DEFENDING THE PUBLIC INTEREST IN TRIPS AND THE WTO

Sol Picciotto

[revised version to appear in Peter Drahos and Ruth Mayne (eds.), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave, 2002).]

A. SHOULD TRIPS STAY IN THE WTO?

This chapter aims to discuss some of the defects of the WTO, as they affect the TRIPS agreement. The criticisms of the TRIPS detailed in other chapters in this book demonstrate how it is potentially damaging to global public welfare. However, the alternatives to TRIPS could be even more harmful, since developing countries would be even more vulnerable to unilateral pressures and sanctions, and coerced bilateral agreements.

I argue that a multilateral framework for intellectual property rights (IPRs) is necessary, but that such a framework should aim to enable the scope of IPR protection to be defined by public welfare criteria. I suggest that it is from this perspective that we should consider whether TRIPS should remain in the WTO, and under what conditions. This entails some consideration of the alternatives to TRIPS, but mainly I will focus on proposals to reform the WTO, and particularly on how to rescue TRIPS and the WTO from the damaging effects of their capture by private interests.

1. Justifying IPRs: Is a Global Public Welfare Standard Possible?

IPRs are a very peculiar institution. They are a grant by the state of an exclusive right over intellectual creations, which creates a monopoly over intangible assets. This artificially created scarcity is in many ways inappropriate for knowledge-based assets, since they do not deplete when shared. In fact, both new technology and artistic and literary works provide the greatest social benefits by being widely diffused. Public availability enhances both pleasure and profit, since diffusion also reduces the marginal costs of further innovation. This is also true from the viewpoint of the originator, who rarely has an interest in concealing her or his creations. Originators also have other concerns, which can be protected in various ways, such as obtaining recognition for their contribution, and safeguarding the integrity of their creations (sometimes referred to as `moral' rights).

Economists have therefore always had difficulty finding adequate justifications for these exclusive rights (Plant 1934, Drahos 1999). The common rationale refers to the need for an economic incentive to encourage innovation. However, closer examination of the socio-economic processes of innovation and creativity shows that many of the justifications for IPRs are weak at best (see MacDonald chapter in this book). The main spur to innovation is the `first-mover' advantage, which ensures a higher rate of profit for leading-edge firms until the innovation becomes generalised. This does not require the artificial creation of monopoly rights. It is therefore paradoxical that the WTO, which is supposedly geared to stimulating economic efficiency through open markets, should establish obligations aiming at high levels of protection of monopoly rights. Furthermore, successful innovation depends on collective effort, much of which needs to be publicly funded or supported and to take place through an open exchange of ideas.

Thus, any valid justification for IPRs is much more limited, as a right of appropriation giving the originator sufficient protection to allow and encourage commercialisation. It is therefore

vital that the extent of the monopoly should be limited, and balanced by obligations to ensure the optimum social benefit from diffusion. It is especially important to ensure such a balance since IPRs are generally exploited not by authors or inventors, whose creativity they are supposed to reward, but by large information-based corporations.

The balance between the rights of appropriation and obligations to ensure diffusion should be determined by public welfare criteria. This is not easy, since the super-profits which result from monopoly rights have always made the process of legislating on IPRs subject to intensive lobbying by private interests. It is even more difficult to strike this balance in terms of global public welfare, given the very big differences in socio-economic conditions between countries. When the modern systems of IPRs emerged during the early 19th century in the main capitalist countries,[1] they generally required only national novelty. This in effect encouraged the free importation of foreign inventions and books, which today is denounced as piracy. Only gradually did the main developed countries agree reciprocal recognition, culminating in the multilateral agreements establishing the Paris Industrial Property Union of 1883 (Plasseraud and Savignon, 1983), and the Berne Copyright Convention of 1886 (Ricketson, 1987). Nevertheless, the USA, which has now appointed itself the main global policeman of IPRs, refused copyright protection for foreign works until 1891, to protect local low-cost publishing (Barnes, 1974), and did not join the Berne Convention until 1987, at the same time that it placed the issue of IPRs on the agenda of the Uruguay Round. It seems that the late converts may be the most fervent apostles.

2. WTO: Market Access, Regulation and the Rule of Law

The aim of inserting IPRs into the broader multilateral framework of the WTO was to overcome the difficulties of reaching consensus within a single-focus organisation such as WIPO, due to lack of reciprocity between countries which are mainly importers and those which are mainly exporters of information-based products and services (Ryan 1998). This information gap exists mainly between developed and developing countries. Developing countries only reluctantly accepted the Uruguay Round package of trade-offs between improved market access for traded goods (textiles and agricultural products) and IPR protection. The danger is that they will be obliged to grant rights which facilitate TNCs' control over new knowledge-based industries, while their access to markets for old-industry products remains restricted.

Professor of Law, Lancaster University.

[1] The first form of IPRs were invented in 15th-century Venice, and spread to France, England and elsewhere, as privileges granted by the state to allow and encourage inventors to use new techniques outside the monopoly control of the guilds, and were personal rights which were not necessarily exclusive. In the subsequent mercantilist period they were used to regulate production using new technology, by price controls, compulsory licensing and obligations to work. They became transformed again under the impetus of the philosophical ideas of the 18th-century Enlightenment, which supported the inherent human rights of the author of a new idea, recognised in the French law of 1790, which gave automatic property rights to the author of any discovery or new invention. However, it also gave the same rights to the first person to import a foreign discovery into France. These were seen as property rights, which could therefore be alienated, so Diderot supported the publishers to whom La Fontaine had sold his rights, against the poet's grandchildren (Prager 1944).

TRIPs has placed IPRs firmly within the WTO's machinery, which is geared towards imposing `disciplines' on national state regulation to ensure `market access'. Advocates of neo-liberalism claim that these obligations do not restrict a state's right to regulate, provided it does not discriminate in favour of domestic firms. However, the experience under GATT has been that any regulatory differences are seen as an obstacle by foreign firms seeking access to a market, and the validity of national regulations has to be justified by stringent criteria, in particular the `least-trade-restrictive' test. Even where GATT recognises a specific exception, as it does for IPRs in article XX(d), it is hard to reconcile the conflict between the National Treatment obligations of article III and the right to regulate under article XX (Evans 1996).

Thus, the WTO agreements also entail a shift towards international harmonisation of regulation, by requiring states to adopt internal regulations based on international standards. It is not surprising that this has made the WTO the focus of debates and conflicts about globalisation. This raises three main issues for the WTO as an institution: (i) the `linkages' between the WTO and related regulatory regimes (especially standard-setting bodies); (ii) the tension between uniformity and appropriate diversity inherent in the slippery concept of harmonisation; and (iii) the accountability, transparency and responsibility of the WTO as a public institution.

The `linkages' issue has been mainly associated with the debate about the `social clause', in which it has been widely asserted that the ILO, not the WTO, is the appropriate body for labour standards. Equally, one of the criticisms of the TRIPS is that WIPO should be the relevant body for IPRs. It can also be said that Codex Alimentarius Commission is the relevant body for food safety standards, and the ISO and other bodies for technical standards. In practice, the WTO does not replace these other organisations, but the problem is that it has been placed in a powerful position towards them. A key issue for the future role of the WTO in global governance is whether it can develop truly cooperative relationships with such related organisations, rather than assuming that international trade should dominate all other concerns.

Perhaps the key element of the power of the WTO is that it can authorise the application of trade sanctions for breach of any of its agreements, under the procedures laid down in its Dispute-Settlement Understanding (DSU). This innocuous-sounding arrangement, developed as a form of political-diplomatic mediation and arbitration under the GATT, has become a world economic court in all but name (Weiler 2000). It is also central to the legitimation of the WTO. As its new Director-General, Mike Moore has put it, `At the WTO, governments decide, not us. … We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right, and the little guy doesn't get a look in'.[2]

However, to paraphrase Clausewitz, law may be the pursuit of trade politics by other means. The rules governing the global economy are in fact laid down at the WTO, and in practice its complex systems of agreements and regulations are made and administered by unelected technocrats, whose activities are occasionally given political approval by semi-informed trade ministers. The WTO can't claim legitimacy merely because it acts through law, if the

[2] In a speech following the Seattle debacle, entitled `The Backlash against Globalization?', Ottawa, 26th October 2000 (published on the WTO website www.wto.org, accessed 27th January 2001).

processes for making and applying those laws lack transparency, responsibility, and accountability to the public (Picciotto 2001). Further, when law is used to define and enforce economic rights, it can reinforce the rights of the economically strong, the haves against the have-nots. It also gives considerable power both to those who make the rules, and to those who interpret them, the adjudicators.

The two issue, linkages and the legitimacy of WTO law, are powerfully combined in the important provisions on `cross-retaliation' in the Dispute Settlement Understanding (DSU). These govern the circumstances in which trade sanctions can be applied for a violation of any of the WTO's rules. The inclusion of TRIPS in the WTO will leave developing countries open to trade sanctions if they are found deficient in implementing any provision of the TRIPS. The converse is also possible, and a developing country may be allowed to withdraw protection for IPRs of a developed country which is found to have violated trading rules.[3] In principle, `cross-retaliation' under the DSU is only allowed if sanctions in the `same sector' would be `impracticable or ineffective'.[4] Thus, a state which fails to rectify measures found to be in breach of the patent provisions of TRIPS should, in principle, be subject to sanctions in respect of patent rights. However, cross-retaliation against a developing country's trade exports is likely to be approved under WTO rules, since withdrawal of IPR protection would be considered ineffective, precisely because few IPRs are owned by people or institutions in developing countries.

Furthermore, a developed country complaining of breach of the TRIPS is likely to be able to show some hindrance also to a potential market in goods. This is enough to give the complaining state complete freedom to apply sanctions entirely to imports of goods, without even the need for approval as cross-retaliation, under the WTO rules as they were interpreted in the *Bananas* dispute. Following that decision, the US was able to retaliate against the EU's Bananas regime entirely against imports of goods from the EU, even though its complaint

---

[3] It has been argued that such retaliation may be effective for developing countries, whose small domestic markets and relatively few tariff bindings may make trade sanctions ineffective; but that suspension of concessions under TRIPS might best take the form of compulsory licensing rather than forfeiture of vested IPRs, which might amount to expropriation (Subramaniam and Watal, 2000).

[4] Under the DSU, sanctions (compensation) are only lawful if a WTO complaint has been upheld, and the offending measures have not been withdrawn. DSU art. 22.3 specifies that a successful complainant should first seek compensation in the same sector where a violation has been found, and it defines sectors as goods, the relevant service sector, or each category of IPRs. Significantly, the complainant has the initiative: if it fails to agree a satisfactory solution with the losing state, it may propose the level and type of sanctions it wishes to the DSB, which may only reject them by consensus, so in practice the DSB is a rubber-stamp. Although the losing state may request arbitration (by the original Panel if available), the arbitrator can review only the level of the compensation sought, and its compatibility with the relevant WTO agreement (including the cross-retaliation provisions of DSU 22.3). Complainant states are generally careful to target retaliatory sanctions to damage only the purely domestic firms of the target states, rather than industries in which their own TNCs may have investments. There is no check on this, since the arbitrator cannot review the `nature' of the suspension sought.

mainly concerned trade in services.[5] In contrast, Ecuador had to justify cross-retaliation by suspension of its obligations towards the EU under the TRIPS, and this was permitted only to the extent that suspension of concessions in traded goods and wholesale trade services would be insufficient.[6]

These inequities show that the rules concerning cross-retaliation, and the freedom given to the complaining state to select sectors against which to retaliate, should be reconsidered in the review of WTO Dispute-Settlement.

B. PRIVATE RIGHTS OR PUBLIC INTERESTS?

The WTO is especially unsuited to the evaluation of the desirable scope of IPR protection because of its domination by private interests. Defenders of the WTO argue that national state regulation tends to be protectionist because it is the product of the `capture' of states by special interests. For example:

> `Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. … The WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting free trade and democracy.' (McGinnis and Movesian 2000: 515).

However, a far bigger danger is the converse: the deployment of free trade rhetoric to secure the capture of the WTO by private interests, and thus to restrict the regulatory powers of democratic states. This pattern originated in US trade policy, with the establishment of the office of US Trade Representative (USTR), and the development of its powers and duties to open foreign markets for US firms under the provisions of the now-notorious Section 301 of

---

[5] The US exports virtually no bananas, so its complaint was mainly in relation to loss of market access by firms such as Dole, in respect of commitments made by the EU under the the General Agreement on Trade in Services (GATS) for the services of wholesaling and distribution (in this case, of bananas). However, under GATT jurisprudence, the agreements are considered to protect trade expectations and not actual trade volume, so that hindering even the very small potential for US banana exports to the EU amounted to a violation of its rights under GATT as well as GATS. For this reason the Arbitrators held that, although the damage suffered by the US was actually in relation to services, its decision to apply sanctions entirely to imports of goods did not involve cross-retaliation under DSU art.22 (`the United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered', para. 3.10 of the Decision of the Arbitrators in the Recourse by the European Communities to Arbitration under DSU art.22.6, WT/DS27/ARB, 9 April 1999).

[6] Ecuador's request for suspension of concessions was referred to arbitrators, who found that the damage it had suffered amounted to US$201.6m, and that to the extent that suspension of concessions in traded goods and wholesale trade services would be insufficient, Ecuador could seek DSB permission to suspend concessions under TRIPS arts. 1 and 14, and sections 3 and 4; this was approved by the DSB on 18 May 2000 (WTO, Overview, 13 Dec. 2000, p.3-4).

the Trade Act.[7] This was extended to intellectual property in 1984 and strengthened by introducing the `super-301' annual review procedures in 1988.[8] The well-known history of the TRIPS agreement demonstrates that it was the capture of US trade policy by the pharmaceutical and media firms, and the deployment of s.301 of the Trade Act in support of strong intellectual property protection,[9] that enabled these special interests to obtain a stranglehold on the WTO.

In principle, the WTO multilateral framework provides some defence, for WTO member states, against purely unilateral actions. However, the rejection of the EC complaint against s.301 allows the US to continue to use it, provided that the WTO Dispute-Settlement procedures are complied with where they are relevant.[10] In any case, the EC complaint did not tackle the pernicious way in which the s.301 procedure in effect makes the USTR an agent for business firms in bringing WTO complaints. The procedure allows any `interested person' to petition the USTR, and although the USTR has discretion in deciding whether to investigate, it is unlikely to refuse a petition by an important US firm. If an investigation finds a violation of US rights under a trade agreement or international law, the USTR is required to take action. Where a WTO agreement is involved, this means a WTO complaint must be filed.

Moreover, the mercantilist character of WTO bargaining, and the adversary nature of its Dispute-Settlement procedures, induce a tit-for-tat mentality in governments. They tend to see their role as being to support`their' firms and industries, although in the guise of upholding the law. Thus, the European Commission has followed the US in introducing procedures encouraging business interests to bring complaints, which further strengthens their power to dictate the agenda of trade policy. In 1984 the EC adopted its version of s.301, the New Commercial Policy Instrument (NCPI: see Zoller 1985), which was replaced from 1995 by the Trade Barriers Regulation (TBR: EC 3286/94) enacted as part of its Uruguay Round implementation package.

---

[7] Sections 301-310 of the Trade Act 1974 (as amended) establish procedures for US firms and industry associations to file petitions which must be followed up by the USTR. Under s.301(a), the USTR is required to take action if it finds a breach of a trade agreement or of `the international legal rights of the US'; under 301(b) USTR has a discretion to act against acts or policies of a foreign state it finds to be `unreasonable or discriminatory' and a burden or restriction on US commerce. See generally Bhagwati and Hudec 1990.

[8] In 1984 lack of adequate intellectual property protection was added to the `unfair trade practices' provisions of s.301 of the 1974 Trade Act. In 1988 the Omnibus Trade & Competitiveness Act enacted `special' 301, mandating the US Trade Representative (USTR) to identify countries with inadequate IP protection, explicitly to support US negotiating objectives in the Uruguay Round.

[9] The organized lobbying by mainly US-based corporations that led to the TRIPS has been thoroughly documented: see Ryan 1998, Evans 1994; Stewart 1993: pp. 2243-2333.

[10] The EC complaint (WT/DS152) was on the rather narrow point that the timetable for action under the s.301 procedure was potentially incompatible with the DSU requirements for approval of implementing measures. The Panel accepted US undertakings that it would not take action in violation of DSU procedures.

The European authorities point out that unlike s.301, the TBR aims only at enforcing rights under international agreements, and does not allow actions which are unilateral or aimed at forcing new concessions (van Eeckhaute 1999: 200, fn.4). Nevertheless, it is advertised as providing a means for private parties to trigger trade complaints, and was a key element of the Market Access Strategy launched by Leon Brittan in 1996, aiming to take the offensive in response to the spate of WTO complaints launched by the USA.[11] In practice, the main procedure used for trade complaints has been that under article 133.[12] However, the TBR procedure allows a firm (if supported by the Commission) to override political opposition by a blocking minority of Member States in the article 133 Committee.[13] Thus, a complaint by German aircraft manufacturer Dornier, against Brazil's export financing scheme (PROEX) as applied to aircraft, was brought under the TBR since after informal inquiries the Commission could see that there would be opposition in the article 133 Committee from member states with firms acting as suppliers to the Brazilian aircraft producers (van Eeckhaute 1999: 211).

The encouragement that these provisions give to firms to articulate their commercial interests in terms of market access rights has undoubtedly contributed to the rapid growth of complaints under the DSU. Even under the TRIPS, although transition periods delayed its coming into force,[14] there has been a high level of disputes. In its first six years, 23 complaints have involved TRIPS (out of 231 in total), 5 Panel reports (out of 53), and one

---

[11] This section has particularly benefited from discussions with Gregory Shaffer of University of Madison Law School, and access to his unpublished paper, based on interviews with trade officials (Shaffer 2000).

[12] Under the NCPI, 7 complaints were filed and 5 cases opened over 10 years (van Eeckhaute 1999: 200, fn. 5); under the TBR, 16 procedures have been initiated in a little over 5 years, 3 of which related to TRIPS (European Commission 2000); of these, 6 have led to WTO complaints, of a total of 54 initiated by the EC. However, the Commission channels many of the cases resulting from representations by firms or business associations through the art.133 procedure.

[13] Under article 133 (formerly 113) of the EC Treaty, the Commission conducts negotiations for trade agreements under an authorisation from the Council and in consultation with a special committee appointed by the Council; it was amended by the Amsterdam Treaty to allow the Council (acting unanimously) to include services and IPRs, although this does not give the EC legislative competence in these areas (Dashwood 1998). The Nice treaty proposes further amendments, inter alia allowing the authority to be given by a qualified majority, except in relation to topics in relation to which unanimity is required for the adoption of internal rules or where the Community has not yet adopted internal rules.

[14] Art. 65 provides a general transition period of one year, and a further 4 years (to 1st January 2000) for developing countries and those in transition to a market economy and undertaking structural reform of their IPR laws. Developing countries may also delay extension of product patent protection to new fields of technology for a further 5 years (art. 65.4). Least developed countries benefit from a transition period of 10 years, which can be extended on request by the TRIPS Council (art.66).

Appellate Body report (out of 32): see Table 1.[15] Almost all have been initiated by the USA or the EU, and most complaints so far have been between developed countries, since they had the shortest transition periods for implementing TRIPS. However, important cases have been brought against India and Brazil to enforce the special protections during the transitional period, and the US was quick to initiate complaints against Argentina and Brazil once their transitional periods expired.

The WTO's DS mechanism is supposed to help states resolve trade disputes amicably, but converting private interests into public claims seems to have exacerbated economic conflict, especially between the two major trading blocs, the USA and the EU. There is little evidence that governments are heeding the admonition of section 3.7 of the DSU that `Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.' Since these are governmental acts, brought in the public interest, the decision to initiate a complaint should be subject to democratic scrutiny. Instead, it is treated as an executive decision, usually taken by officials, with the support of politicians.[16] This again shows the lack of transparency and accountability of the procedures for regulating international economic relations.

However, effective democratic evaluation of whether a trade complaint should be initiated is hindered by the view that this simply involves enforcement of private legal rights. Indeed, some argue that the WTO's market access obligations should be treated as rights directly enforceable by private parties (Petersmann 1998a). This could occur as a matter of domestic constitutional law of any member state, if the WTO agreements could be considered as `self-executing' or having direct effect, by creating rights enforceable by private parties through domestic courts. Until now this has not generally been the case, in particular in the EU where the European Court of Justice has over the years rejected claims that either GATT or the WTO agreements have direct effect in EC law.[17] However, in a recent case involving an alleged trademark violation, the ECJ's Advocate General accepted the claimant's argument that article 50 of the TRIPS (specifying provisional measures for IPR enforcement) should be regarded as having direct effect within national law, thus overriding any conflicting provision (in this case, in Dutch law). The ECJ itself refused to go so far, although it did suggest that national laws should as far as possible be interpreted to comply with WTO obligations.[18]

---

[15] Data derived from Overview of the State of Play of WTO Disputes as at 2nd May 2001, accessed 15th May 2001.

[16] Although s.301 was enacted by the Congress, its effect is to mandate action by the executive branch, and this was delegated by the 1988 amendments from the President to the USTR, an unelected official (Bhagwati and Patrick 1990: 50-57.

[17] See most recently *Portugal v. EC*, Case C-149/96, European Court Reports [1999] I-8395.

[18] *Hermès International v FHT Marketing Choice BV*. Case C-53/96, *European Court Reports* [1998] page I-3603; discussed in Mavroidis and Zdouc 1998: 410-413. However, in *Portugal v. EC*, para. 49, the Court limited this to the interpretation of EC measures intended to implement WTO obligations.

C. PROPERTY RIGHTS VS HUMAN RIGHTS

The view that private rights should be legally entrenched is also put forward by some who argue for the `constitutionalization' of the global trading system. One version, put forward by Ernst-Ulrich Petersmann, espouses a neo-liberal constitutionalism, which would enshrine the `freedom to trade' as a fundamental right of individuals, legally enforceable through national constitutions in national courts (Petersmann 1993). In this perspective, 'equal rights of the citizens may offer the most effective strategy for compensating the "democratic deficit" of international organizations' (Petersmann 1998, 28). Petersmann puts forward an explicitly neo-Kantian liberal view, which asserts that a new era of world peace and prosperity can best be assured through the unrestricted pursuit of economic benefits through trade, under an umbrella of principles embodying individual cosmopolitan rights.

This ultra-liberal view assumes that the pursuit of individual self-interest, especially through economic exchange, is ultimately beneficial to all. Hence, the development of principles embodying individual rights, and the adjudication of conflicting rights-claims, would be sufficient to ensure universal consent and legitimacy. This would therefore justify even the entrenchment of internationally-agreed principles so as to override national parliamentary supremacy, to secure the 'effective judicial protection of the transnational exercise of individual rights' (Petersmann 1998, 26).

Petersmann responds to the challenge of Seattle by accepting that freedom of trade should also be accompanied by other human rights, which should all be enshrined in the WTO `constitution' (Petersmann 2000). In his view, however, `Most human rights guarantees are about individual freedom, non-discrimination, equal opportunities, and rule of law', and a difficulty of applying them in trade law is their neglect of "economic liberties"'. His emphasis, however, is on rights of private property and market freedoms. Thus, he points to the protection of intellectual property rights in the TRIPS agreement (although, to his regret, it does not refer to human rights law), and advocates in addition the protection of competition and of the rights of `the general citizen in maximizing consumer welfare through liberal trade' (ibid. 21-23).

The constitutionalization of the WTO and other international economic institutions by the introduction of human rights is also advocated by some NGOs and others in the human rights community (Mehra, 2000). They also regret that human rights, as they have developed historically, have been most strongly articulated in the `first generation' civil and political rights, while the `second generation' economic, social and cultural rights are often considered to be aspirations at best; and `third generation' collective rights such as self-determination and sustainable development are hard to operationalize as enforceable rights. However, this view of economic rights is very different from Petersmann's. It is significant that the right to property has been considered a civil rather than an economic right, and that this is the only positive economic right recognized by Petersmann, the remainder are `liberties'. This ignores the rather fundamental economic questions of access to land and natural resources, shelter, food, and work, let alone cultural rights. It is these that are generally treated as aspirational or unenforceable rights, which of course are those of the have-nots. Thus, a view of human rights based on the right to property and market freedoms would simply have the effect of legitimizing socio-economic inequalities.

Nevertheless, a serious effort is being made to counterbalance neo-liberal globalization by the assertion of universal human rights norms. This entails counterposing the neo-liberal view of human rights with one based on the broader concepts of economic, social and cultural rights

developed in the past few decades through the UN and other bodies. This suggests that substantive issues in international economic regulation should be viewed in the light of human rights norms (Oloka-Onyango and Udagama 2000). In relation to the TRIPS agreement, for example, the Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights, approved a Resolution in August 2000 (UN Commission 2000), affirming that:

> the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other;

and consequently urging governments and international organizations to integrate into their legislation, policies, and practices

> provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property.

This certainly helps to provide another perspective on the ways in which international economic regulations are formulated, interpreted, and implemented into legal obligations.

However, it is also clear that `human rights' are contestable, not immutable concepts. They may therefore open up space for debate about conflicting values underlying different rights-claims. In particular, property rights entail a balance between the right to control private property and public interests in the `commons'. Ultimately, how the balance is struck between different conflicting rights-claims must be decided by democratic political means. Thus, a recourse to human rights does not resolve issues about the substantive content of international economic rules, it merely shifts the debate to a different ground. Indeed, if human rights norms are limited to liberal concepts of protection of private property and individual liberty, they may inhibit important public policy concerns such as the alleviation of poverty, disease and hunger.

This is well illustrated by the constitutional challenge brought by pharmaceutical firms against South Africa's new medicines laws. Strikingly, this case was based on claims of human rights violations, especially the deprivation of property without compensation.[19] Certainly, strong counter-arguments could be made,[20] especially since the South African constitution is in some respects post-liberal, and recognises rights to housing (article 26), as well as health care, food, water and social security (article 27). These provisions place an

---

[19] See Notice of Motion in the High Court of South Africa, Case number: 4183/98 , 42 applicants, against the Government of South Africa (10 respondents). Article 25 of the constitution prohibits the taking of property except in terms of a law of general application, for a public purpose and with the provision of compensation. Heinz Klug gives an excellent account of the struggles over the drafting of the property clause, in the key context of land rights (Klug 2000: 124-36); and his book is a thoughtful analysis of the role of `democratic constitutionalism' in providing space for the negotiation of potentially explosive political differences, emphasising also the importance of global-local interactions.

[20] For example, as formulated in the Amicus Curiae brief by the Treatment Action Campaign, available from http://www/tac/org/za, accessed 10th June 2001.

obligation on the government to take `reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. Few other constitutions provide such a basis to balance vested property rights against the rights of the dispossessed. Even so, the collapse of the case owed much to the global attention attracted by the access to medicines campaign, and the possibility of building international support around the issue of HIV-AIDS. In other contexts, the defence of public policy against private interests will be much more difficult.

D. WTO RULES AND NATIONAL SOVEREIGNTY

A different approach would aim to ensure that WTO rules allow national states sufficient scope to make their own judgements about the public interest. This would resist pressures for economic globalisation to override national and local political judgements about public welfare. Thus, it has been stressed, especially by developing countries, that the TRIPS should be interpreted with flexibility, to avoid imposing a `one-size-fits-all' model for IPRs. On the other hand, supporters of IPRs have stressed that TRIPS must establish a `high level' of protection.

Certainly, as suggested above (in section A.2), what is meant by `harmonisation' is a central issue for the WTO. In general, the WTO Agreements establish standards against which national regulation should be evaluated, rather than detailed rules for implementation into national law. Even the TRIPS, which is in many respects very specific about what national laws must contain, leaves considerable leeway for states to tailor national laws and policies to suit their own circumstances. It should be recalled that the TRIPS contains two kinds of obligations requiring national IP laws to comply with international standards. First, it requires WTO members to apply the main provisions of several multilateral IP treaties, in particular the Berne Copyright Convention and the Paris Industrial Property Convention. In addition, the TRIPS agreement itself contains a number of minimum requirements for IP protection, for example requiring copyright protection for computer programs (article 10), and patent protection for microbiological processes (article 27.3.b).

Significantly, however, TRIPS is non-prescriptive on the conditions for the granting of private rights, but much more specific and detailed about the procedures for enforcing those rights, and on the permissible limits to private rights to safeguard the public interest. This is particularly important in relation to patents. The basic provisions on patentability in TRIPS article 27 owe much to the draft Patent Harmonisation Treaty, which was abandoned in 1991 after six years' work in WIPO.[21] However, the TRIPS drafters essentially selected those provisions favouring patent-owners, many of which were actually strengthened compared to the 1991 WIPO draft. Thus, TRIPS chose the more stringent options in the WIPO draft on the

[21] The draft text as presented to a Diplomatic Conference at The Hague in June 1991 has recently been republished as WIPO document SCP/4/3. Following the successful conclusion in 2000 of the Patent Law Treaty, which mainly governs procedural matters, WIPO's Standing Committee on Patents has renewed work on harmonising substantive aspects of patent law. In preparation, the WIPO Bureau identified six `basic issues underlying the grant of patents which are of particular importance to the further development of the patent system', viz `the definitions of prior art, novelty, inventive step (non-obviousness), and industrial applicability (utility); sufficiency of disclosure; and the structure and interpretation of claims': WIPO 2000, para. 9.

20-year minimum term, the requirement of product patents, and the reversal of the burden of proof for process patents; and the power for states to limit patentability was somewhat more narrowly drawn, in particular by specifying that it does not extend to micro-organisms or to non-biological or micro-biological processes. On the other hand, although TRIPS specifies the three basic conditions of patentability (novelty, inventive step, and industrial applicability/utility), these are not defined. Nor does TRIPS make any attempt to clarify the all-important distinction between a discovery and an invention. It is this laxity that has allowed patent offices in some countries, notably the USA, to grant `patents on life', and to encourage bio-piracy and the privatisation and commodification of community knowledge and techniques. In this respect, there is a need for greater specificity and less flexibility in the TRIPS.[22] As presently worded, the failure by a state to allow patenting of micro-organisms and microbiological processes could result in a complaint under TRIPS, whereas there is no basis for complaint about over-broad protection due to lax interpretation of patentability requirements.

Where flexibility is important is in the interpretation of the limits on the protection of private property rights, to safeguard the public interest in access to new technologies and knowledge. The difficulty is that, while the criteria for granting private rights are widely drawn, the scope for states to limit these rights for public purposes is defined quite specifically in the TRIPS. This empowers WTO Panels or the Appellate Body to review any public interest limits on IPRs enacted at national level. Indeed, in the first two decisions on the substantive provisions of the TRIPS they have done precisely that. In the complaint by the EC against Canada on *Pharmaceuticals* (WT/DS114/1), the Panel ruled that the `limited' exceptions allowed under article 30 did not justify the `stockpiling' provisions which allowed generic drugs manufacturers to begin production before the end of the 20-year patent term, although the `regulatory review' exception is permissible. Similarly, in relation to copyright, the Panel struck down the US provisions allowing music broadcasting without payment by small businesses, although it accepted that the `homestyle' exception could be regarded as one of the ` special cases which do not conflict with a normal exploitation of the work' permitted by TRIPS article 13.[23]

It is important that the WTO's DS bodies should clarify their proper role in these situations. It would be inappropriate for the WTO DS system to become in effect an appeals court against decisions by national bodies, whether legislatures, courts, or officials such as patent examiners. Its task is to apply the principles of WTO agreements such as TRIPS to review the adequacy of national rules for trade purposes. Thus, in interpreting whether national provisions adopted in the public interest `do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder', it should not substitute its view of the public interest for that of accountable national public bodies. Its task rather is to review whether national provisions fall within a range of possibilities that can be considered `normal' or `reasonable'. In so doing, it is vital to be sensitive to the role of national bodies in striking the appropriate balance between protection of rights-holders and the public interest in free diffusion. In practice, it could be said that the decisions in the *US*

---

[22] As suggested in the Communication from Kenya on behalf of the African group, 6 August 1999, WT/GC/W/302, paras. 19-21.

[23] Interestingly, the likelihood of a WTO review was raised during the debates in the US Congress on the Fairness in Music Licensing Act: see McCluggage 2000.

Copyright and *Canada Pharmaceuticals* cases did offer a pragmatic compromise, in permitting some and invalidating other exceptions.

However, some commentators have argued that the legitimacy of the WTO DS system would be enhanced by the explicit acknowledgement that it is not an appeals but a review process, and an articulation of its standard of review. Thus, Robert Howse puts forward a principle of `institutional sensitivity' in relation to other bodies which may have a particular expertise or particular stake in the laws and policies which come under WTO review (Howse 2000: 62). Lawrence Helfer goes further, and proposes that WTO adjudication could usefully adopt the principle of `margin of appreciation' developed in the human rights context by the European Court of Human Rights (Helfer 1998; Helfer 1999). This suggests that the `appropriate scope of supervisory review' of an international adjudicatory body should be `to review public decisions for their conformity to certain standards and to grant a remedy if it finds that there has been an unjustifiable breach of those standards' (Macdonald 1993: 84).

More broadly, the `margin of appreciation' principle has been justified as an expression of certain elements, which could be described as basic to international institutions engaged in the tasks of `managed interdependence':[24]

> * *Interpretation of International Standards*: international agreements between states, especially those establishing standards for the regulation of individuals, are necessarily formulated in general terms, leaving considerable leeway for interpretive choices which may involve important issues of values;
>
> * *Subsidiarity and Diversity*: as far as possible, internationally-agreed standards should be interpreted and applied to give the primary responsibility for choices involving values to the national or local levels of government, which are closest and most responsive to the people affected;
>
> * *Democracy*: decisions taken by public bodies which are democratically accountable should not lightly be overturned by less accountable bodies such as tribunals or committees of experts.

E. Developing Global Welfare Standards

As suggested in the previous section, a fundamental problem with the TRIPS is the assumption that its aim is to establish a `high level of protection', which is taken to mean strong exclusivity rights. Indeed, the the amendment of TRIPS to include any `higher level' of protection which might be adopted in other treaties to which all WTO members are party is envisaged in both TRIPS (article 71.2) and the WTO Agreement itself (article IX.6). This seems to assume that a `high level' treaty is one that gives maximum scope for private rights of owners, rather than the broader social interest of encouraging diffusion.

It is important, therefore, to oppose the essentially neo-liberal view that international legal obligations should entrench private rights, including property rights, as a check on any regulatory requirements embodying public interests which may be established at national level by states. We should remember that the so-called `private' rights in this context are in practice those of large corporations, the TNCs. In reality, these are institutionalised

[24] My version is adapted from Mahoney 1998: 2.

bureaucracies whose power over immense concentrations of assets and activities requires that they be publicly accountable. Thus, it is misleading to consider these as `private' rights, since they are not personal rights of individuals.

Further, IPRs are not `natural' rights but, as explained in the first section, state-enforced monopolies which artificially create a scarcity. Thus, a consideration of the public welfare impact must enter into the definition and interpretation of the scope of such rights. It would be inappropriate and ineffective to entrench IPRs as private rights at the international level, subject to possible limits in the public interest determined only at national level. This has been made clear by the recent debates about the impact of TRIPS on access to drugs. These have highlighted issues (discussed in other chapters in this volume) such as the appropriate scope for parallel imports, which can only be effectively evaluated against global public welfare standards.

Thus, there is an inescapable need to develop global welfare standards against which to evaluate the definition and scope of international economic rights and obligations, such as those in TRIPS. Indeed, the TRIPS agreement itself contains firm statements of such standards, in articles 7 and 8, which are worth recalling here.

> Article 7: Objectives
>
> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.
>
> Article 8: Principles
>
> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

It is not surprising that in the recent debates in the TRIPS Council, the importance of evaluating TRIPS provisions in the light of these principles has been stressed.[25]

Clearly, the development of such global welfare standards, and the evaluation of TRIPS provisions in light of them, requires wide-ranging public discussions. The campaigns over the impact of TRIPS on access to pharmaceutical drugs has enabled such a debate to be begun. The way has been cleared for this by the withdrawal of the US complaint against Brazil's

[25] Paper by a group of developing countries, TRIPS and Public Health, submitted to special session of TRIPS Council of 20 June 2001, IP/C/W/296

local working requirement, and the collapse of the legal challenge to the South African medicines law. Although these claims for the protection of private rights have been suspended, we are still only in at the initial stages of the debate over the framing of an international IPR regime that can adequately reflect global welfare standards.

TABLE 1 WTO DISPUTES INITIATED INVOLVING TRIPS, JAN. 1995-DEC.2000

Parties, WTO Ref. Date initiated	**Brief details**	**Outcome**
US v. Japan WT/DS28 9/2/1996	US claim that Japan failed to provide retrospective protection for sound recordings contrary, inter alia, to TRIPS 14	solution 24/1/1997
US v Pakistan WT/DS36 30/4/1996	US claim that the absence in Pakistan of (i) either patent protection for pharmaceutical and agricultural chemical products or a system to permit the filing of applications for patents on these products and (ii) a system to grant exclusive marketing rights in such products, violates TRIPS 27, 65 and 70.	solution 28/2/1997
US v Portugal WT/DS37 30/4/1996	US claim that the provisions in Portugal's Industrial Property Act for term of patent protection with respect to existing patents were inconsistent with Portugal's obligations under Articles 33, 65 and 70 of TRIPS.	solution 3/10/1996
EC v Japan WT/DS42 24/5/1996	Request for consultations alleging violations of TRIPS 14.6 and 70.2 in respect of protection of sound recordings. Earlier, EC joined US request against Japan on the same issue (WT/DS28).	solution 7/11/1997
US v India WT/DS50 2/7/1996	Absence of patent protection for pharmaceutical and agricultural chemical products in India claimed to violate TRIPS arts. 27, 65 and 70. **Panel found** non-compliance with 70.8(a) or 63(1) and (2) by failing to establish a mechanism that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and also with 70.9 by failing to establish a system for the grant of exclusive marketing rights. **AB upheld**, with modifications, the findings on 70.8 and 70.9, but ruled that 63(1) was not within the Panel's terms of reference.	**Panel** **AB** India reported details of implem 28/4/1999
EC v India WT/DS79/1 28/4/1997. 3rd party rights reserved by US	Alleged absence in India of patent protection for pharmaceutical and agricultural chemical products, and the absence of formal systems that permit the filing of patent applications of and provide exclusive marketing rights for such products contended to be inconsistent with TRIPS 70 (8) and (9) (cf. US complaint in DS50). **Panel found** violations of both provisions.	**Panel** India reported details of implem 28/4/1999
US v Denmark WT/DS83/1 14/5/1997	US contended Denmark's alleged failure to make provisional measures available in the context of civil proceedings involving intellectual property rights violates TRIPS Arts. 50, 63 and 65.	pending
US v Sweden WT/DS86/1 28/5/1997	US contended Sweden's alleged failure to make provisional measures available in the context of civil proceedings involving intellectual property rights violates TRIPS Art. 50, 63 and 65.	solution notified 2/12/1998
EC v Canada WT/DS114/1 19/12/1997 3rd party rights reserved by: Australia, Brazil, Colombia, Cuba, India, Israel, Japan, Poland, Switzerland, and the US.	EC claim that Canada does not provide for the patent protection of pharmaceutical inventions for the full 20-year term from filing envisaged by TRIPS 27.1, 28 and 33. **Panel found** (i) the `regulatory review exception' in Canada's Patent Act Sec.55.2(1) was not inconsistent with TRIPS 27.1, and was covered by the exception in TRIPS 30 and therefore not inconsistent with TRIPS 28.1 (this allows potential competitors of a patent owner to use the patented invention without authorization, to obtain government marketing approval and be in a position to sell in competition with the patent owner when the patent expires); but that (ii) the `stockpiling exception' (Sec. 55.2(2)) violates TRIPS 28.1 and constituted a substantial curtailment of the exclusionary rights required to be granted to patent owners under Article 28.1 to such an extent that it could not be considered to be a limited exception under TRIPS 30 (under this exception, competitors are allowed to manufacture and stockpile patented goods during a certain period before the patent expires, but the goods cannot be sold until after the patent expires).	**Panel** report adopted 7/4/2000

US v Ireland WT/DS82/1 14/5/1997 US v EC WT/DS115/1 6/1/1998	US alleges Ireland's failure to grant copyright and neighbouring rights under its law, contrary to TRIPS 9-14, 63, 65 and 70. Following pressure from US, Ireland enacted specific legislation in 1998 tightening enforcement, but US still pressing for comprehensive copyright reform.	pending US requested Panel 9/1/1998
US v EC WT/DS124/1 US v Greece WT/DS125/1 30/4/1998	US claim that a significant number of TV stations in Greece regularly broadcast copyrighted motion pictures and television programs without the authorization of copyright owners, involving failure by Geece to provide effective remedies contrary to TRIPS 41 and 61.	solution notified 20/03/2001
Canada v EC WT/DS153/1 2/12/1998	Canada claim that under EC Regulations, especially (EEC) No. 1768/92 and (EC) No. 1610/96, a patent term extension scheme, which is limited to pharmaceutical and agricultural chemical products, has been implemented, contrary to the obligations not to discriminate on the basis of field of technology in TRIPS 27.1, because these Regulations only apply to pharmaceutical and agricultural products.	pending
EC v US WT/DS160/1 26/1/1999 3rd Party rights reserved by Australia, Japan and Switzerland	EC claim that Section 110(5) of the US Copyright Act permits, under certain conditions, the playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee, contrary to TRIPS 9(1) and Arts. 1-21 of the Berne Convention. The dispute centred on TRIPS 13, which allows exceptions to exclusive copyrights, provided they are confined to certain special cases, do not conflict with a normal exploitation of the work in question and do not unreasonably prejudice the legitimate interests of the right holder. **Panel found** (i) TRIPS 13 justified the "homestyle" exemption in sub-para. (A) of Sec.110(5), which allows small restaurants and retail outlets to amplify music broadcasts without an authorization or fee, provided that they use only equipment of a kind commonly used in private homes; but (ii) it did not justify the "business" exemption provided for in sub-para. (B) of Sec.110(5), which allows the amplification of music broadcasts, without an authorization or fee, by food service and drinking establishments and by retail establishments, provided that their size does not exceed a certain square footage limit, and above this square footage limit, provided that certain equipment limitations are met. The panel noted, *inter alia*, that a substantial majority of eating and drinking establishments and close to half of retail establishments were covered by the business exemption.	**Panel** report adopted 27/7/2000. US offered to implement within 15 months EC requested arbitration. Arbitrator on 15/1/2001 set 12-month limit from date of adoption.
US v Argentina WT/DS171/1 6/5/1999	US alleges (i) Argentina's failure to protect exclusive marketing rights for pharmaceutical products or during the transition period of TRIPS Article 65.2 breaches TRIPS 70.9 and is inconsistent with TRIPS Arts 27, 65 and 70; and (ii) that since the revocation in 1998 of previous regulations which provided a ten year term of protection against unfair commercial use for undisclosed test data or other data submitted to Argentine regulatory authorities in support of applications for marketing approval for agricultural chemical products, Argentina has provided no effective protection for such data against unfair commercial use, contrary to TRIPS 65.5.	pending [cf DS196]
US v EC WT/DS174/1 1/6/1999	US alleges lack of protection of trademarks and geographical indications for agricultural products and foodstuffs in the European Communities, in that EC Regulation 2081/92, as amended, does not provide national treatment with respect to geographical indications and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication, contrary to (at least) TRIPS 3, 16, 24, 63 and 65.	pending
US v Canada WT/DS170/1 6/5/1999	US alleged that the period of protection of 17 years from the date on which the patent is issued under the Canadian Patent Act for applications filed before 1 Oct 1989 to be inconsistent with the requirement of a minimum of 20 years of patent protection from date of filing under TRIPS 33, 65 and 70. **Panel upheld the claim**, holding that TRIPS applied to all patents in force when TRIPS became binding on Canada, and	**AB** report adopted by DSB 12/10/2000

	rejecting Canada's argument that 17 years from date of grant was effectively equivalent to the minimum 20 years from filing required by TRIPS because of average pendency periods for patents, informal and statutory delays etc. **AB upheld**.	
EC v US WT/DS176/1 8/7/1999 3rd party rights reserved by Canada, Japan	The EC and member States allege that Section 211 of the US Omnibus Appropriations Act. 1998, has the effect of making impermissible the registration or renewal in the United States of a trademark, if it was previously abandoned by a trademark owner whose business and assets have been confiscated under Cuban law; and prohibiting US courts from recognizing or enforcing any assertion of such rights, contrary to TRIPS especially Art 2 in conjunction with Arts 3, 4, 15 to 21, 41, 42 and 62 of the Paris Convention.	Panel established 26/9/2000
EC v US WT/DS186/1 12/1/2000	EC and its member states allege that Section 337 of the US Tariff Act (19 U.S.C. § 1337) and the related Rules of Practice and Procedure of the International Trade Commission violate GATT 1994 art. III and TRIPS 2 (in conjunction with Art 2 Paris Convention), 3, 9 (in conjunction with Art 5 Berne Convention), 27, 41, 42, 49, 50 and 51, by providing procedures against imports violating IPRs different from those applicable to domestic products alleged to violate IPRs.	pending
US v Argentina WT/DS196/1 30/5/2000	US considers that Argentina's legal regimes governing patents and data protection fail to protect against unfair commercial use of undisclosed test or other data, submitted as a requirement for market approval of pharmaceutical or agricultural chemical products; improperly excludes certain subject matter, including micro-organisms, from patentability; fails to provide prompt and effective provisional measures, such as preliminary injunctions, to prevent infringements; denies certain exclusive rights for patents, such as the protection of products produced by patented processes and the right of importation; fails to provide certain safeguards for the granting of compulsory licenses, including timing and justification safeguards for compulsory licenses granted on the basis of inadequate working; improperly limits the authority of its judiciary to shift the burden of proof in civil proceedings involving the infringements of process patent rights; and places impermissible limitations on certain transitional patents so as to limit the exclusive rights conferred by these patents, and to deny the opportunity for patentees to amend pending applications in order to claim certain enhanced protection provided by the TRIPS. The US considers that Argentina's legal regimes governing patents and data protection are therefore inconsistent with TRIPS especially 27, 28, 31, 34, 39, 50, 62, 65 and 70.	pending
US v Brazil WT/DS199/1 30/5/2000 3rd party rights reserved by Cuba, the Dominican Republic, Honduras, India and Japan	US claims that the provisions of Brazil's 1996 industrial property law and other related measures, which establish a "local working" requirement for the enjoyability of exclusive patent rights, can only be satisfied by the local production – and not the importation – of the patented subject-matter. More specifically, the United States notes that Brazil's "local working" requirement stipulates that a patent shall be subject to compulsory licensing if the subject-matter of the patent is not "worked" in the territory of Brazil. The United States further notes that Brazil explicitly defines "failure to be worked" as "failure to manufacture or incomplete manufacture of the product" or "failure to make full use of the patented process". US alleges these are contrary to TRIPS 27 and 28, and Article III of the GATT 1994.	Panel requested 8/1/2001. Announced that complaint withdrawn 25/6/2001
Brazil v US WT/DS224/1	Brazil claims several discriminatory elements in the US Patents Code, especially Chapter 18 [38] – "*Patent Rights in Inventions Made with Federal Assistance"*, which provides that rights to any federally-funded or federally-owned inventions must be subject to the conditions that any resulting products will be manufactured substantially in the United States. Brazil requests consultations, to "understand how the United States justifies the consistency of such requirements with its obligations under the TRIPs, especially Articles 27 and 28, and TRIMs Art 2 in particular, and GATT 1994 Arts III and XI.	pending

BIBLIOGRAPHY

Barnes, J. J. (1974). *Authors, Publishers and Politicians. The Quest for an Anglo-American Copyright Agreement 1815-1854*. London, RKP.

Bhagwati, J. and H. T. Patrick, Eds. (1990). *Aggressive Unilateralism. America's 301 Trade Policy and the World Trading System*. Ann Arbor, University of Michigan Press.

Drahos, P., Ed. (1999). *Intellectual Property*. International Library of Essays in Law & Legal Theory. Aldershot, Ashgate-Dartmouth.

European Commission (2000). "Trade Barriers Regulation: the First Five Years." Conference on *The Challenge of Globalisation: the European Union's Market Access Strategy*, Brussels.

Evans, G. (1996). "The Principle of National Treatment and The International Protection of Industrial Property." *European Intellectual Property Review* 18(3): 149-160.

Helfer, L. R. (1999). " A European Human Rights Analogy For Adjudicating Copyright Claims Under Trips." *European Intellectual Property Review* **21**(1): 8-16.

Helfer, L. R. (1998). " Adjudicating Copyright Claims under the TRIPs Agreement. The Case for a European Human Rights Analogy." *Harvard International Law Journal* 39(2): 357.

Howse, R. (2000). Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurispudence. *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?* J. H. H. Weiler. Oxford, OUP**:** 35-69.

Klug, H. (2000). *Constituting Democracy. Law, Globalism and South Arica's Political Reconstruction*. Cambridge, CUP.

Mavroidis, P. C. and W. Zdouc (1998). "Legal Means to Protect Private Parties' Interests in the WTO." *Journal of International Economic Law* **1**: 407-432.

McCluggage, L. A. (2000). "Section 110(5) and the Fairness in Music Licensing Act: Will the WTO Decide the United States Must Pay to Play?" *Idea: The Journal of Law and Technology* 40: 1-47.

Macdonald, R. S. J. (1993). "The Margin of Appreciation." In R. S. J. Macdonald, F. Matscher and H. Petzold (eds.) *The European System for the Protection of Human Rights*. Dordrecht, Nijhoff**:** 83-124.

McGinnis, J. O. and M. L. Movesian (2000). "The World Trade Constitution." *Harvard Law Review* **114**: 512-605.

Mahoney, P. (1998). " Marvellous Richness of Diversity or Invidious Cultural Relativism?" *Human Rights Law Journal* (Special Issue on The Doctrine of Margin of Appreciation under the European Convention on Human Rights: its Legitimacy in Theory and Application in Practice) **19**(1): 1-6.

Mehra, M. (2000). *Human Rights and the WTO: Time to Take on the Challenge.* Heinrich Böll Foundation.

Oloka-Onyango, J. and D. Udagama (2000). Preliminary Report on Globalization and its impact on the full enjoyment of human rights to the Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights. (E/CN.4/Sub.2/2000/13).

Petersmann, E.-U. (1993). "National Constitutions and International Economic Law." In M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law*. Deventer, Kluwer**:** 3-53.

Petersmann, Ernst-Ulrich 1998. 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' *Michigan Journal of International Law* 20:1.

Petersmann, E.-U. (2000). "The WTO Constitution and Human Rights." *Journal of International Economic Law* **3**(1): 19-25.

Picciotto, Sol (2001). "Democratizing the New Global Public Sphere". In D. Drache (ed.) [title to follow]. London, Routledge.

Plant, A. (1934). "The Economic Theory Concerning Patents for Inventions." *Economica* N.S. 1(February): 45.

Plasseraud, Y. and F. Savignon (1983). Paris 1883. Genèse du Droit Unioniste des Brevets. Paris, Librairies techniques.

Ricketson, S. (1987). *The Berne Convention for the Protection of Literary and Artistic Works*. Deventer, Kluwer & London, Centre for Commercial Law Studies, Queen Mary College.

Ryan, M. P. (1998). *Knowledge Diplomacy. Global Competition and the Politics of Intellectual Property*. Washington DC, Brookings Institution Press.

Shaffer, Gregory (2000). "The Law-in-Action of International Trade Litigation in the US and Europe: The Melding of the Public and Private", unpublished paper, draft of 24 May.

Subramaniam, A. and J. Watal (2000). "Can TRIPS serve as an Enforcement Device for Developing Countries in the WTO?" *Journal of International Economic Law* **3**(3): 403-416.

UN Commission on Human Rights (2000). Intellectual Property Rights and Human Rights. Geneva, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/7.

Van Eeckhaute, J. C. (1999). "Private Complaints against Unfair Trade Practices. The EC's Trade Barriers Regulation." *Journal of World Trade* **33**(6): 199-213.

Weiler, J. H. H. (2000). The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement. Harvard Law School, Harvard Jean Monnet Working Paper 09/00.

WIPO (2000). `Suggestions for the Further Development of International Patent Law'. Document SCP/4/2, 25th September.

Zoller, E. (1985). “Remedies for Unfair Trade: European and United States Views.” *Cornell International Law Journal* **18**: 227.