US EFFORTS TO IMPOSE TRIPS–PLUS STANDARDS

Falling Down: Unilateral Enforcement of Intellectual Property Rights – A Critical Analysis of United States efforts to impose TRIPS–plus standards

Stephanie Switzer*

A INTRODUCTION

The current stagnation of the Doha Round of multilateral trade talks is juxtaposed against increasing criticism of the terms of WTO membership. Central to this criticism is the Agreement on Trade–Related Aspects of Intellectual Property Rights (TRIPS).[1] Characterised as potentially disruptive to the rights of WTO members to take measures to secure access to affordable essential medicines[2], the TRIPS Agreement has been heavily scrutinised by a myriad of commentators ranging from human rights[3] and development[4] advocates to health charities.[5]

Despite this controversy, the United States appears determined to secure ever–higher standards of intellectual property protection in the international arena. Mercurio contends that developed countries did not achieve all their goals in the negotiation of TRIPS.[6] They have since shifted their focus to bilateral/regional negotiations in order to increase the requisite levels of international intellectual property protection. The three areas which these negotiations have centred on are

(i) inclusion of new areas of intellectual property rights
(ii) implementation of more extensive levels or standards than that available under TRIPS,
(iii) the elimination of flexibilities under TRIPS.[7]

---

* LLB (Hons) QUB, currently an MPhil candidate at University College Dublin. The author would like to thank Fiona Marshall and Noel Hughes for their helpful comments. Any errors are the author's own.

[1] Agreement on Trade–Related Aspects of Intellectual Property Rights, Apr. 15, 1994, The Results of the Uruguay Round of Multilateral Trade Negotiations 320 [1999], 1869 U.N.T.S. 299, 33 I.L.M. 1197 [1994] ["the Agreement"]

[2] Abbott 'TRIPS Legality of Measures Taken to Address Public Health Crises' [2001] 7 Widener L. Symp. J. 71, & Mercurio, 'TRIPS, Patents and Access to Life–Saving Drugs in the Developing World' (2004) 8 Marq. Intell. Prop. L. Rev. 211

[3] McClellan 'Tools for Success: The TRIPS Agreement and the Human Right to Essential Medicine' [2005] 12 Wash. & Lee J. Civ. Rts. & Soc. Just. 153

[4] Bass 'Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century' [2002] 34 Geo. Wash. Int'l L. Rev. 191

[5] T'hoen, 'TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A long way from Seattle to Doha' available online at http://www.accessmed.msf.org/upload/PressClips/.

[6] Drahos 'Expanding Intellectual Property's Empire: The Role of FTAs' [2003] available at www.grain.org.

[7] Mercurio 'TRIPS–plus Provisions in Regional Trade Agreements' in 'Regional Trade Agreements and the WTO Legal System', Oxford OUP [2006] 219

The United States has employed a number of unilateral tools to 'pressure' other countries into the adoption of standards over and above those provided under the TRIPS Agreement. The purpose of this article is to examine the legal compliance of these unilateral pursuits by the United States for ever higher intellectual property protection. Within it an analysis of the circumstances leading to the conclusion of the TRIPS Agreement will be presented. It will be argued that developing countries had little choice at the time but to accept the terms of TRIPS. The pertinence of this negotiating context will be discussed in relation to the current efforts of the United States to pursue ever–higher standards of intellectual property protection.

With this in mind this article shall undertake three tasks. First, it will review a number of the 'tools' employed by the United States to secure ever–higher standards of intellectual property protection. Second, each of these tools will be examined for compliance with United States' international legal obligations under its membership of the WTO. Third, suggestions for reform will be proposed.

B CIRCUMSTANCES LEADING TO THE FORMATION OF THE TRIPS AGREEMENT

The TRIPS Agreement is part of the legal discipline of the WTO. It forms one of the so–called 'covered agreements' of the Organisation. Subject to the rules on implementation of the TRIPS Agreement applicable to developing[8] and least–developed Members,[9] all countries acceding to the WTO must undertake to implement the provisions of the TRIPS Agreement.

The TRIPS Agreement establishes minimum levels of intellectual property rights protection. These rights may be registered and enforced by innovators and inventors on a country–by–country basis. Since the standards instituted by TRIPS are merely minimum requirements, parties are entitled under TRIPS Article 1 (1) 'to implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.'

Prior to the commencement of negotiations on TRIPS in the mid–1980s, the inclusion of intellectual property rights within the multilateral trading system had rarely been mooted as an idea.[10] However, subsequent to a concerted lobby campaign by a coalition of developed world pharmaceutical, software and entertainment companies,[11] intellectual property protection became part of the agenda for discussion at the Uruguay Round of multilateral trade negotiations. These negotiations would eventually lead to the formation of the World Trade Organisation. As Professor Susan Sells notes, intellectual

---

[8] *supra* n 1 Article 65
[9] *ibid* Article 66
[10] Santoro 'Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs' [2005] 31 N.C.J. Int'l L. & Com. Reg. 923, 925
[11]] Sell, Private Power, Public Law: The Globalisation of Intellectual Property Rights (Cambridge CUP 2003), alleging that twelve American corporations were responsible for the introduction of intellectual property to multilateral trade negotiations.

property protection soon became tied to the 'rhetoric of free trade.'[12] Commercial entities from the developed world were keen to explore ways to increase their technology and information rents from the developing world.[13] The TRIPS Agreement thus was part of an effort to protect 'First world assets in the Third World.'[14]

The importance of intellectual property protection to the United States was due to its significant comparative advantage in products of innovation. The internationalisation of intellectual property protection was designed to protect the products of innovation from developing world 'free riders'. The incentive to further invention by rewarding the innovator with an effective monopoly of control of use on their products as facilitated by property right protection would also be strengthened through their internationalisation.[15]

In return for agreeing to TRIPS, developing countries gained market access concessions for goods in which they enjoyed a comparative advantage such as tropical products and textiles. In addition reduction commitments were promised with regard to agricultural subsidies granted by developed states to their farmers.[16]

While the history of negotiations leading to the TRIPS Agreement has been examined elsewhere,[17] it should be noted that the nature of the concessions on offer meant that the developing country group had little option but to accept the TRIPS Agreement. The remarks of the then Secretary General to the United Nations Conference on Trade and Development captures the 'choice' faced by developing countries: '[t]he developing countries were given two choices on TRIPS – being boiled or fried.'[18] It was implied that without the TRIPS Agreement, the Uruguay Round of multilateral trade negotiations would falter. These nations were in essence made an offer they couldn't (afford to) refuse.

In light of this negotiating background the TRIPS Agreement has come in for sustained criticism from a variety of sources. Much of this criticism relates to a lack of a development orientation within the TRIPS Agreement[19]

---

[12] *ibid* at 51
[13] Abbot 'Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism' [2005] 8 Journal of International Economic Law 77, 80
[14] *ibid*
[15] Trebilcock and Howse, The Regulation of International Trade (London and New York Routledge 2005) 400
[16] Abbott 'The TRIPS–legality of measures taken to address public health crises: Responding to USTR–State– industry positions that undermine the WTO' in Kennedy and Southwick (eds) The Political Economy if International Trade Law (Cambridge CUP 2002) 314
[17] See for example Helfer 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 Yale J. Int'l L. 1
[18] *ibid* n 16
[19] See United Kingdom Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' [2002] available online at www.iprcommission.org.

and its potential for interference with the supply of essential medicines to treat diseases such as HIV/AIDS.[20]

It has been also noted that the benefits of the TRIPS Agreement have been accrued primarily by companies in the developed world. Although 'work remains to be done in calculating precise trade and investment flow effects' it appears that 'Northern Tier enterprises are collecting substantially higher levels of information and technology rents' than their Southern counterparts.[21] If the existing terms of the current TRIPS Agreement are contentious, is it apt for the United States (and indeed other developed WTO Members) to pursue unilaterally even higher standards of intellectual property protection in the international sphere? This paper will not examine the normative dimensions of the pursuit of TRIPS–plus standards and so will not analyse the 'appropriateness' of US policy. It will be argued however that, while members are generally free to implement in their law more extensive intellectual property protection than that provided under the TRIPS Agreement,[22] some of the unilateral mechanisms applied by the United States to 'persuade' countries to enforce TRIPS–plus standards (the provision of more extensive intellectual property protection than that provided for under the TRIPS Agreement) may not be WTO–complaint.

The United States' efforts to unilaterally impose TRIPS–plus standards upon foreign countries will be examined within the context of the dispute settlement system of the WTO. Various strategies could exist whereby countries, under pressure to implement TRIPS–plus standards, would litigate the issue in the WTO.

The result of the litigation in the WTO would thereby act as a 'pseudo–precedent' that would impact upon WTO dispute settlement reports. While the Dispute Settlement Understanding of the WTO mandates that the results of Panel or Appellate Body decisions are binding only on the parties to the dispute, the Appellate Body has stated that the rulings of Panels and the Appellate Body create 'legitimate expectations'[23] among members of the WTO. As such, the Appellate Body has sought to argue in favour of a form of precedent whereby "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[24] It would appear likely that the results of any litigation upon the issue of bilateral pressure to implement

---

[20] Some action has been taken to address issues of access to medicines, for example the 2001 Doha Declaration on the TRIPS Agreement and Public Health (TRIPS Declaration) which affirmed that 'the Agreement can and should be interpreted in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all'. See Matthews 'WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem' 7 (1) Journal of International Economic Law 73

[21] *supra* n 16

[22] *supra* n 1 Article 1.1

[23] Appellate Body Report, 'Japan – Taxes on Alcoholic Beverages', WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para107–108

[24] Appellate Body Report, 'United States – Sunset Reviews of Anti–Dumping Measures on Oil Country Tubular Goods from Argentina', WT/DS268/AB/R, para 188

TRIPS–plus standards of intellectual protection will exert considerable influence upon future domestic policy decisions.

C UNILATERAL ENFORCEMENT OF INTELLECTUAL PROPERTY

1 Free Trade Agreements

The first of the 'tools' employed by the United States in its pursuit of TRIPS–plus standards is the negotiation of bilateral agreements such as Free Trade Agreements (FTAs).[25] FTAs are arrangements between two or more countries whereby tariffs are eliminated between participants and other trade concessions are extended according to the principle of reciprocity. Explicit permission for the conclusion of FTAs between WTO members is provided by way of GATT[26] Article XXIV.[27] A FTA is defined in Article XXIV: 8 (b) of GATT which states that:

> a free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all trade between the constituent territories in products originating in such territories.

Since the completion of its first FTA with Israel in 1985, United States' trade policy has become dominated by a rush to establish bilateral and regional FTA accords.[28] The reasoning advanced in explanation for the recent flurry of FTAs relates to the premise that

> by moving on multiple fronts, (the United States) can create a competition in liberalization that will increase U.S. leverage and promote open markets in our hemisphere and around the world.[29]

The 'appeal' of an FTA therefore lies in the possibility of enhanced market access. Various political scientists have posited that governments treat market access in foreign jurisdictions as a domestic political benefit. It is argued that the greater the market opportunities secured, the better the domestic political benefit likely to be achieved.[30] Problems arise, however, when issue linkage occurs such that a given bargain is placed in the context of a more long–term relationship which obscures or upsets the outcome of negotiations.[31] The linkage between market access and intellectual property protection may mire the advantages of many of the free trade agreements negotiated between various developing countries and the United States.

---

[25] Fink & Reichenmiller 'Tightening TRIPS: The Intellectual Property Provisions of US Free Trade Agreements' [2005] The World Bank International Trade Group, available online at www.worldbank.org.
[26] General Agreement on Tariffs and Trade 1994, WTO Annex 1A [hereinafter GATT 1994].
[27] A similar provision authorising free trade areas is found in the General Agreement on Trade and Services (GATS), Article V
[28] Cooper 'Free Trade Agreements: Impact on U.S. Trade and Implications for U.S Trade Policy' Congressional Research Service, Library of Congress, CRS–4
[29] Zoellick, former U.S. Trade Representative, 2001 Trade Policy Agenda and 2000 Annual Report. Washington [2001] p 4
[30] Steinberg 'In the Shadow of Law or Power? Consensus Based Bargaining and Outcomes in the GATT/WTO' [2002] 56 International Organisation 339, 347
[31] *ibid* p 348

Recent FTAs concluded by the United States have included provisions which impose protection for intellectual property standards over and above that provided for under the TRIPS Agreement. Bearing in mind that parties to the TRIPS Agreement are entitled under Article 1.1 "to implement in their law more extensive protection than is required by this Agreement", these standards, while seemingly only applicable to relations between the contracting parties to the FTA, must be extended to all other WTO members under the 'most–favoured–nation' (MFN) provision of Article 4 TRIPS.

While the scope of Article 4 has yet to be fully determined by the dispute settlement system of the WTO, there is no textual basis within the TRIPS Agreement for arguing that recently concluded FTAs may be exempt from application of the MFN obligation. Rather, Article 4 (d) TRIPS provides an exception for:

> international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS (emphasis added).[32]

Any agreement concluded post–TRIPS would thus be precluded from making use of this exception. Any country undertaking to grant TRIPS–plus provisions within the context of an FTA is legally obligated to extend all intellectual property concessions or advantages to other WTO Member States. The current trade strategy of the United States therefore aims to create a new 'norm' of intellectual property protection through the adoption of ever–higher standards in bilateral agreements.[33]

With each successive bilateral accord, the United States is to advance its construction of a new and enhanced level of intellectual property protection over and above that provided by the TRIPS Agreement.[34] Outside of the multilateral arena, the United States has been able to create a "global regulatory ratchet for intellectual property protection."[35]

Evidence of this approach can be found in the United States' Trade Promotion Act (TPA) of 2002, which grants the Executive[36] the authority to negotiate trade agreements on behalf of the United States. Direction is given in the TPA to the effect that 'the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States [should] reflect a standard of protection higher to that found in United States law.'[37] A recent speech by the United States Trade Representative [USTR], Susan Schwab, noted that:

---

[32] UCTAD–ICTSD, 'Resource Book on TRIPS and Development, Cambridge CUP [2003] 82
[33] Rajkumar 'The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health' [2005] 15 Alb. L. J. of Sci. & Tech. 433, 448
[34] *ibid* p 448
[35] Drahos 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' [2004] 77 Temple Law Review p 401
[36] Wolff 'The U.S Mandate for Trade Negotiations' [1975] 16 Va. J. Int'l L. p 505
[37] Trade Act of 2002, Pub. L. 107 – 210, 116 Stat. 993, 19 USC § 2101 (b) (4)

> these (free trade) agreements are raising the bar for intellectual property protection. The intellectual property provisions of our recent United States free trade agreements and those under negotiation set high standards, similar to our own laws.[38]

Since FTAs concluded by the United States are negotiated in conformity with its intellectual property law, their effect is to obligate treaty partners to comply with United States mandated standards.[39]

2 Is the provision of TRIPS–plus standards of intellectual property protection in FTAs in compliance with WTO legal obligations?

The WTO compliance of TRIPS–plus measures is dependent upon the meaning of Article 1.1, which provides that while members "shall not be obliged to", they may:

> implement in their law more extensive protection than is required by this Agreement, *provided that such protection does not contravene the provisions of this Agreement*. [Emphasis added.]

An additional note is added in the second sentence of Article 1.1, which states that "members shall be free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice."

Two issues in relation to WTO compliance arise; first, TRIPS–plus measures must not 'contravene' the provisions of the TRIPS Agreement. Second, members are generally free to determine the appropriate method for TRIPS implementation.

Whether or not a TRIPS–plus provision conflicts with the TRIPS Agreement will depend upon an objective assessment of the matter at hand. One observation offered with regard to TRIPS–plus provisions is that while seemingly facially neutral and applicable to all WTO members, *de facto* discrimination may arise between members in the operation of such TRIPS–plus measures.[40] *De facto* discrimination[41] results when a measure is applicable to all countries but has a disparate impact upon certain states. Thus higher regulatory standards with relation to patents may have a disparate impact upon certain developing country pharmaceutical companies seeking market entry.[42] The standard of *de facto* discrimination has been applied by the Appellate Body in its articulation of the precise meaning of Article II of the

---

[38] 'Remarks by USTR Susan C. Schwab, United States Chamber of Commerce' September 28 2006, available online at www.ustr.gov. See also United States Trade Representative, '2006 Special 301 Report' [2006] available at www.ustr.gov [hereinafter 2006 Special 301 Report] at 3

[39] Thomas, 'Intellectual Property and Free Trade Agreements: Innovation Policy Issues' RL 33205, CRS 4

[40] *supra* n 16 98–99

[41] See generally Ehring, '*De Facto* Discrimination in World Trade Law' [2002] 36 (5) Journal of World Trade p 921

[42] *supra* n 16 p 99

General Agreement on Trade in Services [GATS] which establishes a most–favoured–nation standard in relation to trade–in services. In EC –Bananas III, the Appellate Body noted that

> [t]he obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination it would not be difficult … to devise discriminatory measures aimed at circumventing the basic purpose of that Article (emphasis added).[43]

Thus a *prima facie* neutral TRIPS–plus measure could arguably conflict with the MFN standard of Article 4 TRIPS if its implementation results in *de facto* discrimination between members.

Regarding the freedom of members to determine the appropriate method for TRIPS implementation, research undertaken by the United Nations Conference on Trade and Development [UNCTAD] has questioned whether a

> member that demands the adoption of TRIPS–plus standards in the bilateral or regional context might be failing to perform its TRIPS obligations in good faith. The argument on behalf of a Member being subjected to such demands would be that it accepted its TRIPS obligations as part of a set of reciprocally negotiated commitments that represent a balance of rights and obligations that a Member is entitled to rely on.[44]

A developing member potentially therefore would have a case before the WTO Dispute Settlement Understanding (DSU)[45] in the face of these unreasonable demands to adopt TRIPS–plus measures. Article 7 TRIPS notes that the maintenance of a 'balance of rights and obligations' is within the objectives of TRIPS. Similarly, Article 3.2 DSU lists the

> dispute settlement system of the WTO [to be] a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements.

As stated by UNCTAD:

> bilateral pressure to exceed the agreed upon commitments is contrary to the object and purpose of the WTO Agreement and TRIPS Agreement to

---

[43] Appellate Body Report, 'European Communities – Regime for the Importation, Sale and Distribution of Bananas', WT/DS27/AB/R, also the operation findings of the Panel in 'Canada – Patent Protection of Pharmaceutical Products', WT/DS114/R which delineated that '*de facto* discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non–discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects arte found to be wrong or unjustifiable' (para 7.101)

[44] UCTAD–ICTSD 24

[45] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 [1994] [hereinafter DSU]

> provide a secure framework for the conduct of international trade relations.[46]

Given that the DSU is tasked to ensure the stability and predictability of the trading system, a WTO dispute would appear feasible.

The legal ability of a Member to bring a case before the WTO dispute settlement system in the face of bilateral demands to adopt TRIPS–plus measures is further premised on Article 1.1 DSU which provides that

> [t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements") … As one of the covered agreements under the DSU, the TRIPS Agreement is subject to the dispute settlement rules and procedures of that Understanding.[47]

Therefore, a dispute centred upon alleged infringement of TRIPS Article 1.1 would seemingly be within the competence of the dispute settlement system of the WTO. Furthermore, Article 3.8 DSU notes that

> in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

While various FTAs also include dispute settlement provisions, the 'advantage' of litigation in the WTO is the 'psuedo–precedent' accorded to its dispute settlement reports. Other than the principle of *res judicata*, there is little to prevent[48] the WTO dispute settlement system from exercising jurisdiction over a measure which is also covered by the terms of an FTA. Indeed, the WTO dispute settlement system has recently heard a number of complaints which were previously pursued within the context of the North American Free Trade Agreement (NAFTA).[49]

D TRIPS–PLUS AND THE GENERALISED SYSTEM OF PREFERENCES

The second method utilised by the United States to secure unilateral enforcement of TRIPS–plus standards is through the linkage of its 'generalised system of preferences' (GSP) scheme to adequate intellectual property protection. The GSP is a GATT/WTO[50] authorised scheme[51] which

---

[46] UNCTAD–ICTSD 31

[47] 'India – Patent Protection for Pharmaceutical and Agricultural Chemical Products', WT/DS50/AB/R, 16 January 1998, para 29

[48] Other than perhaps an exclusive jurisdiction clause

[49] See generally Pauwelyn 'Adding Sweeteners to Softwood Lumber: The WTO–NAFTA Spaghetti Bowl is Cooking' [2006] 9 Journal of International Economic Law 197

[50] The conceptual underpinnings of the GSP, however, can be traced to the United Nations Conference on Trade and Development (UNCTAD) and more particularly, its first Secretary General, Dr. Raul Prebisch. See Prebisch 'Towards a New Trade Policy for Development:

permits developed nations to grant non–reciprocal tariff preferences in favour of developing countries.[52] The objectives of the GSP are primarily development–oriented in that they serve to increase the export earnings of developing countries, promote their industrialisation and accelerate their rates of economic growth.[53]

In this section an analysis of efforts to link GSP tariff concessions to developing countries with adequate intellectual property protection will be presented. It will be suggested that the GSP has been utilised as a method of punishment whereby GSP concessions are withdrawn from countries which fail to provide US–mandated standards of protection of intellectual property. The WTO compliance of this use of the GSP will be examined.

1 Historical Development of the Generalised System of Preferences

The original generalised system of preferences (GSP) scheme of the United States was introduced in 1976[54] and sought to provide duty–free treatment on a number of products from selected eligible developing countries. Both mandatory and discretionary criteria are applied when assessing a developing country's eligibility for tariff preferences.[55]

One of the discretionary criteria[56] which the President may take into account when deciding country eligibility is the extent to which the 'country provides adequate and effective protection of intellectual property rights, including patents, trademarks and copyrights.'[57] The linkage between GSP eligibility and adequate intellectual property protection was first introduced in the United States in 1984 by the Generalized System of Preferences Renewal

---

Report by the Secretary–General of the United Nations Conference on Trade and Development'

[51] Specific authorisation for the GSP is provided through what is commonly referred to as the 'Enabling Clause.' The official document containing the Enabling Clause is the GATT Decision on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of the Developing Countries', GATT Doc. L/4903, BISD 26th Supplement, 1980

[52] Santos 'Generalized System of Preferences in General Agreement on Tariffs and Trade/ World Trade Organisation: History and Current Issues' [2005] 39 (4) Journal of World Trade 637

[53] Resolution 21 (II), in, Final Act and Report of UNCTAD II, Annex 1

[54] Title V of the 1974 Trade Act created the Generalised System of Preference Scheme of the United States, Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978, 19 U.S.C § 2461 et seq. The GSP was applied in the United States by Exec. Order No. 11,888, 40 Fed. Reg. 55, 275 (1975)

[55] eg – 19 U.S.C. § 2462 (b) (2) listing mandatory criteria which each country must fulfil before being designated a GSP beneficiary. Countries must not be 'dominated by international communism', must not harbour or offer sanctuary to 'any individual who has committed an act of international terrorism' and must have taken steps or be taking steps towards implementing internationally recognised labour standards. 19 U.S.C § 2462 (c) lists 'discretionary' criteria applicable to beneficiaries of the US GSP

[56] Discretionary criterions are 'factors affecting country designation' which the President 'shall' take into account when making a determination as to whether to designate any country as a beneficiary developing country for the purposes of GSP tariff concessions, see 19 U.S.C. § 2462 (c)

[57] 19 U.S.C. § 2462 (c) (5)

Act.[58] The rationale behind this linkage was a concern for the growth of international counterfeiting.[59] Since many countries violating the intellectual property rights of United States citizens and companies were also GSP beneficiary countries,[60] the passing of the legislation was intended to rebalance the terms of trade between GSP beneficiaries and the United States. The tying of tariff preferences to intellectual property protection was very much in a similar vein to Section 301 of the United States' Trade Act of 1974 which granted the President the authority to act against countries engaged in 'unfair' trade practices or in violation of trade agreements.[61] Sections 301 – 310 (collectively referred to as Section 301) of the 1974 Trade Act are one of the few provisions of United States trade law to target exports rather than imports.[62]

Under the Section 301 mechanism, 'mandatory action'[63] is required if

(i) the rights of the United States under any trade agreement are denied,[64]
(ii) if an act, policy or practice of a foreign country violates, is inconsistent with, or denies benefits[65] accruing to the United States under a trade agreement or
(iii) if the practice is 'unjustifiable' and burdens or restricts United States commerce.[66]

In summary the USTR has discretion to take appropriate action against any act, policy, or practice of a foreign country that is 'unreasonable' or discriminatory and burdens or restricts United States commerce.[67] For the purpose of carrying out the designated authority, the USTR is authorised to "suspend, withdraw, or prevent the application of benefits of trade agreement concessions"[68] and "impose duties or other import restrictions on the goods, ... fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate."[69] Section 301 also accords the USTR the authority to "withdraw, limit, or suspend [duty free treatment]" in a "case in which the act, policy, or practice also fails to meet eligibility

---

[58] Generalised System of Preferences Renewal Act §§ 503 (c) (5) and 505 (a), 19 U.S.C. §§ 2462 et seq. For an overview of the changes ushered in by the GSP Renewal Act of 1984, see Prebluda, 'Countering International Trade in Counterfeit Goods' [1986] 12 Brook. J. Int'l. L. J. 364

[59] Campbell 'The Very Specialized United States Generalized System of Preferences: An Examination of Renewal Changes and Analysis of their Legal Effect' [1985] 15 Ga. J. Int'l L. 39, 56

[60] Senate Committee on Finance, 'Renewal of the Generalised System of Preferences' S. Rep. No. 485 [1984] 10

[61] 19 U.S.C. § 2411

[62] Svenlov, 'Recent Developments: International Trade, the Implementation of 'Super 301'' [1990] 31 Harv Int'l L. J. 359

[63] 19 U.S.C. § 2411 (a) (1)

[64] Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978, s. 301, 19 U.S.C. § 2411 (1) (A) (as amended)

[65] *supra* n 63 (a) (1) (B) (i)

[66] *ibid* (a) (1) (B) (ii)

[67] *ibid* (b) (1) & (2)

[68] *ibid* (c) (1) (A)

[69] *ibid* (c) (1) (B)

criteria for receiving duty free treatment"[70] applicable to the grant of GSP concessions.[71]

The Trade Act of 1974 was amended in 1984 with the introduction of the Trade and Tariff Act.[72] One of these amendments provided a definition for 'unreasonable' which noted that:

> the term includes, but is not limited to, any act, policy or practice which denies fair and equitable ... provision of adequate and effective protection of intellectual property rights.[73]

The present definitional approach to 'unreasonable' also notes that a foreign act may be deemed to deny fair and equitable provision of adequate and effective protection of intellectual property rights "notwithstanding the fact that the country may be in compliance with the specific obligations of the Agreement on Trade–Related Aspects of Intellectual Property Rights."[74]

Further amendments were introduced in 1988 through the Omnibus Trade and Competitiveness Act[75] which added specific categories of Section 301 enforcement,[76] including 'Special 301'[77] which mandates that no more than 30 days after the submission to Congress of the National Trade Estimate and associated reports,[78] the USTR shall identify those foreign countries that "deny adequate and effective protection of intellectual property rights,"[79] or 'deny fair and equitable market access to United States persons that rely on intellectual property protection.'[80]

Those foreign countries that have "the most onerous or egregious acts, policies, or practices" in relation to intellectual property protection and whose "acts, policies, or practices have the greatest adverse impact" and that are not 'entering into good faith negotiations' or "making significant progress in bilateral or multilateral negotiations"[81] will be designated as "priority foreign countries." In according such a designation, the USTR may take into account information submitted by interested persons.[82] Pursuant to this authority, the USTR has created a 'Priority Watch List' and 'Watch List.' The

> [p]lacement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to

---

[70] *ibid* (c) (1) (C)
[71] 19 U.S.C. § 2462 (a) & (b)
[72] Trade and Tariff Act of 1984, Pub. L. 98–573, 98 Stat. 3000 (1984) (as amended), 19 U.S.C § 2101 et seq.
[73] *supra* n 63 (d) (3) (B) (II)
[74] *ibid* (d) (3) (B) (i) ((II)
[75] Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100– 418, 102 Stat. 1851(1988) (as amended)
[76] Puckett and Reynolds, 'Current Developments; Rules, Sanctions and Enforcement under s.301: At Odds with the WTO?' (1996) American Journal of International Law 675, 679
[77] 19 U.S.C. § 2242
[78] *supra* n 63 (b)
[79] *supra* n 77 (a) (1) (A)
[80] *ibid* (a) (1) (B)
[81] *ibid* (a) (1) (A) – (C)
[82] *ibid* (b) (3)

> IPR protection, enforcement, or market access for persons relying on intellectual property.[83]

Countries placed on the 'priority watch–list' are thus the focus of increased bilateral attention from the USTR. Some of the intellectual property infractions watch–listed by the USTR relate to TRIPS–plus standards.[84] Watch–listing is therefore another of the mechanisms through which the US seeks to enforce ever higher standards of intellectual property outside of the multilateral arena.

2 The Utilisation of the Generalised System of Preferences as a Method of Punishment

It is contended that the GSP has been employed as a method of 'punishment.' It has been argued that under the United States' GSP scheme, concessions have been withdrawn from 'problematic states' as punishment for their lack of cooperation. Such arguments regarding United States use of the GSP are far from novel.[85] In a study by Drahos of United States' trade action against developing countries in the GATT between 1984 and 1993, a systemic pattern emerged that "almost every developing country that opposed the US at the GATT ended up being listed for bilateral attention by the US," either through the Section 301 process or its GSP programme.[86]

More recently, comments from senior Congressmen have sought to link the receipt of GSP benefits to the 'cooperation' of developing countries in achieving further trade liberalisation. In the wake of the collapse of the Doha round of multilateral trade liberalisation in mid–2006, Senator Charles E. Grassley, former Chair of the influential Senate Finance Committee, sought to link the granting of US GSP benefits to the conduct of developing countries in

---

[83] United States Trade Representative, 'Background on Special 301', [2006] available online at http://www.ustr.gov

[84] See for example, Article 39.3 TRIPS Agreement provides that '[m]embers, when requiring, as a condition of approving the marketing of pharmaceutical ... products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.' The United States has sought to argue that the sole or most effective method for compliance with the obligation under Article 39.3 is a period of data exclusivity, see UNCTAD–ICSTD (n40) 531. There is no textual basis for supposing that Article 39.3 TRIPS implies the grant of data exclusivity and thus the US demand for such a period may be characterised as a TRIPS–plus provision. In the 2006 Special 301 Review, Argentina, Brazil, India, Lebanon and Turkey were each noted to be failing in their obligations to provide effective protection under Article 39.3. See Fellmeth 'Secrecy, Monopoly, and Access to Pharmaceuticals in International Trade Law: Protection of Marketing Approval Data under the TRIPS Agreement' [2004] 45 Harv. Int'l L.J. 443

[85] See generally Bhala 'The Limits of American Generosity' [2003] 29 Fordham Journal of International Law 299

[86] Drahos and Braithwaite, 'Hegemony Based on Knowledge: The Role of Intellectual Property' in 'Balancing Act: Law, Policy and Politics in Globalisation and Global Trade', Leichhardt – The Federation Press [2004] p 213

the WTO talks.[87] Similarly, the former Senate Agricultural Committee Chairman, Saxby Chambliss, has urged the USTR to refocus "efforts to assist those countries that are willing to liberalize their economies and become full and active participants in the international economy."[88] Countries which block negotiations such as India and Brazil should therefore be excluded from the scope of the US GSP.

While the USTR has failed to acknowledge an explicit link between GSP beneficiary status and the WTO Doha Round of negotiations, Brazil and India were among thirteen developing nations whose eligibility for duty free treatment under the US GSP was recently under review.[89] A similar link between GSP beneficiary status and the continuing protection accorded by developing states to intellectual property is also apparent. In a study conducted by the present author (see table 1), a significant trend emerges linking the status of a country on the US Special 301 'Priority Watchlist'[90] to statutory review of the country's continued receipt of GSP tariff concessions. The three remaining countries subject to the 2006 GSP review, namely Croatia, Kazakhstan and Thailand, were each listed on the Special 301 2006 Watch List.

Table 1

Countries listed on the 2006 Special 2006 Priority Foreign Watch List[91]	Countries listed for possible removal from the United States' GSP as part of the 2006 review process[92]
China	Not GSP eligible[93]
Argentina	Argentina
Brazil	Brazil
Egypt	
India	India
Indonesia	Indonesia
Israel	Not GSP eligible
Kuwait	Not GSP eligible

[87] Yerkey 'USTR Considers withholding from India, Brazil in Wake of WTO Debacle', International Trade Daily, 8th August 2006
[88] Brevetti 'Chambliss Tells Schwab GSP Program Should Not Reward Competitive Economies', International Trade Daily, 21st September 2006
[89] Office of the United States Trade Representative, 'Generalized System of Preferences: Initiation of Reviews and Public Comments' available online at http://www.ustr.gov/assets/ [hereinafter USTR Review]
[90] *supra* n 38
[91] *ibid*
[92] USTR Review, *supra*, note 86, see also 71 Fed. Reg. 152, 45079 (2006)
[93] The phrase 'not GSP eligible' is intended to denote the status of the relevant country under the US GSP and is not indicative of eligibility status for the GSP schemes of other countries.

Lebanon	Not *currently* under review[94]
Pakistan	
Philippines	Philippines
Russia	Russia
Turkey	Turkey
Ukraine	Not *currently* under review[95]
Venezuela	Venezuela

The 2006 review of the United States' GSP was undertaken due to the expiration of the legislation authorising it on the 31st December 2006. The process of review regarding GSP renewal focused upon whether the more competitive of the developing countries should retain their GSP privileges. Based upon statutory criteria outlined in s. 502(d) of the Trade Act 1974[96] the President may withdraw, limit or suspend the applicability of GSP treatment for reasons such as the eligibility of the seeking country's level of economic development. The USTR sought comments as to the appropriateness of withdrawal, suspension or limitation of GSP benefits for countries for which total exports to the US under the GSP totalled over $100 million in 2005, and:

(i) Which the World Bank has classified as a upper–middle income economy in 2005,[97] or
(ii) That accounted for more than 0.25 of total world exports as reported by the WTO

The legal compliance of the continuing link between GSP eligibility status and intellectual property protection States granting GSP concessions have traditionally differentiated between recipient developing states on a variety of grounds. These are different systems of graduation include

(iii) operations to exclude more competitive countries from preference schemes,[98]
(iv) attempts to link receipt of GSP concession adherence to a range of conditions as predetermined by the preference granting state[99] and

---

[94] Note, however, the statement of the USTR to the effect that 'the US will monitor the IP situations in Lebanon closely, particularly under the GSP petition', Special 301 2006 Report, *supra*, note 37, at 29
[95] GSP concessions were withdrawn from the Ukraine in August 2001. Its GSP eligibility was not reinstated until 2005
[96] 19 U.S.C. § 2462 (a)
[97] Based on GNI per capita, the World bank classifies upper middle income countries as between $3,466 and $10,725, see World Bank, Date and Statistics: Country Classification, available online at http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/
[98] § 7 of the Enabling Clause. Some GSP schemes also graduate certain products
[99] e.g. GSP scheme of the United States, 19 U.S.C. § 2462 (b) (2)

(v) offers of additional tariff preferences in return for compliance with certain standards.[100]

The current US GSP review is focussed upon the graduation of the more competitive developing states. The recent WTO dispute of EC–Tariff Preferences[101] centred upon the legal structure of the grant of GSP benefits. The Appellate Body in the dispute, however, explicitly declined to rule upon the mechanisms employed by the European Communities with regard to graduation of developing countries.[102] It is likely that graduation of the more economically advanced developing countries is a legally permissible concept. Paragraph seven of the document providing WTO legal coverage to the GSP, the so–called Enabling Clause, explicitly references the expectation that the capacity of developing countries to "make contributions … will improve with the progressive development of their economies."[103] However, this does not mean that a challenge based upon graduation will automatically fail. Rather, measures taken under the Enabling Clause are tasked to "respond positively to the development, financial and trade needs of developing countries."[104] While the concept of 'development' was recognised by the Appellate Body in EC–Tariff Preferences to be evolutionary in nature and encompassing a wider understanding of development than just economic development,

any 'similarly situated' country sharing the same need must be included within the scope of the grant of preferences. Therefore, the graduation of a country which is deemed to be 'similarly situated' in terms of need to other beneficiary developing countries still included within the grant of preferences may be inconsistent with the terms of the Enabling Clause. Thus, while legal permission for graduation is implicitly granted within the scope of the Enabling Clause, the other relevant provisions of the Enabling Clause are concurrently applicable to any graduation regime.

E SUGGESTIONS FOR REFORM

Building upon the previous analysis, a number of suggestions for reform to WTO legal structures are proposed:

(i) A moratorium upon TRIPS–plus measures in bilateral/ free trade agreements.
(ii) As an alternative, an 'objective prior impact assessment' to be conducted in relation to the conclusion of such (bilateral/free trade)

---

[100] Generally this kind of differentiation is referred to as 'positive conditionality.' Measures of positive conditionality can be found in the GSP of the EC, See GSP of the European Communities, OJ L No. 169 (30 July 2005), Article 2 (b) and Annex III
[101] 'European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries', WT/DS246/AB/R, Report of the Appellate Body, 7 April 2004 (hereinafter EC–Tariff Preferences)
[102] *ibid* para 128–29
[103] *supra* n 51
[104] *ibid* § 3 (c)

agreements.[105] This would take into account the impact of intellectual property provisions in bilateral trade accords upon the social, health, development and economic sectors of the countries concerned. The proposal reflects current efforts to integrate impact assessments into bilateral agreements.[106]

(iii) An empirical and legal study should be undertaken by the TRIPS Council on the scope of the most–favoured–nation provision of Article 4 TRIPS.

(iv) In accordance with the findings of EC–Tariff Preferences, GSP granting states should implement a voluntary de–coupling of the linkage between GSP concessions and intellectual property protection. While not examined in the analysis above, the Appellate Body in EC–Tariff Preferences stated that any 'conditionality' in the grant of tariff preferences to developing countries should be enacted as a 'positive' or constructive response to need.[107] In the opinion of this author the 'negative' conditionality of the US GSP scheme whereby GSP concessions are removed from states not upholding US–mandated standards of intellectual property protection would not be upheld as legal in the event of challenge before the dispute settlement system.

F CONCLUSION

It has been demonstrated that the developing countries had little option but to accept the terms of the Agreement. The pertinence of this negotiating context was discussed in relation to the current efforts of the United States to pursue ever–higher standards of intellectual property protection. It was demonstrated that US attempts to impose TRIPS–plus standards in bilateral trade agreements could potentially be found incompatible with Article 7 of the Agreement which notes that maintenance of a balance of rights and obligations is within the objectives of TRIPS. The possibility of certain TRIPS–plus measures conflicting with Article 4 TRIPS was also noted. Furthermore, the link between intellectual property protection and receipt of tariff preferences under the GSP was questioned as being potentially incompatible with the findings of the Appellate Body in the WTO dispute of EC–Tariff Preferences. A number of 'suggestions for reform' were offered with regard to limiting the proliferation of TRIPS–plus standards of intellectual property protection. While significant political will would be needed to implement such reforms, 'testing' the compliance of TRIPS–plus measures within the WTO dispute settlement system could create a 'pseudo–precedent' that would influence US domestic policy making.

---

[105] Abbot 'Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism' [2005] 8 Journal of International Economic Law 77, 88–89

[106] e.g. 'Communication from the European Commission on Impact Assessment' COM(2002) 276

[107] *supra* n 101 para 164