

ENFORCING TRIPS: CHALLENGES OF ADJUDICATING MINIMUM STANDARDS AGREEMENTS

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I. INTRODUCTION

The key question in this Article is whether the dispute settlement mechanism (DSM) of the World Trade Organization (WTO) is an effective means of resolving disputes arising under a minimum standards agreement, specifically the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).¹ Unlike the other agreements enforced through the WTO, the TRIPS Agreement requires member nations to adopt policies for IP protection that meet certain minimum standards.² This Article seeks to explain why unique trends have emerged in WTO dispute resolution in matters specifically involving the TRIPS

1. 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, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

2. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 274 (Oxford Univ. Press, 2d ed. 2001).

Agreement that are not shared by the larger genus of trade disputes in general.

In the Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations, which resulted in the establishment of the WTO, the developed countries selected the WTO regime over the preexisting World Intellectual Property Organization (WIPO) as a more desirable forum through which to address international disputes over intellectual property (IP). The developed countries favored the GATT/WTO because of the perceived benefit of litigating disputes under the WTO DSM, which they considered “strong” in comparison to the DSM of the WIPO.³ In light of this evident desire for stronger international IP enforcement, it is puzzling that the use of the WTO DSM to address TRIPS disputes has been dramatically declining: in contrast to the successful record of the first five years of adjudication (1996-2000), only three TRIPS disputes have been brought to the WTO DSM since 2001.⁴ Of these three disputes, only one involved a dispute against a developing country, even though the transitional period (a “grace period” granted to developing countries to give them a gentler path to compliance with the TRIPS standards) expired in January 2000. This Article investigates the basis for this decline, and whether the WTO DSM mechanism actually succeeds in fostering compliance with international minimum IP protection standards.

What factors limit the effectiveness of the WTO DSM at encouraging compliance? Answering this question is critical for assessing the success of the TRIPS Agreement as a whole. Without an effective DSM to police violations, the minimum standards ideals articulated in the Agreement are of little practical use to IP-producing countries. Exploring the shortcomings of the WTO DSM also lends insight into the strategy of the United States in its current TRIPS complaint against China.⁵

In Part II of this Article, I provide background on the TRIPS Agreement and briefly explain the developed countries’ strategy in choosing the WTO over the WIPO as the preferred forum for international IP adjudication. In Part III, I evaluate the settlement record of TRIPS disputes and

3. See Frank Emmert, *Intellectual Property in the Uruguay Round—Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT’L L. 1317, 1344-47 (1990). See also JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 58 (Kluwer Law Int’l, 2001) (giving a brief history of the negotiation on DSM in the TRIPS context).

4. Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2006—A Statistical Analysis*, 10 J. INT’L ECON. L. 171, tbl.5 (2007).

5. See Request for Consultation by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 10, 2007).

identify trends in the resolution of IP disputes that are unlike trends in general trade disputes. In Part IV, I suggest two complementary explanations for the infrequent use of the DSM in IP disputes. First, the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS), which monitors compliance with the Agreement, may have preempted disputes over the content of statutes by providing early review of members' domestic legislation.⁶ Second, countries may have been deterred from using the WTO DSM because of its inability to resolve claims which do not focus on statutory language, but instead pertain to the application of statutes or the ineffectiveness of domestic remedies. In Part V, I use the conclusions from my analysis of trends in TRIPS disputes to evaluate the strategy currently being employed by the United States in its TRIPS litigation against China. This strategy, I argue, shows that the United States implicitly recognizes the enormous challenges involved in successfully resolving TRIPS disputes concerning the application of statutes or the ineffectiveness of domestic remedies, and consequently seeks to avoid these types of claims. In Part VI, I present another possible factor behind the reduction in TRIPS disputes. I argue that the huge disparity between the developed countries and developing countries in their views on desirable IP rules helps to explain the reduction in number of disputes, as heavy-handed policing of IP complaints by wealthy nations against developing countries could breed political resentment and serve to undermine the WTO system. Part VII concludes the Article by providing policy implications.

II. BACKGROUND: INTERNATIONAL NEGOTIATION AND THE CONTENT OF TRIPS

In the 1980s, U.S. industrial interests advocated introducing a new IP treaty because of the defects of the existing WIPO regime.⁷ Their preferred forum for policing the new agreement was the international trade regime of the GATT⁸/WTO.⁹ The motivation for granting the

6. WATAL, *supra* note 3, at 50-57, 84.

7. Emmert, *supra* note 3, at 1339-54.

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194 [hereinafter GATT].

9. See, Emmert, *supra* note 3, at 1339-54. See WORLD TRADE ORG., UNDERSTANDING THE WTO (2007), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Apr. 28, 2008) (explaining how the WTO was created during the Uruguay Round of GATT negotiations). I call the new regime the "GATT/WTO regime" in this Part, because at the time of the negotiations it was not yet known as the "WTO."

GATT/WTO regime authority over IP matters was the perceived strength of the WTO DSM.¹⁰ An effective DSM was vital to ensuring that the desired intensification of international minimum standards requirements would be effective. Whether the WTO DSM succeeds at enforcing the minimum IP protections mandated by the TRIPS Agreement is therefore the key inquiry in any assessment of the impact of the treaty. This Part evaluates the defects of the WIPO regime, the strategies adopted by the developed countries in their pursuit of a new agreement, and their achievement in establishing TRIPS.

A. The Defects of the WIPO Regime¹¹

International IP protection has a long history. Multilateral international IP conventions had already existed for more than a century when the TRIPS Agreement was negotiated in the GATT Uruguay Round.¹² The WIPO, which was formed in 1967 as a specialized international organization, had a mandate to administer IP matters under the United Nations.¹³ The WIPO regime, however, had several defects that made it unpalatable to developed-world business interests.

The first problem was the relatively low level of minimum standards set in the conventions that the WIPO was charged with enforcing. Although these conventions did specify certain minimum standards, the contracting parties were given broad discretion as to the level of IP protec-

10. See Emmert, *supra* note 3, at 1342-43; see also Karen D. Lee & Silke von Lewinski, *The Settlement of International Disputes in the Field of Intellectual Property*, in FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 278, 285-86 (Friedrich-Karl Beier & Gerhard Schrickler eds., 1996); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 354-55 (2004) (emphasizing the importance of the lack of effective dispute enforcement mechanism as a motivation of developed countries to move for the TRIPS negotiation).

11. See generally Emmert, *supra* note 3, at 1339-44 (discussing the defects of the WIPO regime).

12. E.g., Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (originally signed in 1883).

13. See World Intellectual Prop. Org., Treaties and Contracting Parties: General Information, <http://www.wipo.int/treaties/en/general> (last visited Apr. 22, 2007) (describing the history of the WIPO). The WIPO's predecessor, the United International Bureaux for the Protection of Intellectual Property, was established in 1893 by merging two separate international bureaus. The WIPO became a specialized agency of the United Nations (UN) in 1974 with a mandate to administer IP matters, including enforcing the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. *Id.*

tions to enact.¹⁴ For example, a country could completely exclude pharmaceutical products from patentability or limit the duration of patent terms to a mere seven years.¹⁵ In addition, the governing conventions of the WIPO regime, particularly the Paris Convention for the Protection of Industrial Property (Paris Convention)¹⁶ and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),¹⁷ required member nations to enact only limited enforcement procedures.¹⁸ For example, these conventions did not even require the exclusion or seizure of counterfeit products at national borders.¹⁹ Although the drafters of the treaty may have hoped that the fundamental principle of national treatment would ensure that member nations were incentivized to protect the IP rights of foreign nationals, in practice national treatment failed to create the uniformly high levels of protection desired by businesses in developed countries.²⁰ National treatment requires a signatory country to provide the same IP protection to foreigners as it does to its own nationals.²¹ However, this principle was of little use to foreigners if a state with broad discretion did not provide adequate treatment for its own nationals.²²

A second shortcoming of the WIPO was that the membership of WIPO conventions was limited and major sources of infringing goods (particularly India, Singapore, and South Korea) were excluded.²³ Furthermore, since not all signatories of the conventions had ratified all of the amendments, it was “difficult to determine the exact obligations between two member states.”²⁴

Finally, the WIPO regime did not provide an effective dispute resolution system.²⁵ For example, although the Paris Convention did provide a

14. Emmert, *supra* note 3, at 1340-41.

15. *Id.* at 1341-42.

16. Paris Convention, *supra* note 12.

17. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 (1986) [hereinafter Berne Convention].

18. Emmert, *supra* note 3, at 1342.

19. Paris Convention, *supra* note 12, at art. 9(1) (establishing an obligation of on-border enforcement). However, Article 9(6) provides a broad exception, by stating that in case these remedies are not available under the domestic laws of the country in question, they must be replaced by such remedies as are available. *Id.* at art. 9(6).

20. *See* Emmert, *supra* note 3, at 1341.

21. Paris Convention, *supra* note 12, at art. 2.

22. Emmert, *supra* note 3, at 1341.

23. *Id.* at 1339-40.

24. *Id.* at 1337.

25. *Id.* at 1342-43.

procedure for dispute settlement,²⁶ this procedure was never used in practice.²⁷ A large problem was that the jurisdiction of the International Court of Justice (ICJ) was noncompulsory.²⁸ Article 28(2) provides that “[e]ach country may . . . declare that it does not consider itself bound by the provisions of [Article 28(1)].”²⁹ As a result, “the majority of the member states of the convention never accepted the compulsory jurisdiction of the ICJ . . . in IP matters.”³⁰ Moreover, “patent disputes were considered to be too trivial to bring before the ICJ.”³¹

The defects in the WIPO regime pushed the developed countries to lobby for a more effective international IP protection scheme.³² The developed countries considered two options: either amending the Conventions within the WIPO regime or developing a new agreement within the GATT/WTO regime.³³ Until the early 1980s, they negotiated with the developing countries mainly within the WIPO regime.³⁴ Their lack of success in these negotiations, together with the advantages posed by the GATT system, led them to push for a new IP treaty within the GATT/WTO regime: the TRIPS Agreement.³⁵

26. Paris Convention, *supra* note 12, at art. 28; Berne Convention, *supra* note 17, at art. 33.

27. Emmert, *supra* note 3, at 1342-43.

28. *Id.* at 1343.

29. Paris Convention, *supra* note 12, at art. 28(2).

30. Emmert, *supra* note 3, at 1343.

31. *Id.*

32. Yu, *supra* note 10, at 361 (noting the process was led by the United States and later joined by other developed countries).

33. *See id.* at 362 (discussing “GATTability,” or “whether countries should include IP issues in the GATT”). Members questioned whether the GATT/WTO regime was the proper forum for international IP enforcement. Some considered the WIPO to be a more suitable forum for enforcing international IP rights. *See id.* at 360.

34. *Id.* at 357. Developed countries could not even maintain the previous levels of minimum standards due to the opposition of developing countries. *See* Emmert, *supra* note 3, at 1343-44. The United States and the European Communities also submitted several proposals in the GATT Tokyo Round (1973-1979) instead of the WIPO, but no agreement was reached. *See* Yu, *supra* note 10, at 356-57. The scope of the proposal was narrow compared to the TRIPS Agreement as it focused only on the on-border measures against trademark piracy. *See* Revised Proposal by the United States & European Economic Community, *Agreement on Measures to Discourage the Importation of Counterfeit Goods*, L/4817 (July 31, 1979) (GATT Communication), available at http://www.wto.org/gatt_docs/English/SULPDF/90960212.pdf (last visited Apr. 22, 2008).

35. *See* Emmert, *supra* note 3, at 1339-54.

B. The Strategies of the Developed Countries in Advocating TRIPS³⁶

By the early 1980s, the United States, which led the overall TRIPS negotiation, had concluded that it would be easier to write a single “completely new treaty” than to negotiate amendments of the existing Conventions.³⁷ Since the Conventions had a long history, it would have been difficult to obtain consensus on their interpretation.³⁸ In addition, the Conventions were “limited to specific aspects of [IP],” and thus the developed nations were apprehensive that “certain new aspects and technologies [might] fall into the gaps in these treaties.”³⁹

In addition, the developed countries were concerned about the voting system in the WIPO.⁴⁰ In the WIPO, as in the United Nations generally, developed countries, developing countries, and socialist countries had customarily voted as unified blocs, even though the individual interests of bloc members may have diverged on particular issues.⁴¹ Since most IP rights—particularly patents—were and are held by parties in developed countries, strengthened international IP rules appeared to benefit the developed countries while imposing costs on the other countries.⁴² Given the WIPO membership’s tendency to vote in blocs, as well as the numerical reality that the developed countries were outnumbered by the developing countries, it would have been difficult for the developed nations to convince the other voting groups to adopt new rules within the WIPO regime.⁴³ In contrast to the WIPO, the members of the GATT regime had not historically formed UN-style voting blocs.⁴⁴ The possibility therefore existed within the GATT/WTO regime of negotiating a “package deal” compromise in which the developed countries would obtain IP protection by tailoring other trade agreements to suit the developing countries’ inter-

36. See generally Emmert, *supra* note 3 (discussing the advantages of GATT/WTO regime); 1 CHARAN DEVEREAUX ET AL., CASE STUDIES IN US TRADE NEGOTIATION 37-76 (2006) (discussing the negotiation strategies of developed countries).

37. Emmert, *supra* note 3, at 1345.

38. *Id.*

39. *Id.* For example, it was hard to decide whether software should be protected under copyright or patent. See *id.* at 1329-30.

40. *Id.* at 1343.

41. *Id.* at 1345-46.

42. *Id.* at 1368 (pointing out that the situation was different in the more advanced Newly Industrialized Countries).

43. *Id.* at 1345-46. Indeed, in the 1980s the developed nations tried unsuccessfully to strengthen the minimum standards requirement of the Paris Convention. See *id.* at 1343-44.

44. *Id.* at 1345-46.

ests.⁴⁵ As a result, the developed countries concluded that the Uruguay Round of GATT offered a better forum in which to promulgate a new international agreement on IP protection.⁴⁶ The developed countries could and did negotiate to provide countervailing benefits to developing countries (favorable terms in WTO agreements on agriculture and textiles) in exchange for the desired minimum IP standards.⁴⁷

Another advantage of the GATT/WTO regime over the WIPO was that the WTO enjoyed broader membership than the WIPO.⁴⁸ Several key countries, such as India, South Korea, and Singapore, had not signed the fundamental WIPO conventions but were all GATT members.⁴⁹

Finally, and most importantly for the purposes of this Article, the strong DSM of the GATT/WTO provided a crucial enforcement mechanism that the WIPO sorely lacked. As discussed in Section A, the DSM under the WIPO was so weak that not a single case had been adjudicated within that regime. The GATT DSM, although criticized for its perceived drawbacks (discussed below), unquestionably functioned more effectively than that of the WIPO, as indeed it had frequently been used by members to resolve trade disputes. Even stronger evidence of the effectiveness of the GATT/WTO regime was that nearly all disputes brought to the GATT had been successfully settled.⁵⁰ In addition, a number of improvements to the GATT DSM, including the establishment of a panel and strict timeframes for adjudication, were already adopted by April 1989,⁵¹ when the contracting parties agreed to start negotiations on substantive issues of IP

45. *See id.* at 1345.

46. *See id.* at 1345-47.

47. Emmert, *supra* note 3, at 1345-46; DEVEREAUX ET AL., *supra* note 36, at 112 (emphasizing the linkages “among the issues of IP, textiles, agriculture, and light manufacturing products”).

48. *Id.*

49. *Id.* at 1339-40. India and Singapore were not signatories to the Paris Convention. The Republic of Korea and Singapore were not signatories to the Berne Convention. On the other hand, all three of them were signatories to the GATT. *See* WTO, The 128 Countries that Had Signed GATT by 1994, http://www.wto.org/English/thewto_e/gattmem_e.htm (last visited Mar. 19, 2008).

50. Emmert, *supra* note 3, at 1346.

51. GATT Secretariat, *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures*, L/6489 (Apr. 12, 1989); *see also* THOMAS A. ZIMMERMANN, *NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING* 52-55 (2006).

protection. Further improvements to the GATT DSM were under negotiation in the Uruguay Round concurrently with the TRIPS Agreement.⁵²

The formulation of the TRIPS Agreement was not an entirely smooth process. While the developed countries preferred the GATT/WTO to the WIPO as the forum for developing new international IP protection rules,⁵³ the developing countries questioned the appropriateness of this forum during the negotiations.⁵⁴ They opposed the idea of strengthening IP protection and insisted that if IP should be protected,⁵⁵ the WIPO was the appropriate forum because it specialized in IP subject matter. As a result of these conflicting preferences, the ministers failed to come to a consensus about the propriety of TRIPS before the end of 1988.⁵⁶

However, in April 1989, the contracting countries agreed to put the institutional issue aside and started negotiations on substantive rules.⁵⁷ Once Canada proposed the creation of a new trade organization, the WTO, in which member states could not pick and choose the trade rules they wished to enact, the suitability of the GATT/WTO was no longer an issue because developing countries were seriously concerned about being excluded from the new trading system.⁵⁸ Ultimately, the TRIPS Agreement was signed at the Marrakesh Ministerial Meeting in April 1994, as part of a package deal with the other Uruguay Round Agreements, and it came into force in January 1995.

C. Did the Developed Nations Achieve Their Goals with the TRIPS Agreement?

In many respects, the signing of the TRIPS Agreement vindicated the anti-WIPO strategy of the developed nations. The successful and universally satisfactory adoption of the TRIPS Agreement itself suggested that the developed countries were correct in their perception that the negotiat-

52. Emmert, *supra* note 3, at 1346-47. The Uruguay Round achieved as a result many improvements of the GATT DSM. See generally Lee & von Lewinski, *supra* note 10, 278-328.

53. See, Emmert, *supra* note 3, at 1339-54.

54. *Id.* at 1372.

55. *Id.*

56. GATT Secretariat, *Trade Negotiation Committee Meeting at Ministerial Meeting*, MTN.TNC/7(MIN) (Dec. 9, 1988).

57. Trade Negotiations Committee, *Trade Negotiations Committee Meeting at Level of High Officials*, at 9, MTN.TNC/9 (Apr. 11, 1989) (“[T]he outcome of the negotiations is not prejudged and . . . these negotiations are without prejudice to the views of participants concerning the institutional aspects of the international implementation of the results of the negotiations . . . [and] negotiations on this subject shall continue in the Uruguay Round. . .”).

58. Yu, *supra* note 10, at 362.

ing procedures, voting system, and package-deal compromises of the GATT/WTO regime offered benefits over the WIPO system.

More importantly, from the perspective of the developed nations the substantive terms of the TRIPS Agreement were a major improvement over the previously existing international IP accords. While referring to many provisions of the Paris Convention and Berne Convention (among other WIPO conventions),⁵⁹ the TRIPS Agreement provided additional and more stringent “minimum standards.” For example, Article 27.1 of the Agreement prohibits discrimination in level of protection based on technology sector⁶⁰ and thus, unlike the largely discretionary WIPO conventions, obliges WTO members to protect IP in pharmaceutical products. Similarly, WTO members can no longer exclude chemical “products” or the processes used to manufacture those products from patentable subject matter.⁶¹ Additionally, Article 33 of the Agreement provides that the minimum duration of patent protection must be “a period of twenty years counted from the filing date.”⁶² Therefore, members cannot fulfill their obligations under the TRIPS Agreement by providing 17-year patent terms, as they could under the WIPO conventions. These reforms addressed key complaints of developed countries against the ineffective international IP regimes of the pre-TRIPS era.

Another of the WIPO drawbacks addressed by the TRIPS Agreement was the lack of mandatory enforcement requirements. Part III of the Agreement provides standards for the enforcement of IP rights. Part III requires member countries to provide civil and administrative procedures, provisional measures, and criminal procedures to ensure IP protection, which neither of the two key WIPO conventions, the Paris Convention and the Berne Convention, mandated.⁶³ In addition, the Agreement imposed upon signatories the obligation to have customs procedures that “enable a right holder . . . to lodge an application . . . for the suspension by the customs authorities of the release into free circulation of such goods.”⁶⁴ While the Paris Convention also provided such a requirement, it was undermined

59. In addition to the Paris Convention and the Berne Convention, the Agreement refers to the “Rome Convention” (the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) and the Treaty on Intellectual Property in Respect of Integrated Circuits. TRIPS Agreement, *supra* note 1, at art. 1.3.

60. *Id.* at art. 27.1.

61. *Id.*

62. *Id.* at art. 33.

63. See Thomas Dreier, *TRIPS and the Enforcement of Intellectual Property Rights*, in *FROM GATT TO TRIPS*, *supra* note 10, at 248-277

64. TRIPS Agreement, *supra* note 1, at art. 51.

by exceptions: in the event that border seizures were not made available, they had to be replaced by (1) "prohibition of importation or by seizure inside the country,"⁶⁵ or (2) "the actions and remedies available in such cases to nationals under the law of such country."⁶⁶ Of course, such a far-reaching exception swallows the rule.

A third weakness of the WIPO addressed by the TRIPS Agreement was the limited membership of the governing conventions. As noted above, the membership of the WTO included nonsignatories of the Berne and Paris Conventions. Because all the WTO members were required to sign the TRIPS Agreement as a part of the package deal of Uruguay Round treaties (including the key sources of counterfeit goods such as India, South Korea, Singapore, and many developing countries), the Agreement successfully addressed one of the primary complaints of the developed nations against the WIPO.⁶⁷

Finally, and of particular significance to the subject of this article, the TRIPS Agreement provides a much stronger DSM than the WIPO regime. The Preamble of the Agreement emphasizes "the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures."⁶⁸ Article 64 of the Agreement provides that the WTO DSM has compulsory jurisdiction over TRIPS disputes.⁶⁹ In addition, the new WTO DSM (negotiated concurrently with the TRIPS Agreement) overcame many of the perceived weaknesses of the GATT DSM. For example, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which governs the WTO DSM, eliminated the right of individual parties to block the establishment of panels or the adoption of a report.⁷⁰

Clearly, the GATT/WTO regime presents numerous advantages over prior attempts at international IP protection, at least on paper. Professor Reichman described the TRIPS regime as "the most ambitious

65. Paris Convention, *supra* note 12, at art. 9(5).

66. *Id.* at art. 9(6).

67. See Emmert, *supra* note 3, at 1339-40 (discussing the limited membership of the WIPO); *Id.* at 1345 (discussing WTO's advantage of extended membership and "the possibility of creating a package deal").

68. TRIPS Agreement, *supra* note 1, at pmb1.

69. *Id.* at art. 64.

70. Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 6, 16, 17, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

international intellectual property convention ever attempted.”⁷¹ However, a question remains: whether and to what extent the WTO DSM functions in practice to police adherence to the TRIPS Agreement. If members can successfully enforce the new IP protection rules through the DSM, the goal of the negotiations has been fully achieved. On the other hand, if the DSM does not work as anticipated and nations cannot compel the cooperation of fellow members in the shared task of IP protection, the “improved” IP rules and broader membership of the WTO might be of little value to the developed nations. It is well-accepted that the new DSM has been successful in resolving non-IP-related trade disputes.⁷² However, there remain questions regarding the effectiveness of the WTO DSM in the TRIPS context. Specifically, the use of the WTO DSM to resolve TRIPS disputes has fallen, while its use to resolve general trade disputes continues unabated. This Article investigates this critical issue.

III. HISTORY OF TRIPS DISPUTES

The short history of TRIPS disputes reveals several curious trends that are notably different from the patterns in the larger genre of non-TRIPS trade disputes. Thus far, twenty-six disputes on TRIPS have been taken into the WTO DSM and most of them have been resolved.⁷³ While TRIPS disputes have from the Agreement’s inception been relatively small in number, they declined sharply after 2001, a dramatic decrease not mirrored in the larger category of trade disputes in general.⁷⁴ Also curious is the small number of complaints levied against developing countries.⁷⁵ What explains these unique trends? This Part outlines the history of DSM disputes involving TRIPS and compares it with the overall dispute trends, while Parts IV and VI discuss possible explanations for the precipitous decline in TRIPS disputes since 2001.

71. J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 366 (1996).

72. ZIMMERMANN, *supra* note 51, at 78-79.

73. See World Trade Org., Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 19, 2008) (showing specific issues involved in each case in the respective case page); see also Leitner & Lester, *supra* note 4, at 171 tbl.5 (illustrating the overall trends of the dispute settlement in the WTO).

74. Leitner & Lester, *supra* note 4, at 171.

75. See World Trade Org., *supra* note 73.

A. The First Five Years (1996-2000)

The TRIPS Agreement came into force in January 1995. However, TRIPS did not become fully effective until January 1996 because the Agreement provided for a one-year transitional period for all members.⁷⁶

The first dispute was taken before the WTO in February 1996, when the United States requested consultations with Japan,⁷⁷ claiming insufficient protection of intellectual property in sound recordings.⁷⁸ The European Communities (EC) joined the dispute as a third party and subsequently filed a separate dispute over similar issues.⁷⁹ These disputes were settled after a year, when Japan amended its Copyright Law in January 1997.⁸⁰

The first case decided by the Panel involved a developing country, India, which was the target of a patent complaint by the United States.⁸¹ The United States argued that India's patent application procedures were inconsistent with the Agreement (Articles 27, 65, and 70) because India allegedly did not establish so-called "mailbox filing procedures," which would preserve novelty and priority for applications of product patents for pharmaceutical and agricultural chemical inventions during the transitional periods (Article 70.8(a)) and the exclusive marketing rights in such products (Article 70.9).⁸² The Panel held for the United States, and the Appellate Body upheld the Panel's decision in most parts.⁸³ Subsequently,

76. TRIPS Agreement, *supra* note 1, at art. 65.1.

77. Under WTO rules, a request for consultation is a prerequisite to panel procedure. See DSU, *supra* note 70, at art. 4.7.

78. World Trade Org., Dispute Settlement: Dispute DS28 Japan—Measures Concerning Sound Recordings, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds28_e.htm (last visited Apr. 28, 2008).

79. This dispute was labeled *Japan—Measures Concerning Sound Recordings* (DS42). See World Trade Org., Dispute Settlement: Dispute DS42: Japan—Measures Concerning Sound Recordings, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds42_e.htm (last visited Apr. 28, 2008).

80. Notification of Mutually Agreed Solution, *Japan—Measures Concerning Sound Recordings*, WT/DS28/4 (Feb. 5, 1997).

81. The dispute was labeled *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (DS50). See World Trade Org., Dispute Settlement: Dispute DS50, India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm (last visited Apr. 28, 2008).

82. See Request for Consultations by the United States, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/1 (July 9, 1996).

83. Appellate Body, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products—Report of the Appellate Body*, WT/DS50/AB/R (Dec. 19, 1997) (*adopted* Jan. 16, 1998).

India implemented a new law to comply with the recommendations of the Report.⁸⁴

In the first five years of TRIPS enforcement, there were twenty-three disputes, and the dispute settlement institutions decided six cases.⁸⁵ The types of claims brought before the WTO varied considerably.⁸⁶ First, the disputes covered all three kinds of treaty obligations: most-favored-nation treatment, national treatment,⁸⁷ and minimum standards. Moreover, the minimum standards claims covered copyrights (Part II.1 of the Agreement),⁸⁸ trademarks (Part II.2),⁸⁹ geographical identifications (Part II.3),⁹⁰ and patents (Part II.5).⁹¹ Some of those claims related to certain provisions of the Paris Convention and Berne Convention to which the TRIPS Agreement referred. Notably absent from the disputes adjudicated by the WTO were claims involving industrial designs (Part II.4 of the Agreement), layout-designs of integrated circuits (Part II.6), and trade secrets (Part II.7). Lastly, many of the disputes brought before the WTO concerned the enforcement provisions (Part III) of the Agreement.⁹²

84. World Trade Org., Dispute Settlement: Dispute DS50: India—Patent Protection for Pharmaceutical and Agricultural Chemical Products (DS50), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm (last visited Mar. 6, 2008).

85. Katarina Nedeljković, WTO Intellectual Property Dispute Settlement 29-111 (2002) (unpublished manuscript, on file with the Harvard Law School Library).

86. *Id.*

87. For example, in the dispute *US—Section 211 Omnibus Appropriations Act of 1998* (DS176), the EC claimed the violation of the Agreement in both most-favored-nation treatment and national treatment. See World Trade Org., Dispute Settlement: Dispute 176: United States—Section 211 Omnibus Appropriations Act of 1998 (DS176), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds176_e.htm (last visited Apr. 28, 2008).

88. For example, the dispute *Japan—Measures Concerning Sound Recordings* (DS28). See World Trade Org., *supra* note 78.

89. For example, the dispute *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (DS174). See World Trade Org., Dispute Settlement: Dispute 174: European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (DS174), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm (last visited Apr. 28, 2008).

90. *Id.*

91. For example, the dispute *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (DS50). See World Trade Org., *supra* note 81.

92. For example, the dispute *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights* (DS83). See World Trade Org., Dispute Settlement: Dispute 83: Denmark—Measures Affecting the Enforcement of Intellectual Property Rights (DS83), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds83_e.htm (last visited Apr. 28, 2008).

In all twenty-three disputes initiated in the first five years, the complainants were developed countries. The respondents included both developed and developing countries.⁹³ The claims against the developing countries involved both transitional and general obligations⁹⁴ (developing countries were only subject to limited obligations for a four-year transitional period, which ended January 1, 2000).⁹⁵ During the transitional period, developing countries were challenged for violating transitional obligations, such as Article 70.8,⁹⁶ as well as for breaching general obligations not subject to transitional exceptions, such as national treatment.⁹⁷ Upon the expiration of the transitional period in the year 2000, developing countries became subject to most claims under the general provisions,⁹⁸ and, unsurprisingly, two disputes which involved such claims were immediately taken into the DSM.⁹⁹ Similarly, the United States immediately amended its claims in a preexisting dispute against Argentina to include claims that the latter nation was not subject to during the transitional period.¹⁰⁰

Most disputes brought before the WTO DSM have been resolved, either by decision or settlement. Many disputes were settled under mutually agreed solutions, without adjudication before a WTO Panel. Five early cases were settled in this way by the end of 2000, and eight disputes were subsequently settled by 2002.¹⁰¹ In disputes that could not be resolved under the consultation processes, the DSM offered timely adjudication. Indeed, out of eight early disputes that proceeded to the WTO Panel procedure, the Dispute Settlement Body (DSB) had adopted reports on six by the end of 2000.¹⁰² In five of these six cases, the complainant countries

93. See World Trade Org., *supra* note 73.

94. *Id.*

95. TRIPS Agreement, *supra* note 1, at art. 65.2.

96. For example, the dispute *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (DS50). See World Trade Org., *supra* note 73.

97. For example, the dispute *Indonesia—Certain Measures Affecting the Automobile Industry* (DS64). See World Trade Org., *supra* note 73.

98. TRIPS Agreement, *supra* note 1, at art. 65.4 (allowing developing countries to delay the application of pharmaceutical patents, under certain conditions, for additional transitional period of five years).

99. These disputes were *Argentina—Certain Measures on the Protection of Patents and Test Data* (DS196) and *Brazil—Measures Affecting Patent Protection* (DS199). See World Trade Org., *supra* note 73.

100. The preexisting dispute was *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals* (DS171). See World Trade Org., *supra* note 73.

101. See World Trade Org., *supra* note 73.

102. *Id.*

won in at least one claim of TRIPS inconsistency.¹⁰³ In the other case, *Indonesia—Auto*,¹⁰⁴ where the TRIPS claim was not the major focus of the dispute, the complainant lost its TRIPS claim but won the other claims. Therefore, in most early cases, the complainant countries achieved their goals by taking the dispute to the DSM, through either settlement or litigation.

The pattern of successful resolution exhibited in the history of the earliest TRIPS disputes makes the later decline in use of the DSM all the more mysterious. Just after the entry into force of the TRIPS regime, Professors Rochelle Dreyfuss and Andreas Lowenfeld predicted that “because the thrust of the TRIPS initiative was to induce developing countries to move toward effective protection of intellectual property, one may expect that much of the WTO litigation in this area will be between developed countries as complainants and developing countries as respondents.”¹⁰⁵ The pattern of early TRIPS disputes clearly vindicated this prediction, although, as discussed below, this early pattern proved transitory. In light of the successes of the first five years of TRIPS dispute settlements, Professor Sue Ann Mota anticipated that “many more disputes involving TRIPS will be taken to and decided by the WTO's [Dispute Settlement Body], especially since complainants have prevailed in the disputes taken thus far.”¹⁰⁶ In addition, scholars expected the expiration of the transitional period for developing countries to accelerate the use of the DSM. For example, in 2002, international IP practitioner Katarina Nedeljković anticipated seeing “more IP disputes involving developing countries upon the expiration of these transitional periods.”¹⁰⁷ Furthermore, scholars such as Mota predicted that the transition from disputes focusing on “bringing members' laws into conformity with TRIPS” to disputes centered on “enforcement issues in member countries”¹⁰⁸ would lead to the increased use of the DSM in the subsequent era.¹⁰⁹ However, as I will now relate, these seemingly reasonable predictions failed to come true.

103. See Sue Ann Mota, *TRIPS—Five Years of Disputes at the WTO*, 17 ARIZ. J. INT'L & COMP. L. 533, 552 (2000). Note that Mota did not mention the *Indonesia—Auto* case.

104. The full name of the dispute is *Indonesia—Certain Measures Affecting the Automobile Industry* (DS64). See World Trade Org., *supra* note 73.

105. Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 282 (1997).

106. Mota, *supra* note 103, at 534.

107. Nedeljković, *supra* note 85, at 144.

108. Mota, *supra* note 103, at 553.

109. *Id.*

B. After Five Years (2001-present)

Astonishingly, only three cases have been initiated since 2001, despite the precedent of successful outcomes during the first five years of the adjudication of TRIPS disputes.

In January 2001, in *United States—US Patents Code*, Brazil requested consultations with the United States concerning the provisions of the U.S. Patents Code.¹¹⁰ This was the first case where a developing country took the role of complainant in a TRIPS dispute, although it is worth noting that this dispute was a counterclaim against a prior complaint by the United States against Brazil.¹¹¹ This case has not yet been resolved.¹¹²

In April 2003, in *EC—Trademarks and Geographical Indications*, Australia requested consultations with the EC concerning the protection of trademarks as well as the registration and protection of geographical indications for foodstuffs and agricultural products in the EC.¹¹³ This case, however, was not a *new* case since the allegations overlap with the former case against the EC initiated by the United States.¹¹⁴ This case was soon litigated before the WTO DSM in a single-panel procedure along with the case brought by the United States, and the Panel held for the complainants in 2005.¹¹⁵

No consultations were requested for nearly four years after Australia brought *United States—US Patents Code*, until April 2007, when the United States requested consultations with China on IPR protection and enforcement.¹¹⁶ This recent case will be analyzed in detail in Part V, be-

110. Request for Consultations by Brazil, *United States—US Patent Code*, WT/DS224/1 (Feb. 7, 2001).

111. See Nedeljković, *supra* note 85, at 70. *United States—US Patent Code* was a counterclaim to *Brazil—Measures Affecting Patent Protection* (DS199).

112. The United States and Brazil settled in the earlier case (*Brazil—Patents*). See Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4 (Jul. 19, 2001). In the mutually agreed solution, the United States explicitly stated that it expected Brazil not to proceed in the latter case (*United States—US Patent Code*). In other words, the United States meant to settle both cases concurrently. However, Brazil did not agree to such an all-encompassing settlement because India had also joined the case. See Nedeljković, *supra* note 85, at 70.

113. Request for Consultations by Australia, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS/290/1 (Apr. 17, 2003).

114. World Trade Org., *supra* note 89. The DSB established a single panel to adjudicate DS174 and DS290.

115. *Id.*

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

cause it well reflects the factors that likely led to the recent decline in TRIPS cases, and furthermore suggests that the developed countries may now be adopting new and more sensitive approaches to TRIPS disputes.

Some disputes which started in the first five years, however, were only resolved in the subsequent era. Eight pre-2000 TRIPS disputes were settled after 2001.¹¹⁷ For example, one dispute originating in 2000 was resolved in 2002, when the DSB adopted the Report of the Appellate Body on *US—Section 211 Appropriations Act*.¹¹⁸ Similarly, in *EC—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, a dispute in which the United States requested consultations in 1999, the Panel was not established until 2003, and the DSB only adopted a Report in 2005.¹¹⁹ In total, ten existing disputes were resolved between early 2001 and spring 2008.

At the time of this Article's publication, three disputes originating in the period 1996–2001 have yet to be resolved: *EC—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, *United States—Section 337 of the Tariff Act of 1930 and Amendments thereto*, and *United States—US Patents Code*.

In addition to these three remaining disputes, one dispute which was adjudicated before the DSB awaits compliance by the losing party: *US—Section 110(5) of US Copyright Act*. The European Community argued that the U. S. Copyright Act did not fulfill the copyright protection minimum standards because it includes the so-called “business” and “homestyle” exemptions to infringement of the exclusive performance right. The Panel Report, which the DSB subsequently adopted in July 2000, held that the business exemption was inconsistent with the TRIPS Agreement.¹²⁰ The United States, however, subsequently failed to implement the changes required by the WTO's decision. After subsequent negotiations, both parties notified the DSB of a mutually satisfactory temporary

117. See World Trade Org., *supra* note 73.

118. World Trade Org., *supra* note 87. Reports of the Panel and Appellate Body are finalized when the DSM adopts them. DSU, *supra* note 70, at arts. 16, 17.14.

119. World Trade Org., Settlement Dispute DS290: European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm (last visited Mar. 6, 2008).

120. Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) (adopted Jul. 27, 2000). Specifically, the Panel determined that the “business exemption” of the U.S. Copyright Act was inconsistent with Article 13 of the Agreement and thus inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention as incorporated into the TRIPS Agreement by Article 9.1 of the Agreement.

arrangement: the United States would pay a lump sum of \$3.3 million to compensate for the nullification or impairment of the benefits the EC was entitled to under the Agreement.¹²¹ While the temporary arrangement expired on December 20, 2004, the United States has still not amended its Copyright Act.¹²² Therefore, despite “winning” the DSB adjudicatory proceeding, the EC has not achieved a satisfactory resolution of the dispute.

In summary, while many TRIPS disputes were successfully settled or adjudicated in the first five years after the entry into force of the Agreement—and indeed, only a handful of the first batch of disputes remain unresolved—the number of TRIPS disputes originating in the years after 2001 declined precipitously. As discussed in the next Section, this counterintuitive decline stands in stark contrast to the pattern in general trade disputes.

C. Comparison of Trends in TRIPS Disputes with Overall Trends in All Disputes Before the WTO

Among the 373 total disputes that have been brought before the WTO, a mere 26 involved one or more TRIPS claim.¹²³ The share of TRIPS disputes on the WTO docket is thus only 7%. As noted above, only nine TRIPS cases have been decided by the Panel or Appellate Body.¹²⁴ In almost all of these cases (89%), the complainants won on at least one of their TRIPS claims (the only exception being *Indonesia—Autos*). Although this success rate for complainants seems overwhelmingly high, it is not actually a significant deviation from the success rate in all trade disputes. Indeed, in all WTO disputes “[t]he percentage of adopted reports in which at least one violation was found is 85%.”¹²⁵ Such a high success rate encourages members to sue each other when an inconsistency with treaty obligations is found.

While the trend in TRIPS success rates largely mirrors that of trade disputes in general, the trend in the number of disputes brought before the Panel is strikingly different. According to one study, “[t]he number of [total WTO] disputes tends to go up and down from year to year, often without a clear reason for either the increase or the decrease in the number of

121. Notification of a Mutually Satisfactory Temporary Arrangement, *United States—Section 110(5) of the US Copyright Act*, at 2, WT/DS160/23 (June 26, 2003).

122. Status Report by the United States, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.39 (Mar. 4, 2008).

123. Leitner & Lester, *supra* note 4, at tbl.5.

124. See World Trade Org., *supra* note 73.

125. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 289 (2005). This data pertains to the period from January 1995 to September 2004.

disputes.”¹²⁶ In contrast, the number of TRIPS disputes has consistently decreased over time.¹²⁷ As noted above, while there were twenty-three disputes from 1996 to 2000, there have been only three cases brought since 2001.¹²⁸ Thus the number of TRIPS cases is clearly not fluctuating, but is instead declining, in dramatic contrast to the general trend in WTO trade disputes.¹²⁹ Why, if the rate of success is as high as 89%, have prospective complainants turned to the DSM so rarely since 2001?

The complainants in TRIPS cases are almost exclusively developed countries. Indeed, such nations (primarily the United States, the EU, Australia, and Canada) were complainants in 25 out of the 26 disputes.¹³⁰ The only exception is *US—Patent Code*, where Brazil sued the United States as a counterclaim.¹³¹ The overall trends in WTO trade disputes are similarly unbalanced, although not nearly so pronounced: developed countries were complainants in the majority of cases. According to one study, “[i]n 61 per cent of all disputes, high-income countries, such as the United States and the European Communities, were the complainant.”¹³² It is relatively simple to explain why nearly all IP-related cases are brought by developed countries. There is a striking asymmetry in the possession of IP between developed and developing countries. Most IP is held by businesses in developed countries. Thus, developed countries are more interested in IP protection than their emerging-economy counterparts.

Interestingly, in many cases the respondents were developed countries as well. Out of the 26 TRIPS disputes, developed countries were respondents in 18.¹³³ Developing countries, namely Argentina, Brazil, India, Indonesia, Pakistan, and finally China, were respondents in a mere 8 disputes.¹³⁴ In other words, 69% of TRIPS disputes related to the allegedly noncompliant measures of developed countries. This number is only slightly larger than the equivalent statistic in WTO disputes, where “[s]ixty-two per cent of all disputes . . . relate to measures of developed

126. *Id.* at 284.

127. Leitner & Lester, *supra* note 4, at 171 tbl.5. The number of complaints about trade in services and sanitary and phytosanitary measures also has declined in recent years. *Id.*

128. *Id.*

129. VAN DEN BOSSCHE, *supra* note 125, at 18.

130. *See* World Trade Org., *supra* note 73.

131. *See id.*

132. VAN DEN BOSSCHE, *supra* note 125, at 285. This data pertains to the period from 1995 to 2003.

133. *See* World Trade Org., *supra* note 73.

134. *Id.*

country Members.”¹³⁵ However, in the context of IP disputes, the predominance of developed countries as respondents raises an interesting question. It seems only logical that developing countries, rather than developed ones, ought to be the disproportionate targets of TRIPS complaints because developing countries have (comparatively speaking) a reduced incentive to vigorously protect intellectual property.¹³⁶ Why then do complainants sue developing countries less frequently than developed ones?

The developed countries thought they could resolve international IP disputes more effectively through the WTO than through the WIPO because of the stronger judicial powers of the WTO DSM.¹³⁷ However, the trends outlined above raise critical questions with respect to this line of reasoning. What characteristics of TRIPS or of IP have led to the disparity in use of the WTO DSM in IP and non-IP cases? Does the DSM work differently in the TRIPS context than it does in the general context? I examine these questions in the following Parts.

IV. DECLINE IN THE USE OF THE DISPUTE SETTLEMENT MECHANISM

As discussed above, the use of the DSM to resolve IP disputes has declined since 2001,¹³⁸ despite both the high success rate of complainants and the expiration of the transitional period for developing countries in 2000. What explains this surprising and incommensurate decrease in TRIPS disputes compared to WTO disputes in general?

It is tempting to try to explain this decline as a result of the early spike of successful settlements and decisions, which might have effectively convinced nations to comply with their TRIPS obligations by demonstrating the power of the WTO DSM.¹³⁹ It seems reasonable that some disputes that would otherwise have been brought before the WTO would have been settled without a hearing because the system proved so effective; respondent nations saw the benefits in compromising in advance of an adversarial proceeding in which their defeat was practically guaranteed. Supporting this hypothesis is the fact that more than half of the disputes concern-

135. VAN DEN BOSSCHE, *supra* note 125, at 286.

136. Dreyfuss & Lowenfeld, *supra* note 105, at 282.

137. See Emmert, *supra* note 3, at 1342-43.

138. Leitner & Lester, *supra* note 4, at tbl.5 (2007).

139. ZIMMERMANN, *supra* note 51, at 85 (citing Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 25-27 (1999)).

ing TRIPS were settled within the consultation process through a mutually agreed solution.¹⁴⁰ However, in contrast to what this line of reasoning would lead us to expect, even the number of these settled-before-adjudication cases is declining. Perhaps, however, this decline can also be explained as a byproduct of the DSM's effectiveness—most countries have elected to avert disputes by unilaterally deciding to comply with their TRIPS obligations even before the consultation process.¹⁴¹ Unfortunately, there is no evidence to support or refute this theory.¹⁴² Additionally, because the strength and effectiveness of the DSM affects both IP and non-IP trade disputes, it is hard to see how any hypothesis based upon the strength of the DSM can explain the unique trends in the TRIPS disputes. What, then, are the real factors behind this decline?

In this Part, after separating TRIPS claims into three helpful categories, I provide two complementary explanations for the decline in the use of the DSM. First, I argue that the Council for TRIPS, which monitors compliance with the Agreement, may have removed many grounds for disputes over the content of statutes. Second, I suggest that the difficulty of resolving claims concerning the application of statutes and the ineffectiveness of domestic remedies may have deterred countries from using the DSM to address these categories of complaints.

A. The Three Categories of TRIPS Claims

TRIPS disputes fall into three categories based upon the type of violation that forms the basis of the complaint: statute, application, and ineffectiveness of domestic remedies. Professors Dreyfuss and Lowenfeld have argued that:

[T]he distinctions between ideas and applications may provide a way to avoid complying with the obligations of the TRIPS Agreement. Legislation can appear to be conforming, but lack all bite. Thus, it is almost inevitable that disputes will arise over the question whether a state that has adopted conforming legislation has nonetheless failed to provide meaningful protection to innovators.¹⁴³

Dreyfuss and Lowenfeld have made a useful distinction between claims based upon nonconforming statutes and those based upon the inef-

140. See World Trade Org., *supra* note 73.

141. ZIMMERMANN, *supra* note 51, at 85 (discussing the function of the DSM in general, without focusing on the TRIPS disputes).

142. *Id.*

143. Dreyfuss & Lowenfeld, *supra* note 105, at 283.

fective application of facially conforming statutes. Dividing TRIPS disputes into such categories allows us to explain the decline in each type of dispute separately, which, as shall become apparent, is a crucial analytical tool. Put simply, different factors affect the willingness of complainants to bring what I shall term “statute claims” and what I deem “application claims.” Statute claims concern a country’s failure to meet treaty obligations in its legislation, regulations, or administrative guidelines, which provide general rules as opposed to case-specific applications of the rules. In some country, these guidelines could be issued by the judicial branch as is the case in the U.S.-China dispute discussed below.¹⁴⁴ On the other hand, application claims concern the ineffective implementation, which is case-specific, of such broadly defined “statutes.” For example, a country which extends IP protection for computer programs and thus facially fulfills the minimum standards requirement of Article 10 of the Agreement may still fail to provide effective IP protection for software because of case-specific court decisions that do not protect programs.¹⁴⁵ In the example, the country’s statute is consistent with the Agreement but the application of the statute violates Article 10 of the Agreement.

In addition to these two categories of claims, I would like to propose a third category, which I shall refer to as a “claim concerning the ineffectiveness of domestic remedies.”¹⁴⁶ Some provisions of the TRIPS Agreement seem to set an obligation to achieve a certain level of success at IP protection. For example, Article 61 of the Agreement arguably requires members to provide criminal punishment *with sufficient deterrent effects*.¹⁴⁷ Thus, a country (Country A) may challenge the ineffectiveness of domestic remedies by citing the measurable level of infringement in another country (Country B) as proof of its claim that Country B’s punishments do not provide sufficient deterrence to infringers. In such a claim, Country B’s statutes could be facially consistent with Article 61, even going so far as to impose imprisonment on copyright infringers, and could still violate the Article if such statutes, even though zealously and efficiently applied, do not serve as measurably effective deterrents. In other

144. See *infra* Part V.

145. Dreyfuss and Lowenfeld used this example. Dreyfuss & Lowenfeld, *supra* note 105, at 283-85.

146. Bradford L. Smith, *Enforcing TRIPS Part III in WTO Dispute Settlement*, in 6 INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY ch. 46 (Hugh C. Hansen et al. eds., 1996). Smith did not use the same specific terminology to refer to this category of claim. Although Smith focused on Article 41 in his discussion, I use Article 61 because the requirement is more specific and this is a potential issue in the U.S.-China dispute, as discussed below in Part V.

147. TRIPS Agreement, *supra* note 1, at art. 61.

words, this category of complaints challenges statutes that are superficially consistent with the Agreement and that are applied enthusiastically but that fail to actually deter infringers.

It should be noted that this category of claims is different from the so-called “non-violation complaint.” Non-violation complaints involve a claim that a member nullifies or impairs the legitimately expected benefit of another member as a byproduct of an action that *does not itself violate* the WTO rules.¹⁴⁸ On the other hand, a claim on ineffectiveness of domestic remedies assumes that a member *violates* the TRIPS Agreement because it does not fulfill the requirement to provide a successful deterrent through its domestic remedies.

B. Council for TRIPS

This Section begins with an overview of the Council for TRIPS. It then compares the Council for TRIPS with other councils in the WTO before concluding that the Council, while likely a factor in the reduced use of the DSM to resolve disputes over statute claims, cannot account fully for the decline in use of the DSM, because the Council has no impact on application or ineffectiveness of deterrence claims.

1. *Function of the Council for TRIPS*

Article IV (5) of the Agreement Establishing the World Trade Organization¹⁴⁹ establishes the Council for TRIPS.¹⁵⁰ The primary function of the Council is to receive notification of exceptions and attempts to comply with relevant provisions of the Agreement, not to resolve disputes brought by members.¹⁵¹ For example, members must put forth their national IP laws and regulations for the Council’s review, to assist the Council in its assessment of the Agreement’s operation.¹⁵²

The Council also functions as a negotiating body. For example, the TRIPS agreement specifies that one of the tasks of the Council is to lead

148. World Trade Org., Dispute Settlement System Training Module, ch. 4.2, at 2, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p2_e.htm (last visited Mar. 9, 2008); *see also* World Trade Org., TRIPS Issues: ‘Non-violation’ complaints (Article 64.2), http://www.wto.org/english/tratop_e/trips_e/nonviolation_e.htm (last visited Mar. 9, 2008) (explaining that non-violation complaints cannot be brought in TRIPS disputes).

149. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

150. *Id.* at art. IV (5).

151. *Id.*

152. TRIPS Agreement, *supra* note 1, at art. 63.2. Articles 1, 3 and 4 also impose notification requirements. *See id.* at arts. 1, 3, 4.

negotiation “concerning the establishment of a multilateral system of notification and registration of geographical indications for wines.”¹⁵³ This negotiating function of the Council has proven to be a crucial source of adaptability in the subsequent development of the TRIPS rules. For example, after vigorous discussion in the Council, the WTO General Council in 2003 adopted a decision that temporarily allows pharmaceutical products manufactured through compulsory licensing to be exported to developing countries that lack sufficient manufacturing capacity.¹⁵⁴ This responsiveness of the Council to the concerns of developing countries about the “threat” posed by international IPR protection to public health exemplifies the benefits of flexibility and sound policy created by the Council.

Another significant power given to the Council under the TRIPS agreement is the discretion to extend the transitional period for the least-developed countries.¹⁵⁵ The Council has exercised its discretion by extending this transitional period until July 1, 2013.¹⁵⁶

Finally, and most importantly, the Council serves as a monitoring body.¹⁵⁷ Article 68 of the Agreement provides that “[t]he Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members’ compliance with their obligations hereunder.”¹⁵⁸ Based on this provision, the Council has reviewed the domestic laws and regulations of most members.¹⁵⁹ From 1996 to 1997, the Council focused on monitoring the developed countries.¹⁶⁰ In July 1996, it reviewed the legislation of developed-country members in the area of copyright and related rights, and in November 1996, it reviewed the areas of trademarks, geographical indications, and industrial designs.¹⁶¹ In May 1997, the Council started reviewing legislation in the areas of patents, layout-designs of integrated circuits, undisclosed information, and the control of anticompetitive prac-

153. *Id.* at art. 23.4.

154. World Trade Org., *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 1, 2003).

155. TRIPS Agreement, *supra* note 1, at art. 66.1.

156. Council for TRIPS, *Extension of the Transition Period under Article 66.1 for Least-Developed Country Members*, IP/C/40 (Nov. 29, 2005).

157. *See generally* WATAL, *supra* note 3, 50-57.

158. TRIPS Agreement, *supra* note 1, at art. 68.

159. World Trade Org., TRIPS: Review of the Implementing Legislation, http://www.wto.org/english/tratop_e/trips_e/intel8_e.htm (last visited Mar. 9, 2008).

160. *Id.*

161. *Id.*

tices in contractual licenses. In November 1997, the Council began reviewing the area of enforcement.¹⁶²

In addition to these formal monitoring processes, beginning in 1997 the Council also provided informal consultation with “individual members whose legislation had not been subject to the review exercise of that time, but whose legislation would have been brought in conformity with the TRIPS Agreement in advance.”¹⁶³ After the transitional periods for developing countries (Article 65.2) and former socialist countries (65.3) ended on January 1, 2000, the Council started reviews of the laws and regulations of these countries.¹⁶⁴ In addition to the normal process of review for most countries, the Council has undertaken the sixth annual transitional review of China based on section 18 of the Protocol on the Accession of the People’s Republic of China.¹⁶⁵ China is subject to the annual review until 2009;¹⁶⁶ this is still an important issue at the Council.¹⁶⁷

The main subject of Council review is the text of members’ domestic laws and regulations. The application of these statutes is also investigated, but only to a limited extent. The Council inquires not only into each member’s satisfaction of its obligation to establish civil and administrative procedures and remedies to protect IP, but also looks into the effectiveness of these procedures, and specifically investigates “the actual duration of [enforcement] proceedings and their cost.”¹⁶⁸ Proposals from the EC to expand the duties of the Council to include “carefully examin[ing the] compliance of Members with the enforcement provisions of TRIPS”¹⁶⁹ faced strong opposition from developing countries.¹⁷⁰ As a result, the Council does not itself investigate these matters, but has provided opportunities for

162. Council for TRIPS, *Annual Report (1997) of the Council for TRIPS*, at 3-4, IP/C/12 (Nov. 28, 1997).

163. *Id.* at 4.

164. Council for TRIPS, *Annual Report (2000) of the Council for TRIPS*, at 2-3, IP/C/22 (Dec. 6, 2000).

165. See Council for TRIPS, *Section 18 of the Protocol on the Accession of the People’s Republic of China—Report to the General Council by the Chair*, IP/C/47 (Dec. 7, 2007).

166. World Trade Org., *Protocol on the Accession of the People’s Republic of China*, at 11, WT/L/432 (Nov. 23, 2001).

167. Council for TRIPS, *Annual Report (2006) of the Council for TRIPS*, at 2, IP/C/44 (Dec. 4, 2006).

168. Council for TRIPS, *Checklist of Issues on Enforcement*, at 2, IP/C/5 (Nov. 30, 1995).

169. Communication from the European Communities, *Enforcement of Intellectual Property Rights*, IP/C/W/448 (June 9, 2005).

170. Council for TRIPS, *Minutes of Meeting on 14-15 June 2005*, IP/C/M/48 (Sept. 15, 2005).

member nations to share the information and experience of their customs authorities related to enforcement.¹⁷¹

The monitoring role of the Council for TRIPS might explain the reduction in the use of the DSM to resolve IP disputes. The Council's effectiveness as a monitoring body might be working to preempt potential disputes well before they would reach the DSM. The Council's review process reveals and addresses inconsistencies in each member's domestic laws and regulations, allowing for corrective action before these noncompliances can serve as the subject of disputes. The procedures for Council review provide for written questions and replies prior to the review meeting, during the course of the meeting, and in subsequent meetings.¹⁷² Thus the review process also provides members the opportunity to gather information,¹⁷³ which might be used to prepare for and perhaps to resolve disputes before they reach the adversarial phase.¹⁷⁴ This information-gathering benefit works along with Article 63.3 of the Agreement, which requires each member to supply information in response to a written request from another member as to its national laws, regulations, final judicial decisions, and administrative rulings of general application.¹⁷⁵

Since the monitoring process in the Council is multilateral, each nation is subject to pressure from all the other members. While such uniform pressure can be expected to encourage compliance, it can also make it difficult to reach a compromise, as the open conversation of a multilateral forum presents negotiating challenges not present in typical bilateral diplomacy. Thus, in some matters bilateral negotiation may have an advantage over the multilateral monitoring process. However, in instances where bilateral negotiation is unsuccessful, the multilateral monitoring process can complement negotiation and facilitate successful resolution. Compared to adjudication before the DSM, the Council's monitoring process is less adversarial and thus is less likely to offend the respondent country. Therefore, while the Council's monitoring process functions dif-

171. Council for TRIPS, *Minutes of Meeting on 14-15 June 2006*, IP/C/M/51 (Sept. 20, 2006).

172. See World Trade Org., *supra* note 159; WATAL, *supra* note 3, at 57.

173. WATAL, *supra* note 3, at 57; Rufus Yerxa, Deputy Dir. Gen., World Trade Org., Address at the Third Global Congress on Combating Counterfeiting and Piracy (Jan. 30, 2007), available at <http://www.ccapcongress.net/archives/Geneva/Files/Yerxa.pdf> (draft of speaking points). Yerxa also mentions the domestic "contact points" as required by Article 69 and the Trade Policy Review Process as tools of information gathering. See *id.*

174. This process does not necessarily work properly because members tend to submit large volumes of information and the Council has only limited resources. See Smith, *supra* note 146, at 46-52; WATAL, *supra* note 3, at 53-54.

175. See WATAL, *supra* note 3, at 53-54; Smith, *supra* note 146, at 46-52.

ferently from bilateral negotiation and DSM, the monitoring process may help resolve disputes.¹⁷⁶

2. *Unique Characteristics of the Council for TRIPS*

To evaluate the role that the Council for TRIPS may have played in the peculiar reduction in TRIPS disputes, it is necessary to compare the Council to other similar WTO sub-councils. Surely if the Council for TRIPS bears some responsibility for the reduction in TRIPS disputes, it must function differently than its sister WTO councils, as general trade disputes have become no less prevalent in recent years. It was not unprecedented for the TRIPS Agreement to have provided for a special Council of its own in addition to the General Council of the WTO. Article IV (5) of the Marrakesh Agreement establishes not only the Council for TRIPS, but also the Council for Trade in Goods (sister council overseeing the GATT), and the Council for Trade in Services (sister council responsible for the GATS).¹⁷⁷

The most important function of the Council for Trade in Services is fostering negotiation.¹⁷⁸ After 1995, members have agreed upon several agreements addressing market sectors such as financial services and telecommunications. In addition, as provided for in Article XIX of the GATS Agreement, members started the Negotiation of Specific Commitments in 2000.¹⁷⁹

Another role of the Council is to receive notification of new laws under the relevant provisions of the GATS Agreement. Members have the obligation to promptly, and at least annually, inform the Council of the introduction of any new laws, as well as of any changes to existing laws, regulations, or administrative guidelines. However, the decision to comply with this obligation is subject to each member's evaluation of whether the new law in question will "significantly affect trade in services covered by its specific commitments" in the GATS Agreement.¹⁸⁰ Unlike the Council for TRIPS, the Council for Trade in Services does not have the authority

176. See WATAL, *supra* note 3, at 50-57.

177. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

178. World Trade Org., The Services Council, Its Committees and Other Subsidiary Bodies: The Committee on Specific Commitments, http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm#specificcommitments (last visited Mar. 9, 2008).

179. Council for Trade in Services, *Report of the Meeting Held on 25 February 2000*, S/CSS/M/1(Apr. 12, 2000).

180. GATS, *supra* note 177, at art. III:3.

to “monitor” members’ compliance.¹⁸¹ Negotiations of further liberalization are carried out in several committees under the Council for Trade in Services.

Unlike the Council for Trade in Services, and more akin to the Council for TRIPS, the Council for Trade in Goods (through its committees) plays a role in monitoring compliance with several sub-agreements. For example, under Article 13.1 of the Agreement on Technical Barriers to Trade (TBT Agreement),¹⁸² the Council for Trade in Goods is empowered to empanel a Committee on Technical Barriers (TBT Committee) to monitor compliance with the terms of the Agreement. Much like its sister councils, the Council for Trade in Goods (through its committees) also serves a review function, as Article 15.2 of the Agreement provides that “[e]ach Member shall, promptly . . . inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.”¹⁸³ As of October 2006, “a total of 108 Members have submitted at least one such Statement.”¹⁸⁴

Another GATT Committee, the Committee on Anti-Dumping Practices, also holds monitoring and review duties akin to those of the Council for TRIPS. The Committee on Anti-Dumping Practices was established by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (the “Anti-Dumping Agreement”).¹⁸⁵ Members have the obligation to report to the Committee “all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members.”¹⁸⁶ Furthermore, the Committee “shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objec-

181. See TRIPS Agreement, *supra* note 1, at art. 68; GATS, *supra* note 177, at art. XXIV.

182. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, World Trade Organization, 1868 U.N.T.S. 120.

183. *Id.* at art. 15.2.

184. Comm. on Technical Barriers to Trade, *Statements on Implementation and Administration of the Agreement under Article 15.2*, at 1, G/TBT/GEN/1/Rev.4 (Oct. 27, 2006).

185. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 16.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Anti-Dumping Agreement].

186. *Id.* at art. 16.4.

tives.”¹⁸⁷ Therefore, the monitoring function of the Committee on Anti-Dumping Practices may be expected to serve to resolve disputes in a similar manner to the monitoring role of the Council for TRIPS.

I have previously discussed how the Council for TRIPS may function as a monitoring body and thus resolve disputes in advance.¹⁸⁸ However, this monitoring council is not unique to the Council for TRIPS, as a similar function is served by several GATT committees. Thus it would seem that the Council for TRIPS cannot by itself explain the notable reduction in TRIPS disputes in the new millennium. However, because the monitoring function of the Council works particularly well in the TRIPS context, as I will now show, it does help explain, at least in part, the peculiar decline in TRIPS disputes after 2001.

The primary duty the TRIPS Agreement imposes upon member nations is to enact minimum standards for IP protection. Member states must implement legislation meeting the standards specified in the Agreement by the specified dates, which differ for the three categories of members: developed, developing, or least-developed.¹⁸⁹ It is important to monitor members' compliance with minimum standards obligations through an inexpensive peer review mechanism rather than solely through the relatively costly DSM.¹⁹⁰ Monitoring is more easily achieved by imposing a burden of self-reporting and notification on members. Significantly, the Council for TRIPS can monitor compliance more efficiently than its sister councils since the number of laws to review is comparatively small, usually consisting of a few relevant IP laws such as a Patent Act. It is not nearly as easy for the Council for Trade in Goods and the Council for Trade in Services to monitor all legislation relevant to members' obligations to enact laws which do not have a discriminatory effect on trade. The number of laws that might have an effect on trade is huge, ranging from customs laws and tax laws to agricultural laws. For such obligations, the peer review mechanism may work only if the reporting and notification obligations are clear and are fully complied with. In contrast to the GATT and GATS, under the TRIPS Agreement the reporting obligations are specific enough and the number of laws to be reviewed is small enough that the Council is able to perform its task effectively. It is thus possible that the superior monitoring effectiveness of the Council for TRIPS, compared to the Councils for Trade in Goods and Trade in Services, may explain the

187. *Id.* at art. 16.1.

188. *See* WATAL, *supra* note 3, at 50-57.

189. TRIPS Agreement, *supra* note 1, at arts. 65, 66.

190. *See* Reichman, *supra* note 71, at 369.

reduction in TRIPS disputes despite the continued prevalence of trade disputes in general.

However, the effectiveness of the Council cannot fully explain the decline in TRIPS disputes because the review mechanism cannot sufficiently resolve all kinds of disputes. In particular, the review process cannot fully monitor members' compliance with the nondiscrimination obligations imposed by the TRIPS Agreement. The Agreement involves not only minimum standards provisions but also nondiscrimination provisions, as it obligates members to afford national treatment to the citizens of other members¹⁹¹ and requires members to extend most-favored-nation benefits to all other WTO members.¹⁹² While Council review of the fundamental IP laws of member states might help them to find some inconsistencies with the Agreement's nondiscrimination provisions, many provisions which violate the nondiscrimination obligations will occur in laws that members do not report to the TRIPS Council and thus are not reviewed as part of the monitoring process.¹⁹³ For example, Section 211 of the United States' Omnibus Appropriations Act of 1998,¹⁹⁴ which the Appellate Body deemed to violate the national treatment and most-favored-nation obligations,¹⁹⁵ was general budget legislation, which of course the Council for TRIPS did not cover in its review, since it was not nominally an IP law. In sum, the review process of the Council cannot resolve disputes related to the Agreement's nondiscrimination requirements.

Another shortcoming of the Council for TRIPS is that it has no authority to resolve disputes which require interpretation of the TRIPS Agreement.¹⁹⁶ For example, the issue in *Canada—Term of Patent Protection* was whether a 17-year-from-issuance term of patent protection violates Article 33 of the Agreement, which requires a 20-year-from-application-date term of protection, in the specific situation where it takes longer than three years on average for the Patent Office to issue patents after application.¹⁹⁷ When the parties interpret the TRIPS Agreement differently, only

191. TRIPS Agreement, *supra* note 1, at art. 3.

192. *Id.* at art. 4.

193. The Council for TRIPS provided three specific measures to demonstrate compliance with the requirements of national treatment and most-favored-nation treatment. *See* WATAL, *supra* note 3, at 52.

194. Omnibus Appropriations Act of 1998, Pub. L. No. 105-277 (1998).

195. Report of the Appellate Body, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002).

196. The Council has interpretative authority only on a consensus basis. Thus it is ineffective if two members have conflicting views. *See* WATAL, *supra* note 3, at 49.

197. Panel Report, *Canada—Term of Patent Protection*, WT/DS170/AB/R (Sept. 18, 2000) (*adopted* Oct. 12, 2000).

the dispute settlement institutions, and not the Council, can resolve the matter.¹⁹⁸ The Council's inability to adjudicate differing interpretations of TRIPS obligations is another reason why its relative success as a monitoring body cannot fully explain the recent dearth of TRIPS disputes.

Similarly, the Council's review mechanism cannot resolve disputes when a member intentionally violates some provisions of the Agreement for a reason such as domestic politics. Although the Council review process reveals the inconsistency of some domestic laws and regulations, the Council does not determine or declare violations.¹⁹⁹ By contrast, the dispute settlement institutions declare violations, which might result in sanctions.²⁰⁰ In addition, because only the DSB has the power to authorize retaliation, members need to go through the DSM to take retaliatory measures.²⁰¹ Clearly the monitoring effectiveness of the TRIPS Council cannot explain the reduction in disputes involving the knowing violation of treaty obligations.

Additionally, although the review mechanism works to preempt disputes over the language of statutes, it might not work well to address claims related to the application of statutes or the ineffectiveness of domestic remedies. The monitoring function of the Council mostly focuses on the implementing legislation and thus most disputes on the application of statutes or the ineffectiveness of domestic remedies are left for the DSM to resolve. Yet, as I will reveal in depth in the following section, the DSM is ineffective at dealing with such disputes. Coupled with the success of the Council at monitoring statutory compliance, the insufficiency of the DSM for addressing application and situation claims largely explains its decreasing use to resolve IP disputes.

In conclusion, the monitoring function of the Council for TRIPS helps to explain in part the decline in use of the DSM. The Council for TRIPS works well to preempt certain types of disputes without using the DSM.²⁰² The Council is largely able to resolve member nations' failures to meet their minimum standards obligations as well as their nondiscrimination obligations so long as their measures implementing these obligations appear in the IP laws or other relevant laws subject to review by the Council. However, because of its limited function, the monitoring power of the Council cannot completely explain the dramatic decline of the cases after

198. See WATAL, *supra* note 3, at 49.

199. *Id.*

200. DSU, *supra* note 70, at art. 3.2.

201. *Id.* at art. 22.2.

202. See WATAL, *supra* note 3, at 50-57.

2001.²⁰³ A more complete explanation of this phenomenon requires some investigation into the challenges faced by the DSM in resolving certain categories of disputes.

C. Difficulty of the DSM in Resolving Claims on the Application of Statutes and Claims on the Ineffectiveness of Domestic Remedies

Most TRIPS disputes, thus far, have dealt with statute claims. In these cases, the complainants claimed that the respondents' legislation lacked certain provisions that were necessary to comply with the TRIPS Agreement. Only a few cases have involved application claims, or claims concerning the ineffectiveness of domestic remedies. However, needless to say, would-be complainants are generally concerned not only about statutes but also about the application and effectiveness of these laws. If TRIPS merely forced uniformity in statute language without concurrently requiring actual application of the minimum standards provisions and effective deterrence, then the benefits of the Agreement would be easily nullified.

Most disputes on statutes are likely to be resolved after the first several years, either through the review mechanism in the Council or through the adjudication of the DSM, because the obligations are relatively clear. With the help of the dispute settlement institutions to interpret statutes, it is relatively easy to detect statutory inconsistencies with obligations under the Agreement. Therefore, any current or prospective dispute is likely to arise due to failure to apply otherwise compliant statutes or insufficiently deterrent penalties, rather than due to statutory shortcomings. The primary issues in TRIPS disputes have thus largely shifted from statutes to the application of statutes and/or the ineffectiveness of domestic remedies.²⁰⁴

Successful international IP protection requires the proactive cooperation of all world governments. IP will never be appropriately protected without concerted conduct—which is the very reason that the WTO members elected to adopt a uniform minimum standards requirement to be shared by the entire world. However, effective IP protection requires more than just a measure of statutory uniformity—it requires affirmative measures by world governments to provide necessary IP-related services, such as the examination of patent applications. Even with express language providing for a patent system in a country's statutes, effective IP protection would hinge upon the country's ability and willingness to apply these

203. Leitner & Lester, *supra* note 4, at 133 tbl.5.1.

204. This shift perhaps has yet to occur for some developing countries.

statutes—for example, by implementing an effective examination system. Similarly, governments need to devote sufficient resources to customs agencies to effectively enforce border regulations. Without such investments in IP enforcement, pirated and counterfeited goods will easily pass over the borders. A country violates its obligations under the TRIPS Agreement when it fails to effectively apply its IP laws, for example by failing to devote adequate resources to customs enforcement. This is in sharp contrast with the nondiscrimination provisions of the other WTO Trade Agreements, under which governments have no duty to take affirmative measures.²⁰⁵ Therefore, the application of domestic laws is more important in the TRIPS context than it is under the other WTO Trade Agreements.

As I will now relate, there are significant challenges in resolving application claims within the WTO DSM. Similar problems make it difficult for the DSM to address claims concerning the ineffectiveness of domestic remedies. Thanks to the success of the Council for TRIPS at preempting disputes over statutes, future TRIPS disputes can be expected to center around application or ineffective deterrence issues. If it is indeed the case that forthcoming disputes will focus on nonstatutory complaints, as it appears to be, then the difficulties that the DSM has in resolving these sorts of issues would help explain the decline in the use of the DSM. The next Section uses a single case before the DSB involving an application claim as an example to elucidate some of the challenges in resolving such claims.

1. *Challenges for Claims Related to the Application of Statutes*

Only one case thus far has explicitly involved a claim regarding the application of statutes: *Canada—Patent Protection of Pharmaceutical Products*.

On December 19, 1997, the EC requested consultations with Canada alleging inadequate protection of pharmaceuticals by Canada under the Canadian Patent Act.²⁰⁶ The EC alleged that Canada's legislation was not compatible with its obligations under the TRIPS Agreement, because it did not provide for the full protection of patented pharmaceutical inventions for the entire duration of the term of protection as required by Articles 27.1, 28, and 33 of the TRIPS Agreement.²⁰⁷

205. See DEVEREAUX ET AL., *supra* note 36, at 37-38.

206. World Trade Org., Dispute Settlement: DS114 Canada—Patent Protection of Pharmaceutical Products, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm (last visited Apr. 26, 2007).

207. *Id.*

The case focused primarily on two provisions of the Canadian Patent Act—the so-called “regulatory review” and “stockpiling” exceptions. The regulatory review exception, provided for in Section 55.2(1) of the Act, allows for the manufacturing of patented products, including pharmaceuticals, without the consent of the patent holder during the six months prior to the expiration of the twenty-year patent term. The purpose of the exception is to allow for a supply of generic drugs to be available at the moment that the patent on a pharmaceutical expires. The EC argued that this exception was inconsistent with Article 28.1 of the TRIPS Agreement.²⁰⁸ The EC also complained that the stockpiling exception (Section 55.2(2)), which allows stockpiling of pharmaceutical products during the same six-month period, was inconsistent with Articles 28.1 and 33.²⁰⁹ The Panel found inconsistency in the stockpiling exception but not in the regulatory review exception.²¹⁰

Additionally, the EC maintained that Canada’s Patent Act was inconsistent with Article 27.1 of the Agreement because the two exceptions, *as applied*, affected only pharmaceutical inventions.²¹¹ The statute, however, did not involve any language which implied that pharmaceuticals were to be less protected than any other products (the statutory language would apply the exceptions to *all* products, *including* pharmaceuticals), and so was facially compliant with the provisions of the TRIPS Agreement prohibiting different levels of protection in different fields of technology.²¹² The EC, relying upon the legislative history of the Act, contended that the provision was designed for pharmaceutical products alone, and so, as applied, reduced the term of protection of those products without similarly affecting other technologies.²¹³ In other words, this claim questioned the application, and not the language, of the Patent Act. However, the Panel relied upon the Canadian government’s own interpretation of its Patent Act. Because the Canadian government insisted that it would apply the provision not only to pharmaceutical inventions but also to other technologies despite the legislative history, the Panel ruled in favor of Canada,

208. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 4.4, WT/DS114/R (Mar. 17, 2000) (adopted Apr. 7, 2000).

209. *Id.* ¶ 4.2.

210. *Id.* ¶ 8.1.

211. *Id.* ¶ 4.3, 4.5.

212. *Id.* ¶ 4.5. (The EC admitted that “Section 55.2(1) of the Canadian Patent Act did not mention expressly pharmaceuticals or medicines.”)

213. *Id.* ¶ 4.3, 4.5.

holding that no evidence supported a claim of technological discrimination.²¹⁴

From this example, we can see the difficulties in resolving application noncompliance disputes in the DSM. First, it takes time to see how the application will unfold, meaning that a complainant has to wait until some harm is suffered before filing a complaint, despite an indication (in the legislative history, for example) that a statute will be applied in a way that violates the Agreement. In *Canada—Pharmaceutical Patents*, the EC based one of its arguments on legislative history but failed in that claim because it could not provide actual evidence that the law was presently being applied in contravention of the Agreement, only that it could be expected to be so applied in the future.²¹⁵ The outcome of this case suggests that to succeed, a future complainant in the position of the EC would have to provide evidence that Canadian courts did not in actuality apply the exception to other technology sectors. While little harm could come to a complainant as a result of this evidentiary requirement,²¹⁶ it nevertheless likely deters would-be complainants from bringing application complaints before the DSM.

The second challenge for complainant countries is the interpretative authority of respondent countries over their own domestic laws and regulations. In *Canada—Pharmaceutical Patents*, absent any evidence of Canada's actual discrimination in applying its laws, the Panel deferred to the respondent country's own interpretation of its statute.²¹⁷ However, this is not always the case. In *India—Patents (US)*, India contended it should be given interpretative authority over its laws,²¹⁸ but the Appellate Body rejected this argument.²¹⁹ The dispute settlement institutions distinguished these cases by the nature of the statutes at issue.²²⁰ Specifically, the Indian rules in question were mandatory and did not leave any discretion to authorities, while the Canadian rules were discretionary.²²¹

The third challenge is found in the implementation process of the report—complainant countries cannot immediately ascertain whether the

214. *Id.* ¶ 7.105.

215. *Id.*

216. Once there is a judicial decision applying the law discriminatorily, the DSM could act to prevent harm. Before such a decision, presumably no injury is being suffered; if it were, the injured party would surely sue and compel such a decision.

217. *Id.* ¶ 7.94-7.104.

218. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 9, WT/DS50/AB/R (Dec. 19, 1997).

219. *Id.* ¶ 64-71.

220. Nedeljković, *supra* note 85, at 116.

221. *Id.*

losing party's remedial measures will result in compliance. Once the DSB adopts a report, the losing party has to take measures to comply with the rules. How can the losing party prove its compliance? It is the application of the rule that violates the Agreement. There is no violation in the statutes. Logically, a respondent country would need to show compliance with an application decision through a new set of practices. If judicial application is at issue, the respondent country needs to show a change in application through new judicial decisions in subsequent cases, which may not be issued for some time. If administrative application is at issue, the respondent country needs to wait for the next such opportunity to apply its laws. Since governments usually do not initiate suits or administrative procedures, the losing governments must wait for private entities to initiate such procedures.²²² If it is the administrative response of the government at issue, for example, in some matter relating to the patent examination process, the losing government needs to wait until some private third party takes the initiative (files a patent application, for example) in order to demonstrate its compliance with the DSB report. If the regulatory conduct of the administrative branch is deemed inconsistent, the government may need to show its compliance by no longer taking the challenged measures against certain sectors. All of these are very hard to prove for the losing party. Therefore, the only effective immediate proof for a member is to show its "intent" to comply by amending laws, regulations, or guidelines even though such intent is logically irrelevant to an "as applied" violation.

A non-TRIPS case illustrates the difficulties complainant countries encounter in enforcing new applications by the losing parties. In compliance with the decision of the Panel, established on Article 21.5 of the DSU, the Canadian government changed some words in the documentation of a subsidy program.²²³ Brazil, the complainant country, was not satisfied with this solution and proceeded to the arbitration panel. The arbitration panel, however, decided for Canada.²²⁴ If this example foreshadows the way the DSB will adjudge TRIPS complaints alleging continued noncompliance in application, then a respondent country can fulfill its obligation to comply with recommendations relatively easily (by, for example, changing a few words in statutes, publishing a press release, or otherwise showing its intent to change its application). If the complainant country is not satisfied

222. This is not the case if the member governments are required to initiate certain actions, such as criminal prosecutions.

223. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, ¶ 34, WT/DS70/AB/RW (Jul. 21, 2000).

224. *Id.* ¶ 53.

with the “new application,” then it needs to wait and see how the statute is actually applied, go through another possibly protracted period of gathering evidence, and then go through the lengthy dispute settlement procedures all over again.

There are two additional challenges when the application of *enforcement statutes* (the sufficiency of criminal prosecution, for example) is at issue. First, the dispute settlement institutions face difficulties in making an illegality determination. Although the Agreement requires members to have minimum rules of enforcement, it does not specify what the precise minimum level of enforcement should be. According to Article 61, members must provide criminal procedures and penalties for willful copyright piracy on a commercial scale.²²⁵ However, each member has discretion in determining the amount of resources to devote to pursuing criminal prosecutions. If a complainant claims that the respondent’s enforcement of its criminal procedures or penalties is insufficient and thus violates the Agreement, many issues arise which the dispute settlement institutions are poorly situated to address. Where exactly is the line to be drawn between compliance and noncompliance? How many police officers are sufficient? How often should they patrol? How often should they prosecute the suspects? In short, the dispute settlement institutions are likely to face challenges in a dispute involving enforcement statutes that they are ill-suited to resolve.

A second challenge lies in the recommendation process. The dispute settlement institutions may find difficulties in specifying concrete remedies that will fulfill the delinquent member’s enforcement obligations. When a WTO dispute settlement institution concludes that a measure is inconsistent with a covered agreement, it must recommend that a respondent country bring the inconsistent measure into conformity with WTO rules.²²⁶ Furthermore, a dispute settlement institution may specifically suggest ways to implement the recommendation.²²⁷ If a member’s criminal prosecution is deemed insufficient, should a panel suggest that the member increase the number of police officers it employs? Should it recommend that the country increase the number of prosecutors? Or suggest it add patrols? Is it more important to increase the enforcement potential of the local governments or that of the central government? The respondent government, however, best knows what measures are likely to result in increased prosecutions. Thus, the dispute settlement institutions are not

225. TRIPS Agreement, *supra* note 1, at art. 61.

226. DSU, *supra* note 70, at art. 19.1.

227. *Id.*

properly positioned to decide the best means of assuring effective enforcement. This may not seem particularly problematic since the dispute settlement institutions do not necessarily make policy suggestions.²²⁸ However, it relates to another challenge: when the losing party takes a measure which it believes sufficient to bring it into effective compliance, the complainant may wish to return to the arbitration panel to determine whether the measure indeed complies with the recommendation.²²⁹ The arbitration panel will once again face the same difficulties it faced in making its original decision on complying measures.

In short, potential complainant countries may find it difficult to win disputes regarding the application of statutes and meet with further difficulty in enforcing any decision they may win. These difficulties might effectively discourage them from using the DSM.

2. *Challenges for Claims Regarding the Ineffectiveness of Domestic Remedies*

One of the most significant achievements of the TRIPS Agreement compared to the pre-TRIPS era is the creation of enforcement provisions. Part III of the Agreement requires member states to implement civil and administrative procedures (Article 42-49), provisional measures (Article 50), border measures (Article 51-60), and criminal procedures (Article 61) to protect IP. However, when the dispute concerns an insufficient reduction in measurable levels of infringement—in other words, ineffective deterrence—the dispute settlement institutions face further difficulties in successfully resolving the matter.

a) Cases in the EC and Greece

Two cases have included claims on the ineffectiveness of domestic remedies:²³⁰ *EC—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs* and *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*. These two cases are actually one dispute since the United States requested consultation with the EC as a community and Greece as a nation. The United States contended that Greece did not provide effective remedies against

228. *See id.* (permitting but not requiring the Appellate Body to suggest policies by which members can implement its recommendations).

229. DSU, *supra* note 70, at art. 21.5 (providing such a procedure).

230. Two other cases mainly deal with enforcement provisions of the TRIPS Agreement: *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights* (DS83) and *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights* (DS86). *See* World Trade Org., *supra* note 73. However, the claims in these cases focused on statutory issues and are thus irrelevant for the purposes of my analysis here.

copyright infringement (evinced by the many television stations regularly broadcasting copyrighted works without licenses), thus violating Articles 41 and 61 of the Agreement.²³¹ These cases are unique since the United States did not allege a lack of required provisions in the Greek copyright legislation, or even the improper application of these statutes. Instead, the United States alleged that the “situation” itself—the failure to actually deter infringement—was a violation of the Agreement. In response to the dispute, the Greek government introduced new legislation to strengthen the domestic enforcement mechanism, which led to the closure of four television stations.²³² As a result, in 2000, both countries notified the DSM that they had reached a mutually agreed solution.²³³ It should be noted that the solution also explicitly referred to the effective reduction of the actual piracy level in Greece.²³⁴ Although these particular cases were settled before adjudication, if the parties had proceeded to the Panel, the United States might have faced many challenges, as further discussed in the remainder of this Section.

b) Potential Challenges for Claims Regarding the Ineffectiveness of Domestic Remedies

Claims of insufficient deterrence present numerous difficulties for the dispute settlement institutions. First, and most importantly, it is not entirely clear whether the enforcement provisions of the TRIPS Agreement even provide a legal basis to challenge the ineffectiveness of domestic remedies in other countries.

Bradford Smith, the General Counsel of Microsoft Corporation, has argued that Article 41 “almost certainly [requires] that enforcement procedures under Part III [of the TRIPS Agreement] must permit ‘effective action against infringement’ and ‘constitute a deterrent to further infringement.’”²³⁵ Smith understood this requirement as “performance standards”

231. Request for Consultations by the United States, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/1 (Apr. 30, 1998).

232. Notification of Mutually Agreed Solution, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/2 (Mar. 26, 2001); Notification of Mutually Agreed Solution, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/2 (Mar. 26, 2001).

233. Notification of Mutually Agreed Solution, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/2 (Mar. 26, 2001).

234. *Id.*

235. Smith, *supra* note 146, at 46-5.

and further argued that such standards apply to Articles 43, 45, 50, and 61.²³⁶ The United States, in fact, made the same argument in *Greece—Enforcement of IPR for Motion Pictures and Television Programs*, based upon Article 61.²³⁷

On the other hand, Professor Carlos Correa interprets the relevant provisions narrowly.²³⁸ According to Correa, the obligation under the first sentence of Article 41.1, which requires “remedies which constitute a deterrent to further infringement,”²³⁹ “should be deemed to be complied with if a Member provides for provisional injunctions, compensation of damages, and seizure as mandated by the Agreement.”²⁴⁰ In interpreting the “deterrent” requirement of Article 61, Correa argues that members have considerable discretion.²⁴¹

Another challenge concerns the proof of facts. Even if the interpretation of the United States is deemed correct, it still takes time and money to gather sufficient information to prove that a country’s enforcement measures and penalties fail to deter infringers. If the violators are not large operations, such as big television companies, it is not easy to gather information about their conduct.

Moreover, even if a complainant country successfully gathers information, the dispute settlement institution may find it difficult to determine the illegality of the situation because the Agreement does not provide any baseline from which to make such a determination. If 90% of broadcasting companies infringe copyrights, the country most likely violates the obligation. If the infringement rate is only 0.1%, copyright owners are expected to appeal to the civil procedures within the country rather than the WTO DSM. However, what if the number is 5%, 10%, or 30%? The dispute settlement institutions must draw a line somewhere. Yet, it is highly difficult to do so, not only because of the likely disagreement between nations as to the acceptable level of infringement, but also because a bright-line rule

236. *Id.* at 46-9.

237. Request for Consultations by the United States, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/1 (May 7, 1998). Article 61 of the TRIPS Agreement is more specific than the general provision of Article 41. Article 61 seems to require that criminal procedures and penalties for copyright infringement actually provide “a deterrent.” See TRIPS Agreement, *supra* note 1, at art. 61.

238. CARLOS CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 409-46 (2007).

239. TRIPS Agreement, *supra* note 1, at art. 41.1.

240. CORREA, *supra* note 238, at 411-12.

241. *Id.* at 448-50.

would effectively create safety zones, up to which level of infringement members would be free from charges of TRIPS inconsistency.²⁴²

The dispute settlement institutions also face difficulties in the recommendation process that hinder their ability to adequately resolve ineffective deterrence disputes.²⁴³ As a matter of general public international law, each sovereign nation, even if it has an obligation under an international treaty to achieve a certain level of effective deterrence, has broad discretion in how it chooses to achieve this situation (unless it has agreed to the contrary). The TRIPS Agreement requires relatively concrete actions by members. The minimum standards provisions of the Agreement require members to take affirmative measures and thus invest their limited resources in IP protection. However, members have broad discretion on precisely what measures to take in fulfillment of their treaty obligations, and how best to spend their resources to achieve compliance. Indeed, Article 1 of the Agreement stipulates that “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”²⁴⁴ In addition, among the enforcement provisions, Article 41.5 of the Agreement provides that “[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”²⁴⁵ Because of the discretion given to member governments, the dispute settlement institutions cannot specify the precise concrete measure that the respondent countries ought to take to comply with their effective deterrence responsibilities under the Agreement.²⁴⁶ By contrast, in a dispute over statutory language the dispute settlement institutions *can* specify the appropriate measure to be taken: reforming the statute.

If statutory language is at issue, it is easy to concretely recommend the expected measure because the dispute settlement institution can point out the precise language that fails to satisfy treaty obligations. If the application of a law is at issue, the dispute settlement institutions can still concretely recommend changing the application in similar future situations or litigation. The difficulty with the application claim exists in the *enforce-*

242. In this regard, Smith suggested comparing the piracy rate of respondent country with that of “similarly-situated countries.” See Smith, *supra* note 146, at 46-5.

243. *Id.* at 46-6.

244. TRIPS Agreement, *supra* note 1, at art. 1.

245. *Id.* at art. 41.

246. Smith, *supra* note 146, at 46-6. (“Panels are unlikely to dictate the specific corrective actions that members must take to bring their regimes up to snuff. This will be left to the members themselves.”)

ment of this recommendation, not the recommendation itself. Most probably, the losing party would know what measure to take to comply with the panel decisions in these cases. On the other hand, in disputes about effectiveness of domestic remedies, even the respondent country might not know how best to achieve the required level of deterrence. Therefore, this difficulty is unique to claims regarding the ineffectiveness of domestic remedies.

The retaliation option granted to aggrieved complainants presents challenges as well, since it is difficult to determine when deterrence has become effective and retaliatory measures should be rescinded. Even if the losing country consents to strengthening its domestic remedies to achieve the desirable level of IP protection, it may take a considerable amount of time for such measures to serve as a deterrent in the society. In *Greece—Enforcement of IPR for Motion Pictures and Television Programs*, the new legislation and its application were effective because the number of companies involved was limited (only television companies), and also because we would expect that the Greek government had administrative supervisory authority over them. By contrast, if the relevant entities are numerous and the government does not have such supervisory authority, it might take a considerable amount of time before all entities change their actual conduct. In such a situation, should the complainant country continue using retaliatory measures against the respondent, who has committed to “try” to improve the situation, until the situation ultimately changes—perhaps even as long as a decade later? Should the WTO allow the winning party to do so? On the other hand, if the complainant country stops the retaliatory measure immediately after the respondent commits to implement some new measures, the complainant country may find only little progress after a few years. In such case, the complainant country needs to go through the lengthy and costly DSM processes all over again in order to gain approval for new retaliation. Therefore, it is questionable whether the use of retaliatory measures works well for claims regarding ineffectiveness of domestic remedies.

It is quite possible that potential complainant countries have elected not to sue other members at this time because they are waiting to see whether the laws and regulations of a contemplated adversary are applied appropriately, and whether they actually serve as a deterrent. Or it is possible that the potential complainant countries have simply needed the time to gather sufficient information to prove a *de facto* inconsistency with responsibilities under the Agreement. Lastly, potential complainant countries may find too onerous the hurdles and challenges of pursuing application and ineffective deterrence claims and thus refrain from suing over

such issues. As we may reasonably assume that most potential cases today are either application or insufficient deterrence disputes, these difficulties are undoubtedly the cause of much of the decline in the use of DSM to resolve TRIPS disputes. The next Part illuminates how these difficulties have shaped the strategy of the United States in its dispute with China.

V. IP PROTECTION AND ENFORCEMENT IN CHINA²⁴⁷

The United States requested consultations with China on IP protection and enforcement in April 2007.²⁴⁸ It is noteworthy that the United States has elected to focus its claims on the insufficiency of China's IP statutes, as opposed to alleging ineffective application of these statutes or insufficient deterrence from domestic remedies. Such a strategy likely reflects the challenges presented by these latter two categories of claims, as revealed above. This Part, after reviewing the function of the Council in the case, examines the U.S. strategy in light of my explanation of the decline in TRIPS cases in the recent past. I will show that the tactics adopted by the United States reflect an implicit understanding of, and a remarkable degree of sensitivity to, the strengths and shortcomings of the WTO DSM that contributed to its decline in use.

A. The Function of the Council for TRIPS in the Case

The Council for TRIPS was unable to resolve the current dispute even though China is subject to the Council's review procedure, and despite the fact that China's commitment to IP protection has been an important issue before the Council in recent years.²⁴⁹

The United States' chosen strategy seems to put more emphasis on bilateral negotiation than the peer review mechanism of the Council. To facilitate such negotiation, the United States and China formed the Joint Commission on Commerce and Trade (JCCT), and created the IPR Working Group to specifically address IP matters.²⁵⁰ According to the United

247. I use the dispute with China as a case study through which to analyze the attitudes of the United States and other developed countries towards TRIPS disputes, as well as to further investigate the trends in TRIPS disputes. I intend this analysis to be dispassionate.

248. Request for Consultations by the United States, *supra* note 116.

249. Council for TRIPS, *supra* note 167, at 2.

250. 2007 OFFICE OF THE U.S. TRADE REPRESENTATIVE SPECIAL 301 REPORT 18, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf (last visited Apr. 28, 2008); OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS: THE U.S.-CHINA JCCT: OUTCOMES ON MAJOR U.S. TRADE CONCERNS 77 (2004) [hereinafter JCCT TRADE

States, the two governments have agreed upon several measures, including cooperation to combat pirated goods displayed at trade fairs in China.²⁵¹ Such agreements or commitments also have the potential for resolving the dispute without using the DSM. The United States understands that the bilateral negotiation and the WTO DSM serve complementary purposes²⁵² and still considers bilateral negotiation as a possible means for settling the disputes.²⁵³ Notably, however, the United States did not mention the multilateral forum, the Council for TRIPS, as a potential factor in resolving the matter.

Nonetheless, the Council may still be enhancing the dispute resolution process in this dispute because the United States uses the forum to gather relevant information from China. Most notably, in October 2005, the United States submitted, along with Switzerland and Japan, a request to China under Article 63.3 of the TRIPS Agreement seeking more transparency on IP infringement levels and enforcement activities in China.²⁵⁴

FACTS], *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2004/asset_upload_file225_5834.pdf (last visited Apr. 28, 2008) (outlining the creation of the IPR Working Groups at the April 2004 JCCT meeting).

251. 2006 OFFICE OF THE U.S. TRADE REPRESENTATIVE REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 6-7, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file688_10223.pdf (last visited Apr. 28, 2008).

252. Press Release, Office of the U.S. Trade Representative, WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks 3 (Apr. 9, 2007), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file908_11061.pdf (last visited Apr. 28, 2008) ("Dispute settlement and cooperative efforts complement one another in important ways. When cooperative efforts do not solve a particular problem, access to WTO dispute settlement provides a neutral forum to assist in resolving the specific disagreement and allows productive bilateral discussions to continue on other issues.").

253. Press Release, U.S. Trade Representative, United States Files WTO Cases Against China Over Deficiencies in China's Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries (Apr. 9, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Files_WTO_Cases_Against_China_Over_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_Market_Access_Barr.html (last visited Apr. 28, 2008).

254. The Office of the U.S. Trade Representative maintained that "China has since provided only limited information in response, hampering the United States' ability to evaluate whether China is taking all necessary steps to address the rampant IPR infringement found throughout China" in its report to the Congress. So, the information gathering function is limited. JCCT TRADE FACTS, *supra* note 250, at 71.

B. Context of the Case

The United States has long been concerned about IP protection and the enforcement of IP laws in China.²⁵⁵ China was listed on the Priority Watch List of the United States Trade Representative's (USTR) 2006 "Special 301 Report"²⁵⁶, and "continues to be one of the [Bush] Administration's top priorities."²⁵⁷ The United States' biggest concern is the continued prevalence of counterfeiting and piracy in China. The position of the USTR is that "[d]espite anti-piracy campaigns in China and an increasing number of IPR cases in Chinese courts, overall piracy and counterfeiting levels in China remained unacceptably high in 2005."²⁵⁸ For this reason, according to the Report, the United States will "continue heightened scrutiny of China" and "step[] up consideration of [WTO] dispute settlement options."²⁵⁹

The United States finally requested consultations with China on April 10, 2007.²⁶⁰ The DSB established a Panel for the TRIPS case on September 25, 2007.²⁶¹

255. See DEVEREAUX ET AL., *supra* note 36, at 241-300. In the 1990s, IP protection was one of the key issues in the U.S.-China negotiation on China's accession to the WTO. See *id.*

256. 2006 OFFICE OF THE U.S. TRADE REPRESENTATIVE SPECIAL 301 REPORT, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf (last visited Apr. 28, 2008).

257. *Id.* at 1. Although thirteen countries are listed on the Priority Watch List, only China and Russia were mentioned in the Executive Summary. More than half the volume was spent describing China. Russia has not joined the WTO and is not subject to obligations under TRIPS.

258. *Id.* at 17.

259. *Id.* The Report also mentioned that the United States will consider all options, including, but not limited to, initiation of dispute settlement consultations for the other twelve countries.

260. Request for Consultations by the United States, *supra* note 116. The United States also requested consultations over other relevant issues on the same date: *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (DS363). However, since the claims in the latter case question the consistency of measures with the Accession Protocol, the GATT Agreement of 1947, and the GATS Agreement, that case is outside the scope of this Article.

261. World Trade Org., DSB Establishes a Panel on China's Protection of IPR and a Compliance Panel to Review US Implementation in "Zeroing" Case (Sept. 25, 2007), http://www.wto.org/english/news_e/news07_e/dsb_25sep07_e.htm (last visited Jan. 8, 2008).

C. Features of the Claims of the United States

China—IPR Protection and Enforcement involves three claims and one potential claim.²⁶² After sorting these claims into my three claim categories, it becomes apparent that the United States has elected to focus on statute claims, rather than application claims or insufficient deterrence claims. The United States probably avoided the latter two categories out of recognition of the challenges posed by them.

1. Avoidance of Claims Relating to the Application of Statutes

The first claim regards the criminal thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties.²⁶³ The Criminal Law of China stipulates certain acts of trademark counterfeiting and copyright piracy that may be subject to criminal procedures and penalties; however, due to ambiguity in the statutory language, the Supreme People's Court and the Supreme People's Procuratorate issued two interpretations, one in 2004²⁶⁴ and one in 2007, which set criminal thresholds that must be met in order to start criminal prosecutions of copyright piracy and trademark counterfeiting.²⁶⁵ It should be noted that these *interpretations* in fact work as guidelines within the government and are *not court judgments* on specific cases. The United States contends that these high thresholds are “a major reason for the lack of an effective criminal deterrent.”²⁶⁶ The United States argues that because counterfeiting on a commercial scale fails to

262. I term this fourth issue a “potential claim” since the United States explicitly distinguished the fourth issue from the other three. Press Release, U.S. Trade Representative, *supra* note 253 (“Beyond these three problems, an additional IPR enforcement issue *may* exist, concerning the scope of China’s criminal law with respect to copyright piracy.”) (emphasis added).

263. Request for Consultations by the United States, *supra* note 116.

264. Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property, SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., Dec. 22, 2004), available at <http://www.chinaiprlaw.cn/file/200412213867.html>, translated at <http://www.chinaiprlaw.com/english/laws/laws20.htm> (P.R.C.).

265. The Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property, SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., Apr. 5, 2007), available at <http://www.chinaiprlaw.cn/file/2007040710737.html> (P.R.C.); Press Release, People's Republic of China, New Interpretation Issued to Enhance Criminal Protection of IP (Apr. 10, 2007), available at http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=67882&col_no=934&dir=200704.

266. 2007 OFFICE OF THE U.S. TRADE REPRESENTATIVE SPECIAL 301 REPORT, *supra* note 250, at 19.

meet the thresholds and is thus not subject to criminal procedures and penalties, China does not comply with Articles 41.1 and 61 of the Agreement.²⁶⁷

This first claim is ostensibly a claim on statutes because it questions the consistency of black-letter rules. By so framing its complaint, the United States carefully avoided sounding a claim on the application of the statute. In reality, the basis for the complaint involves both statutes and their application, and the United States could have elected to press the claim in either category. The United States, however, strategically chose to pursue it in the WTO DSM as a statute claim, although it is concurrently pursuing the application and insufficient deterrence facets of the dispute through bilateral diplomacy. The United States believes that one major factor behind China's poor IP enforcement is "China's chronic underutilization of deterrent criminal remedies."²⁶⁸ Therefore, through the JCCT, the United States requested China to increase the number of criminal prosecutions for IP violations relative to the total number of IP administrative cases.²⁶⁹ Legal obstacles including the quantitative thresholds at issue in the dispute are only one aspect of the problem. The other aspect of the problem is the lack of aggressive prosecution on the part of the Chinese government.²⁷⁰ Thus, the United States could have chosen to claim that China violates the TRIPS Agreement because it does not apply its enforcement rules sufficiently. Significantly, however, the United States chose to focus its claim before the WTO DSM on statutes, not their application.

The second claim relates to customs enforcement. The United States argues that under the hierarchy created by Chinese regulations and administrative "implementing measures," "the Customs authorities often are required to allow seized goods back into the channels of commerce."²⁷¹ Therefore, these regulations and measures are allegedly inconsistent with Articles 46 and 59 of the Agreement.²⁷²

The United States also decided to frame this second claim as a statute claim: the issue is whether the black-letter rules are consistent with the Agreement. Though it could have pursued this issue through an application claim (whether China is in violation of the TRIPS Agreement because

267. Request for Consultations by the United States, *supra* note 116, at 2.

268. 2007 OFFICE OF THE U.S. TRADE REPRESENTATIVE SPECIAL 301 REPORT, *supra* note 250, at 19.

269. *Id.*

270. *Id.*

271. Press Release, Office of the U.S. Trade Representative, *supra* note 252, at 2.

272. Request for Consultations by the United States, *supra* note 116, at 3.

it did not destroy confiscated goods in the concrete cases where the Agreement requires members to do so) the United States elected to focus on the inadequacy of China's regulations.

The third claim concerns the protection and enforcement of copyright and related rights. The United States claims:

China's copyright law denies copyright protection to imported works waiting for approval to enter the Chinese market. . . . During the review period . . . , unauthorized persons are able to put copies of works on the market without infringing copyright and thus without incurring civil or criminal copyright liability.²⁷³

Therefore, the United States alleges, China's relevant measures are inconsistent with Articles 3.1, 9.1, 14, and 41.1 of the Agreement.²⁷⁴

This claim is a claim on statutes as well because the laws, administrative regulations, and procedures at issue are all statutes. The application of these statutes was not challenged. The United States did not claim that, for example, a Chinese court denied copyright protection for a work in a specific case.

The United States asserts a fourth matter as a potential claim.²⁷⁵ The United States is concerned about the scope of the Criminal Law on piracy, specifically whether (1) unauthorized reproduction without unauthorized distribution and (2) unauthorized distribution without unauthorized reproduction are subject to criminal procedures and penalties.²⁷⁶ This relates to Articles 41.1 and 61 of the TRIPS Agreement. In this potential claim, the United States also questions the scope of black-letter law, and not the specific application of it.

That the United States crafted all of its claims to be complaints on statutes suggests that it recognized the challenges of prevailing with claims regarding the application of statutes or ineffective deterrence. By tailoring its claims in this manner, the United States avoided having to wait and see China's application of its laws before taking its case to the DSM. For example, the United States does not now have to provide evidence that Chinese customs released counterfeited products into commercial channels even though the cases are not "exceptional" as allowed in

273. Press Release, Office of the U.S. Trade Representative, *supra* note 252, at 2.

274. Request for Consultations by the United States, *supra* note 116, at 5.

275. Under WTO rules, a party should raise an issue at the consultation phase in order to litigate it in the subsequent panel procedure. This is probably the reason why the United States included this "potential claim." See QI ZHANG, CONSULTATION WITHIN WTO DISPUTE SETTLEMENT 197-99 (2007).

276. Request for Consultations by the United States, *supra* note 116, at 6.

Articles 46 and 59 of the Agreement.²⁷⁷ By using statute claims and not application claims, the United States also avoids implicating the self-interpretation of Chinese law by the Chinese government (which has the authority to interpret its own laws in any rational manner and to which the dispute settlement institution would probably defer).

By choosing to frame its complaints as statute claims, the United States also avoided a second set of challenges posed by application claims related to the burden of proof. If the United States had challenged the sufficiency of China's application of its statutes, it would have been required to provide facts proving the inadequacy of enforcement (such as China's low prosecution rate). The United States has an option to seek detailed information from China under Article 63.3 of the TRIPS Agreement, an option it has exercised in the past—in October 2005, for example.²⁷⁸ However, this right to request information under TRIPS does not mean that the United States will be able to obtain all the information it needs to prove an application or insufficient deterrence complaint. The USTR has admitted its inability to collect the necessary level of information, noting in its 2006 Report that “[t]he United States does not consider . . . that China has provided a full response to the October 2005 Article 63.3 request.”²⁷⁹ The challenge of obtaining sufficient proof to support an application claim likely shaped the strategy adopted by the United States.

A final challenge that likely influenced the decision to avoid articulating the complaint as one regarding application is the difficulty of evaluating the implementation of the panel decision. Even if the United States were to win the case, China could simply issue an official statement showing its intention to strengthen enforcement or to change its application appropriately and argue that these purely symbolic measures bring it into compliance with the recommendations of the panel. If China were to do so, it would be quite difficult for the United States to refute it.

2. *Avoidance of Claims Regarding the Ineffectiveness of Domestic Remedies*

The United States could have included, but did not include, a claim based on China's failure to achieve an adequate measure of deterrence of infringement. Needless to say, the United States is concerned not only with the text of China's statutes or the government's application of them,

277. TRIPS Agreement, *supra* note 1, arts. 46, 59.

278. See Council for TRIPS, *Request for Information Pursuant to Article 63.3 of the TRIPS Agreement*, IP/C/W/461 (Nov. 14, 2005).

279. 2006 OFFICE OF THE U.S. TRADE REPRESENTATIVE SPECIAL 301 REPORT, *supra* note 256, at 24.

but also with the actual level of IP protection. In a press release announcing the initiation of *China—IPR Protection and Enforcement*, the United States revealed its concerns over the current piracy situation, stating that “U.S. industry in 2006 continued to estimate that levels of piracy in China across all lines of copyright business range between 85 and 93 percent”²⁸⁰ The United States chose not to pursue a claim that this extraordinarily high level of infringement suggests that China’s enforcement techniques or punitive strategies are not sufficiently deterrent, and that the country is thus in violation of its duty under the Agreement to stem willful counterfeiting and piracy on commercial scales, even though both its statutes and its application of them are superficially consistent with the requirements of the TRIPS Agreement.

The United States’ careful avoidance of claims based on the inadequate deterrence of domestic remedies in China likely also reflects appreciation of the challenges posed by such claims. As discussed in Part IV, the dispute settlement institutions have not yet accepted such claims, because all prior cases raising such claims were settled without a panel decision. There is thus the risk that the dispute settlement institutions would not accept claims of inadequate deterrence. Additionally, since China is in a better position to gather facts relating to matters within its own borders, the United States may face difficulties in proving claims related to the adequacy of deterrence. For example, the United States might be able to successfully establish that the piracy level of copyright business in China is 90%, but doing so would be far more time-consuming and expensive than it would be for China itself, as the Chinese government has many more sources of information on the activities of its citizens than does the United States.

The United States was undoubtedly aware of the challenges that a claim of inadequate deterrence would present to the dispute settlement institutions. Since the Agreement does not provide a baseline to determine the sufficiency of deterrence (e.g., “counterfeits within the country dominate more than 50% of the market”), the dispute settlement institutions are likely to be unable to objectively determine whether IP infringements are duly deterred. In addition, it is hard for the dispute settlement institutions to specify the measures China must take to comply with the decision, since China has broad discretion as to how to implement its treaty obligations.

Finally, even if the United States were to win the case, there still would remain a challenge in the implementation phase. If the decision of

280. Press Release, Office of the U.S. Trade Representative, *supra* note 252, at 3.

the Article 21.5 Appellate Body in *Canada—Civil Aircraft* applies, China can fulfill its obligation to comply relatively easily, by modifying some language in the relevant legislation or the judicial interpretation to show its intention to comply with the panel report.

VI. ISSUES REGARDING DISPUTES AGAINST DEVELOPING COUNTRIES

The disparity between developed countries and developing countries regarding their views on the appropriate level of IP protection may explain the rare use of the DSM against developing countries. Developed countries should be sensitive to the risk of potential opposition that the use of the DSM against developing countries may bring about and ought to consider refraining from using it. In this Part, after explaining the disparities between developed and developing countries with regard to IP matters, I argue that developed countries should take such disparities into account in a variety of stages in the dispute settlement process.

A. Why Do Relatively Few TRIPS Disputes Target Developing Countries?

At the inception of the TRIPS Agreement, Professors Dreyfuss and Lowenfeld anticipated that “much of the WTO litigation in [the] area [of IP] will be between developed countries as complainants and developing countries as respondents,” since “the thrust of the TRIPS initiative was to induce developing countries to move toward effective protection of intellectual property.”²⁸¹ Indeed, there have been several disputes in which a developed country claimed that a developing country violated its TRIPS obligations.²⁸² However, a developed country was the respondent in eighteen cases, whereas a developing country was the respondent in only eight cases.²⁸³ It is hard to imagine that this relative restraint in suing developing countries is due to all developing countries having already met all their obligations under the TRIPS Agreement.²⁸⁴ Thus, there needs to be more inquiry into the reasons behind the unexpectedly small proportion of TRIPS disputes that target developing countries.

281. Dreyfuss & Lowenfeld, *supra* note 105, at 282.

282. For example, the dispute *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*. See World Trade Org., *supra* note 73.

283. See World Trade Org., *supra* note 73.

284. See, e.g., ORG. FOR ECON. COOPERATION & DEV., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY: EXECUTIVE SUMMARY (2007), available at <http://www.oecd.org/dataoecd/13/12/38707619.pdf> (last visited Mar. 9, 2008). The OECD has estimated the size of the piracy market as up to 200 billion US dollars. *Id.* at 4.

The first, and most obvious, possible explanation relates to the transitional period for developing countries. Article 65.2 of TRIPS provided developing countries with a four-year transitional period (which ended January 1, 2000) in which to meet their obligations (with the exceptions of national treatment,²⁸⁵ most-favored-nation treatment,²⁸⁶ and the obligation not to weaken IP protection during the transitional period²⁸⁷). In addition, there was an additional five-year transitional period in which developing countries were expected to fulfill their obligations “to extend product patent protection” to new technology areas.²⁸⁸ Article 65.3 grants the same transitional period to countries which are “in the process of transformation from a centrally-planned into a market, free-enterprise economy.”²⁸⁹ During these transitional periods, for example, a developing country did not have to provide 20-year protection of inventions, so long as the country did not change “its laws, regulations and practice[s]” in a way which made them less consistent with the provisions of TRIPS.²⁹⁰ Furthermore, Article 66.1 of TRIPS provided for a ten-year transitional period for the least-developed countries (that was to last until January 1, 2006),²⁹¹ which has been subsequently extended for an additional seven and a half years (until July 1, 2013).²⁹²

Undoubtedly as a result of the leeway granted during the transitional periods, developing countries were sued in the DSM in only a few cases until the end of 1999.²⁹³ Four disputes concerned pharmaceutical product patents and agricultural chemical patents: *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*,²⁹⁴ *India—Patents* (one complaint initiated by the United States and the other by the EC);²⁹⁵ and *Argentina—Patent Protection for Pharmaceuticals and Test Data*

285. TRIPS Agreement, *supra* note 1, at art. 3.

286. *Id.* at art. 4.

287. *Id.* at art. 65.5.

288. *Id.* at art. 65.4.

289. *Id.* at art. 65.3.

290. *See id.* at art. 65.5.

291. *Id.* at art. 66.1.

292. Council for TRIPS, *supra* note 156.

293. *See* World Trade Org., *supra* note 73. There have been no cases against the least-developed countries. *See id.*

294. *See* Request for Consultations by the United States, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/1 (Apr. 30, 1996).

295. *See* Request for Consultations by the United States, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/1 (July 2, 1996); Request for Consultations by the European Communities, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/1 (Apr. 28, 1997).

Protection for Agricultural Chemicals.²⁹⁶ Although there was a nine-year transitional period to extend product patent protection to new technology areas involving pharmaceuticals, Article 70 obliges members to immediately establish a particular patent filing system for such products²⁹⁷ (so-called “mailbox filing”), and to grant exclusive marketing rights for five years after the product receives marketing approval in the territory of that member or until a product patent is granted or rejected, whichever period is shorter.²⁹⁸ Another dispute which was taken into the WTO DSM during the transitional period, *Indonesia—Auto*, concerned the national treatment clause, which applies to all member states without regard to level of development.²⁹⁹

Just after the transitional period ended in January 2000, two more disputes involving developing countries appeared before the DSM: *Argentina—Certain Measures on the Protection of Patents and Test Data*; and *Brazil—Patents*. Consultations were requested for both disputes in 2000, and the parties subsequently settled both by mutually agreed solutions.³⁰⁰ Finally, China was sued by the United States as discussed in detail in Part V.³⁰¹ These three cases involved claims that the respondents violated obligations which were not exempted by their transitional status.

In short, there have been a remarkably small number of disputes against developing countries, not only during the transitional period but also once developing countries became subject to general obligations in 2000. Therefore, although the transitional period helps explain the rather small number of disputes in the first four years of the Agreement, it cannot

296. See Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS/171/1 (May 6, 1999).

297. TRIPS Agreement, *supra* note 1, at art. 70.8(a).

298. *Id.* at art. 70.9.

299. World Trade Org., Dispute Settlement: Dispute DS59: Indonesia—Certain Measures Affecting the Automobile Industry, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds59_e.htm (last visited Apr. 28, 2008).

300. Notification of Mutually Agreed Solution, *Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS196/4 (June 20, 2002); Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4 (July 19, 2001).

301. Whether China is a developed or developing country within the WTO regime is debatable. According to the *Protocol on the Accession of the People's Republic of China*, China waived many differential treatments which developing countries enjoy. World Trade Org., *Protocol on the Accession of the People's Republic of China*, WT/L/432 (Nov. 23, 2001). However, in this Article, I describe China as a developing country because I am writing about the political impact rather than application of specific provisions.

explain why there have been only four cases that target developing countries since the expiration of the transitional period. Of course, some factors mentioned in Part IV undoubtedly affect this result, particularly the monitoring function of the Council for TRIPS (which likely preempts many disputes over the contents of statutes) and the difficulties faced by the WTO dispute settlement institutions in resolving claims involving the application of statutes and ineffective domestic remedies. However, when one considers the pre-TRIPS desire amongst developed countries to pressure developing nations to more stringently protect IP, as well as the anticipated heavy use of the WTO to resolve disputes against such nations by scholars such as Dreyfuss and Lowenfeld, it seems evident that there must be additional factors contributing to the surprising rareness of suits against developing countries.

One possible such factor is the economic inefficiency of most disputes against developing nations. Perhaps developed countries do not sue developing countries as frequently as anticipated because the economic reward is often too small to make it worth spending the time and money to litigate before the WTO. This explanation works for small economies such as the least-developed countries. However, it cannot be a plausible explanation for all developing countries because one of the primary motivations of the developed countries in the Uruguay Round of GATT negotiations was to realize IP protection in the developing world. In addition, some emerging economies are even bigger than the economies of many developed countries.³⁰² Therefore, economic efficiency can explain the situation only to a minor extent. A more likely explanation, which I will now discuss in detail, is that the large disparity in attitudes between developed countries and developing countries regarding the appropriate level of IP protection, coupled with the potential diplomatic repercussions from vigorous litigation targeting the developing world, might dissuade the developed countries from pursuing adversarial resolutions to IP disputes.

B. Differing Valuations of IP Protection Between Developed and Developing Countries

Developed countries and developing countries have historically differed in their attitudes towards the desirability of stringent IP protection. At first, the original members of the Paris Convention were mostly European industrial countries, reflecting the early unwillingness of developing

302. For example, the Chinese economy is bigger than the German economy. See International Monetary Fund, *World Economic Outlook: Housing and the Business Cycle*, at 45, tbl. 1.2, available at <http://www.imf.org/external/pubs/ft/weo/2008/01/pdf/text.pdf> (last visited Apr. 28, 2008).

nations to participate in international IP accords. Within the WIPO regime, developing countries had opposed strengthening IP protections.³⁰³ Even in the 1980s and 1990s, during the Uruguay Round, the developing countries opposed strengthening IP protection, and a package deal was needed to win their support for the TRIPS agreement.³⁰⁴

Although all WTO members, including the developing countries, signed the TRIPS Agreement, there is still a huge difference in opinion between the members concerning the desirable level of IP protection. A particular source of disagreement is the extent to which IP protection should accommodate other values such as public health and biological diversity.³⁰⁵ Developing countries have tried to clarify the relationship between IP and public health considerations, soften their relevant IP protection obligations, or even modify the TRIPS Agreement itself, both within and outside the WTO regime.³⁰⁶ Professor Lawrence Helfer argued that:

[T]he post-TRIPs era has seen the emergence of . . . regime shifting, . . . by weaker developing countries that are increasingly dissatisfied with many provisions in TRIPs (or its omission of other issues) and are actively seeking out ways to recalibrate or supplement the treaty by relocating IP lawmaking initiatives to other international venues.³⁰⁷

The difference of opinion between developed and developing nations appears particularly pronounced in discussions about the balance between IP protection and public health. Developing countries are apprehensive that implementing the TRIPS Agreement could result in higher prices for medicines, which would make lifesaving drugs essentially unavailable to people in those countries who are in urgent need of them. The World Health Organization (WHO) started to discuss this conflict between IP protection and public health “only after the TRIPS Agreement entered into force and expanded states’ obligations to protect pharmaceutical patents.”³⁰⁸ Developing countries, however, did not try to change the overall

303. See Emmert, *supra* note 3, at 1343-44.

304. See *id.*

305. See generally Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT’L L. 123 (2004) [hereinafter Helfer, *Mediating Interactions*]; Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004) [hereinafter Helfer, *Regime Shifting*].

306. Helfer, *Regime Shifting*, *supra* note 305, at 27-63.

307. Helfer, *Mediating Interaction*, *supra* note 305, at 126.

308. Helfer, *Regime Shifting*, *supra* note 305, at 42.

TRIPS regime.³⁰⁹ Rather, they elected to use the WHO “as a venue for advocating the use of flexibilities already embedded within TRIPs.”³¹⁰ As a result of such advocacy, the WTO adopted in 2001 the *Declaration on the TRIPS Agreement and Public Health*, which reaffirmed the members’ rights to protect public health.³¹¹ As a further signal of its sensitivity to public health concerns, the General Council of the WTO allowed, in 2003, the temporary waiver of the obligations stipulated in Article 31(f) and (h) of the Agreement under certain circumstances, and hence removed limitations on exports under compulsory licenses to countries that cannot manufacture necessary pharmaceuticals themselves.³¹²

In summary, developing countries have long advocated against the implementation of strong IP treaties and the enforcement of such treaties, and have succeeded to some extent both in the WTO and in other intergovernmental organizations in tempering such agreements. In the following section, I explain the background of the difference of opinion.

C. Why Developing Countries do not Share Developed Countries’ Valuation of IP

IP law is based on a typical market failure: the failure of individuals to internalize positive economic externalities. In the absence of IP protection, once an invention becomes public non-inventors can use it at only a small marginal cost. Without government intervention, there would thus be an underproduction of innovation. Setting property rights on inventions provides such incentives. At the same time, IP laws promote others’ innovation by publishing the contents of inventions and preventing duplicate investments in the same technologies. International IP treaties, such as the TRIPS Agreement, function as the basic rules to promote innovation at the global level.

However, implementing IP protection can be particularly costly to the developing world. First, there are economic costs.³¹³ Developing countries will now need to pay fair license fees to rights holders. Since most IP, especially patents, originates within the developed countries, the international IP treaties result in the transfer of material wealth from developing

309. *Id.* at 45.

310. *Id.*

311. Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001) (adopted Nov. 14, 2001).

312. General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 2, 2003).

313. WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002, at 136-39 (2001).

countries to developed countries as a whole. The World Bank estimated, for example, that the United States would gain a net inflow of \$19.1 billion per year and China would experience a net outflow of \$5.1 billion per year if the TRIPS Agreement were fully enforced.³¹⁴ This transfer does not necessarily occur in every kind of IP. For example, trademarks have little to do with innovation or the technological sophistication of countries. Therefore, even if some transfers occur, the amount of money that could be expected to change hands is smaller than that implicated in the sale of patented products. In addition, since developing countries would be promoting domestic innovation by implementing IP laws, the long-term inflow and outflow is not clear. However, at least in the short term, developing countries would need to bear significant economic costs.³¹⁵

Second, there are administrative costs. The Agreement sets affirmative obligations for member states' administrative and judicial branches. It requires member states to allocate specific administrative resources to a certain area, IP protection, no matter how high or low a priority those states put on it compared to other areas.³¹⁶ The administrative costs "include upgrading offices for registering and examining patents and trademarks, and for accepting deposits of plant materials; training examiners, judges, and lawyers; improving courts to manage intellectual property litigation; and training customs officers and undertaking border and domestic enforcement actions."³¹⁷

These administrative costs could be significant, especially for countries with extremely scarce administrative resources, either in terms of fiscal budgets or trained personnel.³¹⁸ However, some measures could compensate for much of the administrative costs. First, intellectual property offices may charge fees to defray their costs,³¹⁹ since the Agreement allows members to collect fees as long as they are not discriminatory and the cost is not so high that it unreasonably impairs the opportunity to seek and obtain protection.³²⁰ In addition, developing countries can "petition for technical and financial assistance from industrial countries and from the [WIPO] and the WTO."³²¹ Finally, developing countries can rely on

314. *Id.* at 137. It is worth noting that not all developed countries gain from implementing the TRIPS Agreement in this sense. For example, according to the same estimates, New Zealand would experience a loss of \$2.2 billion. *Id.* at 133 tbl.5.1.

315. *Id.* at 136.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *See, e.g.*, TRIPS Agreement, *supra* note 1, at art. 25.

321. WORLD BANK, *supra* note 313, at 136.

the examination results of foreign patent offices.³²² For example, under the Patent Cooperation Treaty,³²³ which is one treaty under the WIPO regime, the International Searching Authority, a certified patent office, establishes international search reports. In other words, it conducts quasi-examinations in advance so that other patent offices can refer to the reports to reduce the burden of duplicative prior art searches.³²⁴ This international application system is not unique for patents.³²⁵ In addition, some countries, such as Singapore, use so-called “modified substantive examinations” where the patent office uses the results of a foreign patent office’s examination and simplifies its own examination if the foreign offices have been pre-approved as competing offices by pertinent regulations and the applicants submit the results of the foreign examinations.³²⁶ Therefore, even though the administrative costs could be significant, they could be lessened to some extent by other measures.³²⁷

The third type of costs for developing countries could be labeled “social costs.” These costs include the impairment of public health and reduction in standards of living that could result from the suppression of piracy. WTO Members must be sensitive to their TRIPS obligations when they make any new laws or policies, even if these might merely collaterally affect (but do not directly target) IP. For example, a country which, prior to TRIPS, could have achieved through legislation a public health goal without any obligation to consider the effect of the new law on the sufficient protection of IP might now be prevented from pursuing such a goal because of the TRIPS Agreement.

The text of the TRIPS Agreement, however, does show some sensitivity to values other than innovation. The Preamble mentions that members recognize “the underlying public policy objectives of national systems for

322. *Id.*

323. Patent Cooperation Treaty, art. 16, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231, 9 I.L.M. 978 (1970).

324. *Id.*

325. There are similar regimes of international cooperation in trademark and industrial design. *See, e.g.*, Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, as last revised at Stockholm on July 14, 1967 and amended on September 28, 1979, 828 U.N.T.S. 163; Hague Agreement Concerning the International Registration of Industrial Designs and Models, June 2, 1934, 205 L.N.T.S. 179, as amended at The Hague, Nov. 28, 1960.

326. Patents Act, ch. 221, § 29 (Sing.) (providing for such a procedure). Rule 41 of the Patents Rules (Chapter 221, Sections 42, 110, and 115) lists that the patent offices prescribed shall be those of Australia, Canada, Japan, New Zealand, Republic of Korea, the United Kingdom, the United States, and the European Patent Office.

327. Usually, there is no registration requirement for copyrights. The administrative costs of copyrights are much smaller on this point.

the protection of intellectual property, *including developmental and technological objectives*” (emphasis added) and “*the special needs of the least-developed country Members* in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base” (emphasis added). Article 8 of the Agreement explicitly allows members to adopt measures to protect public health, provided that those measures are consistent with the Agreement.³²⁸ Article 31 allows compulsory licensing of patents under certain circumstances.³²⁹ If such provisions are not sufficient, the WTO allows for a modification of the Agreement or a temporary waiver of obligations.³³⁰

Of course, it is worth noting that there are reasons for even developing countries to favor IP protection. Strong IP protection can benefit developing countries considerably.³³¹ First, it promotes domestic innovation, however small and minor such developing-world inventions might be.³³² Moreover, “[t]he cumulative impacts of these small inventions can be critical for growth in knowledge and productive activity.”³³³ In addition, a developing country can reduce production costs and raise productivity because it can utilize the high-quality products of foreign countries, some of which can be imported only with appropriate IP protection.³³⁴ Finally, strong IP protection attracts foreign direct investments, which most developing countries need in order to achieve economic expansion.³³⁵

In short, a variety of costs, including economic costs, administrative costs, and social costs, explain the developing countries’ opposition to stronger IP protection. While these costs could be recovered or balanced, to some extent, with the benefits of IP protection, the developing world has historically opposed strengthening international IP obligations.

D. Why Developed Nations Tend not to Sue Developing Nations

The public policy/humanitarian basis for the difference of opinion over the value of IP makes targeting developing nations politically complicated,

328. TRIPS Agreement, *supra* note 1, at art. 8.

329. *Id.* at art. 31.

330. Marrakesh Agreement, *supra* note 149, art. X. Indeed, as discussed above, a waiver was adopted in the IP context in 2003. See General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 2, 2003).

331. WORLD BANK, *supra* note 313, at 134-35.

332. *Id.* at 134.

333. *Id.*

334. *Id.* at 132.

335. *Id.* at 133-34.

but it cannot wholly account for the developed nations' reluctance to pursue international adjudication of their IP disputes. Because the TRIPS treaty was part of a package deal, for which the developing nations received countervailing benefits in other trade treaties in exchange for their assistance in IP matters, the developed countries should be perfectly comfortable with insisting on IP protection that they effectively "paid for" through concessions in other treaties. Even if the costs of IP protection outweigh the benefits for a particular country, this does not justify non-compliance. The TRIPS Agreement is one part of a large package of trade treaties that resulted from the Uruguay Round.³³⁶ Therefore, it is inappropriate to see the TRIPS Agreement as one independent treaty.³³⁷ The developed countries are not free to ignore their responsibilities under the similarly asymmetrical Agreement on Agriculture³³⁸ simply because that treaty benefits developing countries while presenting only costs to the developed nations. In the same vein, even if developing countries are on the whole adversely impacted by TRIPS, while developed countries enjoy most of the benefits of IP protection, the developing countries still ought to fulfill their obligations.

Why then, do developed countries refrain from suing developing countries for noncompliance with TRIPS obligations? Dreyfuss and Lowenfeld have suggested that "[t]here are . . . significant reasons to refrain from taking so hard a line"³³⁹ because the impact of the TRIPS Agreement on developing countries was not comprehensively considered at the Uruguay Round of negotiations and developing countries did not truly have any choice in ratifying the TRIPS Agreement.³⁴⁰ Dreyfuss further argued, in a different article, that attempts by the developed countries to take too hard a line on IP issues had the potential to "backfire, spurring developing nations towards resistance (or even exit from the WTO) rather than moving them to compliance."³⁴¹ In short, the developed countries may refrain from

336. World Trade Org., Frequently Asked Questions about TRIPS in the WTO, http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (last visited Mar. 6, 2008).

337. See, e.g., Frederick M. Abbott, Commentary, *The International Intellectual Property Order Enters the 21st Century*, 29 VAND. J. TRANSNAT'L L. 471, 472 (1996).

338. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

339. Dreyfuss & Lowenfeld, *supra* note 105, at 302.

340. *Id.*

341. Rochelle Cooper Dreyfuss, Commentary, *Coming of Age with TRIPS: A Comment on J.H. Reichman, The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 33 CASE W. RES. J. INT'L L. 179, 179-80 (2001) (citing J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000)).

suing the developing countries simply in order to avoid their resistance, and to maintain their engagement with international cooperative bodies.

In addition, one of the most significant challenges which the WTO faces today is bridging the divide between developed and developing nations, as the choice of name for the current negotiation round, “Doha Development Agenda,” evinces. IP protection is a sector where the developed world and the developing world have particularly disparate motivations. For this very reason, developed countries must strategically consider how and to what extent to enforce the TRIPS Agreement with a “strong” WTO judicial system. Even though the DSM is effective at achieving enforcement, certain issues are better solved by tactful political negotiation rather than heavy-handed judicial determination. Professor Peter van den Bossche has argued that:

“[t]o preserve the effectiveness and efficiency of the WTO dispute settlement system, Members will need to improve the ability of the political institutions of the WTO to address the major issues confronting the multilateral trading system.”³⁴²

Also, Professor J. H. Reichman argued specifically that in the IP context:

“[O]verly litigious climate that produced a stream of controversial decisions on the limits of intellectual property protection would convince most states that they had lost too much sovereignty in this area, and it would undermine confidence in and loyalty to the WTO process.”³⁴³

Thus, if the developed world relies too heavily on the DSM to achieve IP protection in the developing countries, it may undermine the WTO regime itself. The developed countries’ reluctance to use the DSM against developing nations is probably a wise decision.

Developed countries should also be sensitive to the fact that developing countries will be less opposed to the regulation of some areas of IP than others. In particular, the potential repercussions from the opposition of developing countries are extremely serious in the area of pharmaceutical inventions.³⁴⁴ Opposition can be expected to be less intense if the is-

342. VAN DEN BOSSCHE, *supra* note 125, at 299.

343. Reichman, *supra* note 341, at 462-63.

344. Five cases against developing countries concern pharmaceutical patents, all of which were initiated before the *Declaration on the TRIPS Agreement and Public Health* was adopted in 2001. *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (DS36); *India—Patent Protection for Pharmaceutical and Agricul-*

sues have little to do with people's lives and development, as with trademark infringement or copyright piracy.³⁴⁵

Sensitivity to the fragility and importance of the WTO system explains not only the developed countries' careful decisions as to whether to initiate disputes, but also their litigation tactics at all stages of the process: what kinds of claims to involve, whether or not to settle in the earlier phases after consultations, whether or not to request the establishment of a DSM panel, and whether or not to take retaliatory measures if they win in an adjudication before the DSM. At any of these stages, there is a possibility that developed countries would choose claims on statutes, as opposed to claims on application of statutes or those on ineffective domestic remedies, because the requirements of statute claims are relatively clear and thus are likely to be less offensive.

VII. CONCLUSION

Compared to the WIPO regime, the WTO provides the better DSM to foster compliance with international minimum IP protection standards. However, there are still significant challenges in adjudicating IP disputes before the WTO. The DSM does not necessarily work well for resolving claims concerning the application of statutes and ineffectiveness of domestic remedies. These types of claims pose difficult challenges relating to several steps of dispute settlement: interpretation of rules, proof of inconsistency, interpretative authority of the sovereign country, illegality determination, suggestion of specific measures, and retaliatory measures. These challenges are especially critical if the matter relates to the enforcement provisions. In addition, developed countries may have refrained from suing developing countries, due to the wide disparity between the developed and developing worlds regarding the level of desirable IP protection. Finally, the Council for TRIPS, although not a part of the DSM, probably functions through its monitoring capacity to resolve some disputes before they escalate to litigation.

The immediate lesson for developed countries is that they should carefully craft their claims to focus on the language of statutes, even if their main concerns relate to the application of statutes or to ineffective deter-

tural Chemical Products (DS50 & DS79); *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals* (DS171); and *Argentina—Certain Measures on the Protection of Patents and Test Data* (DS196). See World Trade Org., *supra* note 73.

345. The current U.S.-China dispute focuses on trademark and copyright issues and does not deal with pharmaceutical patents.

rence. This is exactly the strategy pursued by the United States in its current dispute with China. One policy option is to renegotiate the Agreement to include more stringent minimum standards, requiring a minimum level of actual deterrence or acceptable threshold levels of actual infringement. However, this is not a viable option at the moment, as it may result in the opposition of developing countries and—disastrously—the weakening of their commitment to the WTO system in general. Another policy option that might improve the current system would be to expand the Council's monitoring function to actively address application issues (particularly those regarding enforcement provisions) and to address the actual level of IP infringement in member countries. Finally, policy makers in developed countries should keep in mind the lessons of a decade of experience resolving disputes under the TRIPS Agreement when negotiating future minimum standards agreements on non-IP issues (such as environmental protection or labor standards), namely that the supposedly “strong” DSM of the WTO may face unanticipated challenges adjudicating disputes related to these agreements.