

# North & South - the WTO TRIPS Agreement: Intellectual Property Disputes and Conflict of Visions

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*I am very thankful to the valuable comments and suggestions from many friends and colleagues during the process of completing this paper; however, all shortcomings and errors remain mine.*

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## **Abstract:**

This article discusses the relationship, history, and the recent development of the linkage between intellectual property rights (IPR) and international trade. More specifically, the study explores the background of the trade-related aspects of intellectual property rights, their rise to the centre stage, their inclusion in international trade negotiations – initially under the GATT system to their final expression in the agreement on Trade-Related Aspects of Intellectual Property Rights – under the current World Trade Organization (WTO) regime. The study also reviews the various positions of the parties to the international trade negotiations, and it also outlines what the writer sees as a “conflict of vision, philosophy, and culture”. This issue is primarily evident, among other things, in the area of patent protection for pharmaceutical products and its devastating consequences for developing countries, especially, when it comes to addressing the crisis of the HIV/AIDS epidemic. The Paper argues, *inter alia*, that the WTO Agreement on Trade-Related Aspects of Intellectual Property, commonly known as the TRIPS Agreement, was a compromise in which the developing countries got the short-end of the stick.



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## **i. Introduction**

The topic of intellectual property rights (IPR) is indeed very intriguing, as it deals primarily with the area of law that protects the expression of human achievements.<sup>1</sup> Even more interesting, however, is its history and the recent development of the linkage between IPR and international trade. This article explores the background of the trade-related aspects of intellectual property rights, their rise to the centre stage, their inclusion in international trade negotiations – initially under the GATT system<sup>2</sup> to their final expression in the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>3</sup> – under the current WTO regime. This article reviews the various positions and outlines what the writer sees as a “conflict of vision, philosophy, and culture”; the article argues, *inter alia*, that the WTO-TRIPS Agreement was a compromise in which the developing countries got the short-end of the stick.

## **ii. Intellectual Property and Trade: A Background**

The background and history concerning the inclusion of IPR-related issues in the arena of international trade remain controversial.<sup>4</sup> While the history of intellectual property itself stretches back to fifteenth century Venice, for the first 350 years it was almost entirely a national issue.<sup>5</sup> However, as part of the nascent multilateralism of the nineteenth century, diplomacy between the major trading nations established two intellectual property agreements, which broadened the governance of IPR beyond national borders in the last quarter of that century. In the last twenty years of the nineteenth century, two sets of conferences focused on the international co-ordination of protection for IPR, reflecting a broadly internationalist position. May<sup>6</sup> observed that the outcome of these developments in the area of IPR protection had resulted in the Paris Convention of 1883 (covering patents), followed by the Berne Convention for the Protection of Literary and Artistic Works (1886), and then completed in Madrid in 1891. By 1893, the common issues across the conventions had led to the establishment of a combined secretariat, functioning under various names until the establishment of World Intellectual Property Organization (WIPO) at the end of the 1960s. An agency of the United Nations since 1974, WIPO also administers other international treaties covering intellectual property, including trademarks, geographic indicators and industrial designs.<sup>7</sup>



Notwithstanding these historical developments, IPR issues did not emerge to the forefront of trade matters until later. Professor Oddi noted that, although it always had relevance to international trade, intellectual property was now seen as transcending the territorial jurisdictions of countries as a necessary aspect of trade relations among countries.<sup>8</sup>

#### **a. Various Positions, Conflicting Visions:**

Publicists indicate that the issue of IPR and trade is rooted in the debate along the so-called North-South divide.<sup>9</sup> One commentator observed that since 1917, just before the end of first World War, international trade has remarkably increased, technology has become more and more sophisticated, and world technology competition has become more keen; the production of counterfeit goods and resulting international disputes have greatly increased due to the fact that intellectual property has not been properly protected.<sup>10</sup> Indeed, the inclusion of IPR protection as part of international trade negotiation has not proven to be an easy task. However, it was the strategy of the American business interest groups that influenced the official US policy, and pushed to include the IPR protection issue and eventually link it to trade negotiations. The following statement by a US Congressman clearly illustrates this point,

“[I]ntellectual property protection for goods and services has become increasingly important to the United States business in recent years. In the post-war era, the relative percentage of the United States export with a high intellectual property content (for example chemicals, books, movies, records, electrical equipment, and computers) has more than doubled to more than twenty-five percent of all United States exports. Royalties received by United States industries from the licensing of intellectual property exceeds \$8 billion per year, which is more than six times the amount paid to foreign firms. Equally significant are the losses that occur when such goods and services are pirated. According to some estimates, the value of lost sales due to unauthorized copying of United States products throughout the world exceeds \$40 billion per year. The increasing importance attached to trade-oriented intellectual property, the growing level of piracy facilitated by emerging technologies, and the expanding research and development costs has motivated businesses to seek governmental intervention to protect their intellectual property rights.”<sup>11</sup>

The United States was actively pushing for stronger IPR protection in national laws based on the US legislation model. During the Tokyo Round of international trade negotiations, there was an attempt by the US to draft anti-counterfeit code; however, its attempt failed to achieve the required consensus. By the end of the Tokyo Round, there was a widespread sense of frustration, both in the North and in the South with respect to the multilateral trade system. The reasons behind the frustration were different: the North felt that GATT was not covering many areas that were becoming more and more



important in international trade, such as trade-related aspects of intellectual property, investment measures, and trade in high-tech products. Another reason for dissatisfaction in the North was the perception that both developing countries and the least developed countries (LDCs) act as “*free riders*” with regard to IPR R&D costs.<sup>12</sup>

In the South, however, there was also much discontent voiced by the developing countries due to various reasons, such as their recognition that the so-called special and differential treatment for LDCs was a failure. The Generalized System of Preference (GSP), as a regime, did not deliver what LDCs were looking for. The Special and Differential treatment was used as a bargaining chip, by the developed and industrialised countries of the North, for the major negotiation issues such as in agricultural trade, textile, and clothing. Of course, these trade issues are of major importance to LDCs and were also not adequately covered by the GATT system.<sup>13</sup>

Historical notes<sup>14</sup> indicate that during the 1960s, India had experienced some of the highest prices for pharmaceuticals in the world. Its response was to design its patent law to help to bring about lower drug prices. Under Indian law, patents were granted for processes relating to the production of pharmaceuticals, but not for chemical compounds themselves. The reformation of the Paris Convention<sup>15</sup> was a rather difficult task, as the group of the developing countries, such as India and Brazil, pushed for provisions that would give developing countries more access to technology that was not available to them due to patent protection. For India, this was a rational social policy for the educational and health care needs of its citizens. For the US, it was a case of “free-riding”. Clearly, it was a classic dispute that demonstrated a conflict of vision and philosophy.<sup>16</sup> The US, due to its position in regards to stronger IPR protection, found itself more and more isolated and unable to press on with its agenda at meetings relating to the Paris Convention.<sup>17</sup> Surely, the US learned, during the process of reforming the Paris Convention, that it was difficult to push for a better international enforcement of IPR laws due to the conflicting positions of the parties to the negotiations.<sup>18</sup> Commenting on this situation, Drahos and Smith observed,

“[N]ot everybody in the U.S.A. was happy with this *laissez faire* attitude towards the enforcement of intellectual property rights. For the U.S. film and pharmaceutical industries in particular, intellectual property (copyright for the former, patents for the latter) represented the backbone of their industries. For pharmaceutical companies like Pfizer, intellectual property was an investment issue. They wanted to be able to locate production anywhere in the world safe in the knowledge that their intellectual property would be protected. Within the lobbying networks that had been organized by these global business entities, an idea began to be



bounced around between a small group of consultants, lobbyists and lawyers who traveled these networks - that of linking intellectual property to trade. There were two obvious advantages of such a move. First, if a set of intellectual property standards could be made part of a multilateral trade agreement it would give those standards a more or less global coverage. Second, use could be made of the enforcement mechanisms that states had developed for settling trade disputes.”<sup>19</sup>

Throughout the 1980s, the US was actively redesigning its trade laws to give it a series of bilateral enforcement measures against countries it considered to have inadequate levels of intellectual property protection, and those which were less than enthusiastic on the issue of enforcement of IPR. Unilateral trade sanctions were the weapon of choice for the US government against countries that were deemed not to enforce IPR protection laws.<sup>20</sup> The US contended that the Paris Convention was not appropriate or competent as a treaty to protect IPR due to, *inter alia*, its weak enforcement mechanism. Moreover, the US government had voiced a similar reservation at the time concerning the GATT IPR enforcement regime.<sup>21</sup> However, these reservations did not stop it from pushing as hard as it could in order to reach an international agreement on trade-related aspects on intellectual property rights using the GATT as the main forum. Officials from the US Government asserted that,

“[G]enuinely disenchanted with the existing multilateral intellectual property fora (the World Intellectual Property Organization (WIPO) and UNESCO), and the absence of enforceable minimum standards within existing multilateral intellectual property treaties, The United States private sector considered using GATT as a vehicle for improving the level of international multilateral standards. Members of the United States business community whose products rely on intellectual property protection – and their Congressional allies – urged the United States Government to attempt to include intellectual property protection in the then-forthcoming round of GATT talks.”<sup>22</sup>

The efforts to negotiate the inclusion of IPR protection in the GATT continued during the Geneva Ministerial meeting in 1982; however, the US proposal failed again due to the opposition not just from LDCs, but also from some of the developed countries, such as France. One could say it was a matter of bad timing on the part of the US, since it was trying to negotiate a new international trade regime amidst a worldwide economic crisis. Nevertheless, there was a milestone in the Declaration of 1982, as for the first time there was an explicit recommendation to examine the question of IPR with regard to counterfeit goods.<sup>23</sup>

Indeed, the outcome of the trade negotiation of the Punta del Este Ministerial meeting of 1986, was very decisive on the issue of implementing a worldwide IPR protection regime. This meeting, which



marked the start of the Uruguay Round, was arguably of crucial importance; for the first time, TRIPS become one of the formal groups for negotiations in this Round, as it was stated on the Punta del Este Declaration.<sup>24</sup> Although this outcome had the support of Europe, Canada and Japan, it was argued that it was basically a US initiative, and more precisely, the proposal of the US business community.<sup>25</sup>

Although the successful inclusion of the IPR in trade negotiations under the GATT regime was considered a milestone and a success for the US initiative, some commentators argued that this was not the case, asserting that IPR have always enjoyed protection under the GATT.<sup>26</sup> The original GATT,<sup>27</sup> however, included provisions that broadly touched on the issue of IPR protection, such as article IX,<sup>28</sup> article XX(d),<sup>29</sup> and article XXIII:1(a), respectively. Article IX discusses marks of origin; article XX(d) includes general provisions with regard to IPR protection; and article XXIII:1(a)<sup>30</sup> provides for general duties of the contracting parties to ensure that any benefits that are accruing under the agreement would not be nullified, impaired or impeded due to the failure of the contracting party to carry its duty.

#### **b. Review of the Debate on the Inclusion of IPR under the GATT Regime:**

Clearly, as discussed above, the history of the rise of IPR to the centre stage of trade negotiations seems to reflect the on-going dispute between the US and the rest of the developed countries on the one hand, and the developing countries and the LDCs on the other hand. The two camps were entrenched in their positions, with the US having the better leverage due to its use of the unilateral trade sanctions against the perceived violators of IPR protection and enforcement.<sup>31</sup>

The main arguments of the US position with regard to the inclusion of the IPR under the GATT regime were based on natural justice, prevention of piracy, and cost recovery of research and development (R&D).<sup>32</sup> Certainly, the US argument on the justification of IPR as a trade-related issue, and hence the call for the harmonisation of national legislation, based on the natural justice principle, has generated more discussion than the other arguments. The natural (right) justice theory,<sup>33</sup> for example in the context of copyright, indicates that the author is the creator or maker of the work, which is the expression of his personality. He should be able to decide whether and how his work is to be published and to prevent any injury or mutilation of his intellectual offspring. The author, like other workers, is entitled to the fruits of his efforts. The royalties he is paid are the wages for his intellectual work. And, as such, the holder of such a right has an absolute “property” right to the exclusion of others. Needless to say, this theory, within the context of IPR, has its critics. The theory



has been labelled, *inter alia*, to mean the implementation of a “polite form of economic imperialism”.<sup>34</sup> Professor Oddi argued that by using the concept of natural property rights,<sup>35</sup> all countries must thus recognize the natural rights entitlement of the inventor. Thus, copying an invention is considered “immoral” by the community of nations and the rights of the inventor must be protected by positive law. However, he also observed that,

“[A]s a school of jurisprudential thought, natural law surely is not at the forefront of the last throes of the twentieth century. Yet, in the sometimes scholastic world of intellectual property, and of patents in particular, as subsumed into the often dog-eat-dog world of international trade, natural rights, presumably derived from natural law, has become the pre-eminent theory (even in somewhat corrupted and disguised form).

[... ]

[A]s put by Professor Cohen, the natural law tradition is not one that has generated much enthusiasm in the contemporary world outside of the Roman Catholic Circles... to defend the doctrine of natural right today, requires either insensitivity to the world’s process or else considerable courage in the face of it. Whether all doctrines of natural rights of (humanity) died with the French Revolution or were killed by historical learning of the 19<sup>th</sup> century, everyone enjoys the consciousness of being enlightened knows that they are, and by rights ought to be dead. The attempt to defend a doctrine of natural right before historians and political scientists would be treated very much like an attempt to defend the belief in witchcraft.”<sup>36</sup>

However, the most interesting thought that I came across thus far, on the natural right and piracy<sup>37</sup> arguments put forth by the US, was the remark by Professor Braga. While commenting on the politics of the issues, he stated that,

“[T]here are many reasons for conflict at the political level, and I would suggest there are even philosophical differences. There is a marvelous article by Michael Novak talking about natural rights, the fact that intellectual property rights could be considered as fundamental rights to physical property. This is the kind of analysis that is usually presented. The United States tries to put itself on high moral ground in presenting this idea, and I think it is a very interesting concept. But to present this as an argument in the ‘Third World’ is bound to generate a lot of scepticism. For example, if you look at industrialized countries’ intellectual property systems, you will see that many of these countries’ systems evolved according to economic expediency. Thus, levels of protection and coverage evolved through the years according to specific national interests.

I would even suggest instead of using the world piracy, maybe nowadays we could use the word ‘*corsairs*’ because most pirates in the ‘Third World’ countries have all the legal mandates and abide by local laws to do what they do. I would also suggest that from a cultural stand point of view, it is important to remember that Sir Frances Drake is a hero from



an Anglo-Saxon perspective, but he is a thief from a Spanish perspective. Let's try to get away from these issues and instead, try to apply some kind of utilitarian approach to see if we can progress in the debate. Society rights are here to stay as a major issue in the debate, mainly because of the technological rivalry, but also because... new technologies dramatically increase the economic significance of 'piracy'"<sup>38</sup> [emphasis is mine]

Regardless of these aforementioned philosophical differences in the debate, the US and the rest of the developed countries have managed successfully to include trade-related aspects of intellectual property as part of the negotiation's agenda. Negotiating TRIPS, however, during the Uruguay Round has proven to be a difficult task. Many developing countries, in emphasising the public policy aspects of the issue, have highlighted their concerns about the likely rise in prices of drugs and other essentials in their countries, if they had to change their patents, laws and provisions in these areas. The group of the developed countries, led by the US, questioned this position. The US also argued for actions against piracy in the Uruguay Round, claiming that its enterprises were losing an annual 40-50 billion dollars in lost export earnings due to lack of adequate intellectual property protection in other countries.<sup>39</sup>

On the other hand, various delegations from the developing countries reportedly raised valid concerns and objections during the negotiations; these objections concerned the substantive issues of IPR protection being dealt with in GATT. These concerns are summarised as follows:

First, the trade negotiation's mandate was limited to "clarifying" the GATT provisions – keeping in mind both the promotion of intellectual property protection and the need to ensure that intellectual property protection did not become a barrier to legitimate trade – and to formulating new provisions "as appropriate".<sup>40</sup>

Second, the jurisdiction of international organisations having competence in the area, such as the World Intellectual Property Organization, had to be fully respected, as stipulated in the mandate.<sup>41</sup>

Third, standards and norms and their enforcement are matters to be prescribed in national laws and within the sovereign jurisdiction of states.<sup>42</sup>

Fourth, there are many aspects of public policy which have some trade effects, but this could not be used as a ground to bring all such policies under GATT scrutiny or jurisdiction.<sup>43</sup>



Fifth, the subject is a very complex one, and its various aspects are being negotiated in several international organisations: the WIPO, UNCTAD, and the FAO.<sup>44</sup>

The negotiations continued until the Marrakesh meeting in 1994, where TRIPS finally arrived, after a difficult birth,<sup>45</sup> to become part of the new World Trade Organization (WTO)-GATT regime.

### **iii. Post-Uruguay Round: the WTO-TRIPS Agreement**

The WTO-[TRIPS Agreement](#), which came into effect in January 1995, has been described as an attempt to narrow the gaps in the way these rights are protected around the world.<sup>46</sup> Professor Reichman described the TRIPS Agreement as the most ambitious international intellectual property convention ever attempted, based on the wide scope of the IPR subject matters being covered under its articles.<sup>47</sup> In the following paragraphs, I will outline some of the main principles of the agreement.

#### **a. TRIPS – Main Principles:**

The first part of the TRIPS Agreement encompasses, among other things, three main principles. The first principle is establishment of minimum standards for the protection and enforcement of intellectual property rights for all members.<sup>48</sup> These standards cover copyright and related rights, patents, trade marks, geographical indications, industrial designs, trade secrets, and integrated circuits.<sup>49</sup> Clearly, the principle establishes minimum standards; however, it doesn't prevent members from creating higher standards under their own national legislation, provided that such protection does not contravene the provisions of the Agreement.<sup>50</sup>

The second principle is the national treatment,<sup>51</sup> modelled after the GATT,<sup>52</sup> establishing a duty of each country to protect nationals of other parties by granting them the rights provided by the Agreement.<sup>53</sup> The third principle concerns the most favoured nation (MFN) doctrine<sup>54</sup> whereby members are required to confer on nationals of other parties' intellectual property protection no less favourable than is provided to their own nationals. The MFN principle provides that any advantage, favour, privilege, or immunity granted by a member to the nationals of any other country, shall be accorded immediately and unconditionally to the nationals of all other members.



Article IV also exempts from the MFN obligation, any advantage, favour, privilege, or immunity accorded by a member that was derived from international agreements on judicial assistance or law enforcement,<sup>55</sup> granted in accordance with the provisions of the Berne Convention.<sup>56</sup> It also protects the rights of performers, producers of phonograms and broadcasting organizations not provided under the Agreement;<sup>57</sup> as well as those rights deriving from international agreements related to the protection of intellectual property, which were entered into prior to the existence of the WTO Agreement.<sup>58</sup> However, in order for the latter exemptions to be valid, members are required to notify the Council for TRIPS,<sup>59</sup> and further, the exemption should not constitute an arbitrary or unjustifiable discrimination against nationals of other members.<sup>60</sup>

The TRIPS Agreement requires members, *inter alia*, to comply with the substantive provisions of such international intellectual property-related conventions as the Berne Convention,<sup>61</sup> the Paris Convention,<sup>62</sup> the Treaty on Intellectual Property in Respect of Integrated Circuits,<sup>63</sup> and the Rome Convention.<sup>64</sup>

#### **b. Dispute Settlement Under the TRIPS Agreement:**

Another equally important principle in the TRIPS Agreement is “Transparency”; as included in article 63 under the dispute prevention section of the Agreement, WTO members are required to maintain transparency in all issues related to the administration of justice in regard to IPR protection.<sup>65</sup>

Similarly, article 64 of the Agreement outlines the dispute settlement requirements; it clearly indicates that the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding (DSU),<sup>66</sup> shall apply to consultations and the settlement of disputes under TRIPS. However, article 64(2) also stipulates that subparagraphs 1(b), and 1(c) of Article XXIII of GATT, shall not apply to the settlement of upcoming disputes under TRIPS for a period of five years from the date of entry into force of the WTO Agreement. These aforementioned subparagraphs outline, respectively, the rules for non-violation and impairment claims under the GATT.<sup>67</sup> However, this exemption period may be extended by consensus decision of the Ministerial Conference.<sup>68</sup>

#### **c. TRIPS: Selected Cases and General Issues:**

Statistical analysis of the WTO dispute settlement cases between the years 1995-2002, reveals that there were 24 disputes involving the TRIPS Agreement.<sup>69</sup> The most notable among these disputes,



however, are two important cases: the *India – Mailbox* case,<sup>70</sup> and the *Indonesia – Autos* case,<sup>71</sup> as they highlight the tension that I alluded to earlier during the TRIPS negotiations.

The *India – Mailbox* case involves a complaint by the US against India, a developing country, for its failure to implement the so-called “mailbox” provision under the TRIPS Agreement. The mailbox provision in article 70(8), while somewhat convoluted, boils down to the fact that those countries – which prohibited patents on pharmaceuticals or agricultural chemicals in 1995, when the WTO Agreement was signed – have to change their laws (by 2000 for developing countries and by 2005 for least developed countries). Nevertheless, as of 1995, these countries were obliged to open a "mailbox" to allow patents to be filed, but not granted, in their countries and give the patent applicant exclusive marketing rights. Once the national law was amended to provide patent protection under the TRIPS calendar, the backlog of applications for pharmaceutical and chemical product patents should be processed and approved for the normal 20 years minus the time elapsed since the "mailbox" filing. Under this process, the exclusive marketing rights provide almost the same commercial protection as if developing and least-developed countries' patent laws had been strengthened already in 1995.<sup>72</sup> India was trying to meet this obligation through administrative measures in a form of Presidential Decrees; it was challenged by the US and the EC for this practice.

The WTO Panel ruled against India; however, on appeal, the Appellate Body (AB) of the WTO upheld the Panel’s decision in part, and reversed it in another part. The AB found that as the Agreement takes into account, *inter alia*, "the need to promote effective and adequate protection of intellectual property rights"; the Panel was correct in finding that the concerned member was obliged to provide the "means" under article 70(8)(a); it must allow for "the entitlement to file mailbox applications and the allocation of filing and priority dates to them". The AB also observed that the Panel was correct in finding that the "means" established under article 70(8)(a) must also provide "a sound legal basis to preserve novelty and priority as of those dates", as required by the necessary operation of paragraphs (b) and (c) of article 70(8).<sup>73</sup>

The AB also did not agree with the Panel that article 70(8)(a) requires a member to establish a means "[a]s to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated because, at the filing or priority date, the matter for which protection was sought was unpatentable in the country in question". It concluded that India is *entitled*, by the "transitional arrangements" in paragraphs 1, 2 and 4 of article 65, to delay application of



article 27 for patents for pharmaceutical and agricultural chemical products until 1 January 2005. However, it noted that India is obliged, by article 70(8)(a), to provide a legal mechanism for the filing of mailbox 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. The AB also clearly indicated that India is "free to determine the appropriate method of implementing its obligations under the TRIPS Agreement within the context of its own legal system."<sup>74</sup> Nevertheless, the AB agreed with the Panel that India's "administrative instructions practice" creates a certain degree of legal insecurity in that it requires Indian officials to ignore certain mandatory provisions of the Patents Act; it concluded that India's "administrative instructions" for receiving mailbox applications are inconsistent with article 70(8)(a) of the TRIPS Agreement, as the system did not provide a sound legal basis to preserve novelty of inventions and priority of applications as of the relevant filing and priority dates.<sup>75</sup> As well, the AB upheld the Panel's finding with regard to India's violation of article 70(9) because it did not have a mechanism in place to provide for the grant of exclusive marketing rights effective as from the date of entry into force of the WTO Agreement.<sup>76</sup>

Notwithstanding the aforementioned findings, the AB also reversed the Panel's decision with regard to the subsidiary US argument under article 63 – the principle of transparency – and agreed with India's argument on appeal that the Panel had indeed exceeded its authority in finding against India in this regard in violation of articles 3, 7, and 11 of the DSU. The AB concluded that a Panel may make findings only on issues that have been submitted to it by the parties to the dispute; it stated, *inter alia*, that,

“[W]e note also the Panel's statement that it "ruled, at the outset of the first substantive meeting held on 15 April 1997, that all legal claims would be considered if they were made prior to the end of that meeting; and this ruling was accepted by both parties". We do not find this statement at all persuasive in advancing the argument made by the United States on this issue. Nor do we find this statement consistent with the letter and the spirit of the DSU. Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU... Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have. In this case, Article 63 was not within the Panel's jurisdiction, as defined by its terms of reference. Therefore, the Panel had no authority to consider the alternative claim by the United States under Article 63. For these reasons, we find that the Panel erred in its findings and conclusions relating to the alternative claim by the United States under Article 63 of the *TRIPS Agreement*.”<sup>77</sup>



Professor Abbott<sup>78</sup> claimed that “there was little basis for defense by India in light of the actions pursued by its government”. However, it is my observation that the AB, in agreeing with the Panel in its determination regarding India’s national legal infrastructure and the use of the “administrative measures”, seemed reluctant to pay deference to India’s claim; these Presidential Decrees, although considered legally “administrative” in nature, are indeed an inherent part of its legal system – they reflect India’s jurisprudential culture. In my view, by not giving these “administrative measures” any weight, and finding that, “[t]he system did not provide a sound legal basis to preserve novelty of inventions and priority of applications as of the relevant filing and priority date...”,<sup>79</sup> etc., both the Panel and the AB have demonstrated a certain bias favouring Western-based legal mechanisms and jurisprudential culture. Although the AB noted that India is “free to determine the appropriate method of implementing its obligations under the TRIPS Agreement within the context of its own legal system”,<sup>80</sup> its ruling on this issue has clearly illustrated what Hamilton observed as the TRIPS Agreement’s attempt to remake international copyright law in the image of Western-style copyright law, without taking into account the legal, cultural and philosophical differences.<sup>81</sup>

The second interesting case in relation to the TRIPS Agreement was the *Indonesia-Autos* case.<sup>82</sup> This case involved a complaint that was brought by the US, the EC, and Japan against Indonesia based on various alleged violations of the WTO Covered Agreements, including articles XXII:1 and XXIII of the GATT; article 8 of the TRIMs Agreement,<sup>83</sup> articles 7(4) and 30 of the SCM Agreement,<sup>84</sup> and articles 3, 20, and 65(5) of the TRIPS Agreement, regarding certain measures affecting trade and investment in the motor vehicle sector in Indonesia. It was noted elsewhere that the US was the only country among the complainants to bring the issue of TRIPS into this dispute,<sup>85</sup> as it would appear that the TRIPS argument was considered peripheral to the case as a whole.

On the issue of the alleged TRIPS violations, the Panel ruled against the US. One of the concerns brought forward was the principle of national treatment (article 3) in relation to the issue of acquisition of trademarks (article 20). It was alleged that Indonesia was discriminating against non-nationals because any trademark that could apply to its “national motor vehicle programme” must be acquired by an Indonesian company – be that a joint-venture or a wholly-owned Indonesian company. In its analysis of the issues, the Panel concluded that while this may give rise to questions regarding the scope for the use of trademarks owned by United States' companies on cars under Indonesia’s “National Car Programme”, it did not pose a problem regarding the acquisition of trademark rights.



The fact that only certain signs can be used as trademarks for meeting the relevant qualifications under the “National Car Programme”, does not mean that trademark rights, as stipulated in Indonesian trademark law, cannot be acquired for these other signs in a non-discriminatory manner. As a result, the Panel found that the US had not demonstrated that Indonesia was in breach of its obligations under article 3 of the TRIPS Agreement in respect to the acquisition of trademark rights.<sup>86</sup>

Likewise, in the second US argument, it was alleged that non-Indonesian car companies were put at a competitive disadvantage because the cars produced under the “National Car Programme” – bearing the Indonesian trademark – benefited from tariff subsidies and other advantages flowing from that programme. The Panel found that the points were not relevant to the maintenance of trademarks, as the US did not explain to its satisfaction how the ineligibility for benefits accruing under Indonesia’s “National Car Programme” could constitute "requirements" imposed on foreign trademark holders, in the sense of article 20 of the TRIPS Agreement. The Panel concluded its analysis by stating that the US was not able to demonstrate that Indonesia was in breach of its obligations under article 3 of the TRIPS Agreement in respect of the use of trademarks specifically addressed in article 20.<sup>87</sup>

Similarly, the Panel found that the arguments put forward by the US in support of its claim with regard to article 65(5) were not sufficient. The so-called "non-backsliding" clause<sup>88</sup> in article 65(5) forbids countries from using the transition period to reduce the level of intellectual protection afforded by their laws. The Panel concluded that the US had not demonstrated that measures had been taken to reduce the degree of consistency with the provisions of article 20 and therefore would be in violation of Indonesia's obligations of the non-backsliding article of the TRIPS Agreement.<sup>89</sup>

Two interesting notes, I think, worth mentioning in relation to this case are: the US objection to Indonesia’s use of private lawyers as part of its defence team; and an issue regarding the confidentiality of the proceedings. As for the first issue, the two main parties to the dispute – Indonesia and the US – used what I observed to be strong language in their briefs to the Panel; this highlighted the tension that was concealed underneath the serene, and usually polite, diplomatic façade. Indonesia was livid, and rightly so, for what it considered to be the somewhat condescending attitude demonstrated by the US during its objection on this point. Indonesia, in its response, described the way that the US objected to its use of private lawyers based on, *inter alia*, “possible potential financial difficulties”, as insensitive and as an insulting attack on its sovereignty, especially as a developing country.<sup>90</sup> The Panel agreed with Indonesia’s arguments, guided by the previous



Appeal Body's ruling on the *Bananas* case<sup>91</sup> – when a similar objection was raised by the US against St. Lucia – and concluded that indeed, Indonesia, and any other dispute party to that effect, had the right to appoint whomever they wanted to represent them on the WTO dispute settlement process.

The second interesting issue in this case was the stern warning from the Panel for the “leaks” of a confidential document – the Panel's interim draft report – by the US and Japan, before it was released. The Panel expressed the view that it was seriously concerned about the leak of the confidential document, and found that the actions of the US and Japan had not respected their obligation of confidence. According to the Panel, their actions displayed a lack of respect – a specific requirement imposed by the Panel – and concluded that these actions would affect the rights of the parties and the integrity of the dispute settlement process.<sup>92</sup>

It is my observation that the tension demonstrated in these two aforementioned cases cannot be taken in isolation from the history of the TRIPS negotiations and the opposing views of the developed and the developing countries on the IPR protection issues.

#### **d. A General Review of the Commentaries on the TRIPS Agreement:**

The TRIPS Agreement, after it came into existence, has evoked many reactions ranging from content<sup>93</sup> and resolve<sup>94</sup> for some observers, to an outright scepticism and hostility for others. The TRIPS Agreement has been called ambitious,<sup>95</sup> as well as, imperialistic, overprotective and outdated.<sup>96</sup> The Agreement, which came into existence as a result of compromise between the two main factions in the Uruguay Round of trade negotiations – the developed and developing countries – could hardly satisfy the two groups and the observers.<sup>97</sup>

Nijar<sup>98</sup> argues that the TRIPS Agreement, under the WTO system, is part of an assault to the value system of the developing countries and thus, against their interests and public policy concerns. This is especially true when it comes to, *inter alia*, health-related issues and traditional knowledge. Indeed, what is particularly alarming is the issue of accessibility to drugs needed to fight diseases like malaria and the HIV/AIDS epidemic, most notably, in Africa.

The unfolding tragedy of the devastating impact of HIV/AIDS on developing and LDCs is exceptionally scandalous – especially as international drug companies are realising record-setting profits. Endeshaw observed,



“[T]he recent controversy surrounding the huge profits registered by the British giant pharmaceutical company, Glaxo SmithKline, and its attempts to stop the importation and local production of cheap generic drugs by many African countries in response to the AIDS/HIV pandemic has resuscitated issues of intellectual property (IP) long considered resolved. A general impression has emerged that the AIDS/HIV pandemic in Africa has reached such a level that entire nations may perish while the cure, though available, is locked away through systematic patenting or become unaffordable as a result of the pricing strategies of the major pharmaceutical companies.

[...]

[T]he apparent reluctance on the part of these companies to allow the production of generic drugs cheaply and to make them affordable to sufferers and the local communities in Africa and elsewhere has attracted lots of commentary and generated heated exchanges. An editorial in *The Guardian* (London) observed: ‘The dreadful dimensions of this plague brutally expose the growing inequality of health provision across the globe. Aids is a death sentence in Africa, whilst in Britain a cocktail of drugs can manage the disease...Right at the heart of it lies the issue of how access to essential medicines is now regulated and patented under the trade related intellectual property agreement (TRIPS) enforced by the World Trade Organisation.’<sup>99</sup>

The apparent reluctance of multinational pharmaceutical companies<sup>100</sup> to make available, or allow for the production of cheap drugs, based on IPR protection has resulted in many commentators calling for a renewed negotiation and review of the TRIPS Agreement.<sup>101</sup> Next, I will discuss some of these suggestions. It was also recommended that developing countries could withdraw their commitments under the Agreement or use it as a retaliatory weapon against developed countries.<sup>102</sup> However, it is my view that this would be difficult to achieve in reality due to the balance of power in the global environment today.

More practical suggestions, at least in the short-term, were the ones, for example, provided by Scherer,<sup>103</sup> and Professor Oddi.<sup>104</sup> Scherer advocates the encouragement of the use of donations by the pharmaceutical companies to the developing countries and the LDCs, in exchange for tax breaks; and the utilisation of compulsory licensing by developing countries in order to make crucial IPR protected products available to their poor citizens. However, tax breaks would require a very strong political will and the politicians’ ability to resist the IPR lobbyists’ big, fat wallets. Professor Oddi, however, provided very valuable ideas to developing countries in the area of patent protection using the current TRIPS provisions. These suggestions included, *inter alia*, the use of a fee system in order to subsidise local education; insistence on complete and full disclosure on patent applications, using the “Japanese



model” of patent protection, as well as quick publication of patent applications; establishment of an opposition procedure for pre- and post-granting of patent applications; establishing a narrow scope of protection; establishing a procedure for dealing with “blocking patents”, thus when otherwise a basic patent blocks an improvement patent, some form of compulsory licensing system should be in place; and finally, the adoption of worldwide “exhaustion” doctrine building on the EC model, as it requires any patent product sold by or with the authorisation of the patent owner to be imported into the country without regard to whether it was protected in that country.<sup>105</sup> A very intriguing suggestion, however, was provided by one commentator, as he encouraged the US trade negotiators to look at the IPR protection issues using an international, cooperative perspective in order to resolve the issues, instead of the one-sided and often confrontational approaches they have taken in the past. Employing the game of basketball as an analogical stand-point, after the US team failed to qualify for the World Cup in the mid 1990s,<sup>106</sup> the commentator observed that the US trade negotiating team lacked both understanding of the “international” rules of the game, as well as, refined team-playing skills.<sup>107</sup>

#### **iv. Recent Developments and Final Remarks**

The Doha Declaration of the Ministerial Conference in 2001 was indeed a milestone with regards to the, often tumultuous, North-South debate on issues associated with the TRIPS Agreement.<sup>108</sup> In addition to the declaration on TRIPS, found in the main document, the Ministerial Conference issued a separate Declaration on TRIPS and Public Health,<sup>109</sup> which came as a result of successful lobbying and negotiation by the developing countries. An observer asserted that,

“[T]he adoption of by Ministers on 14 November 2001, in Doha, of the Ministerial Declaration on the TRIPS Agreement and Public Health marked a turning point in political and legal relations at the WTO. Developing country members sent a clear signal that they would take steps to protect and advance their essential interests. These members demonstrated that by establishing a coalition, and maintaining it throughout a negotiation process, they could prevent themselves from being outmanoeuvred by the EU-US block.”<sup>110</sup>

Clearly, the developing countries, for the first time, were able to obtain a concession on a trade-related legal document that provides a direct link between IPR protection and public health issues. The view is that international IPR protection should not impede developing countries’ ability to provide the necessary, and much needed, pharmaceutical products to its citizens. In the Declaration



on TRIPS and Public Health, the delegates clearly recognized “the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.”<sup>111</sup> They recognised that although intellectual property protection is important for the development of new medicines, they also acknowledged the concerns about its effects on prices.<sup>112</sup> While the Ministers stressed the need for the TRIPS Agreement to be part of the wider national and international action to address the aforementioned health problems, they also confirmed and agreed that the TRIPS Agreement “does not and should not prevent” developing countries, or any country to that effect, from taking measures to protect public health; the TRIPS Agreement “should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.”<sup>113</sup> A very important development at the Doha Conference was the concession for LDCs, as they were exempted from implementing or enforcing pharmaceutical patent protection until 2016.<sup>114</sup> This concession gives these countries a most needed relief, as it allows them to use generic drugs, without being under the threat of being sanctioned or retaliated against by the developed countries.

Although the Declaration on TRIPS and Public Health was considered a victory for developing countries and LDCs in the North-South debate on the issue of IPR protection, the TRIPS Agreement still has many issues that need to be addressed. Reforming the TRIPS Agreement, for sure, is going to be an on-going process. Otten observed that there are still some concerns with the legal technicalities of the Agreement; these concerns focused on issues such as, the *ex ante* effect of drafting national legislation; common interpretation; and identification of deficiencies, based on the fact that the legislation will be reviewed later by the WTO.<sup>115</sup> Other concerns are based on the so-called “built-in” agenda of the TRIPS Agreement, such as procedures related to the protection of geographical indications; non-violation complaints; biotechnology inventions; and the review of the Agreement as a whole, as a mandate for TRIPS Council, based on article 71(1).<sup>116</sup>

Indeed, the failure of the Cancun Ministerial Conference, held in Mexico in September 2003, was very significant. Although the Conference failed due to the sticking points of negotiations around agricultural subsidies, the effects of the failure have extended to the other areas of negotiations, such as TRIPS, especially with regard to the monitoring of the progress of the Doha Development Agenda. Although the Ministers stated that, “[N]otwithstanding this setback, we reaffirm all our Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully”,<sup>117</sup> the reality is that the failure of the Conference has delayed the implementation of the



Doha Development Agenda, including the areas of public health and TRIPS. The stalemate of international trade negotiations can, by no means, be taken as a positive progress, especially for developing countries in Africa and elsewhere.<sup>118</sup>

Finally, the controversy around the North-South debate on IPR protection and TRIPS, without doubt shall continue for some time, especially, the dispute concerning the issues of public health and pharmaceutical patent protection, and cost recovery for research and development. This is indeed a very urgent issue when it comes to fighting debilitating diseases, such as HIV/AIDS in developing countries and LDCs. It would hardly be appropriate to promote patent protection and long-term growth benefits when crisis management is the obvious urgent solution to the unfolding disaster.<sup>119</sup> In this regard, however, I definitely agree with Professor Abbott's astute observation on this issue, as he concluded that, "[W]ith regard to immediate disease crises like HIV/AIDS, long-term R&D is not useful if the patient is already died."<sup>120</sup> Need I say more?

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*Paris Convention for the Protection of Industrial Property 1883*, as amended last in 1979 (Geneva: WIPO Publications, 2003) a (<http://www.wipo.int/clea/docs/en/wo/wo020en.htm>, January 8, 2004)

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## vi. Notes

<sup>1</sup> Cornish, W *Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights* (4<sup>th</sup> edn. London: Sweet & Maxwell 1999), commented that, “[P]atents give temporary protection to technological inventions and design rights to the appearance of mass-produced goods; copyright gives longer-lasting rights in, for instance, literary, artistic and musical creations; trade marks are protected against imitation so long at least as they continue to be employed in trade... There is no single generic term that satisfactorily covers all of them. ‘Industrial property’ is not infrequently used in the common law world, but many would hold this to exclude copyright, particularly



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if they want to emphasise the special importance and vulnerability of the creative artist. **‘Intellectual Property’ is the term used for the whole this field.** The term scarcely describes trademarks and similar marketing devices; but it has now acquired international acceptance. ‘IP’ or ‘IPR’ is indeed becoming a fashionable description of research results and other original ideas, whether or not they fall within the ambit of what the law protects. As a title, the term may sound rather grandiloquent. But then, at its most serious, this is branch of the law, which protects some of the finer manifestations of human achievements.”, at p. 3; also for more general background on the theories and history of intellectual property, see Stewart, S. *International Copyright & Neighbouring Rights* (London: Butterworth, 1983), Chapter 1 [emphasis is mine]

<sup>2</sup> General Agreement on Tariffs and Trade 1947, a provisional agreement, which was negotiated based on the Havana Charter among 23 major trading countries, following the development in the international trade field following the Second World War. The GATT, in fact became the permanent institutional basis for the multilateral world trading regime that had prevailed until it was later adopted in the Marrakesh Agreement by all countries that created the World Trade Organization, and became the GATT 1994, Trebilcock, M. & Howse, R. *The Regulation of International Trade*, 2<sup>nd</sup> ed. (London and New York: Routledge, 2002)

<sup>3</sup> *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, Annex 1C of the GATT 1994 (Geneva: WTO Secretariat ed., 1994) at ([http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.doc](http://www.wto.org/english/docs_e/legal_e/27-trips.doc), January 8, 2004)

<sup>4</sup> Generally, see, *inter alia*, Oddi, S. *TRIPS-Natural Rights and a “Polite Form of Economic Imperialism”* (1996) 29(3) *Vanderbilt Journal of Transnational Law* 415; Abbott, F. *Commentary: The Intellectual Property Order Enters the 21<sup>st</sup> Century* (1996) 29(3) *Vanderbilt Journal of Transnational Law* 471; Hamilton, M. *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective* (1996) 29(3) *Vanderbilt Journal of Transnational Law* 631

<sup>5</sup> May, C. *Digital Rights Management and the Breakdown of Social Norms* (2003) 8(11) *First Monday* at ([http://firstmonday.org/issues/issue8\\_11/may/index.html](http://firstmonday.org/issues/issue8_11/may/index.html), January 3, 2004)

<sup>6</sup> *Ibid*, n. 5

<sup>7</sup> *Ibid*, n. 5

<sup>8</sup> *Supra*, n. 4, at p. 426, footnote 42

<sup>9</sup> Braga, C. *Remarks: Symposium on Trade-Related Aspects of International Property* (1989) 22(4) *Vanderbilt Journal of Transnational Law* 310, however, Professor Braga also indicated that the description of the issues in this context could be seen as an oversimplification of the debate

<sup>10</sup> Yamaguchi, Y. *Remarks: Symposium on Trade-Related Aspects of International Property* (1989) 22(4) *Vanderbilt Journal of Transnational Law* 325

<sup>11</sup> Kastenmeier, R. and Beier, D. *International Trade and Intellectual Property: Promise, Risks, and Reality* (1989) 22(4) *Vanderbilt Journal of Transnational Law* 285

<sup>12</sup> *Supra*, n. 9, at p. 310

<sup>13</sup> *Ibid*, n. 9, at p. 310-11; also for more information on the background of the negotiations, see Trebilcock and Howse, *supra*, n. 2; moreover, it is worth noting however, that the trade issues around agricultural products, is still a contentious issue, which led many to believe that it was credited with the failure of the recent Cancun Ministerial Meeting of the WTO.

<sup>14</sup> Drahos, P. & Smith, H. *The Universality of Intellectual Property Rights: Origins and Development* (London: Queen Mary Intellectual Property Research Institute & Westfield College, 1998) at (<http://www.wipo.org/tk/en/activities/1998/humanrights/papers/word/drahos.doc>, January 3, 2004)

<sup>15</sup> Paris Convention for the Protection of Industrial Property 1883, as amended last in 1979 (Geneva: WIPO Publications, 2003) a (<http://www.wipo.int/clea/docs/en/wo/wo020en.htm>, January 8, 2004)

<sup>16</sup> For a general discussion on this issue, please see Hamilton; and Oddi, *supra*, n. 4; also see Endeshaw, A. *The Paradox of Intellectual Property Law making in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot* (Singapore: Nanyang Technological University Business School Business Law Working Paper; Nanyang Technological University, 2001) at ([http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID291692\\_code011127510.pdf?abstractid=291692](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID291692_code011127510.pdf?abstractid=291692), January 8, 2004)



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<sup>17</sup> Kunz-Hallstein, H. *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property* (1989) 22(4) *Vanderbilt Journal of Transnational Law* 265, at p. 266-67

<sup>18</sup> *Ibid*, n. 17, Kunz-Hallstein argued, *inter alia*, that the US attacked the Paris Convention based on its competency to protect IPR, its use of the principle of reciprocity, and its weak enforcement mechanism.

<sup>19</sup> *Supra*, n. 14

<sup>20</sup> Drahos and Smith, *supra*, n. 14, asserted that “[I]n 1984, the U.S.A. amended its Trade Act of 1974 to include intellectual property in the ‘section 301’ trade process. The 1984 amendment had a sequel in the form of the Omnibus Trade and Competitiveness Act of 1988. This latter Act strengthened the 301 process by adding more processes called ‘Regular 301’, ‘Special 301’ and ‘Super 301.’ Essentially these provisions required the Office of the United States Trade Representative to identify problem countries, assess the level of abuse of US intellectual property interests and to enter into negotiations with those countries to remedy the problems. Ultimately, if this proved futile, the U.S.A. could impose trade sanctions. Countries caught up in the 301 process came to learn a simple truth. If they failed to act on intellectual property they would, sooner or later, face retaliatory action from the U.S.A.”

<sup>21</sup> See, *supra*, comments by Congressman Kastenmeier and Beier, n. 11, at p. 296, footnote 34

<sup>22</sup> Congressman Kastenmeier and Beier, *supra*, n. 11, at p. 290

<sup>23</sup> Braga, *supra*, n.9, at p. 311

<sup>24</sup> *Punta del Este Ministerial Declaration on Trade-related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (Washington DC: OAS Foreign Trade Information System, September 1986), the Declaration states that, “In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT. These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.” at ([http://www.sice.oas.org/trade/Punta\\_e.asp](http://www.sice.oas.org/trade/Punta_e.asp), January 9, 2004)

<sup>25</sup> Drahos and Smith, *supra*, n.14

<sup>26</sup> Zalik, A. *Remarks: Symposium on Trade-Related Aspects of International Property* (1989) 22(4) *Vanderbilt Journal of Transnational Law* 329

<sup>27</sup> *Supra*, n. 2

<sup>28</sup> Article IX:1 and 2, which state that, “Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country... The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.”

<sup>29</sup> Article XX(d) states that, “... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures... necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.”

<sup>30</sup> Article XXIII:1(a) states that, “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of... the failure of another contracting party to carry out its obligations under this Agreement, or...”; also the US Congressman Kastenmeier and Beier agree on this point, as they indicated that article XXIII:1(a) could generally be used for IPR protection in international trade, see *supra*, n. 11, at p. 290, footnote 15

<sup>31</sup> Drahos and Smith, *supra*, n. 14; as well, Congressman Kastenmeier and Beier, *supra*, n. 11, stated that, “[T]he United States may be able to secure a change in the position of some developing nations on intellectual



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property issues **by using the threat or reality of trade sanctions under section 301**. This tool is less potent against larger developing countries that are less dependent on trade with the United States; it may also be unavailable for use against others because of political or military concerns.”, at p.302-3 [emphasis is mine]

<sup>32</sup> For more information on the detail US position on IPR and trade, see *supra*, Kunz-Hallstein, n. 17; and also Kastenmeier and Beier, *supra*, n. 11

<sup>33</sup> *Supra*, Stewart, n. 1, at p. 3; also for more discussion on the natural right theory, and John Locke’s views and IPR, see Gordon, W. *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property* (1993) 102 Yale Law Journal 1533, where Wendy Gordon asserts that the natural right theory of intellectual property would provide a significant protection for free speech, etc.

<sup>34</sup> Oddi, *supra*, n. 4, at p. 515, he based the title of his very interesting article on a statement by Professor J.H. Reichman, who attributed the thought to Steven P. Ladas, stating: “[I]mposition of foreign legal standards on unwilling states in the name of ‘harmonization’ remains today what ladas deemed in 1975, namely a polite form of economic imperialism.”; moreover, Professor Hamilton, *supra*, n. 4, asserted that Professor Oddi’s description – polite – is itself “**too polite**” of a description of the issues under discussion. [emphasis is mine]

<sup>35</sup> Legally, the nature of the human intellectual products as a “property” is still under much debate among common law scholars and jurists. For example, Lord Templeman, S. *Intellectual Property* (1998) Journal of International Law & Economics 603, argues that, “[t]he term ‘**intellectual property is a pernicious fiction**’ because it acts to disguise the creation and enforcement of monopolies which are contrary to public interest.” [emphasis is mine]

<sup>36</sup> *Supra*, n. 4, at p. 417

<sup>37</sup> Endeshaw, n. 16, *supra*, observed that, “Inquiries into the justification for IP are complicated by the fact that a great deal of confusion surrounds the use of the term ‘piracy’. **Scherer traces the ascendancy of the term in recent years to a public relations campaign on behalf of multinational pharmaceutical companies to make it ‘the accepted term to describe the imitation of drug or software products in nations with permissive intellectual property laws, even though ‘knock-off’ production was quite legal under accepted international conventions.**’ Oddi lays the blame for the loose use of the term on proponents of the natural property rights theory who seek to portray such rights as having universal reach. He refers to them as proposing, in relation to patents, that ‘theft’, and ‘pirating’ and ‘infringement’ occur any time an invention patented anywhere in the world is copied anywhere else in the world, including in countries where that invention was not patented or even not patentable because of that country’s positive law.’ He affirms that imitating an invention that is public domain in any country ‘is neither theft nor piracy nor even infringement in the legal sense.’ However, if one were to adhere to the natural property rights theory and extend universality to IP, various nations would be adjudged “guilty” of the practice of maintaining standards of IP law that best suited their economies or level of technological innovations. Talking of major “pirates” throughout the ages, Belgium was such a ‘pirate’ in the 18<sup>th</sup> century (thus triggering the French-initiated drive for international copyright protection); the US in the 19<sup>th</sup>; Russia in the late 19<sup>th</sup> and early 20<sup>th</sup> century. **A 1986 study for the US Congress admitted that the US was a ‘pirate’: ‘When the United States was still a relatively young and developing country...it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development.’** Other countries have had the same experience in one industry or another; thus Switzerland did not grant product patents until 1977; Italy could engage in ‘knock-off’ production until 1978, when the Supreme Court declared it unconstitutional. The alleged problem of piracy affecting major ICs today therefore suffers from a fundamental lack of understanding of what it constitutes. Most often, piracy is perceived to be a manifestation of lack of IP protection or enforcement. Indeed, both are treated as being identical. Yet, while any nation’s decision whether or not to introduce its own laws must be a measure of its sovereignty and its choice to adopt one specific form or another should be considered legitimate, the current (dominant) thinking among policy makers and academic lawyers in US and Europe disavows that. **Typically, the characterization of non-enforcement as ‘piracy’ overlooks the possibility, even reality, of incongruity of IP to the degree of industrial development in the ‘pirate nations’. Where the nation allegedly infringing foreign IP has instituted laws congruent to its economic and technological circumstances and implements them,** it is difficult to see what legal principles or standards can be deployed to persist in calling that nation a pirate. Yet, condemnations of this type are numberless.” [emphasis is mine]



<sup>38</sup> Braga, *supra*, n. 9, at p. 313-14; as well, Trebilcock & Howse, *supra*, n. 2, observed that, “In fact, despite the rhetoric of natural rights or proprietary entitlements that is often invoked to argue for strengthened protection of intellectual property, the debate centres around whether protection should be limited, say, to 15 years for patents or extended to 20 or 25 years. **It is hard to imagine a natural right that miraculously disappears after 20 or 25 years!**”, at p. 308 [emphasis is mine]

<sup>39</sup> Raghavan, C. *TRIPS Consultation Show Serious Divisions* (Geneva: SUNS South-North Development Monitor, 1989) at (<http://www.sunsonline.org/trade/areas/intellec/02130089.htm>, January 9, 2004)

<sup>40</sup> *Ibid*, n. 39

<sup>41</sup> *Ibid*, n. 39

<sup>42</sup> *Ibid*, n. 39

<sup>43</sup> *Ibid*, n. 39

<sup>44</sup> *Ibid*, n. 37

<sup>45</sup> Raghavan, *supra*, n. 37, observed that, “There are a variety of conflicts of interests that had to be resolved - such as for example the rights of plant breeders vs. rights of farmers, intellectual property protection vs. public welfare, consumer rights, and industrialisation and development policies. The issue of “compulsory licensing”, which some of the proposals seek to block through the GATT standards and norms, is at the heart of the negotiations for revision of the Paris Conventions. Complex and technical issues, negotiations on these have been going on for ten years in other fora.”

<sup>46</sup> Introduction to TRIPS (Geneva: WTO Secretariat) at

([http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm), January 9, 2003)

<sup>47</sup> Reichman, J. *Compliance with TRIPS Agreement: Introduction to a Scholarly Debate* (1996) 29(3) *Vanderbilt Journal of Transnational Law* 365, at p. 366

<sup>48</sup> Article 1(1)

<sup>49</sup> Article 2(2)

<sup>50</sup> *Ibid*, n. 48

<sup>51</sup> Article 3(1)

<sup>52</sup> *Supra*, n. 2

<sup>53</sup> However, article 3(2), allows for some exceptions within certain conditions. The article states that, “Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where **such practices are not applied in a manner which would constitute a disguised restriction on trade.**”[emphasis is mine]

<sup>54</sup> Article 4

<sup>55</sup> Article 4(a)

<sup>56</sup> Article 4(b). The reference in this article is to the Berne Convention for the Protection of Literary and Artistic Works 1886, and its amendments (The Paris Act of July 24, 1971) at

(<http://www.law.cornell.edu/treaties/berne/overview.html>, December 20, 2003)

<sup>57</sup> Article 4(c)

<sup>58</sup> Article 4(d)

<sup>59</sup> Established under Article 68 of the Agreement, which states that, “The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.”

<sup>60</sup> *Supra*, n. 58

<sup>61</sup> *Supra*, n. 56, articles 1 and 2 of TRIPS



<sup>62</sup> Articles 1, 2, and 16(2)(3) of TRIPS, the reference is to the Paris Convention for the Protection of Industrial Property 1883 (as amended last in 1979) at (<http://www.wipo.int/clea/docs/en/wo/wo020en.htm>, January 8, 2004)

<sup>63</sup> Articles 1 and 2 of TRIPS, the reference is for the Treaty on Intellectual Property in Respect of Integrated Circuits (Washington, 26 May 1989) at [Lex Mercatoria](http://www.jus.uio.no/lm/ip.integrated.circuits.treaty.washington.1989/doc) (<http://www.jus.uio.no/lm/ip.integrated.circuits.treaty.washington.1989/doc>, January 10, 2004)

<sup>64</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention), 1961, at WIPO Home Page at (<http://www.wipo.int/clea/docs/en/wo/wo024en.htm>, January 10, 2004)

<sup>65</sup> Article 63(1),(2),(3), and (4)

<sup>66</sup> *WTO – Dispute Settlement Understanding (DSU) – Annex 2 of the GATT 1994* (Geneva: WTO Secretariat ed., 1994) at ([http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm), January 11, 2004)

<sup>67</sup> Article XXIII:1(b)(c) of GATT states, “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.”

<sup>68</sup> Article 64(3) of TRIPS, *supra*, n. 3

<sup>69</sup> Leitner, K. and Lester, S. *WTO Dispute Settlement 1995-2002: A Statistical Analysis* (2003) Oxford Journal of International Economic Law 251, at p. 254

<sup>70</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50/AB/R 19 December 1997) at ([http://www.worldtradelaw.net/reports/wtoab/india-patents\(ab\).doc](http://www.worldtradelaw.net/reports/wtoab/india-patents(ab).doc), January 11, 2004)

<sup>71</sup> *Indonesia – Certain Measures Affecting the Automobile Industry* (WT/DS59/R 2 July 1998) at ([http://www.worldtradelaw.net/reports/wtopanelsfull/indonesia-autos\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/indonesia-autos(panel)(full).pdf), January 11, 2004)

<sup>72</sup> Nijar, G. (GRAIN, ed.) *Sui Generis Options: the Way Forward in Signposts To Sui Generis Rights* (Bangkok: International Seminar on *sui generis* Rights, co-organised by Thai Network on Community Rights & Biodiversity (BIOTHAI) and Genetic Resources Action International (GRAIN), 1-6 December 1997),

<sup>73</sup> *India-Mailbox case*, *supra*, n. 70, para. 57

<sup>74</sup> *Ibid*, n. 70, par. 58 and 59

<sup>75</sup> *Ibid*, n. 70, par. 63 and 71

<sup>76</sup> *Ibid*, n. 70, par. 84

<sup>77</sup> *Ibid*, n. 70, para. 92 and 96

<sup>78</sup> Abbott, F. *The Enduring Enigma of TRIPS: A Challenge for the World Economic System* (1998) Oxford Journal of International Economic Law 497, at p. 514

<sup>79</sup> *Supra*, n. 76

<sup>80</sup> *Supra*, n. 74; for more discussion on this issue, see Geuze, M. and Wager, H. *WTO Dispute Settlement Practice Relating to TRIPS Agreement* (1999) Oxford Journal of International Economic Law 347, at p. 352-3

<sup>81</sup> Hamilton, *supra*, n. 4, at p. 614

<sup>82</sup> *Supra*, n. 71

<sup>83</sup> *Supra*, n. 71, the *WTO – Agreement on Trade-Related Investment Measures, GATT 1994* (Geneva: WTO Secretariat, 1994) at ([http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.doc](http://www.wto.org/english/docs_e/legal_e/18-trims.doc), January 11, 2004)

<sup>84</sup> *Supra*, n. 71, the *WTO – Agreement on Subsidies and Countervailing Measures, GATT 1994* (Geneva: WTO Secretariat, 1994) at ([http://www.wto.org/english/docs\\_e/legal\\_e/24-scm.doc](http://www.wto.org/english/docs_e/legal_e/24-scm.doc), January 11, 2004)

<sup>85</sup> Geuze and Wager, *supra*, n. 80, at p. 370

<sup>86</sup> *Supra*, n. 71, para. 14.268, 269 and 274

<sup>87</sup> *Ibid*, n. 71, para. 14.278-9

<sup>88</sup> GRAIN, ed. *Signposts To Sui Generis Rights* (Bangkok: International Seminar on *sui generis* Rights, co-organised by Thai Network on Community Rights & Biodiversity (BIOTHAI) and Genetic Resources Action



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International (GRAIN), 1-6 December 1997) at ([www.grain.org/publications/signposts-en-p.htm](http://www.grain.org/publications/signposts-en-p.htm), January 3, 2004)

<sup>89</sup> *Supra*, n. 71, para. 14.282, article 65(5) of TRIPS states that, “A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.”

<sup>90</sup> *Ibid*, n. 71, para. 4.1-35

<sup>91</sup> The Panel was referring to *Bananas III*, the Appellate and Panel Reports on *EC - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/R 25 September 1997)

<sup>92</sup> *Supra*, n. 71, para. 13.3

<sup>93</sup> The Agreement, with its minimum international IPR protection, was considered a triumph for the US business community. However, Trebilcock & Howse, *supra*, n. 2, asserted that, “[A]merican business interests have estimated losses in the billions of dollars annually from these kinds of supposed inadequacies in intellectual property protection, primarily in developing countries. From a trade theory perspective, however, it is far from clear that all countries should be required to maintain the same level of intellectual property protection. Patent protection constitutes a form of monopoly rent to the innovator. This provides incentives for innovation, but also it may entail at least short-term consumer welfare losses and may discourage imitation and adaptation by competitors, which themselves constitute valuable economic activities. The level of intellectual property protection each country decides to afford will thus be rationally related to whether its comparative advantage resides more in innovations made elsewhere, and the relative weight it gives to the interests of consumers (including its own producers who are consumers of inputs), imitators, and innovators.”, at p. 308; also see Kerr, W. *The Efficacy of TRIPS: Incentives, Capacity and Threats* (2003) 4(1) *The Estey Centre Journal of International Law & Trade Policy*, at (<http://www.esteyscentre.com/journal/>, January 2, 2003)

<sup>94</sup> Straus, J. *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiative to Facilitate Worldwide Intellectual Property Transactions* (1998) 9 *Duke Journal of Comparative & International Law* 91 at (<http://www.law.duke.edu/shell/cite.pl?9+Duke+J.+Comp.+&+Int'l+L.+91>, January 8, 2004); see also Wagner, H. *TRIPS Boomerang – Obligations for Reform* (1996) 29(3) *Vanderbilt Journal for Transnational Law* 535

<sup>95</sup> Reichman, *supra*, n. 47

<sup>96</sup> Hamilton, *supra*, n. 4

<sup>97</sup> Abbott, *supra*, n. 4, observed that, “[F]rom the outset of the Uruguay Round negotiations there was some degree of skepticism among trade specialists concerning the goals of the TRIPS Agreement. Two central questions were whether the TRIPS Agreement might harm the economic interest of developing countries, and how the Agreement might take into account the potentially disparate interests of industrialized and developing countries. The developing countries ultimately accepted the TRIPS Agreement as part of the bargained-for-exchange, not because they concluded that the Agreement as a stand-alone matter was necessarily in their best interests... In positive terms, the bargain included concessions on agricultural export subsidies by the European Union (EU), increased market access for tropical products, and special attention to developing country interests in a number of the Uruguay Round Agreements (i.e. in terms of transitional arrangements). In somewhat more negative terms, it included express and implied promises by the United States to refrain from using unilateral measures against the developing countries in the intellectual property rights (IPR) arena, provided that minimum TRIPS conditions were met. Finally, there was the implicit threat that, without the TRIPS Agreement, the Uruguay Round would fail, and that might have had serious adverse economic consequences for developing countries. In talking with developing country negotiators in the field of agriculture, for example, one may find that they are not entirely satisfied with the agricultural concessions that were ultimately made – the EU concessions did not reach the level they hoped for, and the United States did not press the EU as hard as it might have, so there may be some dissatisfaction with the terms of the bargain. Nevertheless, the TRIPS Agreement must be viewed in this broad context, and not as an isolated event.”, at p. 473; also see Groome, J. *Reshaping the World Trading System: A History of the Uruguay Round* (The Hague/Boston/London: Kluwer Law Publishing, 1999) at p. 244

<sup>98</sup> Nijar, G. (GRAIN, ed.) *Sui Generis Options: the Way Forward* in GRAIN, *supra*, n. 88, he argues that, “[T]here is today a sustained assault on whole value systems by which peoples of the world, especially from



developing countries, have lived and survived. New values are dominating and replacing existing time-honoured ones. Thus are the values of collective interaction and cooperation among third world societies being threatened with replacement by values of monopolisation and privatisation, values of free exchange of knowledge and goods with appropriation and commodification, and the values of creating goods to satisfy local and domestic social needs with production for industrial use to satisfy the economies of the market place. There is a thoroughness of this attack which is disquieting. For it is global in character and integrated into a web of rules and directives from which the weaker members of this global village cannot extricate themselves. The strong use these multilateral mechanisms to their advantage but only when it suits them. Heading this assault is the World Trade Organisation (WTO). Negotiated to facilitate trade amongst nations under the auspices of GATT ..., the ambit of the final treaty has been extended to cover every facet of national endeavour. These are classified as 'trade-related', and subsumed under the WTO's jurisdiction. This includes intellectual property rights (for which there already existed an international organisation, WIPO), services, investment measures..." at ([www.grain.org/publications/signposts-en-p.htm](http://www.grain.org/publications/signposts-en-p.htm), January 3, 2004)

<sup>99</sup> *Supra*, n.16, at p. 4, 7 and 8

<sup>100</sup> Cooper, H., Zimmerman, R. and McGinley, L. *AIDS Epidemic Puts Drug Firms In a Vise: Treatment vs. Profits* (New York: The Wall Street Journal, March 2, 2001), the writers rhetorically wondered, “[C]an the pharmaceuticals industry inflict any more damage upon its ailing public image? Well, how about suing Nelson Mandela?”, while commenting on the coalition of forty US drug companies that decided to sue the Government of South Africa challenging the constitutionality of the Medicines and Related Substances Act of 1997, which was signed into law by Nelson Mandela. The Act allows parallel importing of drugs “from the cheapest sources available, regardless of whether the patent holders give their approval” and compulsory licensing. at ([http://www.globaltreatmentaccess.org/content/press\\_releases/a01/030201\\_WSJ\\_sa\\_lawsuit.html](http://www.globaltreatmentaccess.org/content/press_releases/a01/030201_WSJ_sa_lawsuit.html), January 10, 2004) [emphasis is mine]

<sup>101</sup> For example see Endeshaw, *supra*, n. 16, p. 3-9; and GRAIN, *supra*, n. 88; Abbott, *supra*, n. 78; Hamilton, *supra*, n. 4; etc.

<sup>102</sup> Subrmanian, A. and Watal, J. *Can TRIPS Serve As an Enforcement Device for Developing Countries in the WTO?* (2000) Oxford Journal of International Economic Law 403, at p. 405

<sup>103</sup> Scherer, F. and Watal, J. *Post-TRIPS Options for Access to Patented Medicine in Developing Nations* (2000) Oxford Journal of International Economic Law 913

<sup>104</sup> Oddi, *supra*, n. 4, at p. 461; also see Kongolo, T. *Towards a More Balanced Coexistence Between Traditional Knowledge and Pharmaceuticals Protection in Africa* (2002) 35(2) Journal of World Trade 349, at p. 360

<sup>105</sup> *Ibide*, n. 4, at p. 464-8

<sup>106</sup> Yu, P. *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade* (2002) 26 *Fordham International Law Journal* 701 at ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=341242](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=341242), January 12, 2004)

<sup>107</sup> *Ibid*, n. 106, Yu suggested that, “[h]armonization is a two-way street.”

<sup>108</sup> *WTO - Declaration of the Doha Ministerial Conference, Fourth Session* (Doha: WTO Secretariat, WT/MIN(01)/DEC/1 20 November 2001) at

([http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm), January 11, 2004)

<sup>109</sup> *WTO - Declaration on the TRIPS Agreement and Public Health, Doha Ministerial Conference, Fourth Session* (Doha: WTO Secretariat, WT/MIN(01)/DEC/2 20 November 2001) at

([http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm), January 11, 2004)

<sup>110</sup> Abbott, F. *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO* (2002) Oxford Journal of International Economic Law 469

<sup>111</sup> Article 1, *supra*, n. 107

<sup>112</sup> Article 3, *supra*, n. 107

<sup>113</sup> Articles 2, and 4, *supra*, n. 107; for more information, also see Abbott, *supra*, n. 108, for a detailed and thorough legal analysis of the Declaration

<sup>114</sup> *Supra*, n. 108, at p. 503

<sup>115</sup> Otten, A. *Implementation of the TRIPS Agreement and Prospects for its Further Development* (1998) Oxford Journal of International Economic Law 523, at p. 525-6



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<sup>116</sup> *Ibid*, at p. 531-534

<sup>117</sup> WTO – *The Statement of the Ministerial Conference, Fifth Session* (Cancun: WTO Secretariat, WT/MIN(03)/20 23 September 2003) at

([http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_20\\_e.doc](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_20_e.doc), January 12, 2004)

<sup>118</sup> Azad Rana, K. *The multilateral trading system: Why East Africa must remain engaged* (Nanyuki, Kenya: WTO News, 2003), the keynote address of Dr. Kipkorir Aly Azad Rana, Deputy Director-General, World Trade Organization at the Second East African Business Summit, 18-21 September 2003, at ([http://www.wto.org/english/news\\_e/news03\\_e/speech\\_rana\\_19sep03\\_e.htm](http://www.wto.org/english/news_e/news03_e/speech_rana_19sep03_e.htm), January 12, 2003)

<sup>119</sup> Idris, K. *Intellectual Property: A Power Tool for Electronic Growth* (Geneva: WIPO Publications, 2003), Idris, a fellow countryman, is the current Director General of WIPO, promotes and provides suggestions on how developing countries can use IPR protection as a mean for long-term growth, at p. 37-38, and Chapter 4

<sup>120</sup> *Supra*, n. 108, at P. 473, commenting on the WTO, he also stated that, “[W]e are dangerously close to a new world order characterized by a vast schism between a prosperous and stable post-industrialized North, and a desperately poor and chaotic South. The proliferation of nuclear and bio-weapons does not portend well for the creation of a neat partition behind which the wealth may comfortably lounge... [W]ith that said, **the North is perilously close to standing by while more than 30 million people die prematurely from HIV/AIDS and its implications. The danger is clear and present. The disease can be controlled with existing medicines. We will not be able to say in hindsight, ‘If only we had known’.**” [emphasis is mine]

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