports of more than

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60. The GSP is a mechanism through which the United States can reduce tariffs bilaterally for select countries without implicating the WTO’s Most Favored Nation rule. *Id.* § 501, 88 Stat. at 2066 (codified as amended at 19 U.S.C. § 2461 (2006)).

61. SINGH, *supra* note 36, at 78.

62. *Id.* at 84.

63. SUSAN SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 190 (1998).

64. WATAL, *supra* note 43, at 24.

65. Sell, *Industry Strategies*, *supra* note 42, at 87.

66. WATAL, *supra* note 43, at 25.

twenty pharmaceutical products from Brazil to the U.S., affecting trade worth \$39 million.”<sup>67</sup> This increase coincided with an oppositional submission by Brazil in the TRIPS negotiating group.<sup>68</sup> Also in 1988, the USTR commenced a Section 301 investigation of Argentina’s pharmaceutical patent protections, and Egypt and Yugoslavia were put on the Section 301 “priority watch list.” In 1989 the U.S. revoked \$165 million in GSP benefits to Thailand as a result of a pharmaceutical patent protection investigation.

Thus, by 1989—during a key stage in the Uruguay Round negotiations—five of the “Group of Ten” developing countries that were the most active negotiators had become subject to Section 301 actions on IP.<sup>69</sup> It is also noteworthy, in terms of information asymmetries, that the developing countries that Gervais describes as relatively well-informed<sup>70</sup>—Brazil, India, and Egypt—were all subject to Section 301 actions by the U.S.

### *Summary*

The discussion in this section indicates that lack of information and economic coercion had a significant impact on the TRIPS bargaining process. The fact that developing countries delayed the opening of the 2001 Doha Round until developed countries conceded to the Doha Declaration and its call for a flexible approach to IP protection indicates to Singh that the developing world had “learned its lesson” from the Uruguay Round.<sup>71</sup> Singh’s point underlines the importance of full information, but the Doha Round proceeded without another defect in the bargaining process as well: after a 1999 WTO Panel Report declaring unilateral trade actions unlawful,<sup>72</sup> economic coercion through Section 301 sanctions was no longer available to the United States.

When parties to an agreement lack information and are subject to coercion, arguments for strict adherence to the original bargain lose their strength. This section has argued that

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67. *Id.*

68. *Id.* at 25 n.29.

69. See Harris, *supra* note 37, at 735 (discussing USTR targeting of developing country “hardliners”).

70. See *supra* note 41.

71. SINGH, *supra* note 36, at 111.

72. Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).



these procedural defects were present in the negotiations culminating in the TRIPS agreement, and supports the thesis that there should therefore be a shift in the interpretation of the agreement to account for these defects.

## 2. *Cost-Benefit Analysis*

As was argued earlier, the general preference for a strict interpretation of treaty terms is only rebutted if there are procedural defects in the formation of the agreement.<sup>73</sup> Modifying a procedurally sound bargain simply because it results in a substantively uneven outcome may be defensible based on redistributivist grounds, but it is inconsistent with the principles of *pacta sunt servanda* and freedom of contract. However, it is still necessary to examine the substantive outcome of an agreement, because this inquiry may produce evidence regarding the integrity of the bargaining process.<sup>74</sup> This section conducts this inquiry by analyzing the costs and benefits to developing nations of the TRIPS bargain.

Estimating the economic impact on an international level of different levels of IP protection is not an exact science.<sup>75</sup> Particularly problematic is that there remains a dearth of empirical evidence, despite a fair amount of theoretical inquiry into the question.<sup>76</sup> That being said, clarity can be gained by observing two distinctions. First, the costs and benefits of TRIPS can be examined in isolation, or in the context of linkages and tradeoffs to other sectors of the WTO as part of a broader “Uruguay Bargain.” Second, when examining TRIPS in isolation, one should distinguish between short-term and long-term effects on developing countries’ economic welfare.

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73. See *supra* note 17 and accompanying text.

74. It is also true that if a procedurally uneven bargain accidentally creates even substantive outcomes, there does not seem to be a strong normative reason to intervene.

75. See Sykes, *supra* note 5, at 48 (“The ultimate wisdom of measures that relax intellectual property protection for pharmaceuticals in developing countries turns on complex matters, including empirical issues about which one can only hazard an educated guess.”). This paper hazards such a guess based on the existing empirical literature.

76. See Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 *FORDHAM L. REV.* 505, 516 (2005) (“There is a relative dearth of empirical analyses of the nature and impact of IP in developing economies.”).

*TRIPS in Isolation*

The short-term, static consequences of TRIPS for developing countries are uncontroversial,<sup>77</sup> while the long-term, dynamic effects of heightened IP rights are less clear.<sup>78</sup> In the short-term, TRIPS constitutes a transfer of economic rents from developing countries to developed countries.<sup>79</sup> Such a transfer results because patent holders are able under TRIPS to charge monopoly prices during the patent term,<sup>80</sup> where previously prices were closer to the cost of production. This entails a transfer from the developing to the developed world because most patents are held in OECD countries and most developing countries are net IP importers. For example, by 1982, the year the linkage between IP and the GATT was first proposed,<sup>81</sup> 87.5 percent of the 200,000 patents awarded by developing countries belonged to foreign patentees.<sup>82</sup> The direction of patent awards remains stable: in 2001, less than 1 percent of U.S. patents were granted to applicants from devel-

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77. The consequence is that developing countries that import IP products will transfer economic rents to developed countries that export IP. See Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 CHI.-KENT L. REV. 385, 387 (1996) [hereinafter Abbott, *The WTO TRIPS Agreement*] (concurring in this judgment that “[t]here was, and is, substantial agreement concerning this likely short term impact”).

78. See Carlos A. Primo Braga & Carsten Fink, *The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict*, 72 CHI.-KENT L. REV. 439, 443 (1996) (arguing that the welfare implications of strengthened IP protections will depend on the unknown demand elasticities of each country); Sykes, *supra* note 5, at 58-59 (arguing that forcing developing countries to recognize patent protection has an ambiguous effect on global economic welfare and a debatably harmful effect on the economic welfare of developing nations).

79. See Abbott, *The WTO TRIPS Agreement*, *supra* note 77, at 387 (stating that in the short-term, the recognition of IP ownership rights by developing nations “would logically lead to a transfer of wealth from the developing to industrialized economies”); Braga & Fink, *supra* note 78, at 442 (arguing that “[i]f the existing (or potential) title-holders are predominantly foreigners, the strengthening of protection raises the possibility of an international rent transfer”).

80. See generally Sykes, *supra* note 5, at 57 (explaining how a patent holder is able to secure a monopoly on a product and therefore charge monopoly prices).

81. See *supra* note 36 and accompanying text.

82. Braga & Fink, *supra* note 78, at 442 n.8.

oping countries.<sup>83</sup> Of this 1 percent, 60 percent of patents were from seven of the more technologically advanced developing countries.<sup>84</sup>

Attempts to measure the flow of patent rents have shown that the U.S. is the main beneficiary. A 2002 estimate by the World Bank found that patent enforcement results in a yearly net gain to the U.S. of \$16 billion dollars, and a yearly net loss by developing countries of \$7 billion dollars.<sup>85</sup> Maskus<sup>86</sup> and McCalman<sup>87</sup> have calculated the net transfers for particular countries as a result of TRIPS. Predictably, the U.S. is the big winner,<sup>88</sup> while every developing country suffers a net loss, some quite large.<sup>89</sup> Surprisingly, some developed countries also realize several of the larger net losses.<sup>90</sup> These losses however, are consistent with the fact that the TRIPS framework was proposed at the initiative of the U.S., which only later sought the cooperation of the other OECD countries.<sup>91</sup>

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83. COMM'N ON INTELL. PROP. RTS., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 12 (2002), available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf).

84. *Id.*

85. WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES: MAKING TRADE WORK FOR THE WORLD'S POOR (2002). The discrepancy between the gain and loss is explained by the fact that several developed countries are also net importers of IP relative to the United States.

86. See Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 503 (2000) [hereinafter Maskus, *Intellectual Property Rights*] (providing table of net transfers); KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 184 (2000) [hereinafter MASKUS, THE GLOBAL ECONOMY] (same).

87. See Phillip McCalman, *Reaping What You Sow: An Empirical Analysis of International Patent Harmonization*, 55 J. INT'L ECON. 161, 179-81 (2001) (providing statistics on net transfers); Phillip McCalman, *Who Enjoys 'TRIPs' Abroad? An Empirical Analysis of Intellectual Property Rights in the Uruguay Round*, 38 CAN. J. ECON. 574, 589 (2005) (same).

88. The U.S. enjoys a net patent rent of \$5,760 million in 1995 U.S. dollars. Maskus, *Intellectual Property Rights*, *supra* note 86, at 503 tbl.1.

89. Brazil sees a loss of \$1,172 million in 1995 U.S. dollars, India a loss of \$665 million, and Mexico a loss of \$562 million. *Id.*

90. For example, Canada loses \$1,294 million in 1995 U.S. dollars, United Kingdom \$684 million, and Japan \$555 million. *Id.*

91. See discussion *supra* Part III.A.1 (outlining the course of TRIPS negotiations). While this appears an odd result, it is best understood as a policy miscalculation on the part of a handful of countries that were not themselves opposed to TRIPS. *Id.* The situation of developing countries is distinguishable in that they opposed the provisions at the time they were proposed.

Aside from transfers, TRIPS entails two other static losses for developing countries. First, as a result of the new monopoly prices, the "consumer surplus" is reduced and a "deadweight loss" results.<sup>92</sup> Maskus has estimated that the deadweight loss from TRIPS amounts to 20 percent of the efficiency gains realized from all the liberalization of trade in goods and services in the Uruguay Round.<sup>93</sup> As discussed below, however, this deadweight loss may be justified as the necessary cost of incentivizing innovation in the long term.<sup>94</sup> A final economic cost results from the burden of implementing TRIPS and establishing an administrative infrastructure to process claims of IP rights-holders. This administrative burden is not only expensive for poor countries in simple dollar terms;<sup>95</sup> perhaps more importantly, the large number of professionals required to administer the system diverts scarce human resources.<sup>96</sup>

Thus, TRIPS results in a substantial loss for developing countries, at least in the short term. Politicians in developing countries, necessarily confronted with short-term time horizons, could not have honestly seen TRIPS as an advantageous development. There are however, two arguments that tighter IP protection is actually in the long-term interest of developing countries. The first is that protection of IP in developing countries will lead to internal development of the domestic econ-

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92. See Sykes, *supra* note 5, at 57 (explaining that firms need to recover rents from their successful IP products in order to successfully fund new research and development).

93. MASKUS, *THE GLOBAL ECONOMY*, *supra* note 86, at 185-186.

94. See Sykes, *supra* note 5, at 57 (explaining that patent rights afford the patent holder "a period of monopoly rents that allows the recoupment of research and development costs").

95. An UNCTAD report has estimated the costs of complying with TRIPS for various developing countries. Bangladesh, for example, experiences a fixed cost of \$250,000 and annual costs of \$1.1 million. UNCTAD, *The TRIPS Agreement*, *supra* note 9, at 25. For Egypt, costs are \$800,000 and \$1 million, respectively. *Id.* at 23-24.

96. *Id.*

omy.<sup>97</sup> The second is that heightened protection will maximize the level of innovation globally.<sup>98</sup>

The argument that TRIPS is actually in the self-interest of developing countries because IP protection will expand their domestic economies was first proposed by lawyers and economists working as consultants for industries interested in the outcome of the work.<sup>99</sup> After TRIPS was signed, the idea was taken up in the academic context, albeit with much more tentative conclusions.<sup>100</sup> Both the consultants and the academic commentators reasoned that protection of IP would make developing countries more attractive places of business for foreign patent holders who desire a secure environment for their investments, and that this would be reflected in increased trade flows and Foreign Direct Investment (FDI) to such countries.<sup>101</sup> The economic evidence remained mixed or marginal regarding this proposition for a time, but Maskus's book-length study in 2000 indicated that there was a correlation between IP protection and both trade flows and FDI.<sup>102</sup> However, these correlations were subject to a major caveat respecting their actual domestic effects. As Reichman puts it in a review of Maskus's book:

Absent the right mix of complementary endowments and policies, stronger intellectual property regimes will not produce technological change and growth . . . . The policies that are most needed at the na-

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97. For a strong articulation of this view, see generally Robert M. Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491 (1996). A very thorough treatment of this argument can be found in MASKUS, *THE GLOBAL ECONOMY*, *supra* note 86.

98. See generally Sykes, *supra* note 5 (applying this principle to pharmaceutical innovations).

99. Abbott, *The WTO TRIPS Agreement*, *supra* note 77, at 390.

100. See, e.g., Braga & Fink, *supra* note 78, at 443 ("Generalizations can only be made if strong assumptions are adopted. For example, if one assumes that the supply of innovations in the South. . . is rather inelastic . . . then it follows that the Agreement is in essence an exercise in rent transfer.").

101. See *supra* note 97. It should be noted than an increase in trade may offset an increase in FDI. *Id.* at 454.

102. MASKUS, *THE GLOBAL ECONOMY*, *supra* note 86, at 87-142. Maskus, however, is cautious in his findings: "These conclusions are important . . . . However, keep in mind that they follow from limited econometric analysis." *Id.* at 142.

tional level to convert predictions into practice—i.e. to optimize IPRs—are dauntingly complex and run counter to the historical grain in the bulk of developing countries.<sup>103</sup>

In a 2004 World Bank study, Reichman's intuition was confirmed by the same economists who found the original correlations.<sup>104</sup> Maskus and Fink concluded that developing countries are better off improving their overall investment climates and business infrastructure, rather than focusing on strengthening their patent regimes, which would have little effect on its own.<sup>105</sup> In sum, the claim by industry groups during negotiations that TRIPS would contribute to the dynamism of developing countries' domestic economies rested on no empirical evidence at the time and remains on rather shaky ground today. In any event, the resistance of developing countries at the time indicates that they did not sign the agreement expecting economic dividends that would offset the short-term loss of monopoly prices.

Sykes puts forward a second argument that TRIPS benefits developing countries, claiming that developing countries' resistance to IP agreements reflects an attempt to free-ride off a regime that would increase global innovation, and thereby increase welfare, if it were strictly followed.<sup>106</sup> The logic is that, no matter the effect on developing countries domestically, so long as producers in developed countries can collect patent rents they will invest more in research and development.<sup>107</sup> While it is valid to hold as a theoretical proposition that perfect adherence to IP protection would roughly result in the optimal amount of innovation, it seems implausible that developing countries would consider the cost of rent transfers to be lower than the benefits of pushing the pace of global innovation at the margin. During the Uruguay Round, and even more explicitly in the Doha Round, developing countries

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103. Jerome H. Reichman, *Taking the Medicine, with Angst: An Economist's View of the TRIPS Agreement*, 4 J. INT'L ECON. L. 795, 805 (2001) [hereinafter Reichman, *Taking the Medicine*] (reviewing MASKUS, *THE GLOBAL ECONOMY*, *supra* note 86).

104. World Bank, *Intellectual Property and Development: Lessons from Recent Economic Research*, at 7 (Carsten Fink & Keith E. Maskus eds., 2004).

105. *Id.*

106. Sykes, *supra* note 5, at 48-49.

107. *Id.*

collectively bargained for *less* IP protection. Confirmation of Sykes' claim that developing countries collectively benefit from tight IP protection would require that developing countries collectively coordinate to produce the public good of more IP protection, but that those same countries shirk their obligations on an individual basis. In fact, during the Doha Round, the opposite form of collective action took place.

*TRIPS as part of a Larger "Uruguay Bargain"*

Most commentators concede that the TRIPS agreement produced a loss for developing countries, but hold that the ultimate decision by developing countries to consent to TRIPS was based on their desire to obtain concessions in other areas that were being negotiated at the Uruguay Round.<sup>108</sup> In particular, the Agreement on Textiles and Clothing (ATC), which required developed countries to "phase out" quotas of textiles and clothing on the last day of a ten-year transitional period, is referenced as one such concession.<sup>109</sup>

However, while there were *some* tradeoffs involving other sectors, it does not necessarily follow that these tradeoffs were proportionate to the loss caused by TRIPS. Commentators have questioned the significance of the ATC as a meaningful concession,<sup>110</sup> but perhaps more important is the fact that even when put in the context of the entire Uruguay Round bargain, TRIPS either sharply curtailed the gains of many countries or, in some cases, resulted in net losses.<sup>111</sup> At the

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108. Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L. L. 933, 950-51 (2003); see also Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371 (2006) [hereinafter Yu, *TRIPS and Its Discontents*] (noting that the bargain narrative is the most widely accepted account of the origins of TRIPS). But see JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 77-79 (2006) (questioning whether such a "Grand Bargain" did in fact take place).

109. Yu, *TRIPS and Its Discontents*, *supra* note 108, at 371.

110. See, e.g., WATAL, *supra* note 43, at 20. The original "phase outs" contemplated by the ATC did not go into effect as planned and were renegotiated by developed countries after the ten-year waiting period had lapsed.

111. McCalman's model projected that Mexico, for example, would see efficiency gains from trade liberalization amounting to \$129 million in 1988 U.S. dollars per year, but it actually suffered a loss of \$319 million when TRIPS was factored in; Brazil saw gains of \$1,215 million shrink to \$288 million, given the effects of TRIPS. McCalman, *supra* note 87, at 181 tbl.5.

same time, the U.S. saw its gains increased, not diminished, by other sectors of the Uruguay agreement.<sup>112</sup>

### *Conclusion*

The foregoing analysis shows that TRIPS imposes costs on developing countries that outweigh any net benefits. The agreement entails immense economic rent transfers to developed nations, and it is clear that developing countries do not believe that these costs are offset by any long-term gain in innovation. Moreover, this disparity cannot be explained by the marginal gains won by developing countries in the Uruguay Round. The significant losses that developing countries have experienced as a result of TRIPS present strong evidence that the underlying bargain was characterized by inadequate information and/or outright coercion.

### B. *TRIPS Plus and FTAs*

The original TRIPS agreement set a minimum floor for IP standards but provided for the adoption of “more extensive protection” at WTO Members’ discretion.<sup>113</sup> “TRIPS Plus” refers to provisions in subsequent trade agreements between Members that increase the baseline level of IP protection. These provisions are most commonly found in the bilateral trade agreements of the United States,<sup>114</sup> and usually take one of two general forms. Some provisions require the implementation of a more extensive standard, commonly by either increasing the term of protection<sup>115</sup> or expanding IP protection

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112. The same projections from McCalman report a gain to the United States from non-TRIPS sectors of \$11,185 million, which increases to \$15,738 million when including TRIPS. *Id.*

113. TRIPS, *supra* note 9, art. 1(1).

114. FTAs involving the EU and Japan also commonly include TRIPS Plus provisions, but to a lesser extent than those completed by the U.S. UNCTAD, *Intellectual Property Provisions in International Investment Arrangements*, at 6-7, UNCTAD/WEB/ITE/IIA/201/1 (2007) [hereinafter UNCTAD, *Intellectual Property*].

115. *See, e.g.*, Free Trade Agreement between the United States and Morocco, U.S.-Morocco, art.15.9(7), June 15, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> (extending patent terms when there are delays in the regulatory process following the filing of a patent).



to new areas.<sup>116</sup> The second type of provision eliminates interpretations and flexibilities that were previously left open under TRIPS.<sup>117</sup> Because this second type often forecloses interpretations of TRIPS that were explicitly emphasized as important by the Doha Declaration,<sup>118</sup> such provisions are best understood as conscious attempts by developing countries to “contract out” of the flexibilities in TRIPS.

This section applies the same analysis as above to TRIPS Plus agreements by examining both the bargaining process and the resulting distribution of economic costs and benefits.

### 1. *The Bargaining Process*

Critics of the original TRIPS agreement argue that TRIPS Plus provisions exacerbate the original inequity created by TRIPS.<sup>119</sup> General objections to the idea of free-trade aside, critics of TRIPS Plus FTAs can point to some features of these agreements that appear problematic: disparities in bargaining power appear heightened in the bilateral context; arguments based on encouraging investment in the developing world are

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116. See, e.g., *id.*, art. 15.9(2) (explicitly providing for the patentability of plants and animals).

117. Compare, e.g., United States – Singapore Free Trade Agreement, U.S.-Sing., Jan. 15 2003 [hereinafter U.S.-Singapore FTA], art. 16.7(2) (allowing patent holders to limit parallel imports of pharmaceutical products through licensing contracts), art. 16.7(6) (limiting the use of compulsory licenses to national emergencies, antitrust remedies, and public non-commercial use), available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file708\\_4036.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf) (allowing patent holders to limit parallel imports of pharmaceutical products through licensing contracts), with TRIPS art. 6 (explicitly reserving the question of “exhaustion,” i.e. parallel importation rules, open to Member countries). See also Anselm Kamperman Sanders, *Intellectual Property, Free Trade Agreements and Economic Development*, 23 GA. ST. U. L. REV. 893, 897 (2006) (“FTAs also provide for a uniform interpretation of the TRIPS Agreement, often along the lines provided for by US law.”).

118. Doha Declaration, *supra* note 8, ¶ 5. Common examples are provisions that limit the availability of compulsory licenses and parallel importation. See also Mercurio, *supra* note 15, at 235-37 (discussing the interpretive flexibilities in TRIPS in more detail).

119. See generally PETER DRAHOS, EXPANDING INTELLECTUAL PROPERTY’S EMPIRE: THE ROLE OF FTAs (2003), available at [http://www.grain.org/rights\\_files/drahos-fta-2003-en.pdf](http://www.grain.org/rights_files/drahos-fta-2003-en.pdf) (arguing that TRIPS Plus provisions “ratchet up” IP protections to even more undesirable levels). The “sanguine view” presented in the Introduction would naturally see the FTAs as just another example of mutual gains from self-interested contracting.

dropped and the U.S. agenda is transparently presented as furthering the interest of domestic industry; and most plainly, the terms require more protection of first-world IP assets than before.

However, none of these highly visible features of TRIPS Plus provisions are necessarily problematic from the perspective of the bargaining *process* analysis employed in this Note. Rational parties will only contract to their disadvantage if they lack information or are subject to coercion. Unless the “bargaining power” disparity expresses itself in one of these forms, we can assume that developing countries voluntarily accept the losses from TRIPS Plus provisions as a tradeoff for the market access provided in other terms of the FTAs. This section presents three reasons why developing countries are less procedurally disadvantaged in the negotiation of TRIPS Plus provisions than they were during the conclusion of TRIPS. First, developing countries are now better informed about international IP and its implications for public health. Second, the ability of the U.S. to impose unilateral trade sanctions on negotiating parties is restrained by WTO dispute settlement rules, which were not in place during the Uruguay Round. And lastly, the proliferation of regional trading blocs and South-South trade agreements reduces the necessity of engaging the U.S. as a trading partner.

### *Information Asymmetry*

As outlined in Section III.A, developing countries entered negotiations on IP standards in 1986 anticipating only that they would update a handful of GATT provisions on counterfeit goods, but by the end of 1989 they had agreed to comprehensive minimum standards on all areas of IP. Since 1990, information on the economic and public health implications of IP protection has become increasingly available in the developing world. There has been growing institutional dialogue at the multilateral level, and the subject of IP is actively debated at the UN Food & Agriculture Organization, World Health Organization, and World Bank.<sup>120</sup> Some international organizations have focused their work directly on the tradeoffs of

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120. Frederick M. Abbot, *Toward A New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism*, 8 J. INT'L ECON. L. 77, 79 (2005).

TRIPS Plus FTAs for developing countries.<sup>121</sup> The “reaction to TRIPS has also stimulated developing countries to form increasingly close and sophisticated South-South trade and development initiatives, such as recent initiatives between Brazil, India, and South Africa.”<sup>122</sup> More obviously, awareness of the scope and seriousness of the HIV/AIDS crisis in the developing world has increased during this period. And perhaps most importantly, in 2001 at the Doha Round, all WTO members (which includes every party to subsequent TRIPS Plus FTAs) signed the *Declaration on the TRIPS Agreement and Public Health*, which opens by recognizing “the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics,”<sup>123</sup> and further acknowledges the effect of IP protection on the price of medicines<sup>124</sup> and the need for flexible implementation of IP rights.<sup>125</sup> In this context, lack of information about IP and public health is no longer a significant factor in the bargaining of TRIPS Plus provisions.

### *Coercion*

While there was a manifest asymmetry of information in the original TRIPS negotiations, developing countries, particularly those most active in the bargaining process, were also subject to unilateral trade sanctions via U.S. Section 301.<sup>126</sup> One of the main reasons developing countries agreed to TRIPS was that the WTO Dispute Settlement Understanding (DSU) would remove the availability of unilateral sanctions as a negotiating tool.<sup>127</sup> Disregarding this new prohibition, the U.S. employed Section 301 against Japan in 1995. However, this ac-

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121. For example, in 2004, the Pan American Health Organization drafted an impact assessment for Colombia on the prospective free trade agreement with the United States, which specifically addressed the access to medicines issue. *Id.* at 94-96.

122. *Id.* at 79.

123. Doha Declaration, *supra* note 8, ¶ 1.

124. *Id.*, ¶ 3.

125. *Id.*, ¶ 4.

126. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411(a) (2006)).

127. DAVID VIVAS-EUGUI, REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE FREE TRADE AREA OF THE AMERICAS 7 (Quaker United Nations Office, 2003).

tion was met with a sufficiently vigorous response that the U.S. eventually retreated. Currently, Section 301 actions are, for the most part, unlawful, since a 1999 WTO Panel ruling, *United States—Sections 301-310 of the Trade Act of 1974*, held that Section 301 actions violate the DSU unless used as a last resort after WTO enforcement remedies have been exhausted.<sup>128</sup> Thus, while the U.S. used overt economic pressure against most of the “Group of Ten” developing countries during TRIPS negotiations, it has not used such pressure during TRIPS Plus negotiations.

Finally, while the Uruguay Round was the “only game in town” at the time, the current phase of international trade negotiation has seen a proliferation of South-South trade agreements made on a bilateral<sup>129</sup> and regional basis.<sup>130</sup> Moreover, while bilateral negotiations often begin with a model form used in previous agreements, a United Nations report notes that “these provisions are likely to be subject to serious negotiations by the contracting parties.”<sup>131</sup> The bilateral context also allows the U.S. to provide specific side payments that it would not be able to offer in a multilateral forum.<sup>132</sup>

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128. *Id.* After the 1999 ruling, the United States can use Section 301 to pressure developing countries only indirectly, by placing them on its IP “watch list.”

129. A 2005 UNCTAD report observes that over the previous decade, the “wave” of South-South international investment agreements included 653 bilateral investment agreements, 312 double taxation treaties, and 49 preferential trade and investment agreements. UNCTAD, *South-South Investment Agreements Proliferating*, at 1, UNCTAD/WEB/ITE/IIT/2006/1 (2005), available at [http://www.unctad.org/en/docs/webiteit20061\\_en.pdf](http://www.unctad.org/en/docs/webiteit20061_en.pdf).

130. Examples of regional trading groups that include developing countries are MERCOSUR and the Andean Community in Latin America, and ASEAN in South Asia. While in 2003 the WTO had 250 regional trade agreements on record, 150 of them had been notified after 1994. VIVAS-EUGUI, *supra* note 127, at 5.

131. UNCTAD, *Intellectual Property*, *supra* note 114, at 7. FTA negotiations can also be fairly lengthy and consist of several rounds. For example, the U.S.-Morocco FTA took almost two years to negotiate and included eight negotiation rounds. RAYMOND J. AHEARN, CRS REPORT FOR CONGRESS: MOROCCO-U.S. FREE TRADE AGREEMENT 1-2 (2005), <http://www.fas.org/sgp/crs/mideast/RS21464.pdf>.

132. Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 395 (2004); see also Mercurio, *supra* note 15, at 222 (contrasting the “real gains” received by developing countries at the bilateral level with “pyrrhic victories” in multilateral forums).

It is important, however, not to overstate the dynamism of these negotiations. The U.S., after all, typically gets the terms it wants, especially on IP matters. Yet, even assuming that the U.S. dictates essential terms, this is not necessarily as troubling as it may at first appear, since parties to U.S. FTAs are willing to treat IP as “little more than a bargaining chip as part of broader negotiation.”<sup>133</sup> In fact:

Developing countries such as the Dominican Republic view the inclusion of stronger copyright protections as a costless choice. For those countries, the harm that may result from excessive copyright controls pales in comparison to more fundamental development concerns.<sup>134</sup>

### *Summary*

Harris has analogized the TRIPS negotiation in negative terms to a “contract of adhesion.”<sup>135</sup> In the context of TRIPS, the analogy is misplaced and unjustifiably critical, but applied in the bilateral context it does provide some illumination. If anything, it is not TRIPS but U.S. FTAs that are standard form, take-it-or-leave-it contracts. But this similarity should not raise concern, because adhesion contracts are perfectly enforceable in domestic law as long as the parties have entered into them on a voluntary, informed basis.<sup>136</sup> In the case of FTAs, even if there is not much room to negotiate terms, developing countries are aware of the implications of heightened IP protection, are not subject to Section 301 sanctions, have other potential negotiating partners (many of comparable economic

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Side payments can include science and technology cooperation agreements, or even economic aid assistance. VIVAS-EUGUI, *supra* note 127, at 9.

133. Michael Geist, *Why We Must Stand on Guard Over Copyright*, TORONTO STAR, Oct. 20, 2003, at D3 (describing U.S. treaty partner’s willingness to enter into further IP obligations).

134. *Id.*; see also Mercurio, *supra* note 15, at 221 (“It must be noted, however, that many developing countries do not hesitate to trade off IPRs in exchange for market access.”).

135. Harris, *supra* note 37, at 684.

136. The information-producing function of consumer protection laws seeks only to ensure that parties are aware of the terms of any take-it-or-leave-it, standard-form contracts they enter. As this Note emphasizes, it is the *procedural* defects of coercion and information asymmetry which make certain agreements problematic, not the final agreements’ form or substantive content. See *supra*, note 17.

strength) willing to enter into similar agreements, and freely decide that the TRIPS Plus provisions are worth the tradeoff. This bargaining context, free of the procedural disadvantages that characterized TRIPS, makes it difficult to overcome the presumption of fairness and mutual gain that underpin the *pacta sunt servanda* principle.

## 2. *Cost-Benefit Analysis*

A cost-benefit analysis of the economic effects of TRIPS Plus FTAs is on the whole inconclusive. TRIPS Plus provisions likely generate little benefit for developing countries, but estimating the costs in dollar terms is difficult and will vary by country.<sup>137</sup> The TRIPS Plus provisions that are most likely to have a measurable effect are those relating to pharmaceuticals. A study of the 2004 U.S.-Australia FTA used a sample of five generic drugs to argue that TRIPS Plus provisions could create delays that cost consumers \$1.5 billion over four years.<sup>138</sup> Another study, however, has challenged this result, claiming that the provisions provide a net benefit, even in the near term.<sup>139</sup> Interestingly, one of the misplaced arguments for why TRIPS benefits developing countries—i.e., that it will help attract capital from developed countries—may have more force when applied to TRIPS Plus. A country that adopts standards that are higher than its peers makes itself relatively more attractive to foreign investment than competing capital-importing countries. Thus, a TRIPS Plus agreement could prove to be a valuable signaling device, whereas TRIPS was not because it re-

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137. What, for example, is the actual cost of increased restrictions on the (hypothetical) use of compulsory licenses or the availability of patents on plant varieties? The normal problems that plague empirical study of IP are only exacerbated in the context of innovative TRIPS Plus provisions. See *supra* notes 73-74 and accompanying text.

138. BUDDHIMA LOKUGE ET AL., AUSTRALIA INST., A BACKDOOR TO HIGHER MEDICINE PRICES? INTELLECTUAL PROPERTY AND THE AUSTRALIA-US FREE TRADE AGREEMENT 3 (2003). The Australia Institute is a left-leaning think tank in Australia, self-described as “the country’s most influential progressive think tank.” The Australia Institute, About Us, <https://www.tai.org.au/?q=node/1> (last visited Mar. 7, 2010).

139. CTR. FOR INT’L ECON., Economic Analysis of AUSFTA: Impact of the Bilateral Free Trade Agreements with the United States 7 (2004) (estimating that the agreement will provide the benefit of \$6 billion per year within the decade).

quired every WTO Member to adopt the same standards and create equally attractive investment climates.<sup>140</sup>

It is also difficult to make an across-the-board statement on the costs and benefits of U.S. FTAs for developing country parties. One settled way to measure the welfare gains from trade agreements is to compare the effects of trade creation with trade diversion.<sup>141</sup> This does not, however, answer the distributional question of who receives the gains. An early study examining a potential U.S.-Chile FTA that was later concluded found that it would result in insignificant trade diversion for Chile.<sup>142</sup> A more recent study comparing FTAs between the U.S. and Peru, Ecuador, and Colombia concludes that the FTAs more or less lock in the modest gains from trade that flow from earlier bilateral trade agreements between the parties.<sup>143</sup> Because the direct economic consequences of these agreements are technical and obscure, countries may be motivated more by strategic and political considerations than they are by the sometimes negligible dollars-and-cents outcomes.

The substantive outcomes of FTAs are less one-sided than those of TRIPS and the Uruguay Round, and the overall wel-

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140. Andrew Guzman makes a similar argument with reference to bilateral investment treaties. See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 640 (1998) (arguing that BITs have the effect of making a developing country more attractive to foreign investors, though this gain will be outweighed by the loss the country will suffer as it bids against other developing countries).

141. This methodology was introduced by Jacob Viner in his seminal publication from 1950. See generally JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950).

142. See Manuel R. Agosin, *Free Trade Agreements for Chile: Potential Benefits and Costs*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 21, 39 (1994) ("An FTA with the United States would not have great costs [to Chile] since it is unlikely that trade diversion to manufactured imports from the United States from more efficient suppliers would attain any significant level.").

143. See Jose E. Duran Lima, Carlos J. de Miguel and Andres R. Schuschny, *Trade Agreements by Colombia, Ecuador, and Peru with the United States: Effects on Trade, Production, and Welfare*, 91 CEPAL REVIEW 67 (2007), available at <http://www.eclac.org/publicaciones/xml/2/29502/lcg2333iDuranOtros.pdf>. Specifically, this study found that trade volume would increase as a result of FTAs between the U.S. and certain Latin American countries, but that net welfare benefits (to the Latin American countries) would be slightly negative compared to the status quo. However welfare effects turn positive when one takes account of the fact that the current regime of trade preferences is about to expire.

fare effects of FTAs are surprisingly marginal. In general, they simply reshuffle the terms of trade between a country's trading partners, or lock in trade barrier reductions that are expiring under older bilateral investment treaties. Because not much economic wealth is directly at stake, FTAs are often concluded for political or strategic reasons. While TRIPS Plus provisions surely represent an economic loss for developing countries, the amount of that loss is difficult to measure. The fact that bilateral and plurilateral arrangements are proliferating not only on a North-South axis, but also on a South-South basis indicates the existence of a semi-competitive "market" for these agreements that decreases the leverage of any one bargaining party. Most importantly, it would be reckless to presume that these agreements are disadvantageous to developing countries unless there is clear evidence that they are bargained for under conditions of duress or lack of information.

#### IV. A PRO-DEVELOPMENT INTERPRETATION OF TRIPS

Assuming, as argued above, that the TRIPS bargaining process was undermined by economic coercion and information asymmetries between the parties, the normative argument that the agreement should be interpreted in favor of the disadvantaged parties does not find support in any existing doctrine of international law.<sup>144</sup> The doctrine relating to coercion relates only to use of force, not political or economic pressure.<sup>145</sup> This Section, however, will describe the legal basis for a flexible interpretation of TRIPS that *is* available under existing international law.

Questions of interpretation play a unique and prominent role in the TRIPS agreement, because its provisions leave open a certain amount of "policy space."<sup>146</sup> Also contributing to legal uncertainty respecting the agreement is the fact that very

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144. Doctrines that favor the procedurally disadvantaged party, such as that of "unconscionability," do exist in the domestic common law of contracts. See KNAPP, *supra* note 17, at 584-86 (introducing the doctrine of unconscionability).

145. See Vienna Convention, *supra* note 17, art. 52 (recognizing only coercive behavior that rises to the level of "threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations" as relevant to the validity of a treaty).

146. The open-ended nature of several TRIPS provisions is widely acknowledged and has been described as "constructive ambiguity" by Watal, or



few WTO decisions have provided definitive interpretations of key provisions. Provisions that are susceptible to interpretations that allow flexibility for developing countries can be grouped into three types: (1) “balancing provisions,”<sup>147</sup> which contain pro-development policies on their face; (2) “open provisions,”<sup>148</sup> which are vague or ambiguous as to the level of IP protection they entail; and (3) “exceptions provisions,”<sup>149</sup> which explicitly limit the application of IP protection in some circumstances. These categories are discussed below, but preceding this discussion is a short overview of the general rules of interpretation applied in WTO’s Dispute Settlement Body (DSB) proceedings.

The WTO’s DSB interprets members’ agreements in light of a two-step application of Article 31, then Article 32, of the Vienna Convention.<sup>150</sup> For the first step, Article 31(1) calls for holistic, good-faith interpretation incorporating three considerations: the ordinary meaning of the terms, their context in the treaty as a whole, and the treaty’s object and purpose.<sup>151</sup> Article 31(3)(a) requires that any subsequent agreement be

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“wiggle room” by Reichman. WATAL, *supra* note 43, at 7; Reichman, *From Free Riders*, *supra* note 5, at 28.

147. Examples of Balancing Provisions include the Preamble and Articles 7, 8, and 66(2). TRIPS, *supra* note 9.

148. Examples of Open Provisions include Articles 6, 27(3)(b), 31, and 39(3). *Id.*

149. Articles 13, 17, and 30 cover exceptions to copyright, trademarks, and patents, respectively. *Id.*

150. Article 3.2 of the WTO Dispute Settlement Understanding provides that WTO agreements are to be interpreted “in accordance with customary rules of interpretation of public international law.” Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments: Results of the Uruguay Round, 33 I.L.M. 1125 (1994). The WTO DSB has always held that these customary rules are found in the Vienna Convention, and explicitly applied the Vienna Convention rules on interpretation throughout the *India—Patent Protection for Pharmaceutical* case, to note one example. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 46, WT/DS50/AB/R (Jan. 1998).

151. Vienna Convention, *supra* note 17, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). See Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.22, WT/DS152/R (Dec. 2, 1999) (“[T]he elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are

tween the parties regarding interpretation of the treaty or application of its provisions be taken into account as part of the “context” considered under 31(1).<sup>152</sup> Article 31(3)(a), then would surely incorporate the Doha Declaration in the initial interpretive analysis,<sup>153</sup> particularly paragraphs 4 and 5, which explicitly address how TRIPS is to be interpreted. Doha Declaration Paragraph 4 states:

We affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.<sup>154</sup>

Doha Declaration Paragraph 5(a) states:

In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.<sup>155</sup>

As a second step, Vienna Convention Article 32 allows consideration of the circumstances surrounding the conclusion of a treaty<sup>156</sup> to either confirm the initial Article 31 analysis, or to determine the meaning of the provision in question if the first step leads to an unclear or unreasonable result. The circumstances surrounding the formation of TRIPS described

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to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.”).

152. Vienna Convention, *supra* note 17, art. 31(3)(a) (“There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”).

153. By issuing the Doha Declaration in 2001, WTO members themselves raised the question of policy-driven interpretation of TRIPS. The thrust of the Doha Declaration was that TRIPS provisions relating to access to medicines and public health should be interpreted by the WTO to provide flexibility for developing countries. *See generally* Doha Declaration, *supra* note 8.

154. *Id.* ¶ 4.

155. *Id.* ¶ 5(a).

156. Vienna Convention, *supra* note 17, art. 32. *See also* REBECCA M. WALLACE, INTERNATIONAL LAW 241 (2002) (“‘Circumstances’ includes the *travaux préparatoires*, or drafting history of the treaty, and also contemporary circumstances and historical context.”) (citing *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 105 (July 22)).

above, including the use of coercive trade sanctions in the presence of underlying information asymmetries, would be a relevant part of the Article 32 analysis.<sup>157</sup> This is especially true when the flexibilities insisted upon in the Doha Declaration are applicable to the initial Article 31 analysis.

### A. *Balancing Provisions*

“Balancing provisions” are those provisions of TRIPS that on their face seek to address the needs of developing countries by calling for a balance between the interests of right-holding producers in the developed world and IP consumers in the developing world. Examples of balancing provisions are found in the Preamble, as well as in Articles 7, 8, and 66(2). With the Doha Declaration, WTO members reaffirmed the importance of these balancing provisions. Paragraph 5(a) of the Doha Declaration states that the interpretation of TRIPS “shall” reflect the flexibility of its provisions, particularly those on “Objectives” (Article 7) and “Principles” (Article 8). A feature that distinguishes balancing provisions from the other two types of provisions described below is that the interpretive difficulty lies less in the meaning of their terms and more in the weight and significance they should be given with respect to the agreement as a whole. This is because these provisions do not entail specific legal duties themselves, but instead provide principles relevant to the application of the “open provisions” and “exceptions provisions.” An interpretation that takes into account not only the Doha Declaration but also the unequal bargaining process outlined in previous sections would insist on the balancing provisions’ requirement that equal weight be given to the interests of rights-holders and developing world consumers.

Under “GATT Law,” it is proper to rely on preambles when the wording of an agreement’s provisions is susceptible to divergent interpretations.<sup>158</sup> This is consistent with Vienna Convention Article 31(2), which holds that preambles shall be used to determine a treaty’s object and purpose.<sup>159</sup> Paragraphs 5 and 6 of the Preamble articulate the balancing

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157. WALLACE, *supra* note 156.

158. GERVAIS, THE TRIPS AGREEMENT, *supra* note 476, at 80.

159. Vienna Convention, *supra* note 17, art. 31(2).

concerns that appear later in the actual Articles of TRIPS. Paragraph 5 of the TRIPS Preamble provides:

*Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.<sup>160</sup>

Paragraph 6 of the TRIPS Preamble provides:

*Recognizing* also the special needs of the least developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.<sup>161</sup>

Paragraph 5 recognizes the “underlying public policy” and “developmental and technological” objectives of IP protection, while Paragraph 6 recognizes the “special needs” of Least Developed Countries (LDCs) with respect to “maximum flexibility in the domestic implementation of laws and regulation.” Gervais argues that these paragraphs “reflect the need to cater to the special needs of developing and least-developed countries.”<sup>162</sup> However, Correa points to ambiguities in the language that seem to undermine the claim that these paragraphs were intended to address concerns such as public health and access to medicines.<sup>163</sup> Despite the ambiguities raised by Correa’s close reading, an interpretation relying on the Doha Declaration as incorporated into the analysis via Vienna Convention Article 31(3)(a), and supplemented by the bargaining analysis via Vienna Convention Article 32, would hold that the Preamble reflects the fact that balancing the interests of rights-holders and the developing world is an object and purpose of the treaty.

While the Preamble suggests a flexible approach, preambles carry only so much weight vis-à-vis the text, which presum-

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160. TRIPS, *supra* note 9, pmb. ¶ 5.

161. *Id.*, pmb. ¶ 6.

162. GERVAIS, THE TRIPS AGREEMENT, *supra* note 46, at 81.

163. CARLOS M. CORREA, TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 12-14 (2006). *But see* Susy Frankel, *WTO Application of “the Customary Rules of Interpretation of Public International Law” to Intellectual Property*, 46 VA. J. INT’L L. 365, 392 (2006) (reading the paragraphs as proposing a balancing of rights).

ably is the best reflection of the parties' object and purpose.<sup>164</sup> That said, placement of "Objectives" in Article 7 and "Principles" in Article 8 would seem to give these preambular phrases a heightened legal status.<sup>165</sup> Articles 7, on "Objectives," provides:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>166</sup>

Article 8(1), on "Principles," provides:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.<sup>167</sup>

These articles, which echo the preamble, speak directly to the object and purpose of TRIPS. Moreover, the principle of "effective interpretation" requires that Articles 7 and 8 be taken into account when interpreting other terms.<sup>168</sup>

In the *Canada-Patent Protection for Pharmaceuticals* case, the WTO Panel did not make active use of Articles 7 and 8(1) when interpreting Article 30's patent exception, holding only that "the goals and limitations stated in Articles 7 and 8(1) must obviously be borne in mind"<sup>169</sup> on a case-by-case basis. While this approach arguably ignores the Vienna Convention's Article 31(1) directive that "meaning be given to the *terms of*

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164. See Vienna Convention, *supra* note 17, art. 31(1) (directing treaty interpretation to begin with the terms of the treaty).

165. GERVAIS, *THE TRIPS AGREEMENT*, *supra* note 46, at 116.

166. TRIPS, *supra* note 9, art. 7.

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

168. CORREA, *supra* note 163, at 93; see also Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 81, WT/DS121/AB/R (Dec. 14, 1999) ("[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.").

169. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.26, WT/DS114/R (Mar. 17, 2000).

*the treaty*” (emphasis added), the Panel in *Canada-Patent Protection* left the interpretive weight of these Articles open to question, stating that the decision did not “[i]n any way prejudge the applicability of Article 7 or Article 8 of the TRIPS Agreement in possible future cases with respect to measures to promote the policy objectives of the WTO members that are set out in those Articles. Those Articles still await appropriate interpretation.”<sup>170</sup>

This open question should be answered for future interpretations guided by Doha Declaration paragraph 5(a), which holds that TRIPS interpretations “shall” reflect flexibilities embodied in Articles 7 and 8.<sup>171</sup> Terms of the agreement that require consideration of the interests of consumers in the developing world should not be disregarded simply because their language is more general than that of provisions detailing rights-holders’ protections. As the previous sections of this Note have proposed, the position announced in the Doha Declaration should be given serious weight because rights-holders were the group advantaged by procedural defects in the negotiation of the terms in question.

The last provision that includes an explicitly pro-development policy is Article 66(2). TRIPS Article 66(2) provides:

Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.<sup>172</sup>

This Article was reaffirmed in Paragraph 7 of the Doha Declaration and commentators have called for it to be given more “bite.”<sup>173</sup> However its “best endeavors” structure appears to be a fatal flaw, because it leaves unclear how a developing country could establish violation of Article 66(2) in a DSB proceeding.<sup>174</sup> Perhaps the most problematic feature of Article 66(2) is that it sits uneasily with the basic function of the

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170. *Id.* ¶ 101.

171. Doha Declaration, *supra* note 8, ¶ 5(a).

172. TRIPS, *supra* note 9, art. 66(2).

173. Harris, *supra* note 37, at 744.

174. GERVAIS, THE TRIPS AGREEMENT, *supra* note 46, at 352 (providing a comprehensive commentary on interpretive issues raised by TRIPS).

WTO. The WTO is an arena where countries bargain over terms of trade and (sometimes) have them legally enforced; it is not an aid organization that coordinates direct transfers, monetary or otherwise, between rich and poor countries. Although effective compliance with 66(2) may eventually be coordinated through WIPO or similar international agencies, Articles 7 and 8 remain more relevant for developing countries because they (in part) define the terms of international IP protection.

### B. *Open Provisions*

“Open provisions” are those TRIPS provisions that contain ambiguous terms and are therefore open to interpretation. While a careful and clever reader can find ambiguity almost anywhere,<sup>175</sup> Article 6 (“Exhaustion”)<sup>176</sup> and Article 31 (“Compulsory Licenses”)<sup>177</sup> are particularly open-ended provisions that cover critical issues of IP protection. Although no DSB decision has interpreted Articles 6 or 31, the Doha Declaration emphasizes the flexibilities of the two articles.<sup>178</sup>

Compulsory licensing is a government grant of the right to use or manufacture a patented product without the authorization of the original rights-holder. Compulsory licensing is covered by TRIPS Article 31,<sup>179</sup> which provides:

Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected.

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175. See generally CORREA, *supra* note 163.

176. TRIPS, *supra* note 9, art. 6.

177. *Id.* art. 31.

178. Paragraph 5(b) of the Doha Declaration, *supra* note 8, explicitly refers to compulsory licensing, while paragraph 5(d) covers exhaustion.

179. Ironically, while compulsory licensing would seem to be unwelcome for IP producing countries, it is rarely practiced outside of the United States, which has issued over 100 compulsory licenses, primarily for antitrust reasons. See JEROME H. REICHMAN & CATHERINE HASENZAH, NON-VOLUNTARY LICENSING OF PATENTED INVENTIONS: HISTORICAL PERSPECTIVE, LEGAL FRAMEWORK UNDER TRIPS, AND AN OVERVIEW OF THE PRACTICE IN CANADA AND THE USA (2000), available at <http://www.iprsonline.org/resources/docs/Reichman%20-%20Non-voluntary%20Licensing%20-%20Blue%205.pdf> (providing a historical overview of the use of compulsory licensing in the United States).

While the *chapeau* of Article 31 allows governments to grant compulsory licenses on any grounds, subparagraphs (a) through (l) set conditions on how this is to be done.<sup>180</sup> Subparagraph (b) requires that governments “make efforts” to obtain a voluntary license from the patent-holder on “reasonable commercial terms,” with the exception that these steps are not required “in the case of a national emergency or other circumstances of extreme urgency.”<sup>181</sup> Subparagraph (f) requires licensing “predominantly” for the supply of the domestic market, and subparagraph (h) requires that the rights-holder be paid “adequate remuneration in the circumstances of the case.”<sup>182</sup>

The vagueness of the quoted terms creates serious problems of interpretation. The Doha Declaration reaffirmed the discretion stated in the *chapeau*,<sup>183</sup> but perhaps more importantly, defined “national emergency” expansively to include non-temporary public health crises such as “HIV/AIDS, tuberculosis, malaria and other epidemics.”<sup>184</sup> This provides a powerful interpretive aid, especially in conjunction with the balancing principles stated in Articles 7 and 8. Such a flexible interpretation would also be consistent with the commonly overlooked fact, stated above, that the plain language of TRIPS Article 31 allows countries to issue compulsory licenses for any reason.

TRIPS Article 6 covers exhaustion, or what is also known as “parallel importation,” and provides:

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.<sup>185</sup>

This is the quintessential “open provision” because, while some articles are intentionally vague, Article 6 announces that

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180. TRIPS, *supra* note 9, art. 31.

181. *Id.*

182. *Id.*

183. Doha Declaration, *supra* note 8, ¶ 5(b) (protecting members’ “freedom to determine the grounds upon which [compulsory] licenses are granted”).

184. *Id.* ¶ 5(c).

185. TRIPS, *supra* note 9, art. 6.



no consensus was reached at all, other than on the requirement that any exhaustion regime must respect the principles of National Treatment (Article 3) and the Most-Favored-Nation rule (Article 4). Exhaustion is typically understood to be either “territorial” or “international.” Territorial exhaustion means that a rights-holder loses exclusive license to the product once it is sold within a given country, whereas international exhaustion means that the rights-holder’s protection is exhausted once the product is sold anywhere in the world.<sup>186</sup> International exhaustion favors consumers because it allows products to be imported at below monopoly prices once they have been sold in any other country, while the territorial rule imposes the stricter requirement that the products are sold within the importing country at monopoly prices before IP protection is exhausted.<sup>187</sup>

While some parties have argued that Article 6 carries an implied rule of territorial exhaustion via the Berne Convention,<sup>188</sup> this somewhat fanciful reading appears to be foreclosed by the text itself and has been rejected by the TRIPS Council<sup>189</sup> and the Doha Declaration.<sup>190</sup> While arguments for highly protective interpretations appear plausible, or at least legally permissible with respect to many of the articles of TRIPS, the provision on parallel importation undeniably builds in flexibility.

### C. *Exceptions Provisions*

“Exceptions provisions” identify when the use of IP by someone other than the rights-holder is acceptable. The three exceptions provisions, covering copyright (Article 13), trademarks (Article 17), and patents (Article 30), are all similar in

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186. See James B. Kobak Jr., *Exhaustion of Intellectual Property Rights and International Trade*, 5 GLOBAL ECON. J. 1, 1-2 (2005) (explaining the difference between territorial and international exhaustion).

187. See *id.* at 9 (predicting that countries that are net-importers of IP will favor the international exhaustion rule).

188. See GERVAIS, THE TRIPS AGREEMENT, *supra* note 46, at 113-14 (citing an argument made by the WIPO Secretariat).

189. See CORREA, *supra* note 163, at 79 (citing the Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from the European Communities and Their Member States*, IP/C/W/280, at 6 (June 12, 2001)).

190. See Doha Declaration, *supra* note 8, ¶ 5(d).

structure.<sup>191</sup> Articles 13 and 17 implicitly rely on Berne Convention Article 9(2)<sup>192</sup> for their meaning and are not as important as Article 30 for purposes of this Note.

Within the context of TRIPS as a whole, a broad interpretation of Article 30 would be inapposite.<sup>193</sup> Article 30 provides:

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.<sup>194</sup>

Using Article 30 as grounds for interpretive flexibility is inappropriate because government suspension of protections for rights-holders is already available under Article 31 on compulsory licenses.<sup>195</sup> Furthermore, countries can already exclude patents from specific products whose commercial use threatens public morality, human health, or the environment.<sup>196</sup> Finally, general patent types—including biological processes, plants and animals, and certain medical treatments—may be excluded if they fall under the categories of Article 27(3)(a) and (b).<sup>197</sup>

The argument that a flexible interpretation of Article 30 is inappropriate or foreclosed would be consistent with the *Canada-Patent Protection* case, in which the Panel used a three-step test to interpret Article 30 fairly narrowly in the interests of rights-holders.<sup>198</sup> But, as discussed above, a narrow interpreta-

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191. TRIPS, *supra* note 9, arts. 13, 17, 30.

192. Berne Convention For the Protection of Literary and Artistic Works art. 9(2), July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

193. Gervais reads the article as being limited to cases of non-commercial research. GERVAIS, *THE TRIPS AGREEMENT*, *supra* note 46, at 242.

194. TRIPS, *supra* note 9, art. 30.

195. *See id.*, art. 31 n.7 (making clear that no overlap with Article 30 was intended).

196. *Id.* art. 27(2). Article 27 contains significant interpretive flexibility itself, which could be productively addressed, but an exhaustive treatment of TRIPS articles is beyond the scope of this paper.

197. *Id.* art. 27(3)(a), (b).

198. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000).

tion of Article 30 simply makes TRIPS coherent, not rigid. The flexibilities in patent protection remain available in the open-ended provisions of Articles 27 and 31.

#### D. *Conclusion*

The above discussion has sought to outline an interpretation of TRIPS that would allow developing countries a degree of flexibility in implementing IP protections, so that important public policy prerogatives, such as protection of public health, are not undermined in the process. The interpretation presented is consistent with the customary rules of international law on the interpretation of treaties, as formulated in the Vienna Convention and adopted by the WTO Dispute Settlement Body. It also gives weight to the Doha Declaration and its reaffirmation that the provisions of TRIPS are best understood as striking a balance between the interests of rights-holding producers and IP consumers. Finally, by focusing on the language of the treaty, particularly as found in the “balancing,” “open,” and “exceptions” provisions, it demonstrates that the terms themselves explicitly or implicitly invite policy considerations into the interpretive process. In contrast, because of the analysis of TRIPS Plus FTAs in Section III.B above, IP provisions in these agreements should be strictly interpreted to preserve the original agreement of the parties.

#### V. EFFECTS GOING FORWARD

Applying a pro-development interpretation to TRIPS but not TRIPS Plus would have a significant impact on the countries involved, both developed and developing, as well as on the WTO. It is particularly important to consider the practical effect of applying this novel interpretation because in the international context, states may be unwilling to comply with decisions of international tribunals that substantially modify what they perceive to be their legal obligations.<sup>199</sup> Thus, a re-interpretation of legal obligations at the international level poses a real risk of non-compliance by states, which stands in contrast to the domestic context, where courts can impose powerful

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199. Cf. Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that judicial independence in international tribunals removes judgments from the interests of the state parties and therefore weakens those tribunals' compliance pull).

sanctions for non-compliance. This is important in the context of international trade for an additional reason: the ability of commercial actors to enter new contracts or treaties depends on the existence of clear and predictable rules.

### A. *Developing Countries*

Developing countries that are not parties to TRIPS Plus FTAs would gain from a flexible interpretation of TRIPS, particularly in the short-run. For example, the increased availability of compulsory licenses and parallel importation would reduce the cost of medicine and provide significant help in fighting public health crises. Even the availability of these remedies could drive prices down substantially.<sup>200</sup>

There are three arguments that long-run drawbacks for developing countries may result from less strict IP protection. The cost-benefit analysis of Section III above evaluated whether relaxing the baseline protections of TRIPS would significantly inhibit either the domestic growth<sup>201</sup> of developing economies or the pace of innovation on a global scale.<sup>202</sup> As noted, while these two arguments are sound on a theoretical level, the magnitude of their empirical effects is arguably limited<sup>203</sup> and has not been given great weight by developing countries themselves. This judgment on the part of developing countries would seem reasonable given the fact that many public health problems in the developing world stem from diseases that are already easily treatable but continue to kill millions per year.<sup>204</sup>

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200. See FINK & REICHENMILLER, *supra* note 31 (arguing that the possibility of compulsory licenses or parallel importation would restrain producers from otherwise profit-maximizing price increases).

201. The strong form of this argument is put forward in Sherwood, *supra* note 97. A more complex but still optimistic view is that in MASKUS, *THE GLOBAL ECONOMY*, *supra* note 86.

202. See Sykes, *supra* note 5 (arguing that the free-riding of developing countries would reduce global production of IP).

203. See Reichman, *Taking the Medicine*, *supra* note 103; WORLD BANK, *supra* note 104 and accompanying text (arguing for skepticism about strength of empirical effects.)

204. Malaria, to take one example, kills over 1 million people per year; 80% of these live in Africa, and of this group most are children. Numerous already existing prescription drugs cure malaria. Ctr. for Disease Control and Prevention, Malaria: Topic Home, [www.cdc.gov/malaria](http://www.cdc.gov/malaria), Frequently Asked Questions (FAQ), <http://www.cdc.gov/malaria/about/faqs.html> (last

A third long-run drawback is also conceivable, which is that a favorable interpretation of TRIPS would incentivize the United States to more actively pursue bilateral TRIPS Plus provisions. However, developing countries that are party to TRIPS Plus provisions in FTAs, to the extent that the flexibilities of TRIPS have been bargained away to trading partners, are justifiably constrained because it should be assumed, based on the analysis of Part III.B, that they are accepting such losses in exchange for equally desirable benefits. Going forward, in the wake of the Doha Round and in the absence of unilateral U.S. Section 301 trade sanctions, developing countries would be able to extract larger concessions in exchange for the flexibility afforded under a pro-development interpretation of TRIPS than under a tighter interpretation, for the simple reason that they are “giving more up” when they contract out of the TRIPS baseline. Following this perspective, a new wave of TRIPS Plus FTAs would likely increase the welfare of both parties involved.

### B. *United States*

The United States, as a net IP exporter, would be a clear loser in economic terms from a pro-development interpretation of TRIPS. As stated above, an interpretation explicitly emphasizing the flexibilities in TRIPS would incentivize developed countries to actively negotiate bilateral and plurilateral TRIPS Plus provisions that remove these open interpretations. While a pro-development interpretation is not economically beneficial to the United States, however, it may benefit indirectly from tolerating a WTO interpretation that reflects the Doha Declaration. Health crises in the developing world, such as the HIV/AIDS epidemic, are highly salient international problems; U.S. cooperation on these issues will have positive reputational effects, possibly making developing countries

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visited Mar. 1, 2010). In this context developing countries may be coming to recognize that the well-known John Maynard Keynes quote is morbid but true: “Long run is a misleading guide to current affairs. In the long run we are all dead.” KEYNES, *A TRACT ON MONETARY REFORM* 80 (Prometheus Books 2000) (1923).

more willing to enter into U.S. trade agreements in the future.<sup>205</sup>

The U.S. response to suggestions of a pro-development interpretation of TRIPS has been ambivalent,<sup>206</sup> but there is substantial evidence indicating that its interests are not so divergent from the proposal of this Note. In 2000 then-President Bill Clinton issued an Executive Order effectively prohibiting the U.S. government from seeking any TRIPS Plus standards that could interfere with access to treatments for HIV/AIDS in Sub-Saharan African countries.<sup>207</sup> In February 2001, the Bush Administration stated its support for a continued flexible approach that is sensitive to health crises in the developing world.<sup>208</sup> Even more tellingly, the U.S. itself signed the Doha Declaration, which affirms a pro-development interpretation.<sup>209</sup> And in the wake of signing the Doha Declaration, Congress passed the 2002 Bipartisan Trade Promotion Authority Act, which states in § 2102(b)(4)(C) as follows:

- (4) The principal negotiating objectives of the United States regarding trade-related intellectual property are. . .

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205. *Cf.* ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008) (outlining the importance of reputational information in the formation and maintenance of international law).

206. *See generally* MARGARET LEE, *CTR. FOR INT'L ENVTL. LAW, PUTTING HEALTH ON THE FAST TRACK* (2007), *available at* [http://www.ciel.org/Publications/Lee\\_DohaUSTR\\_25July07.pdf](http://www.ciel.org/Publications/Lee_DohaUSTR_25July07.pdf) (providing an overview and evaluation of U.S. response to the Doha Declaration).

207. Exec. Order No. 13155, 65 Fed. Reg. 30,521 (2000); *see also* CARSTON FINK, *INTELLECTUAL PROPERTY AND PUBLIC HEALTH: AN OVERVIEW OF THE DEBATE WITH A FOCUS ON U.S. POLICY* 28 (CENTER FOR GLOBAL DEVELOPMENT, WORKING PAPER NO. 146, 2008), *available at* <http://www.cgdev.org/content/publications/detail/16228> (suggesting policies that accommodate both developed countries' interest in incentivizing innovation and developing countries' interest in access).

208. *See* Press Release, U.S. Trade Representative, U.S. Announces Framework to Increase Access to Drugs to Fight HIV/AIDS and other Public Health Crises (June 24, 2002), [http://ustraderep.gov/Document\\_Library/Press\\_Releases/2002/June/US\\_Announces\\_Framework\\_to\\_Increase\\_Access\\_to\\_Drugs\\_to\\_Fight\\_HIV-AIDS\\_other\\_Public\\_Health\\_Crises.html](http://ustraderep.gov/Document_Library/Press_Releases/2002/June/US_Announces_Framework_to_Increase_Access_to_Drugs_to_Fight_HIV-AIDS_other_Public_Health_Crises.html) (last visited Mar. 7, 2010) (announcing a new framework that would permit a mechanism for easing WTO rules regarding production of vital medicines).

209. *See*, Doha Declaration, *supra* note 8.

- (C) to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.<sup>210</sup>

Senator Feinstein, who proposed the bill along with Senator Kennedy, explained its rationale as follows: “We should not punish countries of the developing world for using different tools to provide affordable treatment for their citizens who are suffering. We should be a partner and a leader in this effort.”<sup>211</sup> Taken together, these executive and legislative statements and actions cast doubt on the concern that the U.S. and other developed countries would disregard or express hostility towards a pro-development interpretation of TRIPS in the WTO.

### C. WTO

By taking a new interpretive course, there is a concern that the WTO could be introducing an increased level of uncertainty into international economic transactions. It might also be argued that this would reduce the willingness of countries to enter into new agreements because they may worry that other treaties will become susceptible to similar changes in the future.

These criticisms are not unreasonable, but a few responses are available. First, although the Doha Declaration is non-binding, it was a response by all of the WTO members to a long-term and persistent crisis in international public health; a pro-development interpretation should therefore neither come as a shock to WTO members nor create uncertainty. Second, if the analysis of the TRIPS bargaining process in Part III.A is correct, then WTO members *should* be discouraged from these bargaining practices. A WTO response that makes it undesirable to negotiate by, for example, unilaterally leveling 100 percent tariffs on pharmaceuticals when the treaty in

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210. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, § 2102(b)(4)(C), 116 Stat. 993, 995-96 (codified at 19 U.S.C. § 3802(b)(4)(C) (2006)).

211. 148 Cong. Rec. S4346 (daily ed. May 12, 2002) (statement of Sen. Feinstein).

question addresses licensing that very sector,<sup>212</sup> would tend to improve the fairness and efficiency of international trade agreements. Lastly, up to this point WTO agreements have not been characterized by constant, universal compliance, particularly on the part of developed countries.<sup>213</sup> Despite this imperfect record of compliance, the international trade environment has not seen significant destabilization. Finally, the discussion of the U.S. position in Section IV.B indicates that developed states in the WTO are not necessarily hostile to a pro-development interpretation.

## VI. CONCLUSION

Commentary on IP treaties should not be so quick to criticize the fairness of these agreements for developing countries based on a simple reading of the terms and the level of IP protection they provide. It should be presumed that rational states will contract to their mutual advantage as long as the bargaining process is free from coercion and information asymmetries. By examining the conditions under which TRIPS and TRIPS Plus FTAs were made, it becomes clear that TRIPS Plus provisions are negotiated in a relatively free and informed manner while TRIPS was not. This understanding is confirmed by estimates of the costs and benefits that flow from each type of agreement. The economic consequences of TRIPS and the Uruguay Round substantially favored the United States at a cost to developing countries, while the results of TRIPS Plus FTAs are less one-sided. The distinction between TRIPS and TRIPS Plus also shows that context matters, undermining any simplistic application of the “dim view” or “sanguine view” of international agreements.<sup>214</sup> Contra the dim view, agreements between powerful states and weak states will not be inherently or inevitably exploitative if they are bargained for in the absence of coercion and with full information. Contra the sanguine view, rational states may sometimes enter agreements that are to their disadvantage when their decisions are subject to coercion and lack of information.

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212. See *supra* note 65 and accompanying text on the United States' tariff increases during TRIPS negotiations.

213. See, e.g., *supra* note 110, on the failed implementation of the Agreement on Textiles and Clothing.

214. See Introduction, *supra* for a definition of these perspectives.



The analysis above supports the legitimacy of a WTO interpretation of TRIPS that is actively pro-development and takes advantage of the flexibilities affirmed by the Doha Declaration. Judicial intervention in the agreements of private actors or sovereign states does not offend the fairness and efficiency justifications of *pacta sunt servanda* and freedom of contract principles when the interpretive modification applies to a treaty that has been made subject to procedural defects in the bargaining process. The WTO should follow the Doha Declaration and apply a pro-development interpretation of TRIPS that does not do violence to its already considerably flexible terms. If developing countries find it to their advantage to freely and knowingly contract out of these flexibilities by agreeing to TRIPS Plus provisions, critics have the burden of explaining how these countries are not thereby made better off.

