

# **DISTORTED ARCHITECTURE OF INTERNATIONAL INTELLECTUAL PROPERTY REGIME AND PROSPECTS FOR LESS-DEVELOPED COUNTRIES**

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## **ULUSLARARASI FİKRİ MÜLKİYET REJİMİNİN ÇARPIK MİMARİSİ VE AZ GELİŞMİŞ ÜLKELER İÇİN OLASILIKLAR**

### **ÖZET**

*Uluslararası fikri mülkiyet rejimi uluslararası ekonomi hukuku alanındaki en sorunlu hukuksal rejimlerden birisidir. Bahse konu rejimin kuruluşu yüzyıldan daha uzun bir süre öncesine gitmesine rağmen, bu rejimin istikrarlı bir hukuk düzeni olduğu ve devletlerin büyük çoğunluğunca kabul edildiği söylenemez. Ticarete İlişkin Fikri Mülkiyet Hakları Anlaşması'nın (TRIPS) uygulaması ve Anlaşma sonrasında imzalanmış ikili, çok taraflı ve bölgesel ticaret anlaşmaları da az gelişmiş ülkeler ile gelişmiş ülkeler arasındaki uluslararası fikri mülkiyet haklarının korunmasına ilişkin mevcut sorunları çözememiştir. Esasında, Dünya Ticaret Örgütü (DTO) üyeleri arasında Doha Ticaret müzakerelerinde oluşan çıkmazın temel nedenlerinden birisi de tarafların bu hukuki rejime yönelik farklı tutumlarıdır. Uluslararası bir hukuksal rejim olarak fikri mülkiyet sistemi taraflar arasında başlangıçta oluşan müzakere sorunlarından dolayı çarpık bir mimariye sahiptir. Bu alanda yeni bir hukuk rejiminin oluşturulması kısa ve orta vadede olası görünmese de TRIPS Anlaşmasının mevcut hükümleri kalkınma yanlısı bir şekilde yorumlanabilir ve az gelişmiş ülkeler tarafından TRIPS sonrası gelişmeleri şekillendirmek üzere yeni stratejiler benimsenebilir.*

**Anahtar Kelimeler:** *Uluslararası fikri mülkiyet hakları, TRIPS Anlaşması, Dünya Ticaret Örgütü, Doha Ticaret Müzakereleri, anlaşma yorumu.*

## **DISTORTED ARCHITECTURE OF INTERNATIONAL INTELLECTUAL PROPERTY REGIME AND PROSPECTS FOR LESS-DEVELOPED COUNTRIES**

### **ABSTRACT**

*International intellectual property regime is one of the most problematic legal regimes in international economic law. Although its establishment goes back to more than one hundred years ago, it can not be argued that it is stable and accepted by*

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*the majority of the states. The implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the bilateral, multilateral and regional trade agreements signed in the post-TRIPS period have not been able to stabilize the ongoing problems between less-developed and developed countries on the international intellectual property protection. In fact, the discrepancies on this regime is one of the main reasons that caused the current stalemate in the Doha Round negotiations among the WTO members. As an international legal regime, intellectual property system has a distorted architecture mostly stemming from the initial bargaining problems between the parties. Although the establishment of a new regime is highly unlikely neither in the short nor medium term, existing provisions of the TRIPS can be interpreted through a more developmental way and new strategies can be adopted by less-developed countries to shape the post-TRIPS developments.*

**Key Words:** *International intellectual property rights, WTO, TRIPS Agreement, Doha Round negotiations, treaty interpretation.*

## **INTRODUCTION**

Knowledge can be accepted as a public good. It is non-rival because use of it by a member of a society does not reduce anyone else's enjoyment and it is also non-excludable because it is not possible to prevent someone from benefiting from it; you can just reproduce it. Yet, like most of the other public goods, its original costs of production (creation) are high. Therefore, public goods can be subject to two kinds of inefficiencies: free riding and underprovision. Without any intervention (by the government) market mechanisms cannot be sufficient to overcome these inefficiencies. Governments can produce or provide funds for the production of knowledge; they can give subsidies to ease up the private costs of knowledge production or they can define ownership rights for the knowledge producers so that they can utilize these rights to meet their costs.

Normally, governments prefer to use a set of combination of these policy options. However, to be able to assign ownership rights they need to have an intellectual property regime to regulate and protect those rights. The TRIPS Agreement should be accepted as an initiative to protect this system at the international level.

Although having an international intellectual property regime makes sense within the explanation above, one of the most problematic issues discussed

within the WTO system is the international intellectual property regime. While developed countries are defending that the protection and enforcement levels provided by the existing international regime are not sufficient to protect the growing needs of their intellectual property- based industries, less developed countries<sup>1</sup> are claiming that their development process has been retarded by the continuously growing intellectual property protections. They argue that the existing regime is hindering their access to essential medicines, knowledge, information and communication technologies all of which have critical importance for their development.<sup>2</sup> Less-developed countries are also frustrated by the imposition of higher intellectual property protection standards through bilateral, plurilateral and regional trade agreements outside the existing multilateral regime because they believe that these developments have been limiting their policy space further.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which is the core document of international intellectual property regime, was established at the ministerial meeting in Marrakesh in 1994 after a long negotiation process. However, the arguments over its possible effects had started even before its establishment. Before the Uruguay Round was finalized, Dani Rodrik had argued that TRIPS had a redistributive nature and “the impact effect of enhanced intellectual property rights protection would be a transfer of wealth” from developing countries to developed countries.<sup>3</sup> There are studies showing that the transfer to industrialized countries is significant and TRIPS has a distorting effect on the net gains of the Uruguay Round Agreements.<sup>4</sup>

This study proposes that there are historical and systemic reasons of the discontent caused by the existing international intellectual property regime. These reasons can be traced back to the first multilateral attempts which date back more than a century. The imbalances in bargaining power, information and expectations between developed and less-developed countries caused a distorted architecture in the international intellectual property regime. Today, it is this distorted architecture that causes unrest among the actors

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<sup>1</sup> Throughout this study the term “less developed countries” will be used to imply both developing countries and least developed countries.

<sup>2</sup> YU, Intellectual Property, p.1.

<sup>3</sup> RODRIK, p.449.

<sup>4</sup> HOEKMAN and KOSTECKI, p.411.

of the intellectual property system and there is no sign that there will be an improvement in a way that the system will provide more satisfactory results for especially less-developed countries.

This study traces the factors that created this distorted architecture in international intellectual property regime and explores whether the existing factors are sufficient to support the system. Part I describes the pre-TRIPS period and examines the historical reasons that contributed the above mentioned distorted architecture of global intellectual property regime. Part II focuses on the formation TRIPS Agreement and explores the motives in its establishment. It also discusses the post-TRIPS developments in international intellectual property regime such as the proliferation of bilateral, plurilateral and regional trade agreements that include TRIPS-plus provisions. Part III searches whether it is possible to eliminate the discontent within the existing regime and includes suggestions for reforming and /or restructuring the international intellectual property system.

## **I. PRE-TRIPS ERA: GHOSTS FROM THE PAST**

### **A. First Attempts for Multilateralism**

TRIPS Agreement is not the first attempt for multilateral cooperation in the field of international intellectual property rights protection. The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, both of which were created in the 1880s, are the cornerstones of the international intellectual property regime. The main reason for their establishment was to patch up the divergent domestic intellectual property regimes of the participating states.<sup>5</sup> Take the Paris Convention for example. It does not require that the participating states provide protection to specific forms of intellectual property. Neither does it stipulate minimum common standards for the protection of intellectual property.<sup>6</sup> During negotiations, countries could not even agree on some important issues such as compulsory licenses and parallel importation.<sup>7</sup> Main provision of the Convention was national treatment for the intellectual

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<sup>5</sup> GELLER, p.70.

<sup>6</sup> RICHARDS, p.114.

<sup>7</sup> YU, Intellectual Property, p.3.

property rules<sup>8</sup> that emanated from other participatory countries.<sup>9</sup> Taking into consideration the divergent attitudes of the participating countries, the Convention left a wide policy space accepting the existence of different intellectual property systems and did not try to establish a system with uniform rules and standards.

The early attempts for creating an international intellectual property regime were shaped mostly according to the need of developed countries of the time. The Conventions did not include any concerns about the different and challenging conditions in less-developed countries. In fact, since most of the less-developed countries were colonies in those days, they had no alternative option but to engage in the international intellectual property regime created by the colonial powers and other developed countries.<sup>10</sup> Okediji describes these first multilateralism efforts as “the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control. It was also characterized by efforts to secure national economic interests against other European countries in colonial territories.”<sup>11</sup>

When we look at the intellectual property laws of developing countries we could see that they were mostly the outcome of colonization period. Many developing countries have never had a full sovereignty to be able to set their own intellectual property standards for most of their history.<sup>12</sup>

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<sup>8</sup> It is interesting to note that some participating countries like Netherlands and Switzerland did not even have a patent system and some others (like Germany) were the supporters of the anti-patent movement. (YU, Intellectual Property, p.3.)

<sup>9</sup> RICHARDS, p.114.

<sup>10</sup> OKEDIJI, p.326. (stating that former colonies had no choice but to be engaged in the existing international system upon their independence. This was the case not only for the international intellectual property regime but also for other international regulations and regimes formed by the “Western tradition”).

<sup>11</sup> Ibid., p.325.

<sup>12</sup> DRAHOS, Developing Countries, p.766-67. Drahos also provides some interesting examples:

*“In most cases, the transplant of intellectual property laws to developing countries has been the outcome of empire building and colonization. For example, in parts of pre-independent Malaysia, it was English copyright law that applied. (...) While the Philippines remained a Spanish colony, it was Spanish patent law that applied. After December 1898, when the United States took over the running of the Philippines, patent applications from there went to the U.S. Patent and Trademark Office and were assessed under U.S. law. Up until 1947, when the Philippines created an independent patent system, it largely followed U.S. patent law. In 1997*

Colonialism also affected the expansion of copyright protection. Pursuant to Article 19 of the Berne Act for the Berne Convention “(...) these states (implying four colonial powers of the time, France, Spain, Germany and the United Kingdom) had the right to accede to the Convention at any time for their colonies or foreign possessions.”<sup>13</sup> All of these four countries used Article 19 and included their colonies in their accession to the Berne Convention<sup>14</sup>. Even after the old colonies became independent states they found themselves in the Berne System which was established by former colonial powers in conformity with their own economic interests<sup>15</sup>.

These developments show the skewed foundation of the existing distorted architecture of the current international intellectual property regime. This historical power asymmetry between the parties is one of the reasons that cause discontent over international intellectual property system.

### **B. Awakening of Less-Developed Countries: Forum-Shifting Attempts**

During 1960s and 1970s, less-developed countries began to question the international intellectual property standards shaped by the Paris and Berne Conventions. They defended that the existing system was ignoring their needs and became an obstacle for their development efforts.

During the Intellectual Property Conference of Stockholm in 1967, which led the establishment of the World Intellectual Property Organization (WIPO), less-developed countries led by India, requested adjustment and special treatment clauses in the international intellectual property regime. They claimed that the international rules should take into consideration their divergent developmental needs and their economic, technological, social and cultural conditions.<sup>16</sup> The result was the inclusion of the Protocol Regarding Developing Countries in the Berne Convention.<sup>17</sup>

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*the Philippine Congress passed the Intellectual Property Code of the Philippines in order to comply with TRIPS. The case of the Philippines illustrates that many developing countries for most of their history have never exercised a meaningful sovereignty over the setting of intellectual property standards.”*

<sup>13</sup> DRAHOS, Developing Countries, p.767.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> YU, Intellectual Property, p.5.

<sup>17</sup> YU, Currents and Crosscurrents, p.328.

In the 1970s less-developed countries began to demand a revision in the Paris Convention and requested lower minimum intellectual property standards for themselves and broader use of compulsory licenses.<sup>18</sup> Working in cooperation within the United Nations Conference on Trade and Development (UNCTAD) less-developed countries also developed a draft International Code of Conduct on the Transfer of Technology which was confronted with strong opposition of the United States.<sup>19</sup>

These developments and opposition of less-developed countries to the international intellectual property regime are not only important because of their impacts on the system but also important because of the means and strategies used by the actors. For the first time, less-developed countries tried “forum shifting” to enhance their bargaining power in international intellectual property negotiations by shifting law-making to a different international venue.<sup>20</sup>

When the actors of an international regime/system begin to oppose existing norms the question of forum arises. One strategy for the opposing actors is to use the same regime and forum that generated the existing norms. Such a strategy, however, is likely to cause resistance from other actors who are benefiting from the existing rules and legal standards. Therefore, using the existing forum and its structures to change existing norms may be a less effective strategy than shifting to a different forum.<sup>21</sup>

Intergovernmental organizations, international institutions and even international legal regimes often restrain the actions of the hegemonic powers within the system. These venues provide opportunities for weaker states and even for non-state actors to affect the development of new principles, norms and rules. Procedural tools and voting can cause formation of networks and creation of cooperation among weaker states. When confronting resistance from weaker states, powerful actors can be expected to block those attempts by threatening to leave that international regime.<sup>22</sup> However, it is not always

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<sup>18</sup> YU, *Intellectual Property*, p. 5. In the first version of the Paris Convention there was no provision on compulsory licenses. Such provisions were included during the subsequent revisions of the Convention.

<sup>19</sup> *Ibid.*

<sup>20</sup> HELFER, p.18.

<sup>21</sup> *Ibid.*, p.15.

<sup>22</sup> *Ibid.*, p.13.

possible to bear the costs of such actions even for powerful states. Both the sunk costs of existing regimes and high set up costs for new regimes often prevent hegemonic powers from undertaking such actions.<sup>23</sup> Taking into consideration these constraints, both powerful and weaker states use “forum shifting” which can be defined “as an attempt to alter the *status quo ante* by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another”<sup>24</sup> as an important alternative strategy.<sup>25</sup>

Less developed countries used “forum-shifting” strategy during the 1960s and 1970s.<sup>26</sup> In fact, the United Nations Conference on Trade and Development (UNCTAD) was established as a tool or “new venue” in line with this strategy. Since less-developed countries believed that the GATT system was insufficient to address trade and development issues, they used UNCTAD as a mediator to address those problems. UNCTAD was quite successful as a “forum organization” in assisting less-developed countries in

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<sup>23</sup> Ibid., p.13.

<sup>24</sup> Ibid., p.14.

<sup>25</sup> Braithwaite and Drahos argue that “[f]orum-shifting increases the possibility of a victory over one’s opponents or prevents one’s opponents from gaining victory. Borrowing the vocabulary of game theory for a moment (but not its methods) we can say that the rules and modes of operation of an organization (particularly its formal and informal norms on voting) constitute the pay-offs that a state might expect to receive if it plays in that particular forum. The payoffs it actually receives depend on the decisions it and other players make. Pay-offs are thus collectively determined. Forum-shifting is a way of constituting a new game. Each international [venue] has different rules by which it operates one so offers different games and different pay-offs. Forum-shifting is a form of optimizing behavior. An actor avoids a suboptimal outcome by shifting to a new game in which it has a better shot at an optimal outcome.” BRAITHWAITE and DRAHOS, *Global Business Regulation*, p. 565.

<sup>26</sup> According to Braithwaite and Drahos “forum-shifting is a strategy that only the powerful and well- resourced [states] can use.” They claim that less powerful states have only the option to follow reactive strategies according to which they attempt to block disadvantageous forum-shifting by powerful states or advance their agendas as much as possible in the new forum. (BRAITHWAITE and DRAHOS, *Global Business Regulation*, p. 564-565). Helfer, however, argues that not only the powerful states but also weaker states, networks of states and even NGOs can use forum-shifting strategy even though their motivations and specific rationales may be different from those of well-resourced actors. Weaker states can use forum-shifting strategy effectively if they can act as a group and get enough support from sympathetic NGOs and intergovernmental organizations. (HELPER, p.17). Finally, Leebron claims that relatively weaker states can engage in “strategic linkage” by connecting issues in which their abilities and power is limited to the issues “on which they have a stronger bargaining position”. (LEEBRON, p. 12.). For a counter argument see BENVENISTI and DOWNS, p.595. (They underline that proliferation of fora is advantageous for powerful states because it causes a rise in transaction costs for policy negotiation and co-ordination and this helps those countries to sustain the status quo).

their negotiations with developed countries on GATT issues.<sup>27</sup>

We, however, have to underline that less-developed countries' attempts to use UNCTAD as an alternative forum was not successful in the field of international intellectual property system.<sup>28</sup> On the contrary, insistent demands of less-developed countries for amending the international intellectual property system to have a more preferential intellectual property regime and their opposition to creation of higher international intellectual property standards caused the United States and the European Communities to adopt forum shifting strategy in the 1980s.<sup>29</sup>

### **C. Reaction of Developed Countries: Shifting from WIPO to GATT and TRIPS**

Especially after the WIPO diplomatic conference held between 1980 and 1984 ended in deadlock upon the United States' opposition to any efforts and demands of less-developed countries for a revision of patent rules of the Paris Convention, the United States began to seek alternative venues for stronger intellectual property protection standards<sup>30</sup>.

As Helleiner and Oyejide underlines, choosing an appropriate forum for international economic negotiations has an important effect on the outcomes and final agreements.<sup>31</sup> Both the United States and the EC were under an increasing pressure from their intellectual property industries demanding higher intellectual property standards to protect their global competitiveness<sup>32</sup> and since less-developed countries could successfully repelled proposals for stronger intellectual property protection forming opposition blocs in such fora as WIPO, UNCTAD and the United Nations Educational, Scientific and

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<sup>27</sup> ANSARI, p. 224.

<sup>28</sup> A good example on success of the UNCTAD is Tokyo Round negotiations. During the Tokyo Round, the studies drafted by the UNCTAD Secretariat affected the negotiation strategies of less-developed countries. Although many analysts thought that the principle of special and differential treatment would weaken the international trade regime, it was accepted in Tokyo. (STEINBERG, p.357.)

<sup>29</sup> DRAHOS, *Developing Countries*, p.769.

<sup>30</sup> HELFER, p. 20.

<sup>31</sup> HELLEINER and OYEJIDE, p.116.

<sup>32</sup> HELFER, p.20. Intellectual property industries saw WIPO as a failure. Lou Clemente, Pfizer's General Counsel at the time explained their dissatisfaction as following: "Our experience with WIPO was the last straw in our attempt to operate by persuasion". (DRAHOS, *Developing Countries*, p.769.)

Cultural Organization, the United States and the EC began to defend that the intellectual property protection should be integrated to multilateral trade negotiations within the General Agreement on Tariffs and Trade (GATT).<sup>33</sup>

Undoubtedly, the GATT was chosen deliberately because both the United States and the EC had a significant negotiating leverage in this forum. Since they had the largest domestic markets, they had the opportunity to use market access commitments and threats to shape trade bargains according to their economic interests<sup>34</sup>. Furthermore, they used the principle of consensus as a “tool of domination” and legitimization of final treaty bargains<sup>35</sup>.

Another reason to choose GATT as the negotiating forum of intellectual property standards was the opportunity to link intellectual property protection to other bargaining areas. By doing so, the United States and the EC could provide the agreement of less-developed countries which have divergent interests<sup>36</sup>. To understand why less-developed countries, who had weak intellectual property laws and preferred weaker intellectual property protection for their development, agreed to stronger intellectual property standards we need to focus on this reason. They could be convinced thanks to the glitter of the “global package deal” offered by the GATT.<sup>37</sup>

Last but not least, the dispute settlement system of the GATT was more effective than the mechanisms offered by the WIPO system. Even though during the GATT era the dispute settlement system was not as strong as the one offered by the WTO regime it was respected by its members<sup>38</sup>.

Motivated by the above mentioned reasons, the United States and the EC pushed less-developed countries to change the forum for discussing the international intellectual property regime and as a result of their efforts,

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<sup>33</sup> DRAHOS, Developing Countries, p.769

<sup>34</sup> HELFER, p.21.

<sup>35</sup> Ibid. p.21. Braithwaite and Drahos explain that as follow:

*“Decision making under consensus means that a decision is made when no state objects to the decision. In practice (...) consensus does not require an affirmative act, merely the absence of objection. (...) A powerful state no longer needs to obtain positive majorities; it needs to obtain only the support of other powerful states and the silence of others.”* (BRAITHWAITE and DRAHOS, Global Business Regulation, p.570.)

<sup>36</sup> HELFER, p.21.

<sup>37</sup> PETERSMANN, p.398-442.

<sup>38</sup> HELFER, p.22.

the Ministerial Declaration that launched the Uruguay Round negotiations included the trade-related aspects of intellectual property rights as a subject for negotiation<sup>39</sup>.

## **II. DISTORTED ARCHITECTURE OF THE IP REGIME**

### **A. Distortion in the Establishment**

At the end of the Uruguay Round, the Agreement on Trade Related Aspects of Intellectual Property Rights was established at the ministerial meeting in Marrakesh in 1994. It engaged intellectual property to trade which could not be achieved by the previous international regimes<sup>40</sup>. It could achieve a new international consensus on the protection of some emerging technologies and issues which had never done before. For instance, for the first time computer programming technologies included within the intellectual property protection regime (Article 10.2) and special protection offered to geographical indications for wines and spirits pursuant to Article 23.

As mentioned above, the previous international intellectual property regime was like a patchwork which accommodated highly divergent protection standards in various national systems. The previous system provided a wider policy space for states. The TRIPS Agreement, on the other hand, created a new regime on international intellectual property area imposing a “supranational code” on the weaker members of the WTO despite their limited economic development<sup>41</sup>.

The TRIPS Agreement is not an international legislation that can be engaged directly into the national laws of the WTO members, rather it sets the minimum standards to be established and protected by all member states. It is also important to note that unlike other aspects of the WTO system, “TRIPS [Agreement] is a set of requirements for positive legislative action to establish the rights and protections mandated by its various articles, rather than merely requiring states to refrain from certain actions and practices”.<sup>42</sup> In terms of the protection of the intellectual property rights, the agreement is concerned with the results, not the means.<sup>43</sup> More importantly, unlike the WIPO

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<sup>39</sup> DRAHOS, *Developing Countries*, p.769.

<sup>40</sup> YU, *The Global Intellectual Property Order*, p.3.

<sup>41</sup> YU, *Intellectual Property*, p.6.

<sup>42</sup> SELL and MAY, p. 163.

<sup>43</sup> MAY, p.73.

regime, international intellectual property system was bound to a stronger enforcement thanks to the mandatory dispute settlement mechanism within the WTO regime. In other words, TRIPS promised a stronger and meaningful enforcement of intellectual property rights within the national legislations.<sup>44</sup>

Although it increased the intellectual property protection standards significantly, the agreement also provided some safeguards, flexibilities and transitional measures for the benefit of less-developed countries which will be further examined in the last part of this study.

As explained in the first section, the negotiation history of the international intellectual property regime is troublesome and provides some insights to understand the distorted architecture of the current regime. However, it is not convincing to explain the current discontent over the international intellectual property regime just by looking at the history of the development of that regime. If this was the case, today we cannot even talk about any legitimate international legal order. Therefore, we need to find a reasonable explanation why less-developed countries are restless and defensive on the protection of intellectual property rights.

### **i. Distortion in the Bargaining Process**

It can be argued that the TRIPS was an agreement established through bargaining among sovereign and equal States; therefore it was the product of compromise between developed and less-developed countries. Under normal circumstances no state enters into an international agreement if the expected net benefits are negative. Absolute and relative gains of the parties may differ; yet, reaching equal benefits is not a must to have a deal. This rational can be true for most of the international agreements but cannot be relevant for the WTO regime.

It would be naïve to claim that in an international negotiation the parties should have the equal bargaining power. This is especially relevant in international trade negotiations. During the Uruguay Round negotiations the parties had different levels of bargaining powers and different interests. Therefore they exchanged costly agreements with the beneficial ones. While some countries obtained higher benefits in both absolute and relative means, some of them obtained lesser benefits.

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<sup>44</sup> See Article 41-46 of the TRIPS Agreement.

Taking this fact into consideration, WTO Agreements should be seen as a package deal. Under this regime, participating countries did not look for positive net benefits for each individual agreement; rather they tried to maximize their total net benefit from the package of agreements. In other words, the final deal can be explained by the cross sectoral gains not by mutual benefits in individual agreements.

With regard to the TRIPS Agreement, while developed countries received stronger protection for intellectual property rights and a reduction in restrictions over foreign direct investment, less-developed countries got lower tariffs on textiles and agriculture. More importantly, they obtained a protection against unilateral sanctions imposed by the United States and other developed countries.<sup>45</sup>

Although there were significant differences in bargaining powers of the parties, it can be said that each group of countries could obtain what they assumed to be in their self-interests. For less-developed countries, textiles and agriculture are among the most important sectors even today, while the intellectual property related goods and services are essential for developed countries<sup>46</sup>.

On the other hand, one of the motivations for less-developed countries to reach a deal through Uruguay Round negotiations was their seeking for a relief from the unilateral trade sanctions of the United States. In 1988 Congress amended the U.S. Trade Act of 1974. The section 301 of the act, which is known as “Special 301”, requires the United States Trade Representative (USTR) to identify foreign countries that deny adequate and effective protection of intellectual property rights or deny American intellectual property goods fair or equitable market access.<sup>47</sup> To be able to escape from the threat of unilateral

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<sup>45</sup> MAY, p.71 and YU, Trips, p.371. YU underlines the difference between the protection obtained by the parties through the TRIPS Agreement and the Agreement on Textiles and Clothing. He explains that:

*“While developed countries have to “phase out” their quotas on the most sensitive items of textiles and clothing on the last day of the ten-year transitional period, less developed countries are required to “phase in” product patents for pharmaceuticals on the first day of the identical transitional period. In addition, although the TRIPS Agreement required less developed countries to strengthen intellectual property protection, it guaranteed the prospects of neither technical assistance from developed countries nor increased foreign investment.”*

<sup>46</sup> YU, Trips, p.372.

<sup>47</sup> DRAHOS, Developing Countries, p.773.

trade sanctions through mandatory dispute settlement process, less-developed countries gave their consent to TRIPS Agreement.

## **ii. Distortion Caused by Coercion**

The bargain narrative is convincing when focusing on the exchanged items through the negotiations. However, it is necessary to understand that besides the significant difference in the bargaining powers, actions of developed countries (especially the United States) to increase their negotiation leverage shaped the outcomes and level of fairness of the deals.

In this regard, another argument on the TRIPS Agreement was that it was the result of the coercion of developed countries led by the United States. The defenders of this argument claims that the TRIPS Agreement was an unfair deal and imposed on less-developed countries by the powerful states. Agreement is coercive and does not take into consideration the special needs, conditions and interests of less-developed countries.<sup>48</sup>

According to Drahos, the TRIPS negotiations do not meet the minimum conditions of democratic bargaining because they were mostly shaped by the coercive actions of the powerful states (especially the United States).<sup>49</sup> He underlines that Special 301 was a coercive instrument to get the consent of less-developed countries. He further claims that beside the threat of unilateral trade sanctions, the United States used Generalized System of Preferences (GSP) to convince less-developed countries.<sup>50</sup>

<sup>48</sup> YU, Trips, p.373; RICHARDS, p.123-24; DRAHOS, Developing Countries, p.772-73.

<sup>49</sup> DRAHOS, Developing Countries, p. 771.

<sup>50</sup> He also gives some interesting examples:

*“When the United States began to push for the inclusion of intellectual property in a new round of multilateral trade negotiations at the beginning of the 1980s, developing countries resisted the proposal. The countries that were the most active in their opposition to the U.S. agenda were India, Brazil, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia. (...) Breaking the resistance of these “hard liners” was fundamental to achieving the outcome that the United States wanted. Special 301 was swung into action in the beginning of 1989. When the USTR announced the targets of Special 301, five of the ten developing countries that were members of the hard line group in the GATT found themselves listed for bilateral attention. Brazil and India, the two leaders, were placed in the more serious category of the Priority Watch List, while Argentina, Egypt and Yugoslavia were put on the Watch List. Opposition to the U.S. GATT agenda was being diluted through the bilaterals. Each bilateral the United States concluded with a developing country brought that country that much closer to TRIPS.*

*(...) The risk of losing GSP benefits was real. [The USTR], Clayton Yeutter, for instance, had written to a U.S. Senator stating that, if Mexico did not make*

Although the arguments on the coercion are quite strong, it is hard to say that it is completely convincing. As mentioned before, it is neither possible nor appropriate to assume that there is a balanced power distribution among the actors. This is especially the case in trade negotiations. As the largest domestic markets and the biggest economic powers it is understandable that the United States and the EC countries have negotiation leverage over smaller economies.

On the other hand, as underlined before, it would be irrational to assess the agreements that established the WTO regime separately. It would be almost impossible to reach a multilateral deal if every participatory tried to reach a positive net benefit from each negotiation area. For example, it would probably not possible to establish a regime on agriculture or textile and clothing based on mutual gain. Economic theory suggests that unless you have a general regime on trade, product or sector specific deals cannot generate win-win solutions for each participatory.<sup>51</sup> Since this is the case, whole WTO negotiations was based on cross-sectoral bargaining principle. Negotiators exchanged cross-sectoral concessions to reach a positive net total benefit from the whole package.

Undoubtedly, TRIPS Agreement has a special place among other WTO Agreements. It regulates an area which is interconnecting to almost every kind of economic, social and cultural activity. Besides, when we look at the history of the development of international intellectual property regime we can see the struggle between the less-developed and developed countries on this field. If we separate the development process of the international intellectual property regime from the WTO system, it is easy to reach a conclusion that the TRIPS Agreement is a clear victory for developed countries. However, if we assess this regime within the WTO system we need to mention the cross-sectoral concessions that less-developed countries have gained in other areas.<sup>52</sup>

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*a substantial changes on intellectual property, 'I will not hesitate to recommend a significant reduction in Mexico's future level of GSP benefits.' In 1987 Mexico did lose GSP benefits to the sum of US\$ 500 million." (DRAHOS, Developing Countries, p.773-76)*

Drahos provides further interesting cases to support his argument on coercion. He refers to another statement of Clayton Yeutter, according to which the Section 301 investigation of South Korea in 1985 was intended to send a message to GATT members.

<sup>51</sup> Because if this was not the case, every state would want to liberalize only the trade of goods and services in which it has the competitive advantage.

<sup>52</sup> YU, Trips, p.375.

### **iii. Distortion Caused by Ignorance**

Another interesting argument is that the TRIPS could be established because less-developed countries were in ignorance about the possible effects of TRIPS and they did not understand the importance of intellectual property protection during the negotiations.<sup>53</sup> It is claimed that this ignorance caused many less-developed countries to misevaluate the likely consequences of the Agreement and higher intellectual property protection standards in critical areas such as agriculture, health, environment, education and culture.<sup>54</sup>

Historical evidence shows that this argument is hardly true. As explained in the first section, less-developed countries and even the old colonies were very sensitive on the international regime of intellectual property. Beginning with 1960s and 1970s less-developed countries demanded for reforming the international intellectual property regime established by the Berne and Paris Conventions in favor of their specific needs and interests. As a counter argument it can be claimed that it was the awareness and demanding attitudes of less-developed countries that caused developed countries to look for alternative forum to reach higher intellectual property standards.

### **B. Distortion in the Implementation**

If we accept that the TRIPS was the result of a bargaining process as mentioned above, empirical records<sup>55</sup> show that less-developed countries not only got a bad bargain but also a failed bargain.<sup>56</sup> It has been argued that the TRIPS was a compromise: developed countries promised to provide market access opportunities in the agricultural and textile areas in exchange for stronger intellectual property protection, however they have not honored their commitments.

It has been argued that even if less-developed countries were able to get what they were promised for during the Uruguay Round negotiations, the result would remain unfair because the net benefit they received from the WTO regime is negative. This is mostly because of the fact that gains from the

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<sup>53</sup> Ibid. p.375; DRAHOS, *Developing Countries*, p.772. (Drahos claims that all States were in ignorance about the effects of the TRIPS not only less-developed countries).

<sup>54</sup> YU, *Trips*, p.375.

<sup>55</sup> For a good summary of empirical results of intellectual property protection on various aspects of economy see MALHOTRA, p.187.

<sup>56</sup> YU, *Trips*, p.379; HOEKMAN and KOSTECKI, p.411.

agriculture and textile would be insufficient to compensate the losses caused by the concessions given through the TRIPS agreement.

On the other hand, it is a fact that information technologies have become essential for almost every aspect of the economic, social and cultural life. While this spill-over effect is creating a share in the value addition process of various economic activities, it is also decreasing the net gains of the economic activities which were subject to negotiation during the Uruguay Round.

Take agricultural production as an example. Today it is not possible to separate agricultural sector from intellectual property regime because seed production is under the protection of patent system. This means that one of the essential inputs is now linked to the intellectual property regime.<sup>57</sup>

As mentioned before, one of the motives for less-developed nations to participate in the TRIPS negotiations was their need for a relief from the threat of U.S. unilateralism. They also wanted to get rid of the risk of negotiating intellectual property regime bilaterally with the United States (and the EC). They knew that the result of a possible bilateral negotiation would be highly unfavorable for them because of the power asymmetry between them and the United States. However, the post-TRIPS period is a total disappointment for less-developed countries in these regards.

In 1994, the USTR announced that Section 301 “should be an even more effective tool as a result of the Uruguay Round Agreements”.<sup>58</sup> Section 301 became a tool for producing “TRIPS-plus” results without engaging in a formal agreement with the relevant less-developed country because that country “may simply decide to adopt a TRIPS-plus measure in order to avoid further action by the United States under the 301 process.”<sup>59</sup>

<sup>57</sup> Braithwaite and Drahos explain this as follow:

*“Increasingly, agricultural goods are the subject of intellectual property rights as patents are extended to seeds and plants. Agricultural countries will find that they have to pay more for the patented agricultural inputs they purchase from the world’s agro-chemical companies. In addition they will have to compete with the cost-advantages that biotechnology brings to US farmers (not to mention the subsidies that US and EU farmers continue to receive). By signing TRIPS, agricultural exporters have signed away at least some of their comparative advantage in agriculture.”* (BRAITHWAITE and DRAHOS, *Information Feudalism*, p.11

<sup>58</sup> DRAHOS, BITS and BIPS, p.792.

<sup>59</sup> *Ibid.*, p.792. Drahos also notes the following remark by a USTR official to explain the effectiveness of Section 301:

*“One fascinating aspect of the Special 301 process occurs just before we make*

Another disappointment for less-developed countries is the increasing bilateralism of the developed countries. Especially the United States and the European Union have been trying to sign bilateral agreements through which they have been seeking broader intellectual property protection and stronger enforcement rules which have been called as TRIPS-plus protection.

Pursuant to Article 1.1 of the TRIPS Agreement, “Members may, but shall not be obliged to, implement in their law more extensive protection than is required by [the] Agreement, provided that such protection does not contravene the provisions of [the] Agreement.” TRIPS also confers on its Members the discretion on the operation of some standards, to make a choice amongst standards or to decide when to adopt standards. For instance, rather than containing an exhaustive list of criteria for the registrability of trademarks Article 15.1 only establishes minimum principles for the eligibility of a trademark for registration and leaves the option to the member states to deny the registration pursuant to the grounds determined under the domestic law. As another example, pursuant to Article 27.3<sup>60</sup>, Members can qualify the standard of patentability in Article 27.1<sup>61</sup> by excluding some subject-matter from patentability. In this regard Article 27.3(b) allows Members to decide how to protect plant varieties. TRIPS also includes some transitional provisions in Articles 65 and 66 according to which developing countries and (under certain conditions) transition economies were given five years, until 2000.<sup>62</sup> However, the bilateral agreements either require implementation of more extensive intellectual property protection standards or eliminate option of the Members allowed by the TRIPS standards. Bilateral agreements often

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*our annual determinations, when there is often a flurry of activity in those countries desiring not to be listed or to be moved to a lower list. IP laws are suddenly passed or amended, and enforcement activities increase significantly.”*

<sup>60</sup> Text of Article 27.3:

“Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

<sup>61</sup> Text of Article 27.1:

“Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application (...)”

<sup>62</sup> Least-developed countries had 11 years, until 2006 — now extended to 2013 in general, and to 2016 for pharmaceutical patents and undisclosed information.

set new standards on the issues that TRIPS Agreement does not deal with.<sup>63</sup>

However, for less-developed countries, the bilateral or plurilateral negotiation of intellectual property standards is highly disturbing because most of the subjects negotiated are not covered by the TRIPS Agreement. This decreases the total value of the TRIPS Agreement because non-compliance to those agreements may be subject to unilateral sanctions and in such a case less-developed countries would not be protected by the Agreement.

In October 2007, the United States announced its intention to negotiate a new Anti-Counterfeiting Trade Agreement (ACTA) with its key trade partners.<sup>64</sup> Besides Japan and the European Union, Australia, Canada, Mexico, New Zealand, South Korea, Singapore, Morocco and Switzerland were included in the negotiations. On November 15, 2010, the USTR announced that the participants finalized the Agreement text.<sup>65</sup>

On the other hand, besides the bilateral and plurilateral initiatives led by developed countries, there are also demands of developed countries especially on the strengthening of the enforcement mechanisms within the TRIPS regime. It can be seen that beginning with the mid-2000s, developed countries began to call for a discussion of enforcement mechanisms. For example, in June 2006 the EU submit a paper to the TRIPS Council demanding an “in

<sup>63</sup> Bilateralism provides significant advantages especially for the stronger parties. As Peter Drahos explains:

*“In bilateral trade negotiations between States involving both a strong and a weak State, generally speaking the strong State comes along with a prepared draft text which acts as a starting point for the negotiations. Bilateral negotiations are complex and lengthy affairs, features which make them costly even for strong States. In order to lower the transaction costs of bilateralism, the United States has developed models or prototypes of the kind of bilateral treaties it wishes to have with other countries. For example, the BIT which the United States signed with Nicaragua in 1995 was based on the prototype that the United States had developed for such treaties in 1994. Similarly, the Free Trade Agreement (FTA) that the United States has negotiated with Jordan will serve as a model for the other FTAs.” (DRAHOS, BITS and BIPS, p.793-794.)*

<sup>64</sup> YU, TRIPS and Its Achilles’ Heel, p.25.

<sup>65</sup> USTR, p.1. According to the press release, “ACTA aims to establish a comprehensive international framework that will assist Parties to the agreement in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy. It includes *state-of-the-art provisions on the enforcement* of intellectual property rights, including provisions on civil, criminal, border and digital environment enforcement measures, robust cooperation mechanisms among ACTA Parties to assist in their *enforcement efforts*, and establishment of *best practices for effective IPR enforcement*.”[emphasis added]

depth discussion” of enforcement issues. During the follow up TRIPS Council meeting, the EU got the formal support of other developed countries such as Japan, Switzerland and the United States. Their requests mostly focused on the enforcement issues.<sup>66</sup>

As can be expected, less-developed countries opposed to these demands of developed countries. Especially China and India strongly opposed to the initiatives of developed countries on the enforcement issues in the TRIPS Council. China, criticizing TRIPS-plus regulation efforts of developed countries, underlines that such efforts can cause serious systemic problems within the international trading system<sup>67</sup>. Similarly India defends that “push for ACTA and other TRIPS-plus standards, [will] upset the balance in the TRIPS Agreement (...) [Intellectual Property Rights] negotiations in [regional trade agreements] and plurilateral processes like ACTA completely bypasses the existing multilateral processes. These negotiations harm multilateral trade by undermining the ‘systemic checks’ against trade protectionism that had been built into the WTO framework.”<sup>68</sup>

Under normal circumstances, after the establishment of an international legal regime, it is expected to reach stability. However, as it was summarized above, the establishment of the TRIPS Agreement and a new international intellectual property regime did not eliminate the longstanding systemic problems and discussions between less-developed and developed countries. Rather, the developments in the post-establishment period have deepened the existing diversities and tensions between the parties. The belief of less-developed countries that they were deceived during the Uruguay Round negotiations also caused a confidence problem between the parties. Therefore, the reasons for the ongoing stalemate in Doha Round negotiations can be found in the previous deal.

### **III. CORRECTING THE DISTORTED STRUCTURE**

International intellectual property regime has never been perfect. Taking into account the divergent needs, interests and conditions of the parties it can be argued that it is extremely hard to expect it to be close to the perfection in

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<sup>66</sup> TRIPS Council, Joint Communication from the European Communities, United States, Japan and Switzerland, Enforcement of Intellectual Property Rights, IP/C/W/485 (November 2, 2006).

<sup>67</sup> YU, TRIPS and Its Achilles’ Heel, p.30.

<sup>68</sup> Ibid., p.30-31.

the short and medium term. However, if we accept the TRIPS Agreement and the existing international regime as they are, we can generate some suggestions to change the distorted architecture of the system and a more acceptable result for the less-developed countries. In other words, rather than calling for a complete abandonment or a radical revision of the regime, this paper looks for whether it is possible to use the existing system advantageously for less-developed countries.

### **A. Using the TRIPS Agreement Itself**

It can be claimed that the ideal solution to overcome the problems on international intellectual property regime is to redesign of the whole system taking into account the development (and especially public health needs) of less-developed countries. However, by looking at the power asymmetry in the WTO system, it is not hard to foresee that it is almost impossible to reach such a solution.<sup>69</sup> On the contrary, the TRIPS Agreement is likely to stay and the imposition of stronger protection standards through bilateral, regional and plurilateral agreements may be the case in the future.

#### **i. Interpreting the Agreement**

When we look at the TRIPS Agreement we see that WTO members agreed upon various issues such as minimum standards of intellectual property protection and mandatory dispute settlement process. Yet, the Agreement should be interpreted in a way to see the issues that the parties could not agree on. For example, the parties could not reach an agreement on the exhaustion of intellectual property rights<sup>70</sup>. Therefore, it can be argued that there are some ambiguities<sup>71</sup> in the Agreement and these can be used to interpret the Agreement in a more pro-developmental manner.

It cannot be expected from an international agreement to explain every item or concept in detail. Thus the interpretation of the text will have great importance in defining the rights and obligations of the parties. Therefore it is essential to interpret the TRIPS Agreement “through a pro-developmental lens”.<sup>72</sup>

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<sup>69</sup> YU, *Intellectual Property*, p.15.

<sup>70</sup> According to Article 6 of the TRIPS Agreement “(...) nothing in [the] Agreement shall be used to address the issue of the exhaustion of intellectual property rights.” (YU, *Trips*, p.387.)

<sup>71</sup> *Ibid.* p.387. YU calls this “constructive ambiguities”.

<sup>72</sup> *Ibid.*, p.388.

Although there is not a specific provision in the TRIPS Agreement about treaty interpretation, it is included in Appendix 1 of the Dispute Settlement Understanding (DSU) as one of the covered agreements for which the DSU is applicable.<sup>73</sup>

Pursuant to Article 3.2 of the DSU, it serves

“to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” (emphasis added).<sup>74</sup>

This provision (and Article 19.2 of the DSU) underlines the limited nature of the Dispute Settlement Body in clarifying Members’ rights and obligations under the WTO Agreements. Furthermore, Article IX:2 of the WTO Agreement emphasizes that “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements”.

In *Japan-Alcoholic Beverages* the Appellate Body clarified that Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>75</sup> constituted

<sup>73</sup> See Article 1.1 of the DSU.

<sup>74</sup> A similar language can be found in Article 19.2 of the DSU:

“In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”

<sup>75</sup> Article 31: General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so

customary rules of interpretation of public international law for the purposes of Article 3.2 of the DSU.<sup>76</sup>

As mentioned before, there are some ambiguities in the TRIPS Agreement and it leaves discretion to the member states in domestic implementation of some obligations of the Agreement. For example, pursuant to Article 1.1 of the TRIPS Agreement, “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”. Furthermore, it is important to underline that the obligations within the Agreement set minimum standards for international intellectual property protection. Therefore, it would be appropriate to adopt a broad approach in interpretation of the obligations in the TRIPS, leaving considerable discretion to member states for their domestic legislation. As J.H. Jackson claims there is “a more deferential attitude by the Appellate Body towards national government decisions (or in other words more deference to national sovereignty) than sometimes has been the case for the first-level panels or the panels under GATT. In some sense, therefore, the Appellate Body has been exercising more “*judicial restraint*” (emphasis added).<sup>77</sup> However, when especially the exceptions in the TRIPS Agreement are the case, having a broader interpretation can be problematic because this may cause the basic obligations become ineffective.

In *India-Patent Protection* case, the question of whether the TRIPS Agreement should be interpreted by applying the same principles applicable to other covered agreements was answered by the panel as follow:

“[W]e must bear in mind that the TRIPS Agreement, the entire text of which was newly negotiated in the Uruguay Round and occupies a relatively self-contained, *sui generis* status in the WTO Agreement, nevertheless is an integral part of the WTO system, which itself builds upon the experience over

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intended.

Article 32: Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

<sup>76</sup> Japan-Taxes on Alcoholic Beverages, Report of the Appellate Body, p.10-12.

<sup>77</sup> JACKSON, p. 342.

nearly half a century under the General Agreement on Tariffs and Trade 1947. [...] Indeed, in light of the fact that the TRIPS Agreement was negotiated as a part of the overall balance of concessions in the Uruguay Round, it would be inappropriate not to apply the same principles in interpreting the TRIPS Agreement as those applicable to the interpretation of other parts of the WTO Agreement.”<sup>78</sup>

Now we can look at the principles of interpretation embodied in Vienna Convention on the Law of Treaties. Pursuant to Article 31, the first principle is effectiveness. The Appellate Body confirmed in the *United States-Gasoline* case that this principle is applicable to the covered agreements. According to the Appellate Body:

“One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”<sup>79</sup>

The Appellate Body showed consistency on this issue in *India-Patent Protection* reversing the panel’s assessments on good faith interpretation. After referring to the Article 31(1) of the Vienna Convention, the panel concluded that good faith interpretation “requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the [TRIPS] Agreement.”<sup>80</sup> However, the Appellate Body rejected the interpretation of the panel and concluded that:

“The Panel misapplies Article 31 of the *Vienna Convention*. The Panel misunderstands the concept of legitimate expectations in the context of the customary rules of interpretation of public international law. The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone

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<sup>78</sup> *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, p.52.

<sup>79</sup> *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, p.23.

<sup>80</sup> *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, paragraph 8.18.

the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”<sup>81</sup>

In other words, according to the Appellate Body, the language of a treaty determined the limit of any teleological interpretation. This interpretation of the Appellate Body has important implications for less-developed countries because by underlining that the legitimate expectations of a party to a treaty are reflected in the treaty language itself it has clarified that TRIPS-related complaints can only be based on claims of violations of the express terms of the Agreement. By accepting this approach, the Appellate Body closes the door to TRIPS-related non-violation cases. Therefore, WTO members are free to adopt public policy objectives to pursue their development goals as long as they respect their obligations under the Agreement.

Because of the considerable ambiguity of many provisions of the TRIPS Agreement, legal interpretation has a critical role in the clarification of rights and obligations of the WTO members. The obligations of the Agreement may become more burdensome either on less-developed or developed countries “depending on whether a panel stresses more the purpose of intellectual property protection or of certain public policies such as the transfer of technology [...] Here it is important to have recourse to methods of interpretation acceptable to all Members.”<sup>82</sup>

Obviously, a textual interpretation can not be sufficient every time to clarify the extent of the rights and the obligations of the parties; thus it may be necessary to adopt a teleological interpretation taking into consideration the object and purpose of a specific provision.<sup>83</sup> At this point, the interests of less-developed countries can be taken into account by the panels and the Appellate Body. In this regard, the developmental and technological objectives of the TRIPS Agreement as mentioned in the preamble and Articles 7 and 8 should be underlined by the panels and the Appellate Body. Undoubtedly, this does not mean that their interpretations can contradict the clear language of a certain provision. Yet, after securing an effective protection of intellectual property rights a balance of interests can be seek in a more developmental way.<sup>84</sup>

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<sup>81</sup> India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of the Appellate Body, paragraph 45.

<sup>82</sup> UNCTAD-ICTSD, p.704.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

## **ii. Establishing Model Systems**

Another option to have a more development friendly system is to develop a set of model intellectual property systems taking into account the special needs and interests of less-developed countries.<sup>85</sup> These model sets will be useful to determine the limits of the international negotiations and especially the bilateral and plurilateral free trade agreements. Such an approach can also diminish the discontent caused the system and build confidence between parties for further progress in the negotiations.

It is also important to underline that many of less-developed countries and especially the least developed countries are struggling with the lack of experience and human capital required to have an efficient domestic intellectual property regime compatible with the international intellectual property system. Therefore developing a model for domestic legal regimes may enhance the capabilities of those countries to engage in the international regime of intellectual property easing up the tensions stemming from the disparities between different legal regimes.

## **iii. Flexibilities, Safeguards, Transitional Provisions and Capacity to Participate**

It is important to mention that besides the obligations, the TRIPS Agreement also includes some flexibilities, public interest safeguards and transitional periods. For example, pursuant to Article 7 of the Agreement:

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

Article 8, on the other hand provides flexibility to WTO members to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”. Article 27(2), on the other hand, allows members to “exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public

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<sup>85</sup> YU, Trips, p.388.

order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.” Article 30 enables WTO members to “provide limited exceptions to the exclusive rights conferred by a patent”<sup>86</sup>. Article 31 states under what conditions WTO members can use patented products without authorization of the right holder. Finally, article 73 mentions the security exceptions. It is very important to highlight these flexibilities, public interest safeguards and transitional provisions in the Article. These provisions should be brought to the agenda not only in the political venues but also in the WTO judicial processes.

To date, in only seven cases the provisions of the TRIPS Agreement have been invoked.<sup>87</sup> Taking into consideration the ambiguities that the Agreement includes, it is important to develop WTO jurisprudence through the dispute settlement process and clarify those ambiguities with a developmental point of view.<sup>88</sup>

Undoubtedly, it is necessary to mention that there are serious problems within the dispute settlement process. The suggestion to use dispute settlement with regard to the TRIPS issues can only be meaningful if the technical and financial difficulties confronted by less developed countries can be overcome. However, it is a fact that the effective use of the dispute settlement by less-developed countries will affect their leverage in negotiations and can create a

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<sup>86</sup> On the conditions mentioned in the Article 30.

<sup>87</sup> India — Patents (US) WT/DS50; Indonesia — Autos WT/DS54, WT/DS55, WT/DS59, WT/DS64; India — Patents (EC) WT/DS79; Canada — Pharmaceutical Patents WT/DS114; US — Section 110(5) Copyright Act WT/DS160; Canada — Patent Term WT/DS170; US — Section 211 Appropriations Act WT/DS176.

<sup>88</sup> Gregory Shaffer underlines the importance of the WTO jurisprudence as follow:

*“Participation in WTO judicial processes is arguably more important than is participation in analogous judicial processes for shaping law in national systems. The difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. WTO law requires consensus to modify, resulting in a rigid legislative system, with rule modifications occurring through infrequent negotiating rounds. Because of the complex bargaining process, rules often are drafted in a vague manner, thereby delegating de facto power to the WTO dispute settlement system to effectively make WTO law through interpretation. As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law’s interpretation and application over time”* (SHAFFER, p. 470.)

policy space for their domestic intellectual property regimes.<sup>89</sup>

As Shaffer properly underlines, “participation in WTO political and judicial processes are complementary”.<sup>90</sup> Judicial decisions and the interpretation of specific provisions of the WTO Agreements by panels or the Appellate Body affect not only the multilateral trade talks but also bilateral trade negotiations. Bearing this in mind, less-developed countries should clarify their public goods interests and coordinate their efforts in both political and judicial processes so that they can effectively advance their interests in the bargaining process of international intellectual property regime. In this way, “they will be better prepared to exploit the flexibilities of the TRIPS Agreement, tailoring their intellectual property laws accordingly, and will gain confidence in their ability to ward off U.S. and EC threats against their policy choices”.<sup>91</sup>

Finally, it will be useful to remind the provisions of the Doha Declaration on the TRIPS Agreement and Public Health. Upon the request of less-developed countries to meet their needs to have access to affordable drugs in their struggle against public health crisis, the Declaration clarified article 31 of the TRIPS Agreement and underlined each WTO member’s “right to grant compulsory licenses and the freedom to determine the grounds on which such licenses are granted.”<sup>92</sup> According to the Declaration, Members have “the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”<sup>93</sup> The Declaration also “recognize[s] that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.”<sup>94</sup>

When we look at the WTO system, we can see that the existing regime is not completely disadvantageous for less-developed countries. On the contrary,

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<sup>89</sup> Ibid., p.477.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> World Trade Organization, Declaration on the TRIPS Agreement and Public Health, 5(b).

<sup>93</sup> Ibid., 5(c).

<sup>94</sup> Ibid., 6.

there are significant flexibilities and opportunities within the system to reach a more development-friendly regime. Surely, it is hard to claim that the system is exempted from the provisions that ignore the needs and conditions of less-developed countries. However, as we mentioned before, it may be extremely hard to reach a win-win deal in such issues. This is especially the case with regard to the public good problems. For a free-rider, there is no way to reach a more profitable deal preventing him from free-riding. The TRIPS and its discontents should be viewed in this regard. The best way to have a respected international regime will be to balance the costs and the benefits of the regime between the parties. In these balancing efforts, the flexibilities and ambiguities of the Agreement can be used in favor of the less-developed countries.

### **B. Forum-Shifting as an Alternative Strategy**

As mentioned in the first part, both developed and less-developed countries used forum-shifting strategy to improve their bargaining positions. Although it can be argued that regime shifting can only be used by powerful actors effectively, it can be an option for less-developed countries as well. Laurence Helfer argues that “regime shifting has been a pervasive feature of international intellectual property lawmaking at least since the shift from WIPO to GATT to TRIPS. [D]eveloping nations, aided by NGOs and officials of intergovernmental organizations have used regime shifting to serve different normative and strategic goals.”<sup>95</sup>

In this regard, less-developed countries can utilize language used in other regimes to enhance their negotiating positions. Through a successful forum-shifting strategy, they can develop counter-regime norms and therefore can change the “minimum standards” rhetoric to “maximum standards of intellectual property protection”.<sup>96</sup> However, it is obvious that it is highly difficult to find appropriate international venues that have a connection with the international intellectual property regime and provide less-developed countries more advantageous positions against powerful actors of the system. Moreover, most of the times forum-shifting is a costly alternative and can only be adopted by less-developed countries as long as the expected net benefit of such an action is higher than the net benefit of staying in the same regime. Nevertheless, we need to say that, even though less-developed countries

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<sup>95</sup> HELFER, p.82.

<sup>96</sup> Ibid., p.14.

have limited ability to increase their bargaining powers by shifting forums they have successfully used this strategy by using the language used in other regimes such as the biodiversity regime or the human rights regime.

Especially the developments in international human rights regime are quite interesting in this regard. The rights of indigenous peoples and a response to the TRIPS Agreement have been two main international intellectual property issues within the United Nations human rights regime. In particular, the antagonistic approach adopted by the United Nations human rights bodies “has led to the adoption of non-binding declarations and interpretative statements that emphasize the public’s interest in access to new knowledge and innovations and assert that states must give primacy to human rights over TRIPS where the two sets of obligations conflict.”<sup>97</sup>

Intellectual property lawmaking is occurring in a variety of different United Nations fora such as the Commission on Human Rights, its Sub-Commission on the Promotion and Protection of Human Rights, the U.N. High Commissioner for Human Rights and the Committee on Economic, Social and Cultural Rights (the ICESCR Committee).

For instance, legal mechanisms to protect the intellectual property of indigenous communities were first considered by the Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) in the early 1990s and in 2007 the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration) were adopted by the U.N. General Assembly. The Declaration recognizes the right of indigenous peoples to “maintain, control, protect and develop their intellectual property” and imposes an obligation to states to “take effective measures to recognize and protect the exercise of these rights.”<sup>98</sup> Furthermore, pursuant to Article 11 of the Declaration states are obliged to “provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their intellectual [...] property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”<sup>99</sup>

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<sup>97</sup> Ibid., p.46.

<sup>98</sup> Article 31 of the Declaration.

<sup>99</sup> Ibid., Article 11.

Since the implementation of the TRIPS Agreement has become burdensome and controversial for many less-developed countries a “more comprehensive area of intersection between human rights and intellectual property” protection emerged as a reaction to the TRIPS Agreement.<sup>100</sup> Less-developed countries, getting support from NGOs and intergovernmental organizations, have used the U.N. human rights system to pass resolutions and reports critical of the TRIPS Agreement.<sup>101</sup> In 2000, members of the Sub-Commission adopted a unanimous resolution on “Intellectual Property Rights and Human Rights”.<sup>102</sup> The resolution underlines that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights”<sup>103</sup> and asked national governments, intergovernmental organizations, U.N. human rights bodies and NGOs to address the issues stemming from the intersection of international intellectual property regime and human rights.<sup>104</sup> Most importantly, the resolution reminds “the primacy of human rights obligations over economic policies and agreements.”<sup>105</sup> As a response to the invitation of Sub-Commission, the U.N. human rights bodies took various actions and produced some documents which are mostly critical of the existing international intellectual property regime established by the TRIPS Agreement.<sup>106</sup>

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<sup>100</sup>HELPER, p.49.

<sup>101</sup>Ibid., p.49. (noting that the first human rights reaction to the TRIPS regime was initiated by an NGO consortium in July 2000. The Lutheran World Federation, Habitat International Coalition, and the International NGO Committee on Human Rights in Trade and Investment submitted a statement to the Chair of the Sub-Commission on the Promotion and Protection of Human Rights entitled “The WTO TRIPS Agreement and Human Rights”).

<sup>102</sup>Res. 2000/7, U.N. ESCOR Commission on Human Rights,

<sup>103</sup>Ibid.

<sup>104</sup>Ibid.

<sup>105</sup>Ibid.

<sup>106</sup>These are some examples of actions taken: resolutions adopted by the Commission on Human Rights on “Access to Medication in the Context of Pandemics such as HIV/AIDS” which were initiated by Brazil; an official statement by the ICESCR Committee which is defending that intellectual property rights “must be balanced with the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications” and underlines that “national and international intellectual property regimes must be consistent with a human-rights based approach” (Committee on Economic Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Follow-up to the day of general discussion on article 15.1 (c), Monday, 26 November 2001, Twenty Seventh Session, Agenda Item 3.

Less-developed countries have also been using UNCTAD as an alternative forum to address their concerns with respect to the implementation of the TRIPS Agreement and post-TRIPS developments in international intellectual property protection through multilateral treaties and regional and bilateral free trade agreements. To this end, a joint Project by UNCTAD and the International Centre for Trade and Sustainable Development (ICTSD) on Intellectual Property Rights and Sustainable Development was initiated. The aim of the project is to improve the understanding the implications of international intellectual property regime on development and increase the capacity of less-developed countries to participate in multilateral, regional and bilateral negotiations. Furthermore, the project also aims to assist national authorities in the implementation of their commitments on international intellectual property protection.

Finally, we need to underline that forum-shifting is not an exclusive strategy for less-developed countries. Increasing bilateralism of developed countries should also be seen as forum-shifting efforts. Upon the discontent on the TRIPS Agreement and increasing opposition of less-developed countries to stronger enforcement rules within the WTO system, developed countries began to use bilateral, regional and even multilateral venues to bypass the resistance of less-developed countries against a stronger international intellectual property regime.

### **C. Changing Payoffs of the Game with Coalition Building**

Recent proliferation of free trade agreements and bilateral and plurilateral negotiations can be seen as the “divide and conquer” strategy.<sup>107</sup> As USTR Robert Zoellick explained after the failure of the WTO Ministerial Conference in Cancun, “the United States will separate the can-do countries from the won’t-do and will move towards free trade with [only] can-do countries.”<sup>108</sup>

As it was explained in the second part, this strategy was used before especially during the TRIPS negotiations. The United States used “Special 301” sanctions and GSP privileges to isolate and convince the opposition countries.

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<sup>107</sup>YU, Trips, p.403.

<sup>108</sup>Ibid.

As a counter strategy, less developed countries can develop a “combine and conquer strategy”<sup>109</sup> acting in coordination and building coalitions. This strategy successfully implemented by the Group of 21 during the Cancun Ministerial and prevented the members from reaching agreement on investment, competition policy, government procurement and trade facilitation.<sup>110</sup>

We can compare the possible payoffs of coordinated strategy and bilateral negotiation. Suppose that the United States and a less-developed country are negotiating over a bilateral agreement on higher intellectual property protection standards (TRIPS-Plus provisions). If less-developed country agrees on the provisions imposed by the United States it will get a negative net benefit.<sup>111</sup> If it does not agree on higher standards requested by the United States, it will again get negative net benefits. However, this time the loss will presumably be higher because of the possible sanctions of the United States. In other words, in any case, -excluding the possibility of compensatory cross-sectoral gains- the less-developed country will have to bear a loss and the magnitude of the loss will be higher if it refuses the United States’ proposal.

If, on the other hand, less-developed countries can act in a coalition, the rules and pay-offs of the game can change significantly. Firstly, such a strategy will increase the cost of sanctions for the United States. Secondly, the emergence of such a coalition may eliminate the power asymmetry in the WTO negotiations depending on the characteristics and tightness of that coalition because a loose formation, which has been employed by less-developed countries to date, cannot maximize the capacities and bargaining power of this coalition.<sup>112</sup>

However, when the cross-sectoral bargaining principle comes into the equation it is almost impossible to set such a strong coalition among less-developed countries because their interests are not homogenous. For example, while India is insisting on the protection of domestic agricultural producers, Brazil, as a Cairns Group member, is demanding further liberalization of

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<sup>109</sup>Ibid.

<sup>110</sup>Ibid., p.404.

<sup>111</sup>The model does not presume cross-sectoral gains. In fact, by doing this we are testing the claim that the Uruguay Round negotiations are a failed bargain in spite of the cross-sectoral gains principle.

<sup>112</sup>DRAHOS, Developing Countries, p.784.

agriculture<sup>113</sup>. In other words, as long as the cross-sectoral bargaining tradition does not change, which is definitely not likely, keeping a coalition will be serious problem for less-developed countries.

## CONCLUSION

Especially after the recent financial crisis that hit the biggest economies of the world, many commentators claimed that this would change the balance of power in international relations and international economy.<sup>114</sup> The ongoing Doha Round negotiations are being used to support this idea and to give an example of the decline in the U.S.' compulsory power and the increase in other actors' deterrence power.<sup>115</sup> However, attitudes of less-developed countries such as India and Brazil should be assessed in itself without comparing what happened 15 years ago. Those countries are well aware of the costs of the Uruguay Round Agreements for themselves. They gave the biggest concession to the EU and U.S. accepting the TRIPS agreement and they could not reach to the "promised land" of a freer and more advantageous trade. The reason for their resistance to the demands from the U.S. and EU should be found in the results of the last deal not in the shift of power.

It is obvious that less-developed countries could not get the benefits that they were expecting during the Uruguay Round negotiations. The result was a misevaluation of the cross-sectoral gains. Moreover, they could not get everything what they were promised. However, given the differences in the bargaining power between developed and less-developed countries, reaching an unfair deal is not a surprise. While it is extremely hard to get a win-win deal especially in trade issues, it is harder to have an agreement through which each party receives equal benefits. While this is the case, it is its spilling-over effect on almost every economic activity makes the TRIPS Agreement more problematic than any other WTO Agreements.

It is clear that in the short and medium it is not reasonable to expect a radical change in the international intellectual property regime established by the TRIPS Agreement because there is still a significant power asymmetry

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<sup>113</sup> YU, Trips, p.404.

<sup>114</sup> For an example of such arguments see BEESON.

<sup>115</sup> See DREZNER.

between the parties. Moreover, the divergent interests of the parties push the possibility of having a satisfactory deal away.

Existing regime has a distorted architecture in many respects. Historically, it contains the tensions between developed and less-developed countries. Although it can be claimed that it is the result of a bargaining process and compromise between the parties, there are strong evidences of coercion that diminish the value of the deal as a democratic bargain. It contains use of compulsory power by stronger actors. It also contains the feeling of deception. Under these circumstances it is hard to defend that the regime is stable and robust.

It is a fact that less-developed countries are living within an intellectual property paradigm shaped by developed countries and their policy space in the intellectual property area has been drastically shrunk by the proliferation of bilateral and regional agreements. Given the ongoing initiatives of the United States and the EU and increase in TRIPS-plus agreements, it is highly likely that less-developed countries will get very few concessions on intellectual property issues in either a bilateral or multilateral context. There is no sign to have a reasonable expectation that the distorted architecture will be improved in the future. Under these circumstances, less-developed countries have to learn to live within the TRIPS regime by utilizing its ambiguities and flexibilities and they also have to look for other strategies such as forum-shifting and coalition building especially in their struggle against TRIPS-plus arrangements.

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