

**Overcoming David & Goliath:  
Problems of Access and Enforcement in Resolving TRIPS Disputes  
Before the WTO Dispute Settlement Mechanism**

Sandra J. Hall  
Seminar: International Courts  
Upper Level Writing Requirement  
Fall 2007

## Table of Contents

I.	Introduction	2
II.	Background of TRIPS Agreement	3
III.	WTO Dispute Settlement Mechanism	4
	A. Process for Settling Disputes in the WTO	4
	1. Dispute Settlement Panels	5
	2. Permanent Appellate Body	5
	3. Enforcement of Rulings	6
	4. Timing	6
	B. Criticisms of the WTO Dispute Settlement Mechanism	7
	1. Problems of Access	7
	2. Undemocratic Nature of Decision-Making Process	8
	3. Problems of Enforcement	9
IV.	TRIPS Disputes	9
	A. India Patents Case	10
	1. Facts	10
	2. Panel Ruling	11
	3. Appellate Ruling	13
	a. Legitimate Expectations Standard	14
	b. “Means” Under Article 70.8	15
	c. Applying Indian Law and the Burden of Proof	15
	d. “Mechanism” Under Article 70.9	16
	e. Applicability of Article 63	17
	4. Observations from the India Patents Case	17
	B. Comparing the Canada Patent Term Case to the Indian Experience	19
	1. Panel Ruling	19
	2. Appellate Ruling	20
	3. Arbitration Ruling	22
	4. Observations from the Canada Patent Term Case	22
	C. Mutually Agreed Solutions	24
	1. Argentina Protection of Patents and Test Data Case	25
	2. Brazil Patent Protection Case	28
	3. Observations on Mutually Agreed Solutions	29
	D. US Copyright Case	30
	1. Facts	31
	2. Panel Ruling	31
	3. Arbitration Reports	32
	4. Observations from the US Copyright Case	33
V.	Recommendations	33
	A. Encourage Broad Participation in the Dispute Settlement Mechanism	34
	B. Facilitate Pooling of Resources and Coordination of Strategies	34
	C. Harness the Power of Public Opinion	35
	D. Prevent Contracting Out of the WTO Dispute Settlement Mechanism	36
	E. Ensure Level Enforcement and Implementation of Rulings	36
	F. Interpret TRIPS Agreement to Favor Pro-Development Policies	37
	G. Relax Global IP Protection	38
VI.	Conclusion	39
	Endnotes	40

## **I. Introduction**

This paper examines disputes arising under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and how the Dispute Settlement Mechanism of the World Trade Organization (WTO) addresses them. I will analyze whether the WTO Dispute Settlement Mechanism adequately and effectively resolves intellectual property disputes arising with increasing frequency from all corners of the globe, with a particular emphasis on comparing outcomes achieved by developed and developing countries. How do developing countries fare in the WTO Dispute Settlement Mechanism in disputes under the TRIPS Agreement? I conclude that while the process of adjudication before the Panel and the Appellate Body does not create a disparity in outcome, there is significant inequality in accessing the mechanism from the outset and substantial differences in enforcement of rulings after final adjudication.

Part II of this paper provides a brief overview of the TRIPS Agreement, describing what it governs and how it came into force. Part III examines the WTO Dispute Settlement Mechanism. This section begins with a description of the dispute settlement process, from initial consultations between the parties to final appellate rulings and arbitration. This section then addresses some of the major criticisms of the WTO Dispute Settlement mechanism, including problems of access and enforcement, and the non-democratic nature of the process.

Part IV of this paper examines how TRIPS disputes are resolved under the WTO Dispute Settlement Mechanism. By examining three major disputes and two mutually agreed solutions, I compare the experiences of different state parties addressing TRIPS disputes. Through comparison of outcomes of the major disputes, this section shows that the WTO Dispute Settlement Mechanism provides consistent, even-handed results. However, by comparing those outcomes to the mutually agreed solutions, this section shows that inequality in outcomes may

occur where states lack the relative power to get before the Dispute Settlement Mechanism and are forced to settle before a Panel is formed. Accordingly, I conclude that TRIPS disputes primarily raise problems of access and enforcement, rather than disparities outcome. Any disparities in outcome are largely the result of problems of access.

Part V provides recommendations to increase access to the Dispute Settlement Mechanism by developing countries and ensure even-handed enforcement of rulings. This section also suggests ways to lessen the disparity between developed and developing countries by advocating for the promotion of pro-development policies under the TRIPS Agreement. Finally, Part VI concludes that the WTO Dispute Settlement Mechanism, already one of the busiest systems in the international arena, can become one of the most effective if it can correct the disparities and inequalities plaguing developing countries.

## **II. Background of TRIPS Agreement**

The TRIPS Agreement was negotiated during the 1994 Uruguay Rounds that created the WTO.<sup>1</sup> TRIPS established a universal set of minimum standards of intellectual property (IP) regulation.<sup>2</sup> State parties are required to implement these minimum IP protections into their domestic law.<sup>3</sup> The domestic laws created by state parties protect foreign works within the state parties' borders.<sup>4</sup> Some of the protections mandated by TRIPS include the length and scope of IP protection through patents, copyrights and trademarks.<sup>5</sup> TRIPS balances the competing interests of “the need to promote effective and adequate protection of intellectual property rights” while reducing “distortions and impediments to international trade” and ensuring that “measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”.<sup>6</sup>

The TRIPS Agreement was intended to remedy the problems in prior multilateral IP treaties.<sup>7</sup> The 1883 Paris Convention for the Protection of Industrial Property failed to provide a dispute settlement mechanism, limiting adequate enforcement of the treaty.<sup>8</sup> The Berne Convention for the Protection of Literary and Artistic Works created no private right of action for violations.<sup>9</sup> Furthermore, it was considered non-self-executing by the United States (US) Congress, and therefore the US would adhere to it only through applicable provisions of its own domestic law.<sup>10</sup> This created not only problems of protection, but also enforcement.<sup>11</sup> The TRIPS Agreement's mandatory provision for resolution of disputes through the WTO Dispute Settlement Mechanism was designed to solve these problems of IP enforcement.<sup>12</sup>

### **III. WTO Dispute Settlement Mechanism**

Disputes arising under the TRIPS agreement must be settled by the WTO Dispute Settlement Mechanism.<sup>13</sup> The WTO Dispute Settlement Mechanism serves two major functions. First, it facilitates negotiations.<sup>14</sup> WTO Dispute Settlement “forces nations to the negotiation table through international peer pressure.”<sup>15</sup> Second, it provides recourse against violators for parties to trade agreements.<sup>16</sup> WTO Dispute Settlement “legitimizes trade sanctions” through a process of “independent validation of trade sanctions’ appropriateness.”<sup>17</sup> By requiring all WTO members to submit to this process of dispute settlement, the WTO ensures a legitimate multilateral forum for resolution of trade disputes and enforcement of its decisions through its member states.

#### **A. Process for Settling Disputes in the WTO**

The WTO Dispute Settlement Mechanism aims to promote cooperation in resolving disputes. The Understanding on Rules and Procedure Governing the Settlement of Disputes evinces a preference for “amicable resolution to a dispute without resorting to the establishment

of a panel.”<sup>18</sup> To that end, disputing parties must first consult among themselves.<sup>19</sup> If they fail to resolve the dispute during consultations, the disputing parties may request mediation or the establishment of a panel of members of the Dispute Settlement Body.<sup>20</sup>

### **1. Dispute Settlement Panels**

Dispute Settlement Panels hear the complaint, gather evidence, and find facts.<sup>21</sup> Unlike domestic common law courts, the Panel operates more akin to a civil law court, possessing “broad powers to seek any information relevant to the dispute, including independently consulting experts.”<sup>22</sup> Disputing parties submit written arguments and are entitled to two opportunities for oral argument.<sup>23</sup> Here again, the process promotes cooperative solutions by allowing disputing parties to comment on the factual findings of the Panel.<sup>24</sup> Based on these comments, the Panel disseminates an interim report, which includes legal findings and preliminary recommendations.<sup>25</sup> Disputing parties then have another opportunity to provide comments to the Panel before the report is submitted to the Dispute Settlement Body.<sup>26</sup> Thus, the WTO dispute mechanism process provides ample opportunity for the Panel to “work[] directly with the parties at multiples stages of the judicial process in order to arrive at an appropriate and amicable resolution.”<sup>27</sup>

### **2. Permanent Appellate Body**

The Panel’s final report automatically becomes a ruling unless a consensus of Dispute Settlement Body members objects.<sup>28</sup> Disputing parties can appeal the ruling to the permanent WTO Appellate Body.<sup>29</sup> The appellate ruling will stand unless it is rejected by a consensus of the Dispute Settlement Body.<sup>30</sup> Upon final disposition, the losing party must take corrective measures within a “reasonable period of time” to bring domestic laws and actions into compliance with the Treaty.<sup>31</sup>

### **3. Enforcement of Rulings**

The WTO provides several methods of enforcement where the losing state fails to take measures to ensure compliance. The winning party can negotiate for compensation from a losing party that fails to comply with a ruling.<sup>32</sup> The Dispute Settlement Body can ensure payment of compensation by suspending the winning party's obligations under the treaty vis-à-vis the losing party.<sup>33</sup> For example, if the US fails to take remedial steps to protect the copyrighted music from the European Community (EC), the EC is not obligated to protect the copyrights of US works within the European Economic Area.<sup>34</sup>

The winning state can petition the WTO to permit it to impose sanctions against the losing state.<sup>35</sup> Sanctions may encompass sectors of the losing state's economy not in dispute where necessary to enforce a ruling.<sup>36</sup> For example, if India loses a dispute brought by the US concerning pharmaceutical patents, Indian exports of computer software or textiles may be subjected to punitive tariffs.<sup>37</sup> Cross-sectorial sanctions can have a crippling effect on the losing state's economy and provide an effective mechanism to force compliance of WTO decisions. Thus, the WTO Dispute Settlement Mechanism, through compensation, suspension of obligations and cross-sectorial sanctions, provides a "truly effective dispute resolution mechanism which would compel member-states – through sword or shield – to fully comply with international agreements" on trade.<sup>38</sup>

### **4. Timing**

The WTO Dispute Settlement Mechanism corrected one of the primary problems of its predecessor. Under the General Agreement on Tariffs and Trade (GATT), cases often "languished indefinitely in the system" due in large part to a consensus requirement.<sup>39</sup> The WTO eliminated the requirement that dispute rulings be approved by a consensus of Dispute

Settlement Body members, and instead required a consensus to *overturn* a ruling.<sup>40</sup> By changing this procedure, the WTO could control the length of proceedings and create an optimal timetable of fifteen months for the settlement of disputes.<sup>41</sup> The efficiency of the Dispute Settlement Mechanism made state parties more likely to engage in the WTO process than they were under GATT.

## **B. Criticisms of the WTO Dispute Settlement Mechanism**

Judging by the frequent use of the WTO Dispute Settlement Mechanism by member states, it is arguably a success. Indeed, member states requested 185 consultations involving 125 disputes during the first five years of the WTO.<sup>42</sup> Many of the earliest cases resolved were particularly controversial, having been “carried over” without resolution from the GATT system.<sup>43</sup> Despite the increased efficiency of and frequent resort to the WTO Dispute Settlement Mechanism, however, it has been the subject of significant criticism.

### **1. Problems of Access**

Looking behind the numbers of consultation requests, a problem of access by developing countries becomes clear. Of the 185 consultation requests initiated during the first five years, roughly three-quarters were by developed countries, with the United States responsible for one-third, the EC responsible for another third, and Canada an additional 12.5%.<sup>44</sup> Thus, developing countries were responsible for initiating only one-quarter of the requests for consultations, despite outnumbering developed countries by a substantial margin.

The disparity in access between developed and developing countries can be attributed to a number of systemic factors. First, bringing a dispute before the WTO is a luxury many developing countries cannot afford; it is expensive and time-consuming.<sup>45</sup> Second, the system is complex, requiring “sophisticated legal expertise” that is less prevalent in developing countries.<sup>46</sup>



Third, the imbalance of power between developed and developing nations put “defiant” developing countries at risk of retaliation by embittered developed countries, which could have grave consequences on the fragile economy of a developing countries.<sup>47</sup> Finally, in terms of enforcement, developed countries with larger economies are in a better position to withstand sanctions than developing countries, and will not face the same pressure to comply with rulings as developing countries do.<sup>48</sup> Indeed, observers of the WTO process of dispute resolution have noted “non-compliance is a strong possibility for developed nations.”<sup>49</sup> For all of these reasons, developing countries often find that any resolution that might be provided by the WTO Dispute Settlement Mechanism would not be worth the relative costs of obtaining it.

## **2. Undemocratic Nature of Decision-Making Process**

In addition to disparities in access, observers have criticized the undemocratic design of the decision-making process in the WTO Dispute Settlement Mechanism. A Panel or a permanent Appellate Body, both composed of members appointed by the Dispute Settlement Body, make the decisions.<sup>50</sup> The Dispute Settlement Body operates as a governing council, comprised of high-level ministers of WTO member states.<sup>51</sup> The lack of broad inclusion of the general WTO membership results in accusations of a pro-developed country bias.

This perceived bias against developing countries has been further compounded by a lack of transparency in the decision-making process. Despite the participation of the disputing parties in reviewing the fact-finding and interim reports, the panel deliberations occur almost entirely “behind closed doors”.<sup>52</sup> Parties may not attend panel meetings unless specifically invited by the panel.<sup>53</sup> The lack of transparency of the decision-making process only increases the perception of bias and impropriety in the WTO Dispute Settlement Mechanism.

### **3. Problems of Enforcement**

Observers frequently criticize the WTO's provisions for enforcing Dispute Settlement Mechanism rulings. On one hand, some critics claim that the enforcement mechanism is too weak. They argue that the reliance on retaliation to enforce rulings is too unpredictable to be effective, especially in cases of significant disparity in the disputing parties' economies.<sup>54</sup> These critics favor provisions for collective retaliation to strengthen the enforcement mechanism.<sup>55</sup>

On the other hand, some critics argue that the enforcement mechanism is too strong. These critics contend that the enforcement mechanism's retaliatory nature is inflexible and coercive.<sup>56</sup> They see an implicit heavy-handedness in requiring states to change laws enacted by democratically elected governing officials, and subjecting innocent businesses to higher tariff rates.<sup>57</sup> These critics advocate for methods of enforcement with fewer "teeth".<sup>58</sup>

Despite the contrary criticisms of WTO enforcement measures, it seems clear that at least some criticism is justified. Roughly one-third of disputing parties do not comply with WTO rulings at all, and only two-fifths achieve full compliance.<sup>59</sup> While it is arguable whether the WTO enforcement mechanism is too weak or too strong, it is clear that current enforcement measures fail to achieve broad compliance with WTO Dispute Settlement Mechanism rulings.

### **IV. TRIPS Disputes**

Disputes under the TRIPS agreement are submitted to the WTO Dispute Settlement Mechanism for resolution. As this section will show, TRIPS disputes exacerbate many of the systemic problems of the Dispute Settlement Mechanism. Indeed, IP disputes bring another tension to the forefront. Developed nations generally favor increased protection of IP rights to guard domestic industries from suffering substantial economic loss through global piracy and counterfeiting.<sup>60</sup> Developing countries, however, prefer relaxing global IP protection in order to

spur development and economic growth through technological advances.<sup>61</sup> This tension between the right to exclusive enjoyment and the right to develop is an inherent feature of IP disputes involving developed and developing nations.

### **A. India Patents Case**

The India Patents Case is instructive for many reasons. It was one of the first TRIPS disputes considered by the WTO Dispute Settlement Mechanism. It showcases the full range of dispute settlement operations, from consultations to appeals. It concerns issues of treaty interpretation and the scope of the Panel's fact-finding power. It follows a pattern that would be repeated in many TRIPS disputes to follow: a developed country uses the WTO Dispute Settlement Mechanism against a developing country to secure IP protection for its private sector industries abroad. Finally, it provides a basis for comparison of outcomes with patent cases between developed countries.

#### **1. Facts**

In the India Patents Case, the US complained that India failed to provide patent protection for foreign agricultural chemical products and pharmaceuticals in India.<sup>62</sup> Specifically, the US alleged that India failed to implement Articles 70.8 and 70.9 of the TRIPS agreement.<sup>63</sup> Article 70.8 requires parties to protect applications for patents during the transition period when a state is in the process of implementing TRIPS standards into its domestic law.<sup>64</sup> The US argued that India failed to establish this transitional "mailbox" system, intended to store patent applications for review once the permanent patent laws were enacted, since it allowed the executive ordinance providing for the system to lapse.<sup>65</sup> Article 70.9 requires parties to establish a system that grants "exclusive marketing rights" when a patent application has been filed for a

product granted patent rights and marketing approval in another WTO member state.<sup>66</sup> The US contended that India categorically failed to implement an exclusive marketing rights system.<sup>67</sup>

Once the US presented sufficient evidence to show that India acted inconsistently with its obligations under the TRIPS Agreement, the burden shifted to India to present evidence disproving the claim.<sup>68</sup> India argued that it was not required under Article 70.8 to take legislative action to correct the lapse of the ordinance for two reasons.<sup>69</sup> First, India argued that TRIPS allows member states to implement the provisions in the agreement by means it determines most appropriate for its legal system.<sup>70</sup> Accordingly, it was not required to implement legislation at all, and the ordinance, though lapsed, was sufficient.<sup>71</sup> Second, India argued that taking legislative action to implement the treaty requirements would obviate the purpose of the transitional period for developing countries to bring their laws into compliance.<sup>72</sup> According to India, TRIPS would not intend a temporary transitional measure like the mailbox rule to be implemented through legislative measures, where the treaty otherwise provides a ten-year period for India to enact the necessary legislation to protect patents.<sup>73</sup> In effect, it would be forcing India to do now what it was not required to do until 2005.<sup>74</sup> India further argued that Article 70.9 did not require it to legislatively provide for five years of exclusive marketing rights as a transitional measure until 2000, to fill the gap until its permanent patent measures would be enacted in 2005.<sup>75</sup> Since no party had requested exclusive marketing rights yet, India did not violate Article 70.9 by neglecting to provide a process to acquire them.<sup>76</sup>

## **2. Panel Ruling**

The Panel noted that customary law of treaty interpretation, as codified in the Vienna Convention on the Law of Treaties, posits that a treaty should “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 light of its object and purpose.”<sup>77</sup> In the Panel’s opinion, good faith interpretation of trade agreements requires protection of the “legitimate expectations” created by the treaty.<sup>78</sup>

Accordingly, the Panel found that the legitimate expectations of WTO state parties must be considered in interpreting the TRIPS Agreement.<sup>79</sup> The Panel concluded that they needed to determine “whether the current Indian system for the receipt of mailbox applications can sufficiently protect the legitimate expectations of other WTO members as to the competitive relationship between their nationals and those of other members, by ensuring the preservation of novelty and priority” of the mailbox application products.<sup>80</sup> The Panel found that India did not implement its obligations under Article 70.8 because the lapsing ordinance, while not a *prima facie* violation of the treaty, created a “lack of legal security” for the mailbox patent applicants, frustrating the legitimate expectations of the WTO membership.<sup>81</sup>

In analyzing whether India failed to implement its obligations under Article 70.9, the Panel applied the same “legitimate expectations reasoning.” Finding it irrelevant whether any parties actually requested exclusive marketing rights, the Panel held that India breached its TRIPS obligations when it failed to enact a process for providing such rights.<sup>82</sup> Failing to enact procedures in itself frustrated the legitimate expectations of WTO members regarding competitive conditions of their products.<sup>83</sup> To comply with Article 70.9 requirements, a mechanism must be in place for patent applicants to apply for exclusive marketing rights.<sup>84</sup> Accordingly, India breached its duties under Article 70.9 of TRIPS.

India’s argument that Article 70.9 obligations did not automatically inure to India was unavailing. The absence of the phrase “provide as from the date of entry into force of the WTO Agreement” included in Article 70.8 could not be interpreted to provide an extended period of time for implementation, especially since Article 70.8 is incorporated by reference into Article

70.9.<sup>85</sup> Article 70.9 only applies to products for which a patent application was filed under Article 70.8.<sup>86</sup> The Panel found that it would be unreasonable to presume that different frameworks of implementation apply to these interconnected articles and that if Article 70.8 must be implemented when the treaty enters into force, so must Article 70.9.<sup>87</sup>

Thus, the Panel concluded that India was not in compliance with its affirmative obligations under Articles 70.8 and 70.9 of TRIPS.<sup>88</sup> The Panel also concluded that India did not make its systems of protection of IP rights public and transparent because of its failure to provide clear procedures for patent applications, thus violating Article 63.1.<sup>89</sup> The Panel recommended that India take steps to ensure future compliance by enacting the appropriate legislation, to preserve the rights of those that had already applied for patents and exclusive marketing rights while the necessary systems were not in place.<sup>90</sup>

### **3. Appellate Ruling**

India appealed the Panel's ruling on several grounds. First, India contended that the Panel incorrectly read the "legitimate expectations" standard into the good faith interpretation of the TRIPS agreement.<sup>91</sup> Second, India claimed that the Panel misinterpreted the Article 70.8 requirement that states must provide "means" for patent applications to be filed by requiring a legislative framework to be put in place.<sup>92</sup> Third, India claims that the Panel incorrectly applied Indian law and the applicable burden of proof in considering whether India met its obligations under Article 70.8 when it required a legislative framework for compliance.<sup>93</sup> Fourth, India argued that the Panel erred in requiring a "mechanism" to be in place in order for a party to satisfy its obligation to provide for exclusive marketing rights under Section 70.9.<sup>94</sup> Finally, India argued that the Panel should not have ruled on the Article 63 point, since the US raised it

only if India was not found in violation of Article 70.8.<sup>95</sup> Accordingly, as an alternative argument, India should not have been found liable under both articles.<sup>96</sup>

**a. Legitimate Expectations Standard**

The Appellate Body agreed with India's argument that the Panel incorrectly applied the "legitimate expectations" standard of treaty interpretation. The Appellate Body rejected the Panel's reliance on treaty interpretation to justify its use of the legitimate expectations standard, noting that principles of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."<sup>97</sup> Rather, the legitimate expectations of the party were to be inferred only from the words of the treaty.<sup>98</sup>

In applying the legitimate expectations standard, the Appellate Body concluded that the Panel conflated two separate practices that derived from GATT: first, the protection of "expectations of contracting parties as to the competitive relationship between their products and the products of other contracting parties" and second, the protection of "reasonable expectations of contracting parties relating to market access concessions."<sup>99</sup> Under the GATT regime, the "reasonable expectations" doctrine derived from the provision for "non-violation complaints" allowing members to bring a claim if "the negotiated balance of concessions between [m]embers is upset by the application of a measure, whether or not this measure is inconsistent with the provisions of the covered agreement."<sup>100</sup> The TRIPS Agreement, in contrast, does not allow complaints to be made within the first five years after the entry into force unless it derives from an actual violation of the agreement.<sup>101</sup> Article 64.2 specifically states that the "non-violation" provision of GATT does not apply to dispute settlement under TRIPS until after five years from the entry into force.<sup>102</sup> Thus, the Panel incorrectly applied the "legitimate expectations"

interpretation of treaty requirements to determine whether India had violated its obligations under TRIPS. By applying this reasoning, the Panel impermissibly merged the basis for violation complaints with the separate basis for non-violation complaints into a single cause of action.<sup>103</sup>

**b. “Means” Under Article 70.8**

The Appellate Body agreed with the Panel that “means” as used in Article 70.8 does not include an explicit definition and therefore must be interpreted in connection with the treaty’s object and purpose.<sup>104</sup> The Appellate Body affirmed the Panel’s ruling that in the present context, “means” would require a system to receive mailbox applications and record filing and priority dates for the patent applications received through the mailbox system,<sup>105</sup> finding that these requirements “flow inescapably from the necessary operation” of Article 70.8.<sup>106</sup>

The Appellate Body did not agree with the Panel’s conclusion that parties are required under Article 70.8 to eliminate doubt as to the future patentability of the product that was subject to the mailbox patent application.<sup>107</sup> Such a system would require India to implement its full patent review system now and obviate the purposes behind the transitional period provided to developing countries.<sup>108</sup> Accordingly, the Appellate Body found that filing a mailbox application and obtaining filing and priority dates does not mean that the product must be found patentable upon later review.<sup>109</sup>

**c. Applying Indian Law and the Burden of Proof**

Although Article 70.8 does not require a preliminary review of patentability, it nevertheless does require a mailbox mechanism for filing patent applications that “provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates.”<sup>110</sup> The Appellate Body found that it was



necessary and appropriate for the Panel to conduct a “detailed examination” of relevant Indian law.<sup>111</sup> The Appellate Body refuted India’s argument that an international body is ill equipped to examine the municipal law of a state party.<sup>112</sup>

In examining India’s municipal law, the Appellate Body agreed with the conclusion of the Panel that the lapsed administrative ordinance would be unlikely to prevail over contradictory legislation in the Indian Patents Act.<sup>113</sup> The lapsed administrative ordinance does not provide the requisite “sound legal basis” to preserve the patentability of the subjects of the applications nor the appropriate filing and priority dates.<sup>114</sup> Thus, India failed to take steps to meet its affirmative obligations under Article 70.8.

India’s burden of proof argument was similarly unavailing. India claimed that the Panel incorrectly allowed the US to introduce “reasonable doubts” about India’s implementation of its obligations under Article 70.8 and then shifted the burden to India to dismiss any such doubts.<sup>115</sup> The Appellate Body denied India’s claim, finding the Panel’s burden-shifting an appropriate characterization of the standard set out in prior WTO judgments.

#### **d. “Mechanism” Under Article 70.9**

India argued that the Panel’s conclusion that Article 70.9 required a ready mechanism is incorrect and has the effect of “turn[ing] an obligation to take action in the future into an obligation to take action immediately.”<sup>116</sup> The Appellate Body agreed with the Panel that Article 70.9 incorporated by reference Article 70.8, which included language excluding the section from transitional provisions provided in Part VI of the TRIPS agreement.<sup>117</sup> Because Article 70.9 is excepted from the transitional provision, India had an obligation to set up a mechanism as of the date of the TRIPS Agreement’s entry into force.<sup>118</sup> Thus, India’s failure to set up a mechanism to grant exclusive marketing rights was a violation of its obligations under Article 70.9.

**e. Applicability of Article 63**

India contends that the Panel had no authority to make a finding on the alternative argument that the US submitted under Article 63, since this argument was not submitted in the Request for Consultations.<sup>119</sup> Despite the discretion granted to the Panel to determine what issues need to be resolved in order to settle the dispute, the Appellate Body held in other WTO disputes that “all claims must be included in the request for establishment of a panel in order to come within the panel’s terms of reference” in which they have discretion. Accordingly, the Panel had no discretion to address this issue.<sup>120</sup> The Appellate Body overturned the Panel’s ruling, finding Article 63 inapplicable to the dispute.<sup>121</sup>

**4. Observations from the India Patents Case**

At the outset, several observations can be made about the functioning of the Dispute Settlement Mechanism in the India Patents Case. First, it provides a striking example of the complexity of cases under the WTO Dispute Settlement Mechanism. TRIPS disputes only exacerbate the problem, because many developing countries, like India, lag behind developed countries in the protection of IP rights. Unlike the general trade regime that they have been engaging in for centuries, protection of IP rights requires developing countries to amend their IP laws, usually through a lengthy transitional period, to come into compliance with their TRIPS obligations. As the India Patents Case shows, some immediate steps must be taken regardless of the transitional period. The complexity of the legislation that needs to be implemented often leads to disputes among WTO members on interpretative issues.

The complex litigation in the India Patents Case shows how much expense and time is required to bring a TRIPS claim before the WTO. Since the US won the case, the process was worth its time and expense in bringing the action. However, the “David and Goliath” effect in

WTO disputes is clear: the US, having substantial expertise in IP rights, also has the resources to invest in disputes likely to benefit US corporations. Developing countries, on the other hand, have less expertise in IP protection, and will have to invest more money and time to bring a dispute against a developed country. While this is a problem that occurs in any developed-developing country dispute before the WTO, it is more pronounced under TRIPS because of the technical complexity of IP rights protection.

The India Patents Case shows the broad scope of review of both the Panel and the Appellate Body. The Panel engaged in a significant fact-finding, especially with regard to the operation of Indian law and the workings of its executive and legislative branches. The Appellate Body did not rubber stamp the Panel's decision, but rather engaged in a *de novo* style review of the issues entered on appeal. The Appellate Body's activism is clear in its holding: although it upheld several overarching conclusions reached by the Panel, it rejected much of the reasoning behind them. As one of the earliest TRIPS disputes, addressed by the still-nascent WTO Dispute Settlement Mechanism, the Appellate Body's scrutiny may be an effort to establish a tradition of appellate activism. Furthermore, although WTO cases generally do not set precedent or have persuasive weight for later disputes between different parties, the Appellate Body may have interpreted treaty terms in the India Patents Case in an attempt to limit the stream of future cases. By interpreting terms like "means" and "mechanism" narrowly to create a high standard and holding that some measures may not be delayed through the transitional period, the Appellate Body foreclosed the option of similar suits in the future. Arguably, both the Panel and the Appellate Body are sending a message to WTO members that obligations under TRIPS should be taken seriously.

## **B. Comparing the Canada Patent Term Case to the Indian Experience**

In the Canada Patent Term Case, the US claimed that Canada did not implement its obligations under Article 33 of the TRIPS Agreement, which requires WTO members to provide patent protection for a twenty-year term.<sup>122</sup> The US contended that under Article 70.2, Canada was obligated to grant this twenty-year term to all “subject matter” protected at the time it joined the treaty.<sup>123</sup> However, under the Canadian Patent Act, patents granted before October 1989 would only be entitled to seventeen years of protection.<sup>124</sup> The US argued that Canada is required to extend the term of all patents that were valid when it joined TRIPS on January 1, 1996, but whose term would expire after seventeen years under the Canadian Patent Act.<sup>125</sup>

Canada argued that under Article 70.1, it is not required to extend the length of those patents because TRIPS “does not give rise in respect of acts which occurred before the date of [its] application.”<sup>126</sup> In other words, TRIPS requirements are not retroactive. Canada further argued that even if they were retroactive, its Patent Act complied with Article 33 because the protection granted under Section 45 of its Patent Act is more comprehensive than the protection under Article 33 of TRIPS, even if the term is shorter.<sup>127</sup> Additionally, nothing in the Canadian Patent Act precludes terms from lasting as long as twenty years.<sup>128</sup> Therefore, since twenty-year terms of protections equivalent or better than those in Article 33 of TRIPS are possible under the Canadian Patent Act, Canada had met its obligations under TRIPS.<sup>129</sup>

### **1. Panel Ruling**

The Panel sided with the US and held that Article 70.2 required Canada to extend patent terms of all patents in force when it joined TRIPS on January 1, 1996.<sup>130</sup> The Panel interpreted “subject matter” under Article 70.2 to include inventions, and therefore, the provisions would apply to all inventions protected by patents at the time of TRIPS entry into force in Canada.<sup>131</sup>

The Panel rejected Canada's argument that "acts" under Article 70.1 of TRIPS are protected from retroactive enforcement of TRIPS because the affirmative requirement to protect subject matter in Article 70.2 prevails over the limitations in Article 70.1 with respect to patented "subject matter."<sup>132</sup> Furthermore, the Panel found that Section 45 of the Canadian Patent Act did not sufficiently make available twenty-year terms merely because the seventeen-year terms were often extended by the three or more years it took to process the application.<sup>133</sup> The total patent term must be explicitly extended to at least twenty years, in accordance with TRIPS Article 33.<sup>134</sup>

## **2. Appellate Ruling**

Canada appealed the Panel's decision on the grounds that the protective provisions of Article 70.2 should not have prevailed over the non-retroactivity rule of Article 70.1.<sup>135</sup> Canada argued that Article 70.1 imports the customary law rule, codified in the Vienna Convention on the Law of Treaties, that "a treaty's provisions do not operate to bind a party in relation to any act, fact or situation which pre-dates the treaty's entry into force for that party."<sup>136</sup> Furthermore, Canada argued that the Panel did not properly consider the qualifying language in Article 70.2, which grants protections "except as otherwise provided for in this Agreement."<sup>137</sup> Canada argued that Article 70.1 otherwise provides for preventing retroactive agreements.<sup>138</sup> Therefore, Article 70.2 should not retroactively alter the protections in patents granted before the TRIPS agreement entered into force.

With regard to the Canadian Patent Act, Canada argued that although stated different, the protections offered in Section 45 of its Patent Act are substantially equivalent to the protections required by Article 33 of the TRIPS Agreement.<sup>139</sup> Canada reiterated its argument that twenty-year terms of protection from the date of filing are "available" in Canada.<sup>140</sup> Since the seventeen-year term attaches once the patent is granted, and it could take up to three years from filing to

grant of patent, inventions are protected for at least twenty years.<sup>141</sup> Canada also contended that its Patent Act protections comport with the object and purpose of TRIPS: to provide “effective and adequate protection” of IP rights.<sup>142</sup>

The Appellate Body upheld the Panel’s ruling in its entirety. In reviewing the Panel’s decision with regard to Article 70.1, the Appellate Body noted a distinction between an “act” which occurred before the date of entry and is protected from retroactive rulings, and the rights that attach to that act, which may carry on even after the act is completed.<sup>143</sup> Thus, while the act of granting a patent may have ended before TRIPS entry into force for Canada, the rights deriving from that patent continued.<sup>144</sup> The enduring patent rights are more appropriately considered protected “subject matter” than an “act.”<sup>145</sup> Accordingly, the Appellate Body found that Article 70.1 does not exclude from TRIPS protection patent rights granted prior to but continuing after TRIPS entry into force.<sup>146</sup> Rather, the Appellate Body agreed with the Panel’s analysis that patents of inventions are protected subject matter existing at the time of entry into force under Article 70.2 and are subject to the obligations and rights provided in the TRIPS Agreement.<sup>147</sup> Furthermore, since Articles 70.1 and 70.2, respectively dealing with acts and subject matter, address “two distinct and separate matters,” the exclusionary language of Article 70.2 does not incorporate the Article 70.1 prohibition on retroactivity.<sup>148</sup> The prohibition on retroactivity in the Vienna Convention on the Law of Treaties, allowing for a “different intention” appearing in the treaty, would not change the result.<sup>149</sup>

Regarding the substantial equivalence between Section 45 of the Canadian Patent Act and Article 33 of TRIPS Agreement, the Appellate Body agreed with the Panel that Canada did not meet its TRIPS obligations.<sup>150</sup> The Appellate Body rejected the argument that because a patent application could be delayed several years, the seventeen-year term from the date of grant was no

different than a twenty-year term from the date of filing.<sup>151</sup> While such discretionary delays may make a twenty-year term possible under Canadian law, they do not make it legally available “as a matter of right.”<sup>152</sup> Accordingly, Canada did not meet its obligations under Article 33 of the TRIPS Agreement.<sup>153</sup>

### **3. Arbitration Ruling**

Unlike the India Patents Case, the Canada Patent Term Case went into arbitration after the Appellate Report when the parties failed to agree on a reasonable timetable for Canada to amend its patent laws to reflect its obligations under TRIPS.<sup>154</sup> Canada argued that most other arbitral awards allowed a standard fifteen months for implementation, and requested fourteen months to make the amendments.<sup>155</sup> The US, concerned about the potential loss American inventors and corporations could suffer if patents expire prematurely, requested a deadline of six months by which time Canada should have amended its patent laws to comport with Article 33 of the TRIPS Agreement.<sup>156</sup> The US was unconvinced by the lengthy legislative timetable Canada provided and observed that most Canadian laws pass in under four months.<sup>157</sup> The arbitrator noted that under Article 23.1 of the Dispute Settlement Understanding, a “reasonable period of time” was to be as short as a member’s legislative process would allow, but not to exceed fifteen months unless there were exceptional circumstances.<sup>158</sup> The arbitrator decided on an implementation period of ten months.<sup>159</sup>

### **4. Observations from the Canadian Patent Term Case**

In comparison with the outcome in the India Patents Case, the Canada Patent Term Case seems consistent. Criticism of unevenness of access between developed and developing countries notwithstanding, it appears that once parties are before the Dispute Settlement Body, inequalities level out. In both cases, the US brought a claim against another party for failing to

implement TRIPS obligations. In both cases, the applicable burden of proof shifted: the US raised a *prima facie* case for violation, and the burden then shifted to the respondent to refute it.<sup>160</sup> Furthermore, the rules of interpretation used in the Canada Patent Term Case are the same that the Appellate Body applied to India in the India Patents Case: customary public international law rules of treaty interpretation examining the text, context and object and purpose of the treaty, without considering the “legitimate expectations” of parties.<sup>161</sup>

Still, there were significant differences. First, the Appellate Body in the Canada Patent Term Case performed a comparatively deferential review of the Panel ruling. Unlike the *de novo* style review employed by the Appellate Body in the India Patents Case, the Appellate Body in the Canada Patent Term Case reviewed the Panel decision on the points of appeal only for what amounted to substantial error. Without such a finding, the Appellate Body affirmed the Panel ruling without particularly probing scrutiny. Thus, it seems that in the five years since the India Patents Case, the Appellate Body has minimized its activist role and begun to substantially defer to the Panel’s judgment in resolving TRIPS disputes.

Second, the US and Canada resorted to arbitration to agree on a reasonable time period for implementing the necessary legislation. Unlike the India Patents Case, where the Appellate Body set the timetable for implementation, the US and Canada took advantage of the binding arbitration clause in the Dispute Settlement Understanding to resolve their disagreement as to a reasonable time for implementation. This disparity again raises the issue of access. After lengthy litigation before the Dispute Settlement Mechanism, India was not inclined to expend resources to negotiate a timetable for implementation. In light of the fact that implementation is required, negotiating a timetable for implementation seems a comparatively minor issue. It has significant implications, however. As we saw in the Canada Patent Term Case, Canada was able



to use its weight to negotiate a more favorable implementation period despite the US argument that immediate implementation was essential. As we will see in the US Copyright Case, powerful parties like the US may use their weight to delay implementation indefinitely. In addition to the inequality in access between the developed and developing countries, there is inequality in enforcement and implementation between developed and developing countries.

Nevertheless, there was not a significant difference in outcome between the India and Canada patent cases. This suggests that the inequality plaguing the WTO Dispute Settlement Mechanism has more to do with access than the outcomes resulting once parties get before the Panel. Of course, disparities in access are significant. The US dominates the process. The more technologically advanced a state is, and the stronger its economy, the better it can fight claims against it. Accordingly, many states settle on Mutually Agreed Solutions with the US rather than fight the Goliath in an expensive and lengthy process before the Dispute Settlement Body.

### **C. Mutually Agreed Solutions**

Both of the cases in this section were brought by the US and resolved during consultations by Mutually Agreed Solution without a formal request for panel adjudication. This section examines whether the outcomes were fair to the developing country respondents or if they may have been pressured to accept a resolution because adjudication before the Dispute Settlement Body would be impractical. This section focuses on another aspect of access: whether developing countries tend to “settle before trial” to avoid costly and lengthy litigation, especially when facing an adversary that may retaliate or coerce compliance.

#### **1. Argentina Protection of Patents and Test Data Case**

The US brought two separate claims against Argentina related to patent and test data protection. In 1999, the US requested consultations to address a perceived lack of patent protection and exclusive marketing rights for pharmaceuticals.<sup>162</sup> The US argued that Argentina violated TRIPS by allowing marketing rights to third parties where exclusive marketing rights had already been granted and failing to protect the patent of pharmaceutical inventions.<sup>163</sup> The US further alleged that Argentina allowed changes to its law during the transitional period that were inconsistent with the protections provided in TRIPS.<sup>164</sup> The US argued that Argentina, by revoking its protections against unfair commercial use of test data, failed to provide protections mandated by TRIPS.<sup>165</sup>

In 2000, the US brought another set of claims against Argentina related to various Argentinean laws governing patents.<sup>166</sup> The US alleged that Argentina: continued to allow unfair commercial use of test data; unlawfully excluded patentable subject matter from patenting; failed to provide provisional measures to protect against patent infringement; refused protection of some exclusive rights of patents; neglected to provide appropriate safeguards for granting compulsory licenses; limited its judiciary's authority to shift burdens of proof as necessary in process patent infringement cases; and enacted improper restrictions on transitional patents denying patent applicants the opportunity to amend applications to request protections under TRIPS.<sup>167</sup> The US claims that these Argentinean laws violate a number of TRIPS provisions, such as Articles 27, 28, 31, 34, 39, 50, 62, 65, and 70.<sup>168</sup>

The Mutually Agreed Solution between the US and Argentina consisted in large part of agreements to alter Argentinean domestic law and processes to bring them into compliance with obligations under the TRIPS Agreement.<sup>169</sup> Three issues raised by the US resulted in specific legislative language to be sent to the Argentinean National Congress for enactment.<sup>170</sup> Five

issues raised by the US resulted in an affirmative statement by Argentina that its law would be interpreted a specific way by its agencies or that agencies would follow a revised procedure in order to comport with TRIPS obligations.<sup>171</sup> In one of the issues raised by the US regarding transitional patents under Article 70.4 of the TRIPS Agreement, Argentina affirmed that it would “fulfill its WTO obligations on this matter through its legal system and practices, including decisions of the Supreme Court of Justice.”<sup>172</sup>

The Mutually Agreed Solution between the US and Argentina is striking for a number of reasons. First, through consultation and subsequent agreement, the US had a substantial role in the domestic affairs of Argentina. Undoubtedly, the TRIPS Agreement entails some relinquishment of sovereignty by requiring that states implement certain obligations in their domestic law. However, states have agreed to relinquish that sovereignty by ratifying the agreement. Furthermore, state parties are free to choose the most appropriate means by which to implement treaty obligations. Consequently, it would be unusual for another state to have such a dramatic role in the specific way an agreement is implemented.

By way of comparison, the US requested that the India Patents Case Panel recommend that India implement its obligations in a way substantially similar to Pakistan.<sup>173</sup> The Panel in the India Patents Case refused to adhere to the US suggestion, finding that members must adjudge for themselves the appropriate means to implement TRIPS obligations within their domestic law.<sup>174</sup> This decision withstood appeal.

Thus, while the WTO Dispute Settlement Mechanism declined to recommend how India should implement TRIPS obligations in its own law, the US dictated how Argentina could implement TRIPS obligations into its domestic law. This is particularly unnerving because it emphasizes the disparity in power between the two parties. Argentina, threatened with Panel

adjudication and facing retaliatory measures, allowed the US to influence the specific language of Argentinean legislation and direct the operation of Argentina's domestic political affairs.<sup>175</sup>

The US, on the other hand, is traditionally protective of the sovereignty of its domestic affairs.<sup>176</sup> The US would be unlikely to tolerate a similar level of involvement by another country in its own domestic governing institutions. Indeed, the US has earned a reputation as ratifying treaties only to the point that they require little actual change in domestic US law: where such a change is required, the United States generally offers reservations to keep additional obligations from inuring to it.<sup>177</sup> Furthermore, the US discourages the use foreign law as persuasive authority in its court system, and shares a similar aversion to letting domestic courts be controlled by the decisions of international organizations.<sup>178</sup> In contrast, Argentina agreed to implement the Mutually Agreed Solution through its legal process, including decisions of the Argentinean Supreme Court.<sup>179</sup>

In this case, the Mutually Agreed Solution resulted in substantial disparity in outcome, based in large part on the relative power of the parties. Thus, without access to the full Dispute Settlement Mechanism proceedings, Mutually Agreed Solutions can exacerbate the inequalities between developed and developing countries. The lack of transparency and oversight by the Dispute Settlement Mechanism may lead to coercive bargaining during consultations. Accordingly, access to the full dispute settlement procedure must be promoted to ensure that the consultative process does not disfavor developing countries that do not have the requisite means for Panel adjudication.

## **2. Brazil Patent Protection Case**

The US brought a claim against Brazil in 2000 alleging that the “local working rule” in Brazilian Industrial Property Law violates the TRIPS agreement because it allows exclusive marketing rights to patented subject matter that has been imported, not just patented subject matter that is produced locally.<sup>180</sup> Accordingly, the US argued that Brazil was improperly granting compulsory licensing for subject matter not “worked” in Brazil.<sup>181</sup>

The Mutually Agreed Solution between Brazil and the US was a marked departure from the Mutually Agreed Solution in the Argentina Protection of Patents and Test Data Cases. Brazil, while noting that it believes Article 68 of its Industrial Property Law to be in compliance with its obligations under TRIPS, agreed that when the Brazilian government “deems it necessary to apply Article 68 to grant compulsory license on patents held by the U.S. companies,” it would consult first with the US.<sup>182</sup> The US agreed to withdraw its request for panel adjudication based on Brazil’s “commitment to hold prior talks with the United States with sufficient advance notice to permit constructive discussion.”<sup>183</sup> In another words, without determining whether Brazil was in compliance or implementing specific changes to domestic legislation, the parties agreed to consult when compulsory licensing issues in Brazil arise.<sup>184</sup>

The disparity in outcome between the Argentina and Brazil solutions is due to a shift in relative bargaining power. The compulsory licensing legislation in Brazil was a measure to secure access to HIV/AIDS anti-retroviral medicines at a lower cost.<sup>185</sup> Brazil harnessed the power of public opinion, which was overwhelmingly in favor of access to anti-retroviral medicines at a cost not prohibitively expensive to developing countries.<sup>186</sup> The US was facing a public relations disaster perceived by much of the world as an attempt to protect the profits of the pharmaceutical industry at the expense of the AIDS-stricken population of developing countries.<sup>187</sup>

The dispute with Brazil was initiated shortly after a similar dispute between the US and South Africa.<sup>188</sup> The US, declaring South Africa in violation of its obligation to protect pharmaceutical patents under TRIPS, placed South Africa on a watch list and threatened trade sanctions.<sup>189</sup> At the same time, pharmaceutical companies brought suit in South African courts.<sup>190</sup> A political firestorm ensued, as AIDS activists launched a public campaign directed at the developed world's refusal to ameliorate the AIDS crisis in Africa.<sup>191</sup> Ultimately, the US removed South Africa from its watch list and the pharmaceutical companies dropped the suit.<sup>192</sup> As a result of the South African incident, the WTO adopted the Doha Declaration, to clarify that a WTO member will not be liable under TRIPS when it takes measures inconsistent with the international IP regime to prevent a public health crisis in an emergency situation.<sup>193</sup>

After the “global public uproar” against the US and the pharmaceutical industry, culminating in the Doha Declaration's statement announcing a global intent to assist developing countries in times of crisis, the US was vulnerable.<sup>194</sup> Brazil capitalized on power of public opinion and took advantage of the US vulnerability to negotiate a more favorable solution than Argentina.

### **3. Observations on Mutually Agreed Solutions**

Mutually Agreed Solutions are prevalent in disputes between developed and developing countries, where a powerful country is bringing suit against a weaker developing country. While intended to provide an opportunity for compromise and cooperation, the Mutually Agreed Solution has instead become a forum of power politics. The developing country, intimidated by the risk of Panel adjudication that it is ill equipped to afford, and coerced by the threat of sanctions from a powerful country, is more likely to settle for a Mutually Agreed Solution.

Thus, powerful countries like the US use the Mutually Agreed Solutions, as it did in the Argentina Case, to enforce its own IP laws in the international arena.

In addition to being prone to power politics, the Mutually Agreed Solution is more susceptible to coercion than Panel adjudication. When two states engage in direct consultation where there is a significant imbalance of power, the weaker state often negotiates under the threat of retaliation by the stronger state. The US watch list is an example of a retaliatory threat. Section 301 of the Trade Act of 1974 provides unilateral actions for the US to employ in order to achieve greater protection of IP rights.<sup>195</sup> In the 1988 Omnibus, Trade and Competitiveness Act, Congress amended Section 301 by adding a “Special 301” section giving the US Trade Representative authority to investigate countries suspected of providing insufficient protection of IP rights and imposing sanctions where necessary.<sup>196</sup> This section created a public watch list, upon which the US places countries being investigated, providing its opponents warning that sanctions could be forthcoming.<sup>197</sup> Engaging in consultations under the WTO Dispute Settlement Mechanism with countries that are on its “Special 301” watch list, the US can legitimize the use of unilateral trade sanctions through the cloak of multilateralism.<sup>198</sup> In many instances, the threat of such measures forces developing countries to “abandon their policies and agree to unilaterally negotiate with the United States – even when their current policies might very well be in perfect compliance with TRIPS – than risk being blacklisted by the United States”.<sup>199</sup>

#### **D. US Copyright Case**

The US Copyright case is instructive for two major reasons. First, it is one of few cases where a claim was brought against the US. Second, it illustrates how powerful countries can avoid enforcement and implementation by paying damages to compensate the complainant without bringing their laws into compliance with TRIPS obligations. Thus, it provides a striking

example of inequality of enforcement and implementation, as the US and other developed countries, less vulnerable to international pressure, can favor compensation instead of compliance.<sup>200</sup>

## **1. Facts**

The EC brought a complaint against the US to address Section 110(5) of the US Copyright Act, and its subsequent amendment in the Fairness in Music Licensing Act.<sup>201</sup> The Fairness in Music Licensing Act amends the Copyright Act to allow public rebroadcast of radio and television without requiring an additional royalty payment.<sup>202</sup> The EC argued that the US violated Article 9.1 of the TRIPS Agreement.<sup>203</sup> Article 9.1 incorporates obligations in the Berne Convention by reference.<sup>204</sup>

Article 13 provides for exceptions or limitations to copyright protections under the TRIPS Agreement.<sup>205</sup> Accordingly, it allows the exclusive rights of copyright holders to be curtailed in certain limited, specific circumstances.<sup>206</sup> The US contended that the two exemptions provided in the amended Copyright Act would not otherwise conflict with the work's typical exploitation and would not prejudice the right holder's legitimate interests in the work.<sup>207</sup> As such, the US continued, it appropriately fits the exception provisions under Article 13 of the TRIPS Agreement.<sup>208</sup>

## **2. Panel Ruling**

The Panel examined in detail the two exemptions provided by Section 110(5) of the US Copyright Act. The Panel first considered the "business exemption" which allows for music broadcasts in small restaurants, bars and retail stores under a specified square footage without authorization or payment.<sup>209</sup> The Panel found the "business exemption" is not excluded from Berne Convention obligations under Article 13, particularly because it would cover a majority of



restaurants, bars, and retail spaces, violating Article 9.1 of the TRIPS Agreement.<sup>210</sup> The Panel next considered the “homestyle exemption” which allows small restaurants and retail stores to play broadcast music without authorization or payment if they use equipment of the type that is normally used in homes.<sup>211</sup> The Panel found that this “homestyle” exception meets the requirements of Article 13 because it includes adequate limitations by restricting the type of equipment.<sup>212</sup> Accordingly, the “homestyle” exception does not violate obligations under the Berne Convention incorporated by reference in Article 9.1 of the TRIPS Agreement.<sup>213</sup>

### **3. Arbitration Reports**

The US and the EC sought arbitration under Article 23.1 of the Dispute Settlement Understanding to determine the appropriate period of time for the US to bring Section 110(5)(B) of its Copyright Act into compliance with TRIPS.<sup>214</sup> Despite a US proposal of fifteen months, the arbitrator determined that twelve months would be sufficient.<sup>215</sup> The Dispute Settlement Body agreed to extend this period to the earlier of the end of the year or the end of the current session of Congress.<sup>216</sup>

The parties relied on further arbitration in an effort to resolve their dispute. In addition to seeking arbitration to determine a reasonable period of time for implementation, the EC sought arbitration under Article 25.2 to determine the amount of damages due the Community as a result of the US failure to adequately protect copyrighted European works within its borders.<sup>217</sup> The arbitrator determined damages to amount to €1,219,900 per year of non-compliance.<sup>218</sup>

Although the US complied with the damages award, it remains in violation of TRIPS by failing to amend the business exemption under Section 110(5)(B) of the Copyright Act to adequately protect European copyright interests.<sup>219</sup> In the two and a half years since the twelve-month implementation timetable was announced on January 15, 2001, the US provided ten status

reports stating that it is involved in constructive consultations with Congress and the EC and is working to find a mutually agreeable solution.<sup>220</sup> In response, the EC continually expressed its dismay at the failure of the US to implement the appropriate measures to bring its Copyright Act into compliance with its TRIPS obligations.<sup>221</sup> In 2003, the US and the EC reached a temporary arrangement.<sup>222</sup> The US Copyright Act has not been amended.

#### **4. Observations from the US Copyright Case**

The US Copyright Case illustrates the disparity in enforcement of TRIPS rulings by the WTO Dispute Settlement Mechanism. Because the US is economically powerful, it can afford to pay damages for violating TRIPS rather than implement the requisite domestic law to comply with TRIPS. The inequality in outcome is obvious; developing countries, barely able to afford the costs of litigating before the WTO Dispute Settlement Mechanism, certainly cannot afford to buy their way out of compliance. Developed countries have the luxury to choose compensation instead of compliance.

#### **V. Recommendations**

The WTO's Dispute Settlement Mechanism is one of the busiest dispute resolution systems in the international arena.<sup>223</sup> Despite frequent use in trade disputes, the Dispute Settlement Mechanism has significant flaws, including problems of access and enforcement. These problems are exacerbated by intellectual property disputes under the TRIPS Agreement, where substantial inequality results in how developed and developing countries access the Dispute Settlement Mechanism, and what they derive it.<sup>224</sup> Nevertheless, the increasing use of the Mechanism by developing countries in TRIPS disputes is a reason to be optimistic.<sup>225</sup>

##### **A. Encourage Broad Participation in the WTO Dispute Settlement Mechanism**

Despite a history of reluctant participation by developing countries in the WTO Dispute Settlement Mechanism, there is an emerging willingness by developing countries to use the Mechanism to resolve intellectual property disputes.<sup>226</sup> However, much of the increase in participation by developing countries has been in the context of disputes with other developing countries.<sup>227</sup> While any increase in the number of disputes brought by developing countries before the mechanism lessens problems of access, it is essential that developing countries can freely bring disputes against developed countries in order to protect their interests. The TRIPS Agreement, in its attempt to protect intellectual property without creating additional barriers to trade, incorporates a number of competing principles and priorities.<sup>228</sup> Whether these competing conceptions are interpreted to promote development will depend on who brings these disputes before the Dispute Settlement Mechanism.<sup>229</sup> Thus, developing countries must find a way to increase participation before the Dispute Settlement Mechanism in order to ensure that their interests are taken into account.

#### **B. Facilitate Pooling of Resources and Coordination of Strategies**

One way to increase developing country participation is create a system that pools resources and coordinates strategies among developing countries with similar goals.<sup>230</sup> Some scholars have suggested that this can be done on several levels of the system by creating regional, national and international trade centers.<sup>231</sup> Another way to achieve the same ends is by creating a Development Council as a subcommittee of the Dispute Settlement Body.

This Development Council, comprised of a rotating membership of trade ministers of developing countries, could be charged with protecting and promoting development in the realm of IP protection and enforcement. Developing countries could alert the Development Council when they dispute IP policies of member states that have a detrimental effect on development.

Council members can petition domestic trade agencies to garner support from other developing countries that would suffer similar ill effects, and act as a liaison coordinating the response among the participating developing countries. Furthermore, the Council can coordinate sanctions and other enforcement measures among developing nations in order to more severely impact the developed country's economy. Strengthening enforcement measures against developed countries would compel compliance with WTO Rulings.

One of the advantages of creating a Development Council as part of the Dispute Settlement Body, as opposed to relying on national or regional centers, is that the WTO could absorb some of the costs of operating the Council. Otherwise, developing countries would have to bear those costs. Spending additional resources that developing countries already lack in order to coordinate strategy would defeat the purpose of establishing such a system. Not only would most developing countries be incapable of allotting the resources to create such centers, but money spent to create them would lessen the total that could ultimately be pooled. By incorporating the Council into the WTO, costs of overhead would be substantially lower.

### **C. Harness the Power of Public Opinion**

Like developed countries were slow to support the Doha Declaration, they would be reluctant to support a Development Council or other measures aimed at pooling resources and encouraging broad participation. However, the global civil society movement to make AIDS medicines available to developing countries forced developed countries to take a more pro-development stance or be shamed as insensitive to the plight of the AIDS-stricken poor.<sup>232</sup> In the same way that the Doha Declaration was passed by harnessing the power of public opinion regarding access to medicine, a Development Council could be created by channeling the considerable anti-poverty movement in global civil society.<sup>233</sup>

#### **D. Prevent Contracting Out of the WTO Dispute Settlement Mechanism**

In order to ensure that developing countries can use the WTO Dispute Settlement Mechanism to resolve disputes with developed countries, it is essential that trade disputes remain within the jurisdiction of the WTO. However, as developing countries increasingly resort to the Dispute Settlement Mechanism, the US has begun putting private dispute settlement and arbitration clauses in bilateral agreements.<sup>234</sup> Developed countries can take advantage of their greater relative bargaining power in negotiating trade agreements to coerce developing countries to agree to private dispute settlement.<sup>235</sup> If other developed countries follow the US example, developing countries will suffer inequality without the benefit of the public proceedings and review procedures of the Dispute Settlement Mechanism.<sup>236</sup> Without recourse to the Dispute Settlement Mechanism, developing countries will face many of the same problems that they do in Mutually Agreed Solutions, including intimidation and threats of retaliation by the more powerful developing countries. Thus, by empowering developing countries to withstand pressure from developed countries and implementing a WTO resolution that safeguards against such practice, member states can ensure that disputes are not removed from the WTO Dispute Settlement Mechanism

#### **E. Ensure Level Enforcement and Implementation of Rulings**

Without equal enforcement and implementation of Dispute Settlement Mechanism rulings, developed countries can manipulate the system to achieve their own self-interested ends. Developed countries can bring TRIPS disputes before the Dispute Settlement Mechanism where they believe their IP rights have been infringed. Where a ruling supports their argument, developed countries have used the Dispute Settlement Mechanism to enforce their preferred IP regime. Developing countries lack similar access to use the mechanism to protect their interests,

and where they are able to bring a dispute, developed countries can ignore the rulings. While increasing access to the Dispute Settlement Mechanism by developing countries will ameliorate some of this disparity, it is important that the TRIPS agreement is interpreted through a “pro-development lens” in order to provide increased protection for the interests of developing countries.<sup>237</sup>

#### **F. Interpret TRIPS Agreement to Favor Pro-Development Policies**

Developing countries can ensure that their IP interests are better protected by encouraging the Dispute Settlement Mechanism to interpret the TRIPS Agreement with greater regard to the pro-development language in the treaty.<sup>238</sup> Because TRIPS was designed to balance the competing interests of protecting IP rights while preventing additional trade barriers, the treaty includes exceptions to the minimum IP protections to be implemented by states. These competing priorities create ambiguities in the TRIPS Agreement, and developing countries should bring disputes before the Dispute Settlement Mechanism that exploit these ambiguities for development-based ends.

The object and purpose of the TRIPS Agreement support the creation of certain exceptions to the protection of IP rights. Of the three stated goals of the TRIPS Agreement, one emphasizes reducing impediments to international trade, and another focuses on ensuring that IP enforcement does not create additional barriers to legitimate trade.<sup>239</sup> Article 30 of the TRIPS Agreement allows members to create exceptions to IP rights to comport with the object and purpose of the Agreement. Arguably, these two stated purposes, in conjunction with Article 30, create grounds for developing countries to seek exceptions to IP protection measures.<sup>240</sup> Developing countries can argue that a particular measure distorts or impedes trade, and if the Dispute Settlement Body finds that the measure creates a barrier to legitimate trade, it may also

find that such a measure does not comply with the object and purpose of the treaty.<sup>241</sup> Such a measure should not be able to stand. Thus, developing countries can exploit the ambiguity created by Article 30 and the object and purpose of the treaty to create exceptions where IP protection measures impede trade.

In addition to considering the object and purpose of the Agreement, there are a number of articles that create specific exceptions. TRIPS allows the creation of exceptions to safeguard social and economic welfare, protect public health and order, defend the life and health of people, animals, plants, and shield against damage to the environment.<sup>242</sup> Furthermore, the Agreement provides additional exceptions “in the case of national emergency or other circumstances of extreme urgency.”<sup>243</sup> Once developing countries obtain greater access to the WTO Dispute Settlement Mechanism, there are a number of TRIPS provisions, including the object and purpose of the treaty, with which they can achieve pro-development ends.

#### **G. Relax Global IP Protection**

In addition to using the language and ambiguities of the TRIPS Agreement to advocate for pro-development policies before the Dispute Settlement Mechanism, the Dispute Settlement Body should interpret TRIPS flexibly.<sup>244</sup> This flexible approach should take into account state sovereignty and national interests by analyzing the implementation measures by member states on a case-by-case basis.<sup>245</sup> The Dispute Settlement Body should defer to each state’s determination of how IP rights can best be protected within their borders in the context of the welfare of its nationals and the public good.<sup>246</sup> Thus, the Dispute Settlement Body would make an individual determination, based on the particularities of an individual state’s circumstances, to determine the necessary and appropriate level of IP protection to be implemented by that state.

Certainly, the high level of IP protection necessary and sufficient to protect IP rights of a US company in the EC would not, and should not, be the same in sub-Saharan Africa.

## **VI. Conclusion**

Despite being one of the busiest dispute resolution bodies in the international arena, the WTO's Dispute Settlement Mechanism does not resolve IP disputes as effectively as it could. Significant disparities in access and enforcement experienced by developing countries exacerbates inequality between developing and developed countries.

As the India Patents Case and Canada Patent Terms Case show, the process of adjudication before the Panel and the Appellate Body does not create a significant disparity in outcome for developing countries. However, examination of the Mutually Agreed Solutions shows significant inequality of access by developing countries from the outset. This disparity in access leads inexorably to substantial differences in outcomes where states lack the relative power to get before the Dispute Settlement Mechanism and are forced to settle before a Panel is formed. The US Copyright Case provides a striking example of the disparity in implementation and enforcement of WTO rulings between developed and developing countries after final adjudication.

If the WTO Dispute Settlement Body can correct the disparities in access and enforcement between developed and developing countries, it will be the most effective dispute resolution system in the international arena. There are a number ways to remedy these problems of access and enforcement. Encouraging broad participation in the WTO Dispute Settlement Mechanism by facilitating resource pooling and strategy coordination can increase access by developing countries and ensure compliance by developed countries. Harnessing the power of public opinion to advocate for pro-development policies to ameliorate the poverty crippling



many developing countries can advance these efforts. Furthermore, by interpreting the TRIPS agreement to favor pro-development policies and relax global IP protection, the WTO Dispute Settlement Body can ensure that rulings are enforced and implemented fairly and equally.

- <sup>1</sup> See Marrakesh Agreement Establishing the World Trade Organization, GATT Doc. MTN/FA, 33 I.L.M. 1 (Dec. 15, 1993).
- <sup>2</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (Apr. 15, 1994) [hereinafter *TRIPS Agreement*].
- <sup>3</sup> See *TRIPS Agreement*, *supra* note 2, at Part II.
- <sup>4</sup> See *id.*
- <sup>5</sup> See *id.*
- <sup>6</sup> *Id.* at Pmbl.
- <sup>7</sup> See Paris Convention for the Protection of Industrial Property, available at [http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf) (1883) [hereinafter *Paris Convention*]; Berne Convention for the Protection of Literary and Artistic Works, available at [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf) (1886) [hereinafter *Berne Convention*].
- <sup>8</sup> See *Paris Convention*, *supra* note 7.
- <sup>9</sup> See *Berne Convention*, *supra* note 7.
- <sup>10</sup> See Berne Convention Implementation Act, PUB. L. NO. 100-568, 102 STAT. 2853 (1988).
- <sup>11</sup> See Alain J. Lapter, *The WTO's Dispute Resolution Mechanism: Does the United States Take it Seriously? A TRIPS Analysis*, 4 CHI.-KENT J. INTELL. PROP. 217, 220-21 (2005) (concluding that despite its reluctance to follow the rulings, the US does take the WTO Dispute Settlement Mechanism seriously).
- <sup>12</sup> See *TRIPS Agreement*, *supra* note 2, at Arts. 63-64; Understanding on Rules and Procedure Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Art. 3, para. 7, 33 I.L.M. 1226 (Apr. 15, 1994) [hereinafter *Dispute Settlement Understanding*].
- <sup>13</sup> See *TRIPS Agreement*, *supra* note 2, at Arts. 63-64.
- <sup>14</sup> See *Dispute Settlement Understanding*, *supra* note 12, at 1226.
- <sup>15</sup> See Christine Thelen, Note, *Carrots and Sticks: Evaluating the Tools for Securing Successful TRIPS Implementation*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 519, 536.
- <sup>16</sup> See Thelen, *supra* note 15, at 536.
- <sup>17</sup> See *id.*
- <sup>18</sup> See Lapter, *supra* note 11, at 229; *Dispute Settlement Understanding*, *supra* note 12, at Art. 3.
- <sup>19</sup> See Rachana Desai, Note, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 262 (2005); World Trade Organization, *Understanding the WTO: Settling Disputes*, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Oct. 20, 2007) [hereinafter *Settling Disputes*].
- <sup>20</sup> See Lapter, *supra* note 11, at 227; Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 643-44 (2002) [hereinafter *Nonzero-Sum Approach*].
- <sup>21</sup> See Desai, *supra* note 19, at 262; *Settling Disputes*, *supra* note 18 (describing the step-by-step process for using the WTO Dispute Settlement Mechanism, and discussing common criticism of the Mechanism's operation).
- <sup>22</sup> See Lapter, *supra* note 11, at 277.
- <sup>23</sup> See *id.*; William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L. J. 427, 427-30 (1995).
- <sup>24</sup> See Lapter, *supra* note 11, at 228; Aceves, *supra* note 23, at 439.
- <sup>25</sup> See Lapter, *supra* note 11, at 228; Aceves, *supra* note 23, at 439.
- <sup>26</sup> See Lapter, *supra* note 11, at 228; Aceves, *supra* note 23, at 439-40.
- <sup>27</sup> Lapter, *supra* note 11, at 228.
- <sup>28</sup> See Desai, *supra* note 19, at 262; *Settling Disputes*, *supra* note 19.
- <sup>29</sup> See Desai, *supra* note 19, at 262; *Settling Disputes*, *supra* note 19.
- <sup>30</sup> See Lapter, *supra* note 11, at 227; *Nonzero-Sum Approach*, *supra* note 20, at 583.
- <sup>31</sup> Lapter, *supra* note 11, at 227. See also *Nonzero-Sum Approach*, *supra* note 20, at 583-84.
- <sup>32</sup> See Lapter, *supra* note 11, at 228; *Nonzero-Sum Approach*, *supra* note 20, at 584.
- <sup>33</sup> See Lapter, *supra* note 11, at 228; *Nonzero-Sum Approach*, *supra* note 20, at 584.
- <sup>34</sup> See Lapter, *supra* note 11, at 228.
- <sup>35</sup> See Desai, *supra* note 19, at 262; *Settling Disputes*, *supra* note 19.
- <sup>36</sup> See Desai, *supra* note 19, at 262; *Settling Disputes*, *supra* note 19.
- <sup>37</sup> See Desai, *supra* note 19, at 262; David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1397 (1995) (discussing the relationship between the Dispute Settlement Mechanism and the International Court of Justice, noting that under the WTO Agreement, no copyright claims are likely to be brought before ICJ, and none have previously been brought).
- <sup>38</sup> Lapter, *supra* note 11, at 229.
- <sup>39</sup> See Desai, *supra* note 19, at 262.

- <sup>40</sup> See *id.*; *Settling Disputes*, *supra* note 19.
- <sup>41</sup> See Desai, *supra* note 19, at 262; *Settling Disputes*, *supra* note 19.
- <sup>42</sup> See William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 18 (2005) (providing an overview of the mandatory dispute settlement process of the WTO and looking critically at its successes and failures a decade after Marrakesh).
- <sup>43</sup> *Id.*
- <sup>44</sup> See *id.*
- <sup>45</sup> See Thelen, *supra* note 15, at 541; Douglas Ierly, *Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute Over Bananas*, 33 LAW & POL'Y INT'L BUS. 615, 643-45 (2002).
- <sup>46</sup> See Thelen, *supra* note 15, at 541; Ierly, *supra* note 45, at 643.
- <sup>47</sup> See Thelen, *supra* note 15, at 541-42; Peter Drahos, *Commission on Intellectual Property Rights, Study Paper 8, Developing Countries and International Intellectual Property Standard-setting* 11-12, available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf).
- <sup>48</sup> See Thelen, *supra* note 15, at 542; Mark Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 17 (2003) (discussing how the WTO Dispute Settlement Mechanism can "legitimiz[e] the use of trade sanctions" against parties).
- <sup>49</sup> Thelen, *supra* note 15, at 538; Ierly, *supra* note 45, at 637-38.
- <sup>50</sup> See Peter K. Yu, *The First Ten Years of the TRIPS Agreement: TRIPS and its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 394 (2006) [hereinafter *TRIPS Discontents*] (describing the background of the TRIPS Agreement and positing four theories of how the agreement came about: the Bargain Narrative, Coercion Narrative, Ignorance Narrative, and the Self-Interest Narrative).
- <sup>51</sup> See DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 16-17 (1999).
- <sup>52</sup> Lapter, *supra* note 11, at 228; Aceves, *supra* note 23, at 440-43.
- <sup>53</sup> See Lapter, *supra* note 11, at 228.
- <sup>54</sup> See Movsesian, *supra* note 48, at 2-3 (citing numerous sources criticizing the current provisions for enforcement as being too weak and arguing for stronger measures).
- <sup>55</sup> See *id.* at 3.
- <sup>56</sup> See *id.* (citing numerous sources criticizing the current provisions for enforcement as being too harsh and arguing for softer measures).
- <sup>57</sup> See *id.*
- <sup>58</sup> See *id.* at 4 (citing Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 832 (2001)).
- <sup>59</sup> See Ierly, *supra* note 45, at 637-38.
- <sup>60</sup> See Thelen, *supra* note 15, at 522-23; Randy L. Campbell, *Global Patent Law Harmonization: Benefits and Implementation*, 13 IND. INT'L & COMP. L. REV. 605, 613 (2003).
- <sup>61</sup> See Thelen, *supra* note 15, at 520; Drahos, *supra* note 47, at 10-11.
- <sup>62</sup> See World Trade Organization, Panel Report, India—Patent Prosecution for Pharmaceutical and Agricultural Chemical Products, WTO Doc. WT/DS50/R (Sept. 5, 1997), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds50\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm) [hereinafter *India Patents Panel Report*].
- <sup>63</sup> See *id.* at para. 3.1.
- <sup>64</sup> See *TRIPS Agreement*, *supra* note 2, at Art. 70.8 (requiring state parties to create a mechanism to ensure that applications filed during the transitional period receive the same filing date as they would if a valid patent application system been in place).
- <sup>65</sup> See *India Patents Panel Report*, *supra* note 62, at paras. 3.1(a)-(b).
- <sup>66</sup> See *TRIPS Agreement*, *supra* note 2, at Art. 70.9.
- <sup>67</sup> See *India Patents Panel Report*, *supra* note 62, at paras. 3.1(d)-(e).
- <sup>68</sup> See *id.* at para. 7.40.
- <sup>69</sup> See *India Patents Panel Report*, *supra* note 62, at para. 4.2.
- <sup>70</sup> See *id.*
- <sup>71</sup> See *id.*
- <sup>72</sup> See *India Patents Panel Report*, *supra* note 62, at para. 4.9.
- <sup>73</sup> See *id.*
- <sup>74</sup> See *id.*
- <sup>75</sup> See *India Patents Panel Report*, *supra* note 62, at para. 4.27.
- <sup>76</sup> See *id.* at para. 4.29.

- <sup>77</sup> See *id.* at para. 7.18 (citing the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980), art. 31 [hereinafter *Vienna Convention*]).
- <sup>78</sup> See *India Patents Panel Report*, *supra* note 62, at paras. 7.18-7.20.
- <sup>79</sup> See *id.* at para. 7.22.
- <sup>80</sup> See *id.* at 7.31.
- <sup>81</sup> See *id.* at paras. 7.42-43.
- <sup>82</sup> See *id.* at para. 7.53.
- <sup>83</sup> See *India Patents Panel Report*, *supra* note 62, at para. 7.53.
- <sup>84</sup> See *id.* at para. 7.60.
- <sup>85</sup> See *id.* at para. 7.55.
- <sup>86</sup> See *id.*
- <sup>87</sup> See *id.*
- <sup>88</sup> See *India Patents Panel Report*, *supra* note 62, at para. 8.1.
- <sup>89</sup> See *id.* at para. 7.48-49.
- <sup>90</sup> See *id.* at para. 8.2.
- <sup>91</sup> See World Trade Organization, Appellate Body Report—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Doc. WT/DS50/AB/R (Dec. 19, 1997), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds50\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm), at Sec. V [hereinafter *India Patents Appellate Report*].
- <sup>92</sup> See *id.* at Sec. III.
- <sup>93</sup> See *id.*
- <sup>94</sup> See *id.*
- <sup>95</sup> See *id.*
- <sup>96</sup> See *India Patents Appellate Report*, *supra* note 91, at Sec. III.
- <sup>97</sup> See *id.* at Sec. V.
- <sup>98</sup> See *id.*
- <sup>99</sup> See *id.*
- <sup>100</sup> See *id.*
- <sup>101</sup> See *TRIPS Agreement*, *supra* note 2, at Art. 64.2.
- <sup>102</sup> See *id.*
- <sup>103</sup> See *India Patents Appellate Report*, *supra* note 91, at Sec. V.
- <sup>104</sup> See *id.* at Sec. VI.
- <sup>105</sup> See *id.*
- <sup>106</sup> See *id.*
- <sup>107</sup> See *id.*
- <sup>108</sup> See *India Patents Appellate Report*, *supra* note 91, at Sec. VI.
- <sup>109</sup> See *id.*
- <sup>110</sup> See *id.*
- <sup>111</sup> See *id.*
- <sup>112</sup> See *id.*
- <sup>113</sup> See *India Patents Appellate Report*, *supra* note 91, at Sec. VI.
- <sup>114</sup> See *id.*
- <sup>115</sup> See *id.*
- <sup>116</sup> See *id.* at Sec. VII.
- <sup>117</sup> See *id.*
- <sup>118</sup> See *India Patents Appellate Report*, *supra* note 91, at Sec. VIII.
- <sup>119</sup> See *id.*
- <sup>120</sup> See *id.*
- <sup>121</sup> See *id.* at Sec. IX.
- <sup>122</sup> See World Trade Organization, Panel Report, Canada—Term of Patent Protection, para. 6.2, WTO Doc. WT/DS170/R (May 5, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds170\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds170_e.htm) [hereinafter *Canada Patent Term Panel Report*].
- <sup>123</sup> See *TRIPS Agreement*, *supra* note 2, at Art. 70.2; *Canada Patent Term Panel Report*, *supra* note 122, at para. 6.2.
- <sup>124</sup> See *Canada Patent Term Panel Report*, *supra* note 122, at para. 6.2.
- <sup>125</sup> See *id.*
- <sup>126</sup> See *id.* at para.6.16 (quoting *TRIPS Agreement*, *supra* note 2, at Art. 70.1).
- <sup>127</sup> See *Canada Patent Term Panel Report*, *supra* note 122, at para. 6.3.
- <sup>128</sup> See *id.*
- <sup>129</sup> See *id.* at para. 6.4.

- <sup>130</sup> See *id.* at para. 6.36.
- <sup>131</sup> See *id.*
- <sup>132</sup> See *Canada Patent Term Panel Report*, *supra* note 122, at para. 6.41.
- <sup>133</sup> See *id.* at para. 6.111.
- <sup>134</sup> See *id.*
- <sup>135</sup> See World Trade Organization, Appellate Body Report, Canada—Term of Patent Protection, para. 10, WTO Doc. WT/DS170/AB/R (Sept. 18, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds170\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds170_e.htm) [hereinafter *Canada Patent Term Appellate Report*].
- <sup>136</sup> See *id.* at para. 11, citing *Vienna Convention*, *supra* note 77, at Art. 28.
- <sup>137</sup> See *Canada Patent Term Appellate Report*, *supra* note 135, at para. 13.
- <sup>138</sup> See *id.*
- <sup>139</sup> See *id.* at para. 20.
- <sup>140</sup> See *id.* at para. 27.
- <sup>141</sup> See *id.* at para. 28.
- <sup>142</sup> See *Canada Patent Term Appellate Report*, *supra* note 135, at para. 22.
- <sup>143</sup> See *id.* at paras. 54-55.
- <sup>144</sup> See *id.* at para. 56.
- <sup>145</sup> See *id.* at para. 58.
- <sup>146</sup> See *id.* at para. 60.
- <sup>147</sup> See *Canada Patent Term Appellate Report*, *supra* note 135, at para. 60.
- <sup>148</sup> See *id.* at para. 69.
- <sup>149</sup> See *id.* at para. 74.
- <sup>150</sup> See *id.* at para. 90.
- <sup>151</sup> See *id.* at para. 92.
- <sup>152</sup> See *Canada Patent Term Appellate Report*, *supra* note 135, at para. 91.
- <sup>153</sup> See *id.* at para. 99.
- <sup>154</sup> See World Trade Organization, Article 21.3(c) Arbitration Report, Canada—Terms of Patent Protection, WTO Doc. WT/DS170/10 (Feb. 28, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds170\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds170_e.htm) [hereinafter *Canada Patent Term Arbitration Report*].
- <sup>155</sup> See *id.* at paras. 7-10.
- <sup>156</sup> See *id.* at paras. 20-21.
- <sup>157</sup> See *id.*
- <sup>158</sup> See *id.* at paras. 36-37.
- <sup>159</sup> See *Canada Patent Term Arbitration Report*, *supra* note 154, at para. 67.
- <sup>160</sup> Compare *Canada Patent Term Panel Report*, *supra* note 122, at para. 6.9, with *India Patents Panel Report*, *supra* note 62, at para. 7.40.
- <sup>161</sup> Compare *Canada Patent Term Appellate Report*, *supra* note 135, at paras. 54-61, with *India Patents Appellate Report*, *supra* note 91, at Sec. V.
- <sup>162</sup> See Request for Consultation by the United States, Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, WTO Doc. WT/DS171/1 (May 6, 1999), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds171\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds171_e.htm).
- <sup>163</sup> See *id.*
- <sup>164</sup> See *id.*
- <sup>165</sup> See *id.*
- <sup>166</sup> See Request for Consultation by the United States, Argentina—Certain Measures on the Protection of Patents and Test Data, WTO Doc. WT/DS196/1 (May 30, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds196\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds196_e.htm).
- <sup>167</sup> See *id.*
- <sup>168</sup> See *id.*
- <sup>169</sup> See World Trade Organization, Mutually Agreed Solution, Argentina — Certain Measures on the Protection of Patents and Test Data, WTO Doc. WT/DS196/4 (June 20, 2002), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds196\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds196_e.htm); World Trade Organization, Mutually Agreed Solution, Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, WTO Doc. WT/DS171/3 (June 20, 2002), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds196\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds196_e.htm) [hereinafter *Argentina Patents Mutually Agreed Solutions*].
- <sup>170</sup> See *id.* at paras. 4-6.
- <sup>171</sup> See *id.* at paras. 1-3, 7, 8.
- <sup>172</sup> See *id.* at para. 8.

- <sup>173</sup> See *India Patents Panel Report*, *supra* note 62, at para. 3.1(g).
- <sup>174</sup> See *id.* at 7.65.
- <sup>175</sup> See *Argentina Patents Mutually Agreed Solutions*, *supra* note 169, at para. 9 (noting that the United States reserves the right to monitor developments in Argentina and reinstate its request for a Panel if Argentina fails to abide by the Mutually Agreed Solution).
- <sup>176</sup> See Lawyers Committee for Human Rights, In the National Interest 2001: Human Rights Policies for the Bush Administration, available at [http://209.212.64.43:777/archives/arc\\_misc/ITNI/index.htm](http://209.212.64.43:777/archives/arc_misc/ITNI/index.htm) (attacking the US use of reservations, understanding and declarations in treaties as efforts to ensure that treaties “effect virtually no change” in domestic law).
- <sup>177</sup> See *id.*
- <sup>178</sup> See, e.g., *Breard v. Greene*, [523 U.S. 371](#) (1998) (refusing to stay the execution of a Paraguayan citizen in Virginia despite a ruling by the International Court of Justice).
- <sup>179</sup> See *Argentina Patents Mutually Agreed Solutions*, *supra* note 169, at para. 8.
- <sup>180</sup> See Request for Consultation by the United States, Brazil—Measures Affecting Patent Protection, WTO Doc. WT/DS199/1 (May 30, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds199\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm) [hereinafter *Request for Consultations with Brazil*].
- <sup>181</sup> See *id.*
- <sup>182</sup> See World Trade Organization, Mutually Agreed Solution, Brazil — Patent Protection, WTO Doc. WT/DS199/4 (July 19, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds199\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm) [hereinafter *Brazil Patents Mutually Agreed Solution*] (providing for the creation of a US-Brazil Consultative Mechanism to “hold prior talks on the matter”).
- <sup>183</sup> See *id.*
- <sup>184</sup> See *id.*
- <sup>185</sup> See JEFFREY L. DUNOFF, ET. AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 1049-51 (2d. Ed. 2006).
- <sup>186</sup> See *id.* at 1050-51.
- <sup>187</sup> See *id.*
- <sup>188</sup> See Lina M. Monton, *The Inconsistency Between Section 301 and TRIPS: Counterproductive with Respect to the Future of International Protection of Intellectual Property Rights*, 9 MARQ. INTELL. PROP. L. REV. 387, 419-20 (2005).
- <sup>189</sup> See *id.*
- <sup>190</sup> See *id.*
- <sup>191</sup> See *id.*
- <sup>192</sup> See *id.*
- <sup>193</sup> See World Trade Organization, Doha Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/W/2, 41 I.L.M. 755 (Nov. 14, 2001), available at <http://www.who.int/medicines/areas/policy/tripshealth.pdf>.
- <sup>194</sup> See Monton, *supra* note 188, at 420.
- <sup>195</sup> See Trade Act of 1974, PUB. L. NO. 93-618, § 301-302, 88 STAT. 1978, 2041-43 (1975).
- <sup>196</sup> See Omnibus, Trade and Competitiveness Act of 1988, 102 STAT. 1107; Monton, *supra* note 188, at 400-01.
- <sup>197</sup> See Omnibus, Trade and Competitiveness Act of 1988, 102 STAT. 1107.
- <sup>198</sup> See Movsesian, *supra* note 48, at 11-13. See also David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT’L L. 893 (1989) (discussing how states will be more likely to accept multilateral agreements if they feel that they will not be subjected to unilateral actions such as trade sanction).
- <sup>199</sup> See Monton, *supra* note 188, at 387.
- <sup>200</sup> See generally Lapter, *supra* note 11.
- <sup>201</sup> See World Trade Organization, Panel Report, US — Section 110(5) Copyright Act, WTO Doc. WT/DS160/R (June 15, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm) [hereinafter *US Copyright Panel Report*].
- <sup>202</sup> See United States Copyright Act, 17 U.S.C. § 110(5).
- <sup>203</sup> See *TRIPS Agreement*, *supra* note 2, at Art. 9.1.
- <sup>204</sup> See *Berne Convention*, *supra* note 7, Arts. 1-21.
- <sup>205</sup> See *TRIPS Agreement*, *supra* note 2, at Art. 13.
- <sup>206</sup> See *id.*
- <sup>207</sup> See *US Copyright Panel Report*, *supra* note 202, at para. 3.3.
- <sup>208</sup> See *id.*
- <sup>209</sup> See United States Copyright Act, 17 U.S.C. § 110(5)(B).
- <sup>210</sup> See *US Copyright Panel Report*, *supra* note 202, at paras. 6.114-6.134, 7.1(b).
- <sup>211</sup> See United States Copyright Act, 17 U.S.C. § 110(5)(A).
- <sup>212</sup> See *US Copyright Panel Report*, *supra* note 202, at 6.135-6.148, 7.1(a).

- <sup>213</sup> See TRIPS Agreement, *supra* note 2, at Art. 9.1.
- <sup>214</sup> See World Trade Organization, Article 23.1(c) Arbitration Report, US – Section 110(5) Copyright Act, WTO Doc. WT/DS/160/12 (Jan. 15, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm) [hereinafter *US Copyright Implementation Arbitration Report*].
- <sup>215</sup> See *id.* at para. 47.
- <sup>216</sup> See World Trade Organization, United States—Section 110(5) of US Copyright Act, Summary of Dispute To Date, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm) (last visited Dec. 3, 2007) [hereinafter *US Copyright Summary*].
- <sup>217</sup> See World Trade Organization, Recourse to Article 22.6 Arbitration Report, US – Section 110(5) Copyright Act, WTO Doc. WT/DS160/ARB25/1 (Nov. 9, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm).
- <sup>218</sup> See *id.* at para. 5.1.
- <sup>219</sup> See Lapter, *supra* note 11, at 251.
- <sup>220</sup> See *US Copyright Summary*, *supra* note 216.
- <sup>221</sup> See *id.* (describing how the EC repeatedly “expressed its concern about the US’ slow progress in implementation and requested the US to provide more information in its next status report”).
- <sup>222</sup> See Lapter, *supra* note 11, at 251 (noting that the temporary agreement between the parties required the US to pay \$3.3 million and was silent as to implementation during the three-year term of the agreement).
- <sup>223</sup> See generally Monsesian, *supra* note 48, at 2 (noting that the frequent use of the Dispute Settlement Mechanism by member states is evidence that it is a “stunning success”).
- <sup>224</sup> See generally Thelen, *supra* note 15 (discussing lack of access for developing countries); Movsesian, *supra* note 48 (discussing problems of enforcement).
- <sup>225</sup> See generally Davey, *supra* note 42 (observing that the WTO Dispute Settlement Mechanism began as a tool for developed countries, but noting the recent uptake in disputes between developing countries).
- <sup>226</sup> See, e.g., Brazil, Request for Consultations, US—US Patents Code, WTO Doc. WT/DS224/1 (Jan. 31, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds224\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds224_e.htm).
- <sup>227</sup> See World Trade Organization, Index of Disputes, TRIPS, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm) (last visited Dec. 3, 2007).
- <sup>228</sup> See Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT’L ECON. L. 459, 464 (2004) (noting that the more involvement developing countries have with the Dispute Settlement Mechanism, the more likely they will be to trust in it and use it to push pro-development policies and create stability in international trade).
- <sup>229</sup> See *id.*
- <sup>230</sup> See *id.* at 477-78.
- <sup>231</sup> See *id.*
- <sup>232</sup> See Monten, *supra* note 189, at 419-20; DUNOFF, *supra* note 186, at 1049-51.
- <sup>233</sup> See, e.g., Oxfam International, Development Campaign, <http://www.oxfam.org/en/programs/development/>; The One Campaign to Make Poverty History, <http://www.one.org/>.
- <sup>234</sup> See generally Lapter, *supra* note 11, at 252-53. See also Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT’L L. 79 (2004).
- <sup>235</sup> See *TRIPS Discontents*, *supra* note 50, at 408-09.
- <sup>236</sup> See *id.*
- <sup>237</sup> See *id.* at 387-88.
- <sup>238</sup> See *id.*
- <sup>239</sup> See Shaffer, *supra* note 229, at 466-67.
- <sup>240</sup> See *id.*
- <sup>241</sup> See *id.* See also Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT’L L. & POL. 11 (1997) (discussing “wobble room” left in the TRIPS agreement for developing countries to push for more pro-development policy).
- <sup>242</sup> See Shaffer, *supra* note 228, at 466-67 (describing pro-development clauses in TRIPS Article 7, 8, 27.2). See also *TRIPS Discontents*, *supra* note 50 (citing Reichman, *The TRIPS Agreement Comes of Age: Conflict of Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441 (2000) (discussing of the pro-development clauses in TRIPS)).
- <sup>243</sup> See *TRIPS Discontents*, *supra* note 50 (citing Reichman’s discussion of the pro-development clause in TRIPS Article 31).
- <sup>244</sup> See Shaffer, *supra* note 228, at 482.
- <sup>245</sup> See *id.*
- <sup>246</sup> See *id.*