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## Are Developing Countries Playing a Better TRIPS Game

Peter K. Yu  
peter\_yu@msn.com

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# ARE DEVELOPING COUNTRIES PLAYING A BETTER TRIPS GAME?

*By Peter K. Yu\**

## ABSTRACT

The Agreement on Trade-Related Aspects of Intellectual Property Rights entered into force more than fifteen years ago. Although commentators have widely criticized the Agreement for its failure to address the needs, interests, conditions, and priorities of less developed countries, few have examined whether these countries have now attained greater success in shaping the development of the Agreement than they did before. This Article seeks to fill the void by examining the performance of these countries at various stages of development of the TRIPS Agreement. Utilizing game theory and game metaphors, this Article disaggregates the “TRIPS game” into five different mini-games: (1) negotiation; (2) implementation; (3) enforcement; (4) interpretation; and (5) compliance. The Article then analyzes the performance of less developed countries in these games. By documenting the state of play in each game, this Article highlights the complex and dynamic nature of TRIPS developments as well as the machinations of WTO members. The Article underscores the need for a more holistic perspective in studying the TRIPS Agreement.

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## INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>1</sup> (TRIPS Agreement) entered into force on January 1, 1995. For more than fifteen years, the TRIPS Agreement has strengthened the standards for the protection and enforcement of intellectual property rights among less developed members of the World Trade Organization (WTO).<sup>2</sup> Commentators have widely criticized the TRIPS Agreement for its failure to address the needs, interests, conditions, and priorities of less developed countries.<sup>3</sup> Few commentators, however, have examined whether these

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

<sup>2</sup> The TRIPS Agreement distinguishes between developing and least developed countries. *See, e.g., id.* arts. 65–66. This Article uses “less developed countries” to denote both developing and least developed countries. When referring to the TRIPS Agreement, however, this Article may return to using the terms “developing countries” and “least developed countries.”

<sup>3</sup> *See generally* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827 (2007) (discussing the enclosure of the policy space less developed countries have in designing intellectual property systems that fit their needs, interests, goals, and priorities).

countries have now attained greater success in shaping the development of the TRIPS Agreement than they did before. This Article seeks to fill the void by examining the performance of less developed countries at various stages of development of the Agreement.

Following a growing volume of literature applying game theory or game metaphors to the TRIPS Agreement,<sup>4</sup> this Article disaggregates the “TRIPS game” into five different mini-games: (1) negotiation; (2) implementation; (3) enforcement; (4) interpretation; and (5) compliance. The Article then analyzes the performance of less developed countries in these games. By documenting the state of play in each game, this Article highlights the complex and dynamic nature of TRIPS developments as well as the machinations of WTO members. The Article underscores the need for a more holistic perspective in studying the TRIPS Agreement.

## I. THE NEGOTIATION GAME

### A. Phase 1: TRIPS Negotiations

Commentators have examined at length the origins of the TRIPS Agreement.<sup>5</sup> While it is hard to pinpoint these origins, at least four dominant narratives exist: (1) bargain; (2) coercion; (3) ignorance; and (4)

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<sup>4</sup> See, e.g., CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* (2009) (describing the implementation of the TRIPS Agreement as an “implementation game”); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 *EMORY INT’L L. REV.* 819, 823 (2003) (introducing “the two-stage game as a model to evaluate the implications of dispute settlement on sovereign discretion over domestic intellectual property policy”); Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 *FORDHAM INT’L L.J.* 218 (2003) (considering the process of international harmonization of intellectual property standards as a game).

Game theory, indeed, has been widely used in the international law context. See, e.g., Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 *BUFF. L. REV.* 679 (2003); Moshe Hirsch, *Game Theory, International Law and Future Environmental Cooperation in the Middle East*, 27 *DENV. J. INT’L L. & POL’Y* 75 (1998).

<sup>5</sup> See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 3–27 (3d ed. 2008) (describing the origins and development of the TRIPS Agreement); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPs and Its Discontents*, 10 *MARQ. INTELL. PROP. L. REV.* 369, 371–79 (2006) [hereinafter Yu, *TRIPs and Its Discontents*] (examining four different accounts of the origins of the TRIPS Agreement).

self-interest. The most widely used is the bargain narrative, which considers the TRIPS Agreement the product of a compromise between developed and less developed countries.<sup>6</sup> In this narrative, developed countries received stronger protection for intellectual property rights and a reduction in restrictions against foreign direct investment. In return, less developed countries obtained lower tariffs on textiles and agriculture and protection via the mandatory WTO dispute settlement process against unilateral sanctions imposed by the United States and other developed countries.

Compared with this dominant narrative, the other three narratives downplay, or even question, the existence of a “grand bargain” between developed and less developed countries. The coercion narrative portrays the TRIPS Agreement as an unfair trade instrument that developed countries imposed upon their less developed counterparts.<sup>7</sup> The ignorance narrative emphasizes the inability of less developed countries to understand, during the TRIPS negotiations, the importance of intellectual property protection—and, by extension, the impact of the TRIPS Agreement.<sup>8</sup> The self-interest narrative postulates that less developed countries agreed to stronger intellectual property protection because they considered such protection in their self-interest.<sup>9</sup>

Although all four narratives provide valuable insights into understanding the origins of the TRIPS Agreement, they are not mutually exclusive. They are also incomplete. Being state-centered, all four narratives fail to fully capture the active participation of non-state actors.<sup>10</sup>

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<sup>6</sup> See Yu, *TRIPS and Its Discontents*, *supra* note 5, at 371–73 (discussing the bargain narrative).

<sup>7</sup> See *id.* at 373–75 (discussing the coercion narrative).

<sup>8</sup> See *id.* at 375–76 (discussing the ignorance narrative).

<sup>9</sup> See *id.* at 376–79 (discussing the self-interest narrative).

<sup>10</sup> As Susan Sell explained:

State-centric accounts of the Uruguay Round are at best incomplete, and at worst misleading, as they obscure the driving forces behind the TRIPS Agreement. . . . In the TRIPS case, private actors pursued their interests through multiple channels and struck bargains with multiple actors: domestic interindustry counterparts, domestic governments, foreign governments, foreign private sector counterparts, domestic and foreign industry associations, and international organizations. They vigorously pursued their IP [intellectual property] objectives at all possible levels and in multiple venues, successfully redefining intellectual property as a trade issue. . . . It was not merely their relative economic power that led to their ultimate success, but their command of IP expertise, their ideas, their information, and their framing skills (translating complex issues into political discourse).

Although civil society organizations, by most accounts, did not actively participate in the TRIPS negotiations,<sup>11</sup> corporations and trade groups aggressively pushed for the adoption of the TRIPS Agreement.<sup>12</sup> As Susan Sell boldly declared, as far as the Agreement was concerned, “twelve corporations made public law for the world.”<sup>13</sup>

In sum, a wide variety of narratives, both state- and non-state-centered, exist to account for the origins of the TRIPS Agreement. Regardless of which narrative one finds most convincing, less developed countries clearly did not experience much success in the negotiation process. While they submitted a negotiating text—the so-called B text—for consideration, most of the TRIPS Agreement’s final language came from the A text, which drew on proposals submitted by developed countries.<sup>14</sup> In the end, less developed

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SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 8 (2003).

<sup>11</sup> See *id.* at 181 (“When [Professor Sell] asked some public-regarding copyright activists ‘where they had been’ during TRIPS, they told [her] they had been ‘sleeping’ but that because of TRIPS they had ‘woken up.’”); Ellen ‘t Hoen, *The Revised Drug Strategy: Access to Essential Medicines, Intellectual Property, and the World Health Organization*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY* 127, 131 (Gaëlle Krikorian & Amy Kapczynski eds., 2010) (stating that it was at the International Conference on National Medicinal Drug Policies in Sydney in 1995 that “for the first time public-health advocates raised the concern that the globalization of new international trade rules and the harmonization of regulatory requirements would restrict countries’ ability to implement drug policies that would ensure access to medicine for all.”).

<sup>12</sup> For detailed discussions of the private sector’s active involvement in the development of the TRIPS Agreement, see generally DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* (2002); SELL, *supra* note 10.

<sup>13</sup> SELL, *supra* note 10, at 96.

<sup>14</sup> As Daniel Gervais, who was working at the Secretariat at the time of the negotiations, recounted in detail:

In the first few months of 1990, a number of industrialized countries tabled, with little advance notice, draft legal texts of what they saw as the future TRIPS Agreement. Prior to the tabling of these texts, the discussions had focused on identifying existing norms and possible trade-related gaps therein, but the emerging outline of a possible TRIPS result had essentially been at the level of principles, not legal texts. The draft legal texts, which emanated from the European Community, the United States, Japan, Switzerland, and Australia, foreshadowed a detailed agreement covering all IP rights then in existence, even the seldom used *sui generis* protection for computer chips. The proposals also included detailed provisions on the enforcement of those rights before national courts and customs authorities and a provision bringing future TRIPS disputes under the General Agreement on Tariffs and Trade (“GATT”)/WTO dispute-settlement umbrella. These proposals were far from obvious in light of the

countries only obtained limited concessions in the form of articles 1.1, 7, 8, 40, 41.5, 65, 66, and 67, and some minor adjustments in other provisions.

The second sentence of article 1.1 specifically states that “Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”<sup>15</sup> Articles 7 and 8 lay down the Agreement’s overarching objectives and normative principles.<sup>16</sup> Article 40 permits member states to take appropriate measures to curb “an abuse of intellectual property rights having an adverse effect on competition in the relevant market.”<sup>17</sup> Article 41.5 explicitly stipulates that a WTO member is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement.<sup>18</sup>

In addition, articles 65.2 and 65.3 delayed the implementation of the TRIPS Agreement in less developed and transition countries for four years.<sup>19</sup> Article 66.1 granted least developed countries a transitional period of ten years,<sup>20</sup> which has since been extended to at least seventeen and a half

limited mandate of the TRIPS negotiating group.

As a reaction, more than a dozen developing countries proposed another “legal” text, much more limited in scope, with few specific normative aspects. They insisted on the need to maintain flexibility to implement economic and social development objectives. In retrospect, some developing countries may feel that the Uruguay Round Secretariat did them a disservice by preparing a “composite” text, which melded all industrialized countries’ proposals into what became the “A” proposal, while the developing countries’ text became the “B” text. The final Agreement mirrored the “A” text. As such, it essentially embodied norms that had been accepted by industrialized countries. The concerns of developing countries were reflected in large part in two provisions—Articles 7 and 8.

Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 *FORDHAM L. REV.* 505, 507–08 (2005).

<sup>15</sup> TRIPS Agreement art. 1.

<sup>16</sup> *Id.* arts. 7–8. See generally Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 *HOUS. L. REV.* 979 (2009) [hereinafter Yu, *Objectives and Principles*] (discussing articles 7 and 8 of the TRIPS Agreement).

<sup>17</sup> TRIPS Agreement art. 40.

<sup>18</sup> *Id.* art. 41.5 (“Nothing in [Part III of the Agreement] creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”).

<sup>19</sup> *Id.* arts. 65.2–3.

<sup>20</sup> *Id.* art. 66.1.

years.<sup>21</sup> Article 66.2 states that “[d]eveloped country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”<sup>22</sup> Article 67 requires developed countries to “provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members.”<sup>23</sup>

In the remaining provisions, which were drawn primarily from developed countries’ proposals, less developed countries obtained concessions through the built-in ambiguities, flexibilities, limitations, and exceptions. For example, some provisions, like those in Part III of the TRIPS Agreement, contain vague, broad, undefined, and result-oriented terms. These terms include “‘effective’, ‘reasonable’, ‘undue’, ‘unwarranted’, ‘fair and equitable’, and ‘not . . . unnecessarily complicated or costly.’”<sup>24</sup> Some provisions also introduce empowerment norms, as opposed to norms mandating specific actions.<sup>25</sup> Moreover, key terms have

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<sup>21</sup> Shortly before the Sixth Ministerial Conference in Hong Kong in 2005, WTO members extended the transitional period to July 1, 2013 for those least developed countries that have yet to meet the TRIPS requirements. *See* Press Release, World Trade Org., Poorest Countries Given More Time to Apply Intellectual Property Rules (Nov. 29, 2005), [https://www.wto.org/english/news\\_e/pres05\\_e/pr4\\_24\\_e.htm](https://www.wto.org/english/news_e/pres05_e/pr4_24_e.htm). The Doha Declaration, which was adopted four years earlier, extended the deadline for the formal introduction of both patent protection for pharmaceuticals and protection for undisclosed clinical trial data to January 1, 2016. World Trade Organization, Declaration on the TRIPS Agreement and Public Health ¶ 7, WT/MIN(01)/DEC/2 (2001), 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

<sup>22</sup> TRIPS Agreement art. 66.2.

<sup>23</sup> *Id.* art. 67 (“Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.”).

<sup>24</sup> UNCTAD–ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 576 (2005); *see also* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 23, 71 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008) (“[The TRIPS] enforcement provisions—unlike the substantive standards set out in the agreement—are truly minimum standards, as attested by the loose and open-ended language in which they are cast.”).

<sup>25</sup> *See* TRIPS Agreement arts. 43–48, 50, 53, 56, 57, 59. As Rachel Brewster lamented: “Essentially, the TRIPS Agreement relies on the existence of formal sanctions and not the efforts of governments to enforce domestic laws.” Rachel Brewster, *The Surprising Benefits*



been left undefined in several articles,<sup>26</sup> thereby creating what Jayashree Watal and other commentators have described as “constructive ambiguities.”<sup>27</sup>

While all of these concessions have benefited less developed countries, they do not offset the many new and higher substantive and enforcement standards developed countries successfully imposed upon their less developed counterparts.<sup>28</sup> Even worse, if the TRIPS Agreement is viewed as a bargain between developed and less developed countries, as advanced through the bargain narrative, the latter group of countries not only got a bad bargain but also a failed one.

The TRIPS bargain is bad because gains by less developed countries in the areas of agriculture and textiles would not make up for losses in the

*to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 6 (2011); *see also id.* at 31 (“[T]he TRIPS Agreement’s enforcement provisions are institution-oriented, not outcome-oriented.”). Consider, for example, article 59, the provision at issue in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*. That provision states that “competent authorities shall have the authority to order the destruction or disposal of infringing goods” seized at the border. TRIPS Agreement art. 59 (emphasis added). The concerned authorities, however, need not order the destruction or disposal of the seized goods. *See* Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1069–75 (2011) (discussing the United States’ claim in the WTO dispute that the Chinese customs authorities had failed to properly dispose of infringing goods seized at the border pursuant to article 46—and, by extension, article 59—of the TRIPS Agreement).

<sup>26</sup> For example, the term “commercial scale” in article 61 was undefined. *See* Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ¶¶ 7.532–579, WT/DS362/R (Jan. 26, 2009) [hereinafter Panel Report] (providing the interpretation of the phrase “on a commercial scale”). The lack of such a crucial definition eventually posed a fatal challenge to the United States’ complaint against China over its failure to extend criminal sanctions to “wilful trademark counterfeiting or copyright piracy on a commercial scale.” *See* Yu, *The TRIPS Enforcement Dispute*, *supra* note 25, at 1056–69 (discussing the United States’ claim in the WTO dispute that the high thresholds for criminal procedures and penalties in the intellectual property area in China are inconsistent with article 61 of the TRIPS Agreement). Because the United States was unable to advance sufficient evidence to “demonstrate what constituted ‘a commercial scale’ in the specific situation of China’s marketplace,” the WTO panel found that the United States had failed to substantiate its claim. Panel Report, *supra*, ¶¶ 7.615–616.

<sup>27</sup> *See* WATAL, *supra* note 5, at 7 (advancing the concept of “constructive ambiguities”); Yu, *Objectives and Principles*, *supra* note 16, at 1022–23 (discussing the ambiguities within the TRIPS Agreement).

<sup>28</sup> *See* TRIPS Agreement arts. 41–61 (mandating new and higher standards for enforcement of intellectual property rights); *see also* Yu, *TRIPS and Its Discontents*, *supra* note 5, at 373–75 (discussing the coercion narrative).

intellectual property and information technology areas.<sup>29</sup> Many less developed countries simply do not possess the needed wealth, infrastructure, and technological base to take advantage of the opportunities created by the TRIPS-based intellectual property system.<sup>30</sup> They also do not have the economic strengths or established legal mechanisms to overcome problems created by such a system.<sup>31</sup>

The TRIPS bargain also failed because developed countries thus far have refused to honor their promises to reduce tariffs and subsidies in the areas of agriculture and textiles.<sup>32</sup> These concessions were what initially enticed less developed countries to strengthen intellectual property protection and increase market access through the WTO negotiations. To date, cotton subsidies has remained one of the most contentious issues in the present Doha Development Round of Trade Negotiations (Doha Round).<sup>33</sup>

*B. Phase 2: TRIPS Recalibrations*<sup>34</sup>

Notwithstanding the limited success of less developed countries in shaping the TRIPS Agreement during the initial phase of the negotiation process, these countries have been using the Doha Round to regain some of the ground they lost during the TRIPS negotiations. For example, during the Sixth Ministerial Conference in Hong Kong, countries voted to accept the

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<sup>29</sup> See *id.* at 379 (“[E]mpirical records have indicated that less developed countries not only got a bad bargain, as some would say, but also a failed bargain.”).

<sup>30</sup> See KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 237 (2000) (noting that “[l]ong-run gains would come at the expense of costlier access in the medium term”).

<sup>31</sup> See Yu, *TRIPS and Its Discontents*, *supra* note 5, at 382–83.

<sup>32</sup> See COMM’N ON INTELLECTUAL PROP. RIGHTS, *INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 8* (2002) [hereinafter *IPR COMMISSION REPORT*] (noting that many less developed countries “feel that the commitments made by developed countries to liberalise agriculture and textiles and reduce tariffs, have not been honoured, while they have to live with the burdens of the TRIPS agreement”); SELL, *supra* note 10, at 173 (stating that “there is . . . no evidence that developed countries are making good on their commitments to open their markets more widely to developing countries’ agricultural and textile exports”).

<sup>33</sup> See Ravi Kanth Devarakonda, “*Cotton Dossier*” Will Make or Break WTO’s Doha Round, *INTER PRESS SERV.* (June 9, 2010), <http://ipsnews.net/news.asp?idnews=51762>.

<sup>34</sup> One could arguably add a sixth revision game to the five mini-games examined in this Article. However, the analysis of that game is quite similar to that of a negotiation game. This Part therefore groups the discussion of the TRIPS revision game together with the TRIPS negotiation game.

proposal to formally amend the TRIPS Agreement.<sup>35</sup> Built upon paragraph 6 of the Declaration on the TRIPS Agreement and Public Health<sup>36</sup> (Doha Declaration), the proposed amendment will add article 31*bis* to the TRIPS Agreement. If adopted, the provision will allow countries with insufficient or no manufacturing capacity to import generic versions of patented pharmaceuticals. Although the amendment has not entered into effect due to insufficient ratifications by WTO members,<sup>37</sup> the temporary arrangement called for by the Doha Declaration will remain in effect until the adoption of a permanent arrangement.<sup>38</sup>

In recent years, less developed countries have also advanced a proposal for the development of a new article 29*bis*,<sup>39</sup> which seeks to create an obligation to disclose the source of origin of the biological resources and traditional knowledge in patent applications.<sup>40</sup> The proposal further requires patent applicants to disclose their compliance with access and benefit-sharing requirements under the relevant national laws.<sup>41</sup> Thus far, a large

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<sup>35</sup> See General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), available at [www.wto.org/english/tratop\\_e/trips\\_e/wtl641\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm).

<sup>36</sup> Doha Declaration, *supra* note 21, ¶ 6.

<sup>37</sup> As of this writing, more than a third of the 158 WTO member states, including the United States, India, Japan, China, and the European Union, have ratified the proposed amendment. See *Members Accepting Amendment of the TRIPS Agreement*, WTO, [http://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm) (last updated Nov. 5, 2012).

<sup>38</sup> See Doha Declaration, *supra* note 21, ¶ 6.

<sup>39</sup> See Council for Trade-Related Aspects of Intellectual Prop. Rights, *The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity: Checklist of Issues*, IP/C/W/420 (Mar. 2, 2004) (providing a checklist of issues that should be explored by the Council, including the disclosure of the source of origin of the biological resources and traditional knowledge used in patent-seeking inventions); Council for Trade-Related Aspects of Intellectual Prop. Rights, *Elements of the Obligation to Disclose the Source and Country of Origin of the Biological Resources and/or Traditional Knowledge Used in an Invention*, IP/C/W/429/Rev.1 (Sept. 27, 2004) (discussing issues listed in a checklist and proposing that the TRIPS Agreement be amended to include a mandatory disclosure requirement); Emanuela Arezzo, *Struggling Around the "Natural" Divide: The Protection of Tangible and Intangible Indigenous Property*, 25 CARDOZO ARTS & ENT. L.J. 367, 382–85 (2007) (discussing proposals to add a disclosure requirement in the TRIPS Agreement).

<sup>40</sup> See Council for Trade-Related Aspects of Intellectual Prop. Rights, Trade Negotiations Comm., *Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity* ¶ 2, WT/GC/W/564/Rev.2 (July 5, 2006) (requiring patent applicants to “disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin”).

<sup>41</sup> See *id.* (requiring patent applications to “provide information including evidence of

number of less developed countries have supported this proposal.<sup>42</sup> The United States and Japan, by contrast, strongly oppose it, expressing their fear that the additional requirement would destabilize the existing patent system.<sup>43</sup>

In addition, less developed countries seem to have achieved some success in linking the disclosure issue in the TRIPS Agreement to the Convention on Biological Diversity.<sup>44</sup> For example, the Doha Ministerial Declaration “instruct[ed] the Council for TRIPS . . . to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore.”<sup>45</sup> Such discussion is particularly important in light of the recent adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity.<sup>46</sup> Adopted in October 2010, this protocol aims to promote the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and the sustainable use of biological diversity.<sup>47</sup>

In sum, although the TRIPS negotiations were completed more than a decade and a half ago, the TRIPS negotiation game has not yet ended. With continued negotiations during the Doha Round and the arrival of new issues

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compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge”).

<sup>42</sup> See William New, *WTO Biodiversity Amendment Backed; EU Seeks ‘New Thinking’ on GIs*, INTELL. PROP. WATCH (Oct. 26, 2007), <http://www.ip-watch.org/weblog/2007/10/26/wto-biodiversity-amendment-backed-eu-seeks-new-thinking-on-gis/> (describing the support of the majority of the WTO membership).

<sup>43</sup> See Arezzo, *supra* note 39, at 387–88 (noting that the United States’ opposition is based on its concern that the disclosure requirement would “render[] the application mechanism excessively burdensome and the validity of its protection uncertain”).

<sup>44</sup> Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993). The Convention was established in 1992 to promote “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.” *Id.* art. 1.

<sup>45</sup> World Trade Organization, Ministerial Declaration of 14 November 2001 ¶ 19, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

<sup>46</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, *available at* <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

<sup>47</sup> *Id.* art. 1.

and overlapping areas, this game has never been more exciting. Because less developed countries have acquired greater leverage and better negotiation skills in recent years, the game they play today has also become more sophisticated. If these countries continue to improve, the outcome of the second phase of this negotiation game is likely to be rather different from that of the first phase.

## II. THE IMPLEMENTATION GAME

The high costs of implementation of the TRIPS Agreement and the low payoffs to less developed countries have placed a significant burden on many of these countries. As Michael Finger, a World Bank economist, observed, the introduction and enforcement of laws alone has created in less developed countries an obligation of \$60 billion per year.<sup>48</sup> Depending on how the laws are implemented and whether additional infrastructural support is needed, this obligation can become even more costly, thereby threatening to take away more scarce resources from competing public needs.<sup>49</sup>

If the TRIPS obligations are not costly enough, the TRIPS Agreement's one-sidedness has increased the implementation challenges confronting less developed countries. As the World Bank estimated, "rent transfers to major technology-creating countries—particularly the United States, Germany, and France—in the form of pharmaceutical patents, computer chip designs, and other intellectual property, would amount to more than \$20 billion" if the TRIPS Agreement were fully implemented.<sup>50</sup> Likewise, Jagdish Bhagwati declared, "TRIPS does not involve mutual gain; rather, it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations. . . ."<sup>51</sup>

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<sup>48</sup> J. Michael Finger, *Introduction and Overview*, in POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 1, 4 (J. Michael Finger & Philip Schuler eds., 2004) (citing J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round 9* (Asia Development Bank, ERD Working Paper Series No. 21, 2002), available at [http://www.adb.org/documents/ERD/Working\\_Papers/wp021.pdf](http://www.adb.org/documents/ERD/Working_Papers/wp021.pdf)).

<sup>49</sup> For discussions of the development of low-cost intellectual property systems, see IPR COMMISSION REPORT, *supra* note 32, at 145–46; ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 181–85 (1990); Sean A. Pager, *Patents on a Shoestring: Making Patent Protection Work for Developing Countries*, 23 GA. ST. U. L. REV. 755 (2007).

<sup>50</sup> See WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002, xvii (2001), available at <http://siteresources.worldbank.org/INTGEP2002/Resources/gep2002complete.pdf>.

<sup>51</sup> Jagdish Bhagwati, *What It Will Take to Get Developing Countries into a New Round of*

Notwithstanding these potential adverse impacts, many less developed countries have quickly embraced the TRIPS Agreement. In her recent book, Carolyn Deere Birkbeck showed shockingly that some of the *poorest* countries in francophone Africa have adopted some of the *highest* protections in the intellectual property area.<sup>52</sup> Such adoption is particularly troubling considering that the United States and other developed countries have not exerted pressure on these countries to strengthen intellectual property protection. As the author reminded us, “[n]o African [least developed country] has ever been cited on the US Special 301 list or subject to a WTO dispute.”<sup>53</sup>

Compared with these countries, large developing countries have played the implementation game much better. India, for example, took full advantage of the transitional period for developing countries.<sup>54</sup> Indeed, the country has used the transitional period so aggressively that it became the subject of two WTO complaints shortly after the TRIPS Agreement entered into force. In *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the United States and later the European Communities successfully challenged, through parallel proceedings, India’s failure to establish a mailbox system<sup>55</sup> in its patent law pursuant to article 70.8 of the

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*Multilateral Trade Negotiations*, in DEP’T OF FOREIGN AFFS. & INT’L TRADE, TRADE POLICY RESEARCH 2001, 19, 21 (2001).

<sup>52</sup> See DEERE, *supra* note 4, at 232 (“[I]n francophone Africa, . . . a group of the world’s poorest countries adopted some of the world’s highest IP standards at an earlier date than TRIPS required.”). See *generally id.* at 240–86 (discussing the implementation of the TRIPS Agreement in francophone Africa).

<sup>53</sup> *Id.* at 306.

<sup>54</sup> Compared with India, China was unable to take advantage of this transitional period, as it did not join the WTO until December 2001, close to two years after the expiration of the period. See Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 2 (2003) (remarks of the Author) (stating that China became the 143rd member of the international trading body on December 11, 2001).

<sup>55</sup> Article 70.8(a) of the TRIPS Agreement provides:

Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed . . . .

TRIPS Agreement art. 70.8(a).

TRIPS Agreement.<sup>56</sup>

Notwithstanding its losses in these proceedings, India succeeded in delaying the introduction of a new patent law for pharmaceutical products until after the expiration of the transitional period.<sup>57</sup> Section 3(d) of that law specifically prevents patent protection from being granted to

the mere discovery of a new form of a known substance which does not result in increased efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such process results in a new product or employs at least one new reactant.<sup>58</sup>

Because of this prohibition, multinational pharmaceutical manufacturers have considered the provision a major concern.<sup>59</sup> As of this writing, Novartis is still challenging the provision before the Indian Supreme Court.<sup>60</sup>

In retrospect, India's success in taking full advantage of the TRIPS transitional period not only demonstrates how well large developing countries have played the implementation game, but also underscores the importance for less developed countries to utilize the flexibilities available in the TRIPS Agreement.<sup>61</sup> By experimenting with different policy options

<sup>56</sup> Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997).

<sup>57</sup> For comprehensive discussions of the recent changes in Indian patent law, see generally Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571 (2009); Janice M. Mueller, *The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation*, 68 U. PITT. L. REV. 491 (2007); Srividhya Ragavan, *Of the Inequals of the Uruguay Round*, 10 MARQ. INTELL. PROP. L. REV. 273 (2006).

<sup>58</sup> The Patents (Amendment) Act, No. 15 of 2005, § 3(d), INDIA CODE (2005).

<sup>59</sup> See Kapczynski, *supra* note 57, at 1590–92 (discussing the operation of Section 3(d) of the Indian patent law and how it limits patent rights).

<sup>60</sup> See Katy Daigle, *Novartis Fights Patent Rejection in Indian Court*, GUARDIAN, Sept. 6, 2011, <http://www.guardian.co.uk/world/feedarticle/9832383>. That lawsuit was precipitated by the patent office's rejection of Novartis's patent in Gleevec, a drug for treating chronic myeloid leukemia and other cancers. See *id.*

<sup>61</sup> Indeed, with the recent extensions of the transitional periods for least developed countries, it has become particularly important for these countries to take full advantage of the transitional periods. As Sisule Musungu reminded us:

While giving extra time due to administrative and financial constraints was one

and delaying the introduction of TRIPS standards, India successfully maintained an intellectual property system that was tailored to its local needs, interests, conditions, and priorities.

In sum, although the TRIPS implementation game has not garnered as much scholarly attention as the TRIPS negotiation game,<sup>62</sup> the stakes in the implementation game are high for less developed countries. How well they play the game ultimately will depend on how well they utilize, and experiment with, the flexibilities available under the TRIPS Agreement. India succeeded in this game not only because it is a powerful developing country but also because it has the ability to determine for itself the appropriate intellectual property policies as permissible under the WTO rules.

### III. THE ENFORCEMENT GAME

During the TRIPS negotiations, intellectual property enforcement presented one of the most challenging issues for negotiators.<sup>63</sup> While adequate and effective enforcement is essential to the effective operation of the intellectual property system, higher enforcement standards often come with a hefty price tag, difficult tradeoffs,<sup>64</sup> and significant intrusions on sovereignty.<sup>65</sup> Indeed, less developed countries were so concerned about the

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aim, the central objective of the LDCs [least-developed countries] transition period under the TRIPS Agreement is different. Article 66.1 of TRIPS read together with the Preamble of the TRIPS Agreement and its objectives under Article [7] envisage the purpose and objectives of the LDCs transition period to be to respond and address: the special needs and requirements of these countries; and the need for maximum flexibility to help these countries create a sound and viable technological base.

Sisule F. Musungu, *A Conceptual Framework for Priority Identification and Delivery of IP Technical Assistance for LDCs During the Extended Transition Period Under the TRIPS Agreement* 5 (Quaker United Nations Office, Issue Paper No. 7, 2007), available at <http://www.quono.org/geneva/pdf/economic/Issues/Priority-ID-English.pdf> (endnote omitted).

<sup>62</sup> The rare exception is DEERE, *supra* note 4.

<sup>63</sup> See Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 492–99 (2011) (discussing the enforcement-related negotiation challenges).

<sup>64</sup> See Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 2–6 (2010) (discussing the costs of strong intellectual property enforcement norms and the resulting trade-offs).

<sup>65</sup> See Panel Report, *supra* note 26, ¶ 7.501 (acknowledging the “sensitive nature of criminal matters and attendant concerns regarding sovereignty”); Frederick M. Abbott, *Innovation and Technology Transfer to Address Climate Change: Lessons from the Global Debate on Intellectual Property and Public Health* 6–7 (International Centre for Trade and



heightened obligations that they specifically negotiated for article 41.5 of the TRIPS Agreement to preempt demands for resources to set up specialized intellectual property courts or to strengthen intellectual property enforcement.<sup>66</sup>

As a result of the compromises struck by WTO members in the enforcement area, the TRIPS Agreement has had very limited success in inducing less developed countries to offer stronger global enforcement of intellectual property rights. As I explained in a recent article, historical, economic, tactical, disciplinary, and technological challenges have, and continue to, militate against such enforcement.<sup>67</sup> It is therefore no surprise that Jerome Reichman and David Lange have described articles 41 to 61 as the “Achilles’ heel of the TRIPS Agreement.”<sup>68</sup>

From the standpoint of developed countries, the TRIPS standards are primitive, constrained, inadequate, and ineffective.<sup>69</sup> To strengthen these

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Sustainable Development, Issue Paper No. 24, 2009), available at <http://ictsd.org/downloads/2009/07/>

innovation-and-technology-transfer-to-address-climate-change.pdf (“National governments traditionally are unwilling to surrender sovereignty over the specific implementation of IPRs, just as they are unwilling to surrender sovereignty over their budgets or their military institutions.”).

<sup>66</sup> See CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 417 (2007); UNCTAD–ICTSD, *supra* note 24, at 585.

<sup>67</sup> See Yu, *TRIPS and Its Achilles’ Heel*, *supra* note 63, at 483–504 (discussing five sets of challenges that hamper the TRIPS Agreement’s ability to provide effective global enforcement of intellectual property rights).

<sup>68</sup> See J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public–Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT’L L. 11, 34–39 (1998) (explaining why the enforcement provisions are the “Achilles’ heel of the TRIPS Agreement”); see also Yu, *TRIPS and Its Achilles’ Heel*, *supra* note 63 (using “Achilles’ Heel” in the title of the article).

<sup>69</sup> See, e.g., European Comm’n, Directorate Gen. for Trade, *Strategy for the Enforcement of Intellectual Property Rights in Third Countries* 1, 3 (2005), available at [http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122636.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf) (“Violations of intellectual property rights . . . continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement.”); TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 4 (2008) (noting that “[I]t has become apparent to some national governments and regional organizations that the ‘aggressive’ enforcement provisions of TRIPS, particularly the border measures, have fallen short of expectations of providing an effective system of thwarting international movement of infringing goods.”); Timothy P. Trainer, *Intellectual*

standards, developed countries and their supportive industries have recently pushed for the establishment of the Anti-Counterfeiting Trade Agreement<sup>70</sup> (ACTA), a highly controversial plurilateral agreement that seeks to set a new and higher benchmark for intellectual property enforcement among like-minded countries.<sup>71</sup> Developed countries have also actively engaged in the creation of TRIPS-plus enforcement standards through other bilateral, plurilateral, and regional trade and investment agreements.<sup>72</sup>

From the standpoint of less developed countries, however, the TRIPS enforcement provisions are neither inadequate nor ineffective. Instead, the limited enforcement of intellectual property rights on the ground in less developed countries can be seen as a blessing in disguise. By facilitating

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*Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. MARSHALL REV. INTELL. PROP. L. 47 (2008–2009) (discussing the inadequacies of the enforcement provisions of the TRIPS Agreement and explaining the need for TRIPS-plus bilateral and regional free trade agreements in the border enforcement area).

<sup>70</sup> Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, available at [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147937.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf). Most recently, the agreement was signed by more than two-thirds of the negotiating parties—namely, Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. Press Release, U.S. Trade Representative, Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties (Oct. 1, 2011), available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>.

<sup>71</sup> See generally Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 2–9 (2011) (criticizing the use of the “country club” approach to establish ACTA); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011) (discussing the serious concerns about ACTA).

<sup>72</sup> See, e.g., INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing free trade agreements in the intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.–Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL’Y 259 (2008) (criticizing the U.S.–Australia Free Trade Agreement); Jean-Frédéric Morin, *Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?*, 12 J. WORLD INTELL. PROP. 175 (2009) (examining the United States’ free trade agreement strategy); Pedro Roffe et al., *Intellectual Property Rights in Free Trade Agreements: Moving Beyond TRIPS Minimum Standards*, in RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 266 (Carlos M. Correa ed., 2010) (discussing free trade agreements in relation to the TRIPS framework); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392–400 (2004) [hereinafter Yu, *Currents and Crosscurrents*] (discussing the growing use of bilateral, plurilateral, and regional trade agreements to push for new and higher intellectual property standards); Peter K. Yu, *Sinic Trade Agreements*, 43 U.C. DAVIS L. REV. 953, 961–86 (2011) (critically examining the strengths and weaknesses of bilateral and plurilateral trade agreements).

what commentators have described as the “benign neglect” of intellectual property rights,<sup>73</sup> the ineffective TRIPS provisions have provided the much-needed balance against the highly aggressive standards pushed by developed countries. They have also benefited those countries that continue to struggle to adjust their intellectual property systems to the higher TRIPS standards.<sup>74</sup>

Nevertheless, the continued insistence on having minimum TRIPS enforcement standards may not always be beneficial. For some fast-growing developing countries, such as Brazil, China, and India, such insistence could become problematic when local creators and innovators begin to emerge. At some point, under-enforcement will pose a major barrier to the countries’ economic development efforts.<sup>75</sup>

Greater enforcement could also become more attractive to less developed countries when the international intellectual property system better protects their interests, such as traditional knowledge and cultural expressions. Their need to reverse position is easy to understand. Without adequate enforcement, provisions that offer stronger protection to the developing countries’ interests are unlikely to deliver the intended results.<sup>76</sup> Because less developed countries are now able to derive more benefits from

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<sup>73</sup> See, e.g., Frederick M. Abbott, *Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism*, 8 J. INT’L ECON. L. 77, 100 (2005); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 16 (2004).

<sup>74</sup> See Yu, *TRIPS and Its Achilles’ Heel*, *supra* note 63, at 504.

<sup>75</sup> See generally Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 10–15 (2009) (discussing the existence of a crossover point where countries consider in their self-interest to move from a pirating nation to one that strongly respects intellectual property rights).

<sup>76</sup>As I noted earlier:

A country’s interest in setting new and higher international intellectual property enforcement norms depends largely on the overall structure of the global intellectual property system and the substantive benefits that country can derive from reforming the system. As less developed countries continue to push for greater protection of traditional knowledge and cultural expressions—and to some extent, geographical indications—they eventually will reach a point where the existing system will provide them with some attractive benefits. At that point, they may begin to value the effective enforcement of intellectual property rights as highly as their developed counterparts.

Yu, *TRIPS and Its Achilles’ Heel*, *supra* note 63, at 523–24; see also Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 453 (2008) (discussing how “enforcement issues may provide a promising opportunity for both developed and less-developed countries to cooperate”).

the system, they are also more eager to join developed countries in establishing higher international intellectual property enforcement standards.

In sum, although developed and less developed countries remain far apart in terms of both the actual level of enforcement and the level they consider optimal, the needs, interests, and conditions of less developed countries have been slowly changing. As these countries obtain a bigger stake in the international intellectual property regime, they will provide better and stronger enforcement of intellectual property rights. At that time, they will also play the TRIPS enforcement game rather differently.

#### IV. THE INTERPRETATION GAME

Under the WTO, the TRIPS Agreement can be interpreted through two different processes. The first process involves the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council), which is charged with monitoring the operation of the TRIPS Agreement and the WTO members' compliance with its obligations.<sup>77</sup> The second process involves the WTO Dispute Settlement Body (DSB), which is established to address disputes arising between and among member states.<sup>78</sup> This Part discusses these two processes in turn.

##### *A. TRIPS Council Meetings*

Thus far, less developed countries have not been very active in the TRIPS Council. For example, when developed countries—such as the United States, the members of the European Union, Japan, and Switzerland—advanced proposals to strengthen enforcement standards during the Council meetings, less developed countries merely uttered their strong opposition to the introduction of these standards.<sup>79</sup> As the latter group of countries insisted, enforcement issues should be handled by the DSB, not the TRIPS Council.<sup>80</sup> These countries further expressed concern

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<sup>77</sup> See TRIPS Agreement art. 68 (“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.”).

<sup>78</sup> See *id.* art. 64; Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

<sup>79</sup> See Yu, *TRIPS and Its Achilles’ Heel*, *supra* note 63, at 506–07.

<sup>80</sup> See William New, *TRIPS Council Issues Still Alive for WTO Ministerial*, INTELL. PROP. WATCH (Oct. 28, 2005, 8:10 PM), <http://www.ip-watch.org/weblog/2005/10/28/trips-council->

that the discussion of enforcement issues would result in unconstructive “finger pointing” among WTO members that would have distracted the Council from its work.<sup>81</sup> Their opposition, though passive, eventually led to the rejection of the developed countries’ proposals.

In recent TRIPS Council meetings, however, less developed countries have become more aggressive. In the June 2010 meeting, for instance, both China and India made important interventions, largely in response to the release of the draft ACTA text and to the highly disturbing trend concerning TRIPS-plus enforcement standards.<sup>82</sup>

In the first intervention, China explained that the TRIPS-plus enforcement standards could cause a wide variety of systemic problems within the international trading system.<sup>83</sup> For example, they could raise potential legal conflicts with the TRIPS Agreement and other WTO agreements.<sup>84</sup> By increasing the complexity of intellectual property standards, the TRIPS-plus enforcement standards could also make the international legal framework highly unpredictable, thereby posing barriers to legitimate trade.<sup>85</sup>

In addition, the TRIPS-plus standards may upset the delicate balance struck in the TRIPS Agreement through an arduous multiyear negotiation process.<sup>86</sup> The standards could also build harmful technological barriers while raising concerns about resource misallocation,<sup>87</sup> an issue raised previously in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.<sup>88</sup> To conclude its intervention, China advanced

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issues-still-alive-for-wto-ministerial/.

<sup>81</sup> See Tove Iren S. Gerhardsen, *WTO TRIPS Council Stumbles Over Inclusion of Enforcement*, INTELL. PROP. WATCH (Oct. 27, 2006, 12:23 PM), <http://www.ip-watch.org/weblog/2006/10/27/wto-trips-council-stumbles-over-inclusion-of-enforcement/> (“In the meeting, several developing countries protested to the presentation and what they perceived as a way to bring enforcement and ‘finger-pointing’ into the council . . .”).

<sup>82</sup> See Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting* ¶¶ 250, 264, IP/C/M/63 (Oct. 4, 2010) [hereinafter *TRIPS Council Minutes*].

<sup>83</sup> See *id.* ¶¶ 248–63. China’s June 9 statement was reprinted as *The Problems with the “TRIPS Plus” Enforcement Trend: China’s View*, S. BULL., July 28, 2010, at 13.

<sup>84</sup> See *TRIPS Council Minutes*, *supra* note 82, ¶¶ 252–53.

<sup>85</sup> See *id.* ¶ 254.

<sup>86</sup> See *id.* ¶ 255.

<sup>87</sup> See *id.* ¶¶ 256–58.

<sup>88</sup> See Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT’L L. REV. 727, 778–81 (2011) (discussing China’s arguments in relation to Article 41.5 of the TRIPS Agreement).

a proposal outlining three specific principles to provide safeguards against the ongoing push for TRIPS-plus enforcement standards.<sup>89</sup> These principles include:

- (i) the [intellectual property] chapter or provisions of [a regional trade agreement, free trade agreement] or regional agreement to which a WTO Member was party shall not be inconsistent with the TRIPS Agreement of WTO; (ii) the enforcement of [intellectual property rights] shall not create distortive effects on legitimate international trade; and (iii) no WTO Member shall be restrained from the autonomy for utilizing its public enforcement resources.<sup>90</sup>

Following China's intervention, India drew attention to the systemic problems created by TRIPS-plus standards.<sup>91</sup> Of primary concern was the developed countries' push for ACTA and other TRIPS-plus standards, which India claimed would upset the balance in the TRIPS Agreement.<sup>92</sup> As India reminded the Council, the second sentence of article 1.1 of the TRIPS Agreement states specifically that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."<sup>93</sup> This particular sentence therefore delineates one of the maximum standards, or the so-called "ceilings," in the TRIPS Agreement.<sup>94</sup> Viewed from that perspective, the TRIPS Agreement prohibits WTO members from implementing more extensive protection than required if such additional protection would contravene the Agreement.<sup>95</sup>

India further claimed that the introduction of TRIPS-plus standards "could short-change legal processes, impede legitimate competition and shift

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<sup>89</sup> See *TRIPS Council Minutes*, *supra* note 82, ¶ 259.

<sup>90</sup> *Id.*

<sup>91</sup> See *id.* ¶¶ 264–73; see also TRIPS Council, Communication from India, *Intervention on TRIPS Plus Enforcement Trends* (June 9, 2010), reprinted in *Why "IPR Enforcement" in ACTA & FTAs Harm the South*, 49 S. BULL. 1, 10 (2010) [hereinafter India's TRIPS Council Intervention] (providing a transcript of the speech for India's intervention).

<sup>92</sup> See India's TRIPS Council Intervention, *supra* note 91, at 10.

<sup>93</sup> TRIPS Agreement art. 1.

<sup>94</sup> India's TRIPS Council Intervention, *supra* note 91, at 10–11; see also *TRIPS Council Minutes*, *supra* note 82, ¶¶ 265, 272.

<sup>95</sup> See, e.g., Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade?: ACTA Border Measures and Goods in Transit*, 26 AM. U. INT'L L. REV. 644, 653–57 (2011) (discussing how this provision can serve as a ceiling requiring WTO members not to implement more extensive protection than required by the TRIPS Agreement if such additional protection would contravene the Agreement).

the escalated costs of enforcing private commercial right to governments, consumers and tax payers.”<sup>96</sup> In its view, the standards represent “a systemic threat to the rights of legitimate traders and producers of goods and fundamental rights of due process for individuals.”<sup>97</sup> These standards may also upset resource allocation while having strong trade-distorting effects.<sup>98</sup>

Finally, India lamented the fact that “[intellectual property rights] negotiations in [regional trade agreements] and plurilateral processes like ACTA completely bypassed the existing multilateral processes.”<sup>99</sup> By undermining the “systemic checks” against trade protectionism that had been built into the WTO framework, these negotiations have harmed multilateral trade.<sup>100</sup> The negotiations will also implicate non-signatory members of the WTO when the negotiated standards are cross-referenced in other nonmultilateral agreements.<sup>101</sup> Toward the end of the intervention, India offered a trenchant critique of ACTA, covering issues that ranged from customs seizure of in-transit generic drugs to the restriction of TRIPS flexibilities to the inconsistencies between ACTA and the Doha Declaration.<sup>102</sup>

Compared with the earlier passive resistance put up by less developed countries in the TRIPS Council, China and India’s recent interventions signaled a more proactive attitude toward the TRIPS interpretation game. Nonetheless, it remains to be seen whether less developed countries will take greater advantage of Council meetings from now on. After all, less developed countries seemed to have become less vocal since the June 2010 meeting.<sup>103</sup>

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<sup>96</sup> *TRIPS Council Minutes*, *supra* note 82, ¶ 265.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* ¶ 266.

<sup>99</sup> *Id.* ¶ 267.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* ¶ 268.

<sup>102</sup> *See id.* ¶¶ 269–71.

<sup>103</sup> Nevertheless, less developed countries continued to register their concerns about the impact of ACTA negotiations in the next TRIPS Council meeting in October 2010. As Indonesia noted, “[t]he ACTA initiative has failed to keep in line the TRIPS standards and thus undermined the safeguards provided by the TRIPS Agreement.” Kaitlin Mara, *TRIPS Council Discusses Efficacy of ACTA, Public Health Amendment*, INTELL. PROP. WATCH (Oct. 29, 2010, 7:18 PM), <http://www.ip-watch.org/weblog/2010/10/29/trips-council-discusses-efficacy-of-acta-public-health-amendment/>. Likewise, Brazil criticized ACTA for “propos[ing] only one remedy against counterfeiting and piracy, and that remedy is repression.” *Id.* While the country recognized the need for enforcement, it noted that

*B. WTO Dispute Settlement Process*

Similar to their behavior in the TRIPS Council, less developed countries were initially rather passive in the WTO dispute settlement process.<sup>104</sup> Most of the time, these countries participated in the process defensively. As mentioned earlier, India was the first developing country against which developed countries filed a complaint with the DSB, thanks to the WTO body's aggressive interpretation of the transitional period provisions.<sup>105</sup> Since then, Argentina, Brazil, Indonesia, and Pakistan have all appeared on the respondent side of TRIPS-related complaints in the WTO.<sup>106</sup>

In April 2007, the United States filed a complaint against China for failing to protect and enforce intellectual property rights pursuant to the TRIPS Agreement.<sup>107</sup> Although only a respondent in this dispute, China defended its position admirably before the DSB. Its defense was joined by Argentina, Brazil, India, Mexico, Thailand, and Turkey, all of which participated in the panel proceedings as third parties.<sup>108</sup> Perhaps because of

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enforcement alone "is not enough to combat a problem that results from the interplay of factors that are to be found in different economic and social realities." *Id.*

<sup>104</sup> See Yu, *TRIPS and Its Achilles' Heel*, *supra* note 63, at 515–16.

<sup>105</sup> Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998); See Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997).

<sup>106</sup> These complaints, in chronological order, were: Request for Consultations by the United States, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/1 (May 6, 1996); Request for Consultations by the United States, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS59/1 (Oct. 15, 1996); Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171/1 (May 10, 1999); Request for Consultations by the United States, *Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS196/1 (June 6, 2000); Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/1 (June 8, 2000).

<sup>107</sup> Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007).

<sup>108</sup> Panel Report, *supra* note 26, ¶ 1.6. Except for India and Turkey, all of these countries either provided a written submission to or made an oral statement before the WTO panel. For discussions of third party participation in the WTO dispute settlement process, see generally Chad P. Bown, *MFN and the Third-Party Economic Interests of Developing Countries in GATT/WTO Dispute Settlement*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 265 (Joel P. Trachtman & Chantal Thomas eds., 2009); Marc L. Busch & Eric Reinhardt, *With a Little Help from Our Friends? Developing Country Complaints and Third-Party Participation*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM*, *supra*, at 247.



their more active participation and increased concerted effort, less developed countries achieved greater success in this dispute than they did. In the end, although the WTO panel found that China had failed to comply with the TRIPS Agreement, China, with the support of other less developed countries, succeeded in defending against half of the claims brought by the United States.<sup>109</sup>

More importantly, China and its fellow less developed countries were able to score some important points that are likely to influence the future interpretation and implementation of the TRIPS Agreement. For example, the panel report underscores both the importance of having minimum standards and flexibilities in the TRIPS Agreement and the longstanding treatment of intellectual property rights as private rights.<sup>110</sup> It also rejects the use of bilateral, plurilateral, or regional trade agreements to divine meaning in the TRIPS language.<sup>111</sup> In addition, the report demonstrates an appreciation of the divergent local market conditions in each WTO member while continuing the use of an evidence-based approach for resolving WTO disputes.<sup>112</sup> The panel's discussion of article 41.5 also hints at its willingness to consider evidence in cases where resource demands in the area of intellectual property enforcement have exceeded those in other areas of law enforcement.<sup>113</sup> Compared with *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the first dispute involving a less developed country that resulted in the release of a WTO panel report,<sup>114</sup> the US–China dispute demonstrates the significant progress China and the less developed world have made in using the WTO dispute settlement process to enhance their performance in the TRIPS interpretation game.

A year after the release of the panel report in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*,

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<sup>109</sup> See Panel Report, *supra* note 26, ¶ 8.1.

<sup>110</sup> See Yu, *TRIPS Enforcement and Developing Countries*, *supra* note 88, at 747–54 (discussing the panel's emphasis on the importance of the TRIPS minimum standards and on the Agreement's recognition that "intellectual property rights are private rights").

<sup>111</sup> See *id.* at 754–57 (discussing the panel's refusal to treat subsequently-negotiated US free trade agreements as subsequent agreements within the meaning of the Vienna Convention on the Law of Treaties).

<sup>112</sup> See *id.* at 757–63 (discussing the panel's appreciation of local conditions and its demands for substantive, as opposed to anecdotal, evidence).

<sup>113</sup> See *id.* at 778–81 (discussing the panel's interpretation of article 41.5 of the TRIPS Agreement).

<sup>114</sup> See text accompanying *infra* notes 122–23.

India and Brazil filed complaints against the European Union and the Netherlands over the repeated seizure of in-transit generic drugs.<sup>115</sup> These complaints represent the first attempt by less developed countries to challenge TRIPS-plus standards—enforcement or otherwise. They also mark the second time less developed countries have proactively used the WTO dispute settlement process to address TRIPS concerns.<sup>116</sup>

In July 2011, India and the European Union reached an interim settlement.<sup>117</sup> As of this writing, it remains unclear whether India will withdraw its complaint from the WTO, or whether Brazil will follow suit. Nevertheless, regardless of how the dispute is eventually resolved, the European Union's willingness to resolve India's complaint by amending its customs border regulations<sup>118</sup> suggests the growing ability of less developed countries to take advantage of the WTO dispute settlement process. In this case, India successfully negotiated with the European Union over border control measures in the shadow of a WTO complaint.<sup>119</sup>

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<sup>115</sup> Request for Consultations by India, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS408/1 (May 19, 2010); Request for Consultations by Brazil, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS409/1 (May 19, 2010). See generally Frederick M. Abbott, *Seizure of Generic Pharmaceuticals in Transit Based on Allegations of Patent Infringement: A Threat to International Trade, Development and Public Welfare*, 1 W.I.P.O.J. 43 (2009) (discussing issues concerning the seizure of in-transit generic drugs in Europe).

<sup>116</sup> The first time occurred when Brazil filed a retaliatory complaint challenging the US patent law for violations of articles 27 and 28 of the TRIPS Agreement. Request for Consultations by Brazil, *United States—US Patents Code*, WT/DS224/1 (Feb. 7, 2001). The complaint was filed in response to the United States' complaint in Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/1 (June 8, 2000).

<sup>117</sup> See *India, EU Ink Deal to End Drug Seizure for Now*, TIMES INDIA (July 29, 2011, 1:21 AM), [http://articles.timesofindia.indiatimes.com/2011-07-29/india-business/29828750\\_1\\_generic-drugs-consignments-of-generic-medicines-eu-parliament](http://articles.timesofindia.indiatimes.com/2011-07-29/india-business/29828750_1_generic-drugs-consignments-of-generic-medicines-eu-parliament) (reporting the European Union's interim settlement with India).

<sup>118</sup> Council Regulation 1383/2003, Concerning Customs Action Against Goods Suspected of Infringing Certain Intellectual Property Rights, 2003 O.J. (L 196) 7.

<sup>119</sup> See Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 476–77 (2004) (noting the importance of negotiation “in the shadow of” the WTO dispute settlement process); see also Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 219, 220 (John S. Odell ed., 2006) (arguing that “the use of legal adjudication allows developing countries to gain better outcomes in negotiations with their powerful trade partners than they could in a bilateral

In sum, although the TRIPS interpretation game is complex and highly technical, and the game's intensive demands for resources and expertise seem to have stacked up against less developed countries, these countries have greatly improved their game in recent years. Whether the game is played in the TRIPS Council or the DSB, less developed countries now perform much better to promote their interests. It remains to be seen whether these countries could make further advances in the game to reshape the development of the Agreement, but that potential certainly exists.

### V. THE COMPLIANCE GAME

While reports from the DSB—including those from WTO panels and the Appellate Body—contain findings regarding WTO members' compliance with the TRIPS Agreement, an additional compliance game kicks into gear after the release of these reports. Thus far, less developed countries have behaved responsibly in the WTO, complying with *all* of the DSB's findings. When India lost in *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, it introduced a “mailbox” system collecting patent applications that had been filed since the inception of the TRIPS Agreement.<sup>120</sup> India also provided exclusive marketing rights pursuant to article 70.9.<sup>121</sup>

Likewise, when China lost part of its case in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, it quickly amended both article 4 of its Copyright Law and article 27 of its Customs Regulations.<sup>122</sup> Article 4 of the amended Copyright Law now

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negotiation outside of the institution”); Yu, *Currents and Crosscurrents*, *supra* note 72, at 392–96 (noting the importance for less developed countries to take advantage of the WTO dispute settlement process).

<sup>120</sup> See The Patents (Amendment) Act, 1999, No. 17 of 1999, INDIA CODE (1999).

<sup>121</sup> Article 70.9 of the TRIPS Agreement provides:

Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

TRIPS Agreement art. 70.9.

<sup>122</sup> See Yu, *The TRIPS Enforcement Dispute*, *supra* note 25, at 1091–92, 1097–98 (discussing the amendments).

offers protection to works that have been prohibited for publication or dissemination.<sup>123</sup> Article 27 of the amended Customs Regulations further prohibits seized counterfeit imports from “enter[ing] the commercial channels only by eliminating the trademarks on the goods, except for special circumstances.”<sup>124</sup> Both amendments have brought Chinese laws into conformity with the TRIPS Agreement.

The reactions of India and China stood in sharp contrast to those of the United States. Despite losing in the WTO dispute settlement process, the United States has repeatedly failed to amend its intellectual property laws to comply with the panel’s findings.<sup>125</sup> As Edward Lee recently observed, if a WTO scorecard is to be created to keep track of WTO members’ responses to their violations, the results for the United States would be rather disappointing.<sup>126</sup> Out of all the TRIPS cases that have resulted in a WTO panel report, *all* noncompliance cases occurred when the United States lost the case.

In *United States—Section 110(5) of the U.S. Copyright Act*, the panel found the business exemption in the Copyright Act to be inconsistent with the Berne Convention as incorporated into the TRIPS Agreement.<sup>127</sup> The contested exemption enables some restaurants and small establishments to play copyrighted music without compensating copyright holders.<sup>128</sup> Notwithstanding the adverse panel report, the United States has refused to update its statute to ensure compliance with the TRIPS Agreement. The United States also has refused to make annual payments to the European

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<sup>123</sup> See *Zhonghua Renmin Gongheguo Zhuzuoquan Fa* (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010).

<sup>124</sup> Guowuyuan Guanyu Xiugai 《Zhonghua Renmin Gongheguo Zhishichanquan Haiguan Baohu Tiaoli》 De Jueding (国务院关于修改《中华人民共和国知识产权海关保护条例》的决定) [Decision of the State Council on Amending the Regulation of the People’s Republic of China on the Customs Protection of Intellectual Property Rights] (promulgated by the State Council, Mar. 24, 2010, effective Apr. 1, 2010).

<sup>125</sup> See text accompanying *infra* notes 129–34.

<sup>126</sup> See Edward Lee, *Measuring TRIPS Compliance and Defiance: The WTO Compliance Scorecard*, 18 J. INTELL. PROP. L. 401, 429 (2011) (“In January 2011, the U.S. scored the worst of all WTO countries on the TRIPS Compliance Scorecard using either formula [proposed in the article].”).

<sup>127</sup> See Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, ¶ 6.266, WT/DS160/R (June 15, 2000).

<sup>128</sup> See 17 U.S.C. § 110(5) (2012).

Union, even though the arbitration award was determined to be €1,219,900 per year.<sup>129</sup> The only payment it has made thus far was \$3.3 million, which was provided more than a year after the arbitration proceeding.<sup>130</sup>

In *United States—Section 211 Omnibus Appropriations Act of 1998*, a WTO panel found another US statute inconsistent with the TRIPS Agreement.<sup>131</sup> That statute prohibits the registration or renewal of trademarks previously abandoned by trademark holders whose business and assets have been confiscated under Cuban law.<sup>132</sup> Following the panel and Appellate Body reports, the United States has again refused to amend its noncomplying statute.

While benefits—such as the promotion of goodwill and the fostering of rule of law in the international trading system—undoubtedly inure to less developed countries when they comply with WTO panel reports, it is worthwhile to question whether these countries have managed to play the TRIPS compliance game to their full advantage. After all, following the rules of a game is not the same as excelling in a game.

Consider the different approaches the United States and less developed countries have taken when playing the compliance game. In *United States—Section 110(5) of the US Copyright Act*, the United States played the game by introducing a new “exemptions plus compensation” approach.<sup>133</sup> Instead of amending the noncomplying section of its Copyright Act, the United States entered into an agreement with the European Communities to submit to binding arbitration.<sup>134</sup> Although commentators have heavily criticized this approach,<sup>135</sup> there is no denying that the United States has played the

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<sup>129</sup> See Recourse to Arbitration Under Article 25 of the DSU, *United States—Section 110(5) of the US Copyright Act*, ¶ 5.1, WT/DS160/ARB25/1 (Nov. 9, 2001) [hereinafter Arbitration Report].

<sup>130</sup> Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 940 n.196 (2006).

<sup>131</sup> See Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002); Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R (Aug. 6, 2001).

<sup>132</sup> Omnibus Appropriations Act of 1998, Pub. L. No. 105–277, § 211, 112 Stat. 2681, 2681–88 (1998).

<sup>133</sup> Richard Owens, *TRIPS and the Fairness in Music Arbitration: The Repercussions*, 25 EUR. INTELL. PROP. REV. 49, 52 (2003).

<sup>134</sup> See Arbitration Report, *supra* note 129.

<sup>135</sup> See, e.g., Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 629 (2001) (“[T]he opportunity for strategic gaming predicated on the requirement for agreement between disputing states poses

compliance game tactfully by introducing a new WTO-compliant approach to protect its interests.

By contrast, less developed countries have not experimented with new approaches when playing the compliance game. Strict compliance was, indeed, the standard response. Nevertheless, outside the TRIPS arena, these countries have been instrumental in shaping the rules involving cross-retaliations,<sup>136</sup> which will have a significant impact on the TRIPS compliance game.

For example, in *United States—Subsidies on Upland Cotton*, Brazil considered the suspension of intellectual property rights as a cross-retaliatory measure.<sup>137</sup> After prevailing in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,

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a threat to the notion of equality that a rule-based system was intended to secure.”); Owens, *supra* note 133, at 52 (lamenting that the United States’ approach “raises worrying concerns that future WTO dispute settlement proceedings might undercut the minimum standards for intellectual property protection included in the TRIPs Agreement”).

<sup>136</sup> See Frederick M. Abbott, *Cross-Retaliations in TRIPS: Options for Developing Countries* (ICTSD Programme on Dispute Settlement, Issue Paper No. 8, 2009), available at <http://ictsd.org/downloads/2009/06/cross-retaliation-in-trips.pdf>. These rules ironically were proposed by the United States during the Uruguay Round of Trade Negotiations. As Professor Brewster recalled:

[T]he demand that WTO retaliation include such cross-agreement retaliation came from the US government. The US government was concerned about the enforcement of the TRIPS Agreement. If cross-agreement retaliation was not permitted, then the US government would be permitted to retaliate for violations of the TRIPS Agreement only through that Agreement—specifically, the suspension of the violating state’s intellectual property rights. The US government was concerned that developing countries would not have sufficient intellectual property (or that the intellectual property lobby would not have sufficient political power) to make the sanctions effective. Thus, by linking intellectual property and the trade in goods (the trade in which developing countries are most politically sensitive), the developed states would have a more effective weapon against violations of the TRIPS Agreement. The Indian government resisted this linkage—arguing for retaliation to be limited to each agreement (that is, GATT to GATT and TRIPS to TRIPS). The result was a compromise that allows cross-agreement retaliation when other forms of retaliation are not “practicable or effective” and the conditions are “serious enough.”

Brewster, *supra* note 25, at 39–40 (footnote omitted).

<sup>137</sup> Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004).

Antigua and Barbuda also considered similar cross-retaliatory measures.<sup>138</sup> Although the DSB has laid down conditions for introducing cross-retaliations,<sup>139</sup> such retaliations may allow less developed countries to successfully roll back some of what they have lost in the negotiation game.

Indeed, as Rachel Brewster recently pointed out, “intellectual property retaliation is far more advantageous to developing states, compared to retaliation in goods, when targeting developed states.”<sup>140</sup> As she explained, such retaliation has three attractive characteristics:

First, it improves net welfare for the developing state—it does not require that the state bear an economic loss to sanction the violating state, as do most suspensions of trade in goods or services. Second, the net welfare gains of retaliation and the greater capacity to sanction make the threat of sanctions more credible. The more credible the sanction, the more likely the respondent state is to modify its behavior, even if sanctions are never actually applied. Finally, the effects of retaliation in intellectual property are felt by very influential interest groups in the respondent state. The real value of trade retaliation is in convincing the target government to change its policies, and thus, the key element of the sanction’s effectiveness is the political pain it can inflict on the respondent government, not the net pain that the retaliation causes on the respondent state’s economy.<sup>141</sup>

Thus, according to Professor Brewster, “retaliation in intellectual property is likely to give developing states a greater bang for their buck than other forms of retaliation.”<sup>142</sup> By engaging in an area where the goods subject to retaliation can be vastly reproduced, intellectual property retaliation has also greatly expanded the ability of less developed countries to retaliate.<sup>143</sup>

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<sup>138</sup> Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

<sup>139</sup> See *Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 156–65, WT/DS27/ARB/ECU (Mar. 24, 2000); see also Joost Pauwelyn, *The Dog that Barked but Didn’t Bite: 15 Years of Intellectual Property Disputes at the WTO*, 1 J. INT’L DISP. SETTLEMENT 389, 428–31 (2010) (discussing the constraints on cross-retaliations undertaken by WTO member states).

<sup>140</sup> Brewster, *supra* note 25, at 7.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *id.* at 44. As Professor Brewster explained:

The ability to retaliate is no longer based on the size of the sanctioning state’s

In fact, additional examples can be found outside the WTO, where cross-retaliations have been used to enhance the bargaining positions of less developed countries. In 1996, for example, China responded to the United States' threat of intellectual-property-related trade sanctions by signing a \$1.5 billion order for thirty short-haul Airbus planes from France.<sup>144</sup> As I explained earlier:

From the standpoint of international trade, the move by the Chinese leaders was ingenious. While the U.S. intellectual property industries claimed that trade sanctions were needed to protect them from a *potential* loss of \$2 billion of intellectual property-based goods and services, Boeing registered an *immediate* loss of \$1.5 billion worth of contracts to its European archrival, Airbus. In the end, the response by the Chinese leaders skillfully transformed the issue from a bilateral intellectual property dispute to a domestic cross-industry trade dispute concerning the United States' *overall* interests. As executives from the powerful Boeing Company would ask following the Airbus deal, "The importance of protecting intellectual property rights is undeniable, but why should we suffer to help reduce the loss by the entertainment industries?"<sup>145</sup>

Thus, if less developed countries continue to explore the use of cross-retaliations in the intellectual property arena, they may be able to greatly improve their performance in the TRIPS compliance game.

In sum, although less developed countries did not play the compliance game as creatively as their developed counterparts, they hold an important weapon in the form of cross-retaliations. If less developed countries

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import market, but instead on its ability to reproduce intellectual property. For instance, the same state that has only \$50 million of imports from its target nation can impose \$100 million in sanctions by reproducing \$100 million worth of software, music, or other intellectual property from that state. . . . Some developing states, such as India and Brazil, have the capacity to reproduce pharmaceuticals or software, while other developing states may not. But the technology constraint is relatively low for the reproduction of other types of intellectual property, such as music or films recorded onto CDs or DVDs. Almost all nations will have the technology necessary to copy CDs or DVDs and retaliate by (legally) reproducing these goods.

*Id.* (footnotes omitted).

<sup>144</sup> Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 168 (2000).

<sup>145</sup> Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 31–32 (footnote omitted).



skillfully deploy this weapon, and bring the leverage in non-intellectual-property area to bear on the development of the TRIPS Agreement, they likely will be able to better maximize their leverage and effectiveness in this game.

### CONCLUSION

As Shakespeare would write in the TRIPS context, “All the TRIPS Agreement’s a complex game, and all the countries merely players.”<sup>146</sup> This Article discusses the performance of less developed countries in five different mini-games: (1) negotiation; (2) implementation; (3) enforcement; (4) interpretation; and (5) compliance. Although these countries began with a lackluster performance in highly challenging negotiation game in the late 1980s and the early 1990s, they have recently attained much greater success in the enforcement, interpretation, compliance games. Some powerful developing countries, such as China and India, have also improved their performance in the implementation game and the second phase of the negotiation game.

As less developed countries continue to improve, it is important to explore not only how well they perform in each game but also how each game would affect the outcome of other games. When we analyze the TRIPS Agreement, we tend to look at the different distinct aspects of the Agreement—the negotiation process, implementation reforms, WTO panel reports, threats of cross-retaliations, you name it. However, all of these aspects are interconnected. In analyzing five different games in one fell swoop, this Article shows the wide variety of interactions between developed and less developed countries surrounding the development of the TRIPS Agreement. It also demonstrates how a country’s performance in one game can easily affect its performance in other games.

In view of the importance of the TRIPS Agreement and the multidirectional interactions between these different games, it is essential that we explore the Agreement more holistically by taking into account its various stages of development. In so doing, we will gain better and deeper insights into the full impact of the TRIPS Agreement. We will also be able to come up with more effective reforms to enable less developed countries to perform better in the WTO and within the international intellectual property regime.

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<sup>146</sup> Cf. WILLIAM SHAKESPEARE, *AS YOU LIKE IT*, act 2, sc. 7 (“All the world’s a stage, And all the men and women merely players.”).

The TRIPS game is not a one-off event where countries will play only once. It is a reiterated game that countries will have to continue to play over and over again. From the negotiation and implementation of new rules to ultimately enforcing those rules to facilitate compliance with TRIPS standards to the negotiation of even newer rules, the TRIPS game will include a cycle of mini-games that are connected to each other. How well a country is to perform in the international intellectual property arena will depend on how well they have learned to play the TRIPS game.

