Between Cancún and Hong Kong: The Agenda of the World Trade Organisation's *Agreement on Trade Related Aspects of Intellectual Property Rights* and the Tensions of Development

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Introduction

This article reflects upon the dynamics of the intellectual property (IP) agenda of the World Trade Organisation (WTO) and the legal framework provided by the WTO's *Agreement on Trade Related Aspects of Intellectual Property Rights* (*TRIPS Agreement*). With the 6th Ministerial Conference of the WTO due to take place in Hong Kong in December 2005, it is timely to reflect upon the political impasse in relation to the agenda of the *TRIPS Agreement*, due to the dramatically difference perspectives of developed and developing states. Many commentators, both academic and political, believed that the 5th Ministerial Conference in Cancún in 2003 was a failure.[1] Consequently, if the 2005 conference fails to secure consensus on the implementation of the Doha Development Agenda,[2] there is the risk that the WTO will no longer be viewed as the principal forum for the advancement of international trade law.

This article seeks to point out that disharmony between developed and developing states is not essentially a manifestation of the *TRIPS Agreement* or the WTO. Rather, the trade-intellectual property agenda is inherently complex. For this reason, it is not appropriate to describe

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1 See, for example, Evenett S, "Systemic Research Questions Raised by the Failure of the WTO Ministerial Meeting in Cancún" (2005) *Legal Issues of Economic Integration* 1; "IMF Calls Cancun Trade Talks Collapse 'Tragedy'", *Reuters Online*, <http://asia.news.yahoo.com/030918/3/14kv5.html> (Dubai, 18 September 2003); "WTO Must Learn Lessons from Cancun Failure", *AFP Online Edition*, <http://uk.news.yahoo.com/030915/323/e8fni.html> (London); "Warning over Cancun Failure", *BBC News Online Edition*, <http://news.bbc.co.uk> (London, 10 September 2003).

2 For an explanation of the Doha Development Agenda and the Declaration made at the 4th Ministerial Conference in Doha, see <http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm>.

the events in Cancún as a failure, but as an inevitable part of the protracted negotiation of a complex web of issues. Similarly, it is not reasonable to expect consensus to emerge from the Hong Kong Ministerial Conference, and commentators and states alike should shift their focus from the question of 'success' to the question of whether progress, however incremental, has been made.

Part I of the article considers the significance of IP in international trade and the genesis of the *TRIPS Agreement*, before moving in Part II to examine the interplay of developed and developing interests in the context of two contentious areas, compulsory licensing and copyright. Part III considers debate since the Uruguay Round through to the 2003 Cancún Ministerial Meeting, focussing on the idea that the modern agenda of the *TRIPS Agreement* is partially revisiting issues that have been contentious since its inception, but arguing that the debate is also moving into a more democratic participatory phase. It is argued that this democratic participatory phase is not only more accurately representative of the WTO's constituents (both in terms of numbers of members and in terms of the populations they represent), but it is one from which there is a greater possibility, in the long term, of an equitable, useful *TRIPS Agreement* for all members.

A Note on Terms

Interestingly, even the most simple discussion of IP is capable of generating controversy, as not even a definition of what constitutes "intellectual property" is agreed upon. The main body responsible for international IP laws, the World Intellectual Property Organisation (WIPO), considers the term not to hold a fixed definition, but rather as a broad term encompassing "the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields."[3] On the other hand, the WTO utilises a more limited description, with the *TRIPS Agreement* defining IP in Article 1(2) by reference to the types of IP that it protects: Copyright and Related Rights; Trademarks; Geographical Indications; Industrial Designs; Patents; Layout-Designs (Topographies) of Integrated Circuits; and

3 *WIPO Intellectual Property Handbook : Policy, Law and Use*, WIPO, Geneva, 2001.

Undisclosed (Confidential) Information.[4] Thus, while WIPO's working definitions may be able to encompass emerging areas of unique protection such as genetic resources and traditional knowledge, and take account of group rather than individual production and ownership of innovation, the concept of IP within the trade law system is much more limited.[5] While acknowledging the advantages of a broader definition, and the controversies that the WTO definition has generated,[6] this article will nevertheless focus on the types of IP referred to in the *TRIPS Agreement*.

The author acknowledges that the classification of a state as 'developed' or 'developing' may be unnecessarily dyadic, and that not all states considered to be 'developed' will have identical interests in relation to IP. However, as international discourse on IP protection has displayed ever-increasing polarity since the inception of the *TRIPS Agreement*, it is the analysis of that discourse that forms the basis of this article.

Part I – The International Linkage of Intellectual Property and Trade

The linkage of IP and trade has become widely accepted as inevitable, despite initial criticism of the two being combined. For example, despite the origins of The General Agreement on Tariffs and Trade (GATT) system clearly being traced back to the trade and labour

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4 It is, however, interesting to note that of the five draft texts submitted to the Uruguay Round's Negotiating Group, the Swiss Proposal (Document MTN.GNG/NG11/w/73 dated 14/05/1990) suggested a more expansive definition of IP as including these areas, rather than these areas exhaustively defining the scope of IP. This suggestion was not adopted in the Draft (Document MTN.TNC/W/35/Rev.1 dated 03/12/1990) that was submitted as the working draft to the Brussels Ministerial Conference.

5 See Subramanian A, "Proprietary Protection of Genetic Resources and Traditional Knowledge" (p 382) and Penna FJ and Vissa, CJ, "Cultural Industries and IP Rights" (p 390) in Hoekman B and others (eds), *Development, Trade and the WTO: A Handbook*, The World Bank, Washington DC, 2002.

6 See, for example, Killian M, "A Hollow Victory for the Common Law? TRIPS and the Moral Rights Exclusion" (2003) 2 *John Marshall Review of Intellectual Property Law* 321, which criticises the exclusion of Moral Rights from the *TRIPS Agreement* and argues (p 322) that "by excluding moral rights, TRIPS thereby diminishes the overall economic benefits that can be derived from a work."

agenda of the Havana Charter's proposed International Trade Organisation in 1948, proponents of the trade-labour linkage lament that labour does not receive the same attention as IP.[7] Interestingly, many were also sceptical of the intellectual property-trade linkage when it first developed, with commentators such as Gadbaw concluding in 1989 that it was more analogous to a "two career-marriage than a merger", but he would certainly be forced to revise that opinion in the present day.[8] Authors such as Sell[9] and Drahos[10] chronicle in their work the politics behind the genesis of the *TRIPS Agreement*, and the way in which powerful lobby groups in developing states created a framework agreement that became "a structure that actors now either try to expand or resist", and no longer a negotiable frame of reference.[11] Aspects of this linkage are also discussed below.

It cannot be denied that IP fulfils multiple roles in international trade. In many cases, the IP provides leverage for a particular product to gain a competitive advantage in the marketplace, and thus makes the product one that is in demand and traded internationally. Types of IP in this category include geographical indications and trademarks, which are used to inform the consumer of the origin or characteristics of a product or service. For example, consumers who purchase bottles of 'Champagne' may do so in the expectation that they are purchasing bottles of sparkling wine originating from the champagne region of France, made with a traditional selection of grapes, and produced in accordance with the *methode champenois*. The second category of IP is that which receives the most attention in the present political climate, namely, products of innovation that rely on IP protection to prevent others from duplicating the IP (often referred to as 'free-riding'). Examples include software, forms of entertainment such as music or movies, or pharmaceuticals. In these cases, the otherwise intangible IP

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7 See, Cottier T and Caplazi A, "Labour Standards and World Trade Law: Interfacing Legitimate Concerns" paper presented to Menschenrechte Schweiz, <www.humanrights.ch/bildungarbeit/seminare/konzerne.html>.

8 Gadbaw RM, "Intellectual Property and International Trade: Merger or Marriage of Convenience?" (1989) 22(2) *Vanderbilt Journal of Transnational Law* 223, p 241.

9 Sell S, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge University Press, 2003.

10 Drahos P, "Developing Countries and International IP Standard Setting" (2002) *Commission for Intellectual Property Rights Study Paper 8*, <http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf>.

11 Sell, note 9, pp 173-174.

(such as a formula, a method, or an artistic, literary or musical expression) is embedded in a tangible medium (such as a capsule or a CD) that can be easily and cheaply reproduced. The cost and value of the finished product is not the value of the medium, but the apportioned cost of creating the intangible IP, such as the costs of research and development or the production of the movie. Finally, the IP itself may be traded, such as the licensing of a trademark by a United States owner to a Chinese manufacturing company, or the assignment of certain patent rights through a technology transfer.

Given this varied role, it is difficult to estimate the true value of international trade in IP. According to the United States Bureau of Economic Analysis, the export income of the United States generated through royalties and licence fees was estimated to be over US$44 billion dollars in 2002.[12] However, this figure takes into account only a limited amount of the contribution that IP makes to trade, since most goods and services that are exported will contain or utilise some type of IP, and their traded value is not apportioned between the commodity and the IP taken alone. For example, in the international sale of a bottle of United States-made Jim Beam Bourbon Whiskey across a national border, it is difficult to distinguish the extent to which the transaction price is paid for the purchase of whiskey (for which dozens of local substitutes may be available), or whether the sale represents a choice driven by the consumer's appreciation of the goodwill generated by the Jim Beam trademarks, or the patented ornamental designs for the Jim Beam bottle.[13] For this reason, sales of trademarked goods and services are not included in statistics of trade in IP.

Authors such as Grandstrand have attempted to quantify the value of IP by considering the proportionate value of IP in a corporation compared to capital value, a term dubbed "intellectual capital". Grandstrand notes that in 1997 the intellectual capital of General Electric, at that time (according to the *Financial Times*) the world's most valued corporation, constituted 85 per cent of the corporation's market value, with the corporation's equity representing only 15 per cent of its overall worth. Similarly, over 90 per cent of Microsoft's, 78 per cent of Novartis' and 95 per cent of Coca Cola's value could be

12 Bureau of Economic Analysis, *Current and Historical Data, International Transaction Tables for September 2003*, D-52 Sept.03 (2003).

13 United States Patent D448,307.

attributed to intellectual capital.[14] It can also be surmised that, but for the protection of IP, the United States would have little comparative advantage in the international market for whiskey, cola-flavoured carbonated soft drinks, or AIDS drugs, let alone any capacity to generate revenue through licensing.

Regardless of the difficulties in ascertaining the precise value of IP, it is clear that "goods that rely on intellectual property right protection tend to be among the fastest growing items in international trade and also are distinctive in terms of international comparative advantage."[15] It is for this reason, namely that IP is capable of generating large revenue for its owners, that IP has become such a critical and divisive issue in international trade. The nature of its divisiveness is discussed below.

Polarised discourse on intellectual property

There is a marked difference between the IP interests of developed and developing countries, due not only to political differences but also to economic, philosophical, and geopolitical considerations. While substantial disagreements exist amongst the members of each of these groups, such as disagreements between the European Union and the United States over issues of patent protection and copyright duration, and between the European Union and many other states over geographical indications, by far the largest policy schism is between developed countries and developing countries.

Developed states such as the United States advocate comprehensive inclusion of IP protection in the trade law system, arguing that domestic innovation and export capability can only be facilitated if the fruits of that innovation are as adequately protected in other member states as they are in their domestic legal system. They argue that if innovation is not protected by an attendant proprietary right, then the incentive to innovate is diminished, and that scientific, social and cultural advances will not proceed apace. Similarly, they argue, technology transfer from developed to developing countries will not take place unless the recipients of the technology can protect the

14 Granstrand O, *The Economics and Management of Intellectual Property*, Edward Elgar Publishing, Cheltenham, 1999, p 11.

15 Maskus KE, *Intellectual Property Rights in the Global Economy*, Institute for International Economics, Washington DC, 2000, p 73.

transferor's IP rights and enable them to receive maximum returns from the exploitation of their invention. Underlying this school of discourse is a treatment of IP as a 'right' – as an inalienable form of property rather than a statutory construct granted by a sovereign power.[16] This attitude is further evidenced in the rhetoric of industry groups in developing countries who liken the production of counterfeit goods to piracy,[17] pointing out that the profits made by counterfeiters are comparable to the profits made by arms-smugglers or drug dealers,[18] and arguing that "the huge illegal profits are inevitably used to entrench the position of the pirates; to secure manufacturing and distribution networks through violence, intimidation and corruption and to subvert state institutions and processes."[19]

Although forced to accept that IP was an unavoidable negotiating topic in the Uruguay Round, the developing countries lacked a fundamental interest in IP protection, as there was no clear impetus from or benefit to their constituencies. As Gadbaw observes: "For most developing … countries, intellectual property is seen less as a body of fundamental rights than as a subset of their general economic policies, to be managed for their contribution to economic growth and industrial development."[20] Developing countries argue that, particularly in the early years of the *TRIPS Agreement*, they felt pressured into accepting IP regimes on the terms offered by developed countries, but without the reciprocal consideration of their IP protection interests.[21]

Despite being urged to strengthen their IP regimes as a stepping stone towards development and economic growth, developing countries feel

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16 In this context it is interesting to recall that patents originated in 14th Century England not as a right, but as a monopolistic privilege granted by the Crown for a particularly novel invention.

17 See Farnsworth C, "U.S. Offer Proposals to Fight Piracy", *New York Times* (Washington), 27 February 1988, p 38.

18 Interview with an IP attorney from the United States working in Asia on the implementation of IP standards, Hanoi, June 2003, interviewed by the author.

19 Mr Iain Grant, Head of Enforcement of the International Federation of the Phonographic Industry, United States House of Representatives Committee on International Relations, *Statement*, (2003), <http://wwwa.house.gov/international_relations/108/grant.pdf>.

20 Gadbaw, note 8, p 224.

21 The increasing participation of developing countries after the Uruguay Round, and particularly since Seattle and in Cancún, is discussed in Part III below.

sceptical that little would be achieved other than the expansion of their trade deficit. At a practical level, they argue, it is better for one family to profit from selling counterfeit CDs than for the revenue to be repatriated to the foreign IP owner, and they do not "see the extensive grant of patent monopoly rights to foreigners as being unqualifiedly consistent with their own national aspirations."[22] They support their position with a number of economic studies in developing countries suggesting that it is not in the interests of consumers in those countries to adhere to the requirements of the *TRIPS Agreement*, particularly in the case of patent protection. A case study in 2000 concerning pharmaceuticals in India suggested that the full implementation of the *TRIPS Agreement* in that country could cause a price increase of up to 242 per cent on protected pharmaceuticals.[23]

The argument put forward by developing countries against the WTO generally, as well as against the *TRIPS Agreement*, points to the inconsistency between economic theory and political reality. Free trade may theoretically be able to deliver greater benefits for all on the basis of comparative advantage, however, in reality, trade is at least as much a matter of politics as it is a matter of economics. The theory of comparative advantage does not take into account the internal pressures felt by a government such as that of the United States to defend the best interests of a multinational pharmaceutical corporation: a corporation with immense resources that is a significant contributor to taxation revenue and part of an industry that holds immense political power. In this way, a fundamental conflict of interest arises for a negotiating group that espouses free trade on the one hand, yet on the other needs to satisfy the interests of its stakeholders in order to ensure its political longevity within the domestic political arena.

There is also a certain level of scepticism and hostility between the two factions. Siebeck, writing contemporaneously with the Uruguay Round, observed this when he stated: "Strong intellectual property protection is widely seen as a prerogative of advanced countries, something not required until relatively late in the development process … Suggestions that developing countries could be better off protecting

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22 Vernon R, *The International Patent System and Foreign Policy*, US Govt. Print. Off., 1957, p 24.

23 Watal J, "Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India under the WTO TRIPS Agreement" (2000) 23(5) *World Economy* 733.

intellectual property are often interpreted as attempts to deprive the developing world of the benefits of technological advances."[24]

Genesis of the *TRIPS Agreement*

Although Drahos begins his analysis of the *TRIPS Agreement* with an exploration of the colonial transplantations of IP laws,[25] its origins can be traced back to GATT, which in the 1940s was: "With all its limits, modifications, and shortcomings … the economic pillar within the legal framework that was designed to build a peaceful world after 1945. Free trade was regarded as a major contribution to this aim."[26] IP was addressed in two major Articles of GATT. Article IX deals with Marks of Origin, and Article XX(d) with patents, trade marks and copyrights, and the prevention of deceptive practices. However, in contrast to the later *TRIPS Agreement*, GATT was significant in that it was neither self-executing nor dispositive of minimum standards. Instead, Article XX(d) provided an exception to the general rules of GATT with respect to "measures necessary to secure compliance with laws or regulations … including those relating to [intellectual property]." Similarly, Article IX directs the parties to cooperate to prevent the misrepresentative use of trade names.

Thus, GATT and international IP Conventions such as the Berne, Geneva, and Rome Conventions existed independently but contemporaneously, with the former being much more minimalist than the latter. GATT rested on two key principles: the National Treatment (NT) Principle and the Most Favoured Nation (MFN) Principle. While these principles were a satisfactory basis for free trade, they were unenforceable at a national level:

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24 Siebeck W, *Strengthening Protection of Intellectual Property in Developing Countries - a Survey of the Literature*, The World Bank, Washington, 1990, p 1.

25 Drahos P, "Negotiating Intellectual Property Rights: Between Coercion and Dialogue" in Drahos P and Mayne R (eds), *Global Intellectual Property Rights: Knowledge, Access and Development*, Palgrave MacMillan, Hampshire, 2002, p 164.

26 Fikentscher W, "GATT Principles and Intellectual Property Protection" in Beier F and Schricker G (eds), *GATT or WIPO? New Ways in the International Protection of Intellectual Property*, Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich, 1989, p 103.

> GATT NT [National Treatment] is a part of international law without direct applicability in the national arena. Conventions NT, however, gives rise to individual claims under national law**.** ***GATT NT is a correction of the impact of national sovereignty on free trade***; it is subject-oriented (merchandise, services). Conventions NT is a correction of differences that could be made on the basis of nationality or territory; it is mainly person-oriented … In case of a breach of an obligation to observe the rules of GATT NT, sanctions have to be taken from the arsenal of substantive reciprocity applicable to all parts of GATT. Convention NT is sanctioned, in the first place, by private litigation, and only in last resort by the classical retaliatory means of international law. (Emphasis added.)[27]

Gervais considers that GATT was a failed attempt at an international trade regime in respect of IP, and argues that "the (extant) intellectual property framework set the stage for the TRIPS negotiations; its shortcomings basically constituted the agenda for the negotiations."[28] Indeed, it was felt by many developed states, and most vocally by the United States, that GATT's protection of IP was inadequate, and that the type of harmonisation offered by WIPO could only be successful if inextricably linked with trade rights and benefits. The initial concern was counterfeiting, based on estimates that in 1988 counterfeiting activity was costing more than $60 billion per year in lost profits.[29]

However, the agenda was rapidly broadened to include not only the prevention of piracy but also the introduction of international standards of IP protection. Gadbaw was one of many analysts who fiercely advocated the industry perspective that trade and IP ought to be "one of the principal priorities of United States trade policy [and must be integrated] in the interest of maintaining United States' competitiveness."[30] The United States' response was a two-track approach, with both domestic and international attempts being made to protect its interests.

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27 Fikentscher, note 26, p 122.

28 Gervais D, *The TRIPS Agreement - Drafting History and Analysis*, Sweet & Maxwell, London, 2003, p 5.

29 See Farnsworth, note 17.

30 Gadbaw, note 8, p 224.

For example, the *Omnibus Trade and Competitiveness Act of 1998* granted very broad powers to the United States Trade Representative (USTR) to suspend trade agreements if the "United States rights or benefits under a trade agreement are violated or an action, policy, or practice of a foreign country is found to unjustifiably burden or restrict United States commerce."[31] This power was exercisable if the USTR identified a foreign country as being deficient in its protection of IP rights.[32] A similar provision was contained in the *Omnibus Appropriations Act of 1998*, which ultimately became the subject of a dispute before the Dispute Settlement Panel and the Appellate Body pursuant to Article 8(7) of the WTO Dispute Settlement Understanding.[33] This legislation was another example of the United States' determination to link trade, IP and international relations. Among other matters, it involved refusing enforcement rights to Cuban trademark owners in United States' courts.

The international agenda centred on the expansion of the very limited IP protection contained in GATT, and to have those provisions supplanted by a comprehensive agreement that would be 'bundled' into the WTO's parcel of obligations. Rhetoric from the USTR clearly communicated to the developing countries that the United States would insist on IP protection for its rights holders, regardless of whether this had to be achieved multilaterally or bilaterally, or through the exertion of general political pressure on developing countries. In various interviews, the USTR reportedly stated that "until there was a multilateral enforcement code, the United States would continue to take strong independent action against offending countries. 'If they don't

31 *Omnibus Trade and Competitiveness Act of 1998* s 301.

32 *Omnibus Trade and Competitiveness Act of 1998* s 182.

33 *United States – Section 211 Omnibus Appropriations Act of 1998 Case*, Panel Report No. WT/DS176/R (06/08/2001), Appellate Body Report No. WT/DS176/AB/R (01/02/2002). The WTO dispute arose out of a dispute between a French-Cuban joint venture and a US corporation over rights to the Havana Club trademark in relation to rum. The WTO dispute focussed on claims by the European Communities that the denial of registration for Cuban IPR holders was inconsistent with Articles 2.1, 4 and 42 of the *TRIPS Agreement* and with parts of the Paris Convention. For an analysis of the political machinations that caused the dispute to be brought to the WTO, see Schaffer GC, *Defending Interests: Public-Private Partnerships in WTO Litigation*, Brookings Institution Press, Washington, DC, 2003, pp 108-109.

change, we're going to swat them' he told the news briefing."[34] Another article quoted the USTR as saying that "a small group of developing countries [is] objecting to a new round of trade liberalization talks, thus 'blocking the will' of most of the global trading community. … He declared that if these countries persisted, the United States would go ahead anyway with talks outside the framework of the General Agreement on Tariffs and Trade with nations that 'share our objectives'."[35] Other countries soon recognised that the demands of a comprehensive agreement were unavoidable. They recognised "[it was] highly likely that in the absence of agreement on trade-related intellectual property the United States would have withdrawn its support for the Uruguay Round of GATT talks and the agreement establishing the WTO would never have been ratified."[36]

These attempts were successful both domestically and internationally, since, according to Maskus, "in the ensuing 16 years, intellectual property rights have moved from an arcane area of legal analysis and policy backwater to the forefront of global economic policymaking."[37] However, the limitation of the *TRIPS Agreement* to "trade-related measures" was one that emerged from the Uruguay Round as a concession by the United States to developing countries. Price and Christy observe that the United States had been seeking expansive investment and IP protection, while developing countries considered expansive laws to be "inimical to their development interests and as a one-sided approach which failed to account for the restrictive business practices of multilateral enterprises."[38] It is in this context that much of the subsequent debate, discussed in Parts II and III below, can be understood.

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34 Farnsworth, note 17.

35 Farnsworth C, "Brazil and India Fight New Copyright Rules", *New York Times* (Montreal), 7 December 1988, p 2.

36 Richards DG, "The Ideology of Intellectual Property Rights in the International Economy" (2002) 60(4) *Review of Social Economy* 521.

37 Maskus, note 15 p 1.

38 Price DM and Christy PB, "Agreement on Trade-Related Investment Measures (TRIMS): Limitations and Prospects for the Future" in Stewart TP (ed), *The World Trade Organization: Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, ABA Section of International Law and practice, Chicago, 1996, p 448.

Part II – The Implementation of the *TRIPS Agreement*

Substantive provisions of the *TRIPS Agreement*

The *TRIPS Agreement* is Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organisation*, signed in Marrakesh, Morocco on 15 April 1994. As its Preamble suggests,[39] the objective of the *TRIPS Agreement* is not to provide unqualified protection to IP rights holders, but rather to balance the needs of free trade and IP protection. This attitude recognises that IP has the propensity to form an effective barrier to free trade between the WTO's member states.

The implementation mechanism of the *TRIPS Agreement* accords some recognition to national differences toward the protection of IP. Article 1 states: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."[40]

The cornerstone principles of the WTO system, the NT Principle and the MFN Principle, are incorporated in Part I of the *TRIPS Agreement*. These principles seek to avoid discrimination between domestic and foreign IP rights holders (the NT principle), and between foreign rights holders (the MFN principle).

Part II of the *Trips Agreement* considers each of the seven types of IP in turn, setting out the minimum standards that members must implement in respect of each type of property. In relation to copyright[41] and circuit layouts,[42] it requires members to comply with the substantive provisions of the major WIPO Conventions applicable to each type of IP, such as the *Paris Convention for the Protection of Industrial Property*.[43] The substantive provisions of the *Washington*

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39 The opening paragraph of the Preamble refers to "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."

40 *TRIPS Agreement*, Article 1.

41 *TRIPS Agreement*, Part II, Section 1.

42 *TRIPS Agreement*, Part II, Section 6.

43 Applicable also to *TRIPS Agreement*, Part II, Section 7 – Protection of Undisclosed Information.

Treaty on Intellectual Property in Respect of Integrated Circuits are also incorporated by reference. The minimum standards set for patents[44] and trademarks[45] do not incorporate any of the international treaties. They simply focus on critical areas of protection, such as equal treatment be given to trade and service marks, the protection of marks that are 'well-known', even if they are not used within the member state in question,[46] patentability of all products and processes "in all fields of technology", provided they meet the criteria of being new, inventive and capable of industrial application.[47] "Geographical Indications"[48] have also been controversial, as Article 23 provides "additional protection" for wines and spirits in comparison to the protection provided by Article 22 for other types of products. Finally, Section 8 of Part II provides a consultative process between members in relation to dealings with IP rights in a manner that adversely affects competition.

Part III is perhaps the most significant part of the *TRIPS Agreement*, as enforcement was one of the main reasons for the introduction of trade-related IP laws at an international level. It comprehensively describes the minimum standards required by member states for the effective enforcement of IP rights, with Section I setting out general obligations such as a requirement that the procedures be "fair and equitable … not unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."[49] Part III then deals with issues such as evidence, injunctions, damages and other remedies, border enforcement measures and enforcement of criminal sanctions. Parts IV to VII deal with a variety of mainly procedural issues, such as "Transitional Arrangements" and "Institutional Arrangements".

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44 *TRIPS Agreement*, Part II, Section 5.

45 *TRIPS Agreement*, Part II, Section 2.

46 *TRIPS Agreement*, Article 16(2) provides that in order to determine whether a mark is 'well-known': "the knowledge of the trademark in the relevant sector of the public is to be taken into account."

47 *TRIPS Agreement*, Article 27(1), which is subject to the qualifications in subsections (2) and (3).

48 *TRIPS Agreement*, Part II, Section 3.

49 *TRIPS Agreement*, Article 41(2).

Tensions in the implementation of the *TRIPS Agreement*

This part examines the implementation of the *TRIPS Agreement* and the tensions between developed and developing states, including the way those tensions manifested themselves in disputes. Two key disputes will be examined: compulsory licensing as a complaint frequently raised by developing members against developed members, and enforcement of copyright in accordance with Part III as a complaint frequently raised by developed members against developing members. Each of these issues will be discussed only briefly, although each is worthy in itself of extensive treatment. However, they are included merely to highlight two of the more contentious issues in respect of IP, rather than to provide a comprehensive analysis.

Access to pharmaceuticals and compulsory licensing

Richards speaks of "the tragedy of the anti-commons", which encapsulates the debate about compulsory licensing. Whereas the tragedy of the commons is the problem of overuse of the world's natural resources, the tragedy of the anti-commons is the problem of under-use of the world's innovations.

> In this scenario, a resource (new knowledge) is subject to underuse when multiple owners of 'upstream knowledge' have the right to exclude others, leaving no one with an effective privilege of 'downstream' use. This is perhaps best illustrated with the … mapping of the human genome. Private profit-seeking companies have taken out patents on thousands of DNA sequences that preclude their study by other scientists. … The tragedy, however, is that this sort of speculation impedes the process of scientific discovery.[50]

In the context of compulsory licensing, the tragedy of the anti-commons is that innovation has created effective pharmaceutical products to cure or control the health epidemics faced by most developing countries: malaria, tuberculosis, and HIV/AIDS. However,

50 Richards, note 36.

in countries that have enacted patent legislation and enforce the patent rights of foreign companies, the only non-infringing method of accessing these products is to import them from the patent holder or a licensee. In most cases this is not a viable option for the citizens of developing countries, as the cost of the pharmaceuticals is prohibitively expensive. For example, the World Health Organisation considers the failure to deliver anti-retroviral (ARV) treatment to millions of HIV-positive patients in developing countries to be "a global health emergency".[51] While many states have relied upon the compulsory licensing provisions to provide access to ARV treatment, developing countries still fear "the political problem [of] whether they will face sanctions from the United States Government, for doing things that they have a legal right to do, but which the United States Government does not like."[52]

In response, developed countries argue that the compulsory licensing provisions must be coupled with an obligation not to export the manufactured products, in order to prevent the parallel importing of the pharmaceuticals back into Western markets. Additionally, they argue that developing countries do not restrict their compulsory licensing regimes to the scope of the Doha mandate. Instead, compulsory licences are combined with fixed rate royalties and imposed on exporters who wish to have their IP rights enforced within the importing country as a precondition to being given import rights in a particular market. Additionally, few developing countries prohibit parallel importing. In many developed countries, the prohibition of parallel importing prevents licensees in other jurisdictions from exporting the product to compete with the licensor's own product.

One such example is Vietnam, which has not yet joined the WTO but has a very comprehensive Bilateral Trade Agreement (BTA) with the United States. The IP obligations of the BTA generally mirror those of the *TRIPS Agreement*, although in certain situations they are more onerous.[53] Having not yet fully implemented its bilateral obligations,

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51 Website of the World Health Organisation, <www.who.org>.

52 Singh S, "Compulsory Licensing Good for U.S. Public, Not Others", *Third World Online Network*, <www.trnside.org.sg/public-cn.htm>.

53 'TRIPS-plus' obligations are a common feature of many bilateral trade agreements negotiated by the United States. For a comprehensive analysis of this phenomenon, see Roffe P, "Bilateral agreements and a TRIPS-plus world: the Chile-USA Free Trade Agreement" *TRIPS Issue Papers No. 4 of the Quaker*

nor having made its IP system fully compliant with the *TRIPS Agreement* in readiness for WTO accession, Vietnam provides a useful case study through which to highlight the concerns of developed countries. For example, Vietnam's Civil Code permits compulsory licensing, coupled with the payment of fixed royalty rates.[54] Additionally, Decree No. 63 excludes a broad range of subject matters from patentability, including "natural science discoveries", "business or management solutions", "teaching or training methods for humans and animals", "computer software, algorithms and flowcharts", and "diagnostic, therapeutic and preventative methods for disease."[55]

Enforcement of copyright in developing countries

Vietnam also provides an example of the enforcement difficulties faced by IP rights holders in developing countries. On the streets of Hanoi, locals and visitors are freely able to purchase photocopied books, illegally copied CDs and DVDs, and counterfeit versions of Europe's high-class clothing and accessories. The IP subgroup of the Vietnam Business Forum[56] laments that, despite the accession by Vietnam of most IP treaties, "[t]he ease with which such infringing products are distributed in the retail markets creates the perception that Vietnam does not recognise or protect any intellectual property rights."[57] The subgroup argues the consequences of the lack of enforcement are that "the development of the local software industry is impeded, there is limited in-country support for business software, and there are no 'new release' foreign films licensed for exhibition in Vietnam."[58]

International Affairs Programme, Ottawa, 2004 <http://geneva.quno.info/pdf/Chile(US)final.pdf> (15 July 2005)

54 Civil Code, Article 802, supplemented by "Decree No. 63/CP Providing Detailed Regulations on Industrial Property, Dated 24 October 1996" (Decree No. 63).

55 Article 4(4) of Decree No. 63.

56 The Vietnam Business forum is an initiative of foreign investors in Vietnam to promote law reform and trade facilitation.

57 Issues Paper of the Vietnam Business Forum, <www.vietnambusinessforum.org/papers/IP_Papers_in_English.doc>.

58 Issues Paper of the Vietnam Business Forum, note 57.

Rights holders in many developing countries also point out that successful enforcement of IP rights can only take place if wider reforms are implemented to limit corruption, make judicial processes accessible to foreign plaintiffs, ensure such processes are transparent, and provide both interlocutory and final relief to plaintiffs. Without effective enforcement, they argue, their IP rights have minimal or no practical or economic value.

Part III - The Future of the *TRIPS Agreement* and the Cancún Meeting

> If law is seen as the common parlance of a society that has established relations between all nations, there are three factors to bear in mind: first, how far the law, the content of the rules of law and the use people can make of it is actually understood; second, how the existing rules are in fact used by the different players; and thirdly, the degree to which those same (diverse) players understand that they can devise new law whenever the present law is incomplete, open to challenge or simply non-existent.[59]

It is a fundamental axiom of behaviour, not only of individuals but also of international states, that they will act primarily out of self-interest. In the context of the *TRIPS Agreement*, the challenge for the WTO is to establish a legal regime that satisfies the interests of both developed and developing members. This is essential, not only to introduce an element of democratic process into the WTO regime, but also as an encouragement to all members to adhere to the regime, and not merely to do so because of the threat of coercive action (whether through the institutional dispute settlement mechanisms or through the application of informal political or economic pressures).

As the above quote suggests, a critical element for a regime that is supposed to reflect "common parlance" is an awareness by its constituent members that they have the ability to change or improve the regime. In this context, the current debate and the Cancún meetings themselves are evidence that developing countries are gaining a greater

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59 Chemillier-Genreau M, "International Law and the Developing World", *Le Monde Diplomatique*, <http://mondediplo.com/2001/02>.

awareness not only of their political power, but also of the facets of the *TRIPS Agreement* architecture that need to be amended or improved in order to meet their national interests. In other words, they are attempting to make the *TRIPS Agreement* reflect "common parlance" through the Doha Development Agenda.

Five Ministerial Conferences have taken place since the establishment of the WTO in 1995: in Singapore in 1996; Geneva in 1998; Seattle in 1999; Doha in 2001; and Cancún in 2003.

While the Doha Ministerial Conference was touted as a 'success', and seen as the epitome of what should be achieved at a Ministerial Conference, it should be recognised as being atypical in its outcome. The 1999 WTO Seattle Meeting was significant for the general public in many developed countries, as the occurrence of numerous violent protests and the collapse of negotiations meant that criticism of the WTO's reason for existence – free trade – reached the mass media for the first time in a sensationalised and confronting way. For developing countries, a new awareness was reached of their potential for collective action, although their representatives gave no concrete agenda other than to repeat and rely on the criticisms espoused by the protesters. Similarly, the Cancún Meeting demonstrated that developing countries not only recognised their potential for collective action but also were able to effectively promote their agenda in the negotiations.

This has been evident not only from the official record of the meeting, but also from the reports of non-government organisations and some media organisations. For example, the address by the South African delegate to an NGO Symposium provided an insight into the position that developing countries intended to put at the meeting:

> [R]ather than promoting the traditional model of technology transfer, we should seek to foster collaboration based on a mutually beneficial technology partnership between developed and developing partners, as a mechanism which can effectively address these concerns and deliver the required results. … An area of specific concern is the international intellectual property rights regime, which frequently works against developing countries due to factors such as high entry-cost barriers to the patent system and the lack of adequate protection for traditional knowledge. It is a situation which often means that developing countries can not afford access to knowledge and key

> technologies, and it is indeed imperative that the recent progress achieved in this domain be built upon constructively in Cancún.[60]

The Cancún Ministerial Text was considered by most developing members to be biased in favour of developed countries, and the conclusion of the meeting without agreement was considered to be a victory in terms of demonstrating the strength of the developing countries acting in alliance. Alliances such as G-22 and the African cotton producers provided a powerful demonstration of their ability to leverage negotiating power to prevent the perpetuation of damaging agricultural subsidies in developed cotton-producing nations. The Malaysian Trade Minister expressed sentiments that were shared by many of his fellow members, stating: "We will no longer sit at the door of the negotiating room being handed sweeteners from time to rime. We know what is good for us."[61]

Conclusion

While the introduction of the *TRIPS Agreements'* agenda into the global trading system occurred largely over the silent objections of the WTO's developing member states, events at the Seattle and Cancún Meetings demonstrated to observers that developing members are willing and able to utilise their political power to ensure that they contribute to its future form.

IP is recognised as one of the most politically and economically significant forms of property, and the linkage between trade and IP is firmly established as a key element of the WTO Agreements. While developed and developing states have strongly different and often conflicting interests in the protection and exploitation of IP, both seem to have recognised the importance of balanced debate and negotiation as part of the WTO's processes.

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60 Ngubane Dr BS, Minister of Arts, Culture, Science and Technology of the Republic of South Africa, at the Opening Session of the Cancún Trade and Development Symposium, <www.dst.gov.za/news/speeches/minister/cancun.htm>.

61 "New World Order May Emerge from WTO's Cancún Collapse", *Trade News Archive*, <www.importers.com/news_archive.php#59>, (16 September 2003).

This article has traced the development of the *TRIPS Agreement's* agenda, from its origins as a US political movement and a sub-issue in GATT to one of the most evocative issues in international trade law. In doing so, it has become clear that the negotiations, stalemates, and political and trade disputes are an inherent part of the TRIPS coming-of-age process. After the 5th Ministerial Conference, the media in developing countries referred to the events in Cancún as "a great moral victory for the world's poor"[62] and "a victory for developing countries which have come into their own."[63] Conversely, the media of the developed countries, including the press releases of the WTO, criticised the lack of consensus in Cancún as a serious threat to the WTO's processes. History demonstrates that neither view is correct: there was nothing new in Cancún except a reaffirmation of developing countries' commitment to advocate for their own interests in the implementation of the Doha Agreement. As the 6th Ministerial Conference in Hong Kong approaches, the objective should not be an "agreed text", but simply a continuation of the debate.

62 Morely J, "After Cancun, Rich Man's Debacle Is the Poor Man's 'Moral Victory'", *Washington Post Online Edition*, <www.washingtonpost.com/wp-dyn/articles/A18471-2003Sep16.html>.

63 Morely J, note 62.