

International Intellectual Property

- Slides for module 3
- State to State Dispute Resolution

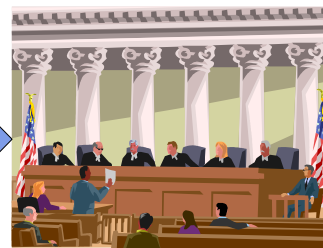
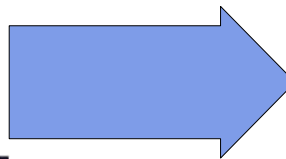


Palmeto – Sovereignty & the WTO

- Thickening of legality . . .

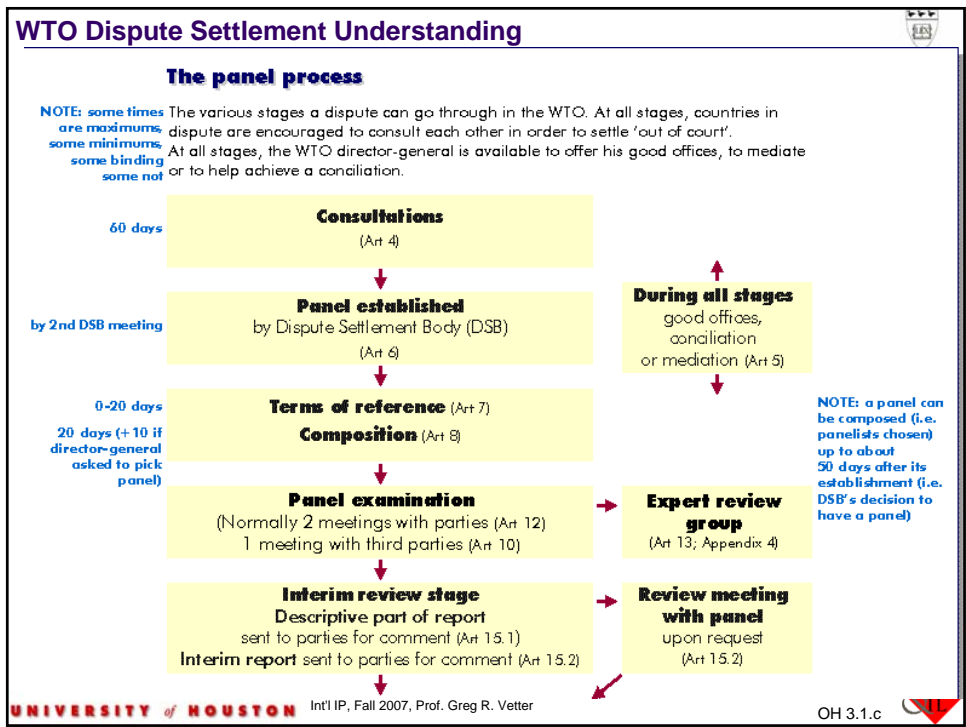
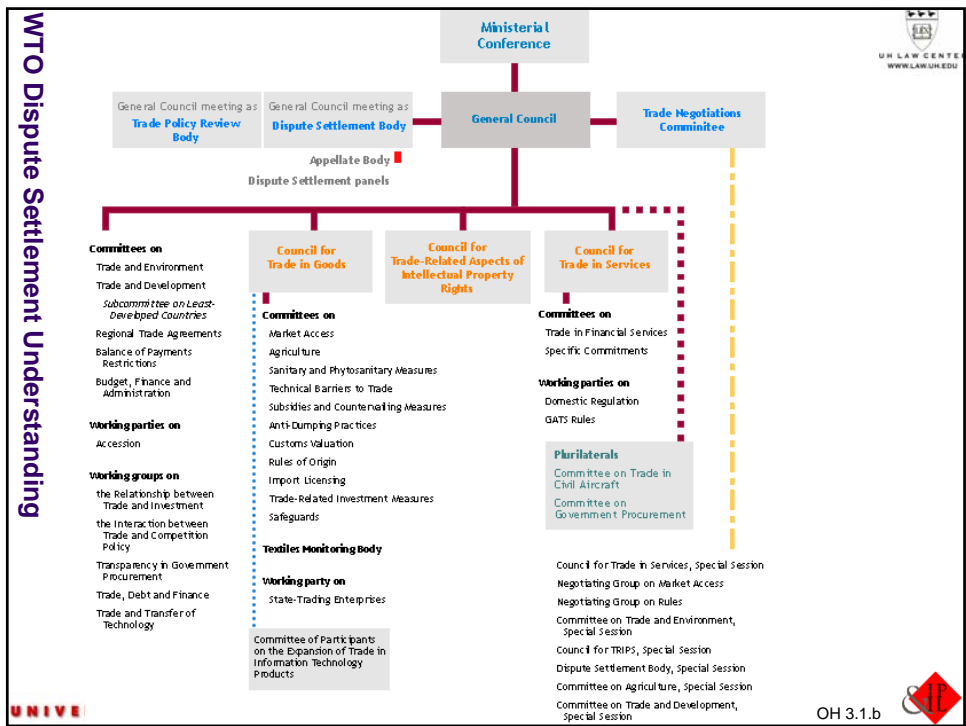


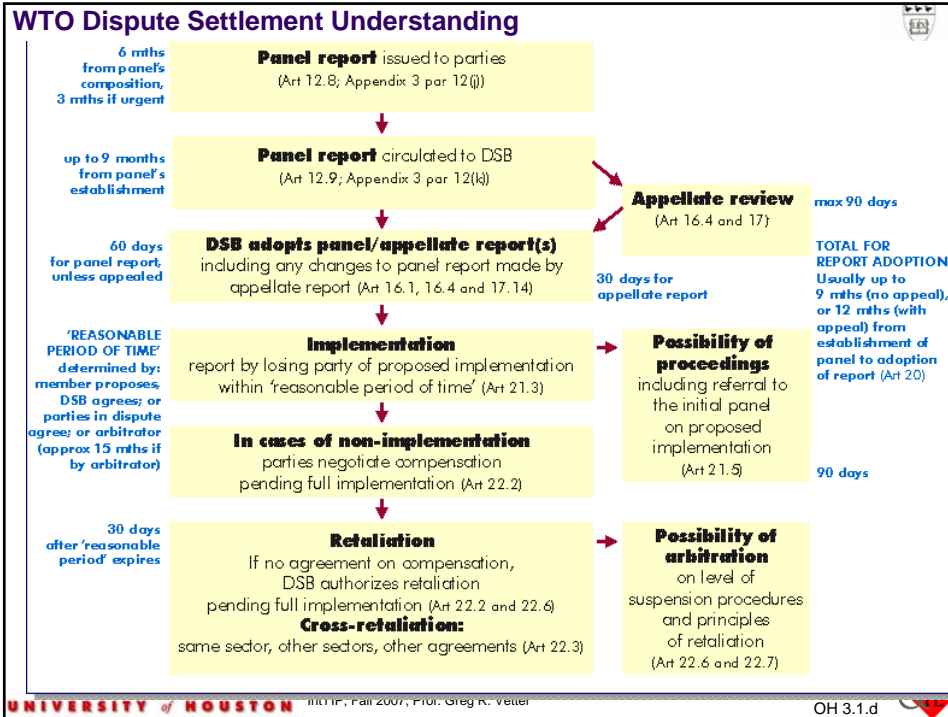
**THE
DIPLOMACY**



- Concerns
 - Transparency – party submittals are confidential, hearings are private
 - US and EU agreed to open up the process
 - Why would developing countries be leery of opening up the process?







WTO Dispute Settlement Understanding

How long to settle a dispute?

These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointment
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)

UNIVERSITY of HOUSTON Int'l IP, Fall 2007, Prof. Greg R. Vetter OH 3.1.e

Dreyfuss & Lowenfeld – DSU & TRIPS - Introduction

- Uruguay Round – a miracle
- DSU, to the extent it was “designed,” was designed for traditional import/export disputes
- Potential issues - the differences between
 - rights in intellectual property and other forms of property,
 - between tangible and intangible goods,
 - between disputes that arise among countries and among firms, and
 - between disputes that arise as a result of judicial, as contrasted with legislative, decision making
- Dispute Settlement Board
 - Representatives of the member state
 - Different chairman and secretariat
 - Standing Appellate Body



Dreyfuss & Lowenfeld – DSU & TRIPS - Introduction

- Berne and Paris
 - No free riding!
- Differences between IP and other trade issues means that pre-Uruguay Round dispute experience is of limited value
- “The Uruguay Round succeeded where WIPO failed for a variety of reasons. One of the reasons, it seems, was that the architects of the TRIPS Agreement used words - and a concept of minimum standards - that allowed each state to read into the Agreement what it wished to see.”
- Nuanced nature of IP laws
 - Implement a balance – so difficult to draft



Dreyfuss & Lowenfeld – DSU & TRIPS - Introduction



- De jure TRIPS compliance
 - But de facto noncompliance?
- GATT Art. XXIII(1) [retained in WTO in 1947 form]
 - Dispute resolution for
 - Violation complaint - - Art. XXIII(1)(a)
 - Benefit nullified or impaired
 - Most common, easy to bring, presumed harm
 - Non-violation complaint - Art. XXIII(1)(b)-(c)
 - An objective of the Agreement is being impaired by a member's measure whether or not the measure violates the Agreement
 - Rare, 5 year moratorium, need to show reliance and injury

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
 - (a) the failure of another contracting party to carry out its obligations under this Agreement, or
 - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
 - (c) the existence of any other situation,



Dreyfuss & Lowenfeld – Case 1 – MacroHard (MH)



- MH contends that Patria is engaging in a pattern of non-enforcement, i.e., no IP protection for software programs
 - No patent protection, but copyright protection
 - Patria court said the program is no more than a principle, system or method of operation
- Choice of law for characterization question – GATT law applies

TRIPS Article 64

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.
2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.
3. During the time period referred to in paragraph 2, the Council for TRIPS shall **examine the scope and modalities** for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.



Dreyfuss & Lowenfeld – Case 1 - MacroHard



- Authors argue to characterize the MH complaint as a violation type complaint
 - Don't want threshold requirements to keep dispute panels from reaching the interpretive issues
 - MH is unlikely to be able to show any sort of reliance on protection in Patria in developing the software
 - Perhaps reliance should be presumed due to nature of IP?
 - Similar analysis for showing injury
 - MH is not blocked in any way from selling/licensing its software in Patria
 - Xandia may even have difficulty showing that MH's incentives to innovate were harmed because MH can sell/license the software in other countries and recoup the investment there
 - Note that this argument relies in part on the essentially zero reproduction cost of creating copies of an information product, as opposed to the traditional cost structure of goods
 - Presumption of injury approach as in some US copyright situations



Dreyfuss & Lowenfeld – Case 1 - MacroHard

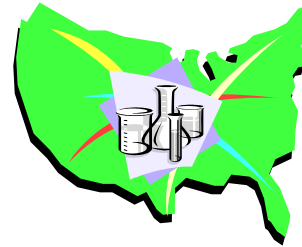


- Is Patria in compliance with TRIPS?
 - TRIPS Art. 10(1)
 - 1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).
 - Probably in compliance
 - TRIPS Art. 9(2) provides that copyright protection shall not extend to methods of operation
 - TRIPS Art. 27(1) – patent protection available “in all fields of technology”
- The first issue then becomes whether, in interpreting TRIPS, patent protection for software is required
 - Favor the specific statement of protection in Art. 10
 - History of the negotiations and discussions point to an emphasis and worry over copyright protection
 - Practice of states at the time was minimal patent protection
 - In part due to the challenge of examining software patents
- The second issue is whether Patria is in compliance with TRIPS Art. 10



Dreyfuss & Lowenfeld – Case 1 - MacroHard

- “Judicial process” considerations for DSU panels
 - rulings of the DSB “cannot add to or diminish the rights and obligations provided in the covered agreements” DSU Art. 3.2, 19.2
 - Minimal third party involvement
 - Early years will not produce “best” rules for entire membership because early on disputants will be between technologically advanced countries
 - It takes a level of sophistication to be a systematic “copier”
 - No real checks on the panels
 - Council of TRIPS may evolve as a rule-enunciating body
 - Member states function as laboratories
 - Sound familiar?
- Skepticism that there always is a “best rule”
 - Look to WIPO for input on the potential “best” rules



Dreyfuss & Lowenfeld – Case 1 - MacroHard

- Resolving the MH case
 - Some degree of deference to Patria court
 - Classic burden shifting approach recommended
 - Case(s) show policy about protection of software (releasing ideas into the public domain)
 - (1) Does this further a goal shared by countries that protect programs
 - (2) Is the “announced” policy recognized elsewhere
 - If both are “yes” – presumption of Patricia law and policy in compliance with TRIPS
 - Xandia would have to then rebut
- Implications of a “deference to national governments” approach to TRIPS disputes?



Case 1 - notes



- TRIPS history the first 6 years
- Need for MH to “prevail upon” Xandia to bring an action
 - Exhaustion of remedies?
 - Is a single case decision a basis for a WTO complaint?
- One commentator posits that the international law of freedom of expression should require panels to defer to state’s interpretations when the area is free speech concerns
 - Interaction of free speech and copyright in an international setting
 - Contribution to legal norms from these panels?
- Third party involvement
 - “amicus” briefs accepted
 - Contrast with TP involvement in supplying data for “Special 301”
- Extending the moratorium for non violation complaints?
 - Expired on 1/1/2000
- Non trips case – panel interpreted scope of non violation complaints narrowly to require that the challenged measures could not have been reasonably anticipated at the time of the treaty negotiation



India Patent Protection – WTO DSU Appellate Body (1997)



- WTO Appellate body reversed panel
 - “disciplines formed under GATT 1947” apply to interpreting TRIPS
 - But, that does not incorporate the “legitimate expectations” principle into a violation complaint
 - Panel misapplied the Vienna Convention
 - The legitimate expectations of the parties are in the treaty itself
 - Must not add or diminish rights – DSU Art. 3.2, 19.2
 - So, a panel must not always take into account legitimate expectations concerning conditions of competition
 - This is in the context of non violation complaints
- Article 70.8
 - “mailbox” system for filing patent applications before TRIPS obligated India to protect patents
- Dispute is over whether India’s mailbox system is in compliance with Art. 70.8



India Patent Protection



- Art. 70.8
 - (a) . . . provide . . . a **means** by which applications for patents for such inventions can be filed;
 - (b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application;
 - (c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term . . .
- A developing country may delay providing patent protection not previously protectable until 1/1/2005. TRIPS Art. 65.
 - But, Art. 70.8 applies without regard to Transitional Arrangements



India Patent Protection



- So, what are the “means”
 - Look to 70.8(b) & (c) for “object and purpose” following Vienna Convention Art. 31 interpretation principles
 - Must allow for the entitlement to file mailbox applications and the allocation of priority and filing dates to them
 - Sound legal basis to preserve novelty and priority
- India
 - We comply by receiving, dating and storing, under administrative instructions
 - They don't go to an examiner until 1/1/2005
 - India did not provide the text of any of these administrative instructions
 - We are “free” under TRIPS 1.1 to determine the appropriate method to implement
 - Appellate body
 - recounts failed attempt to enact legislation
 - Notes that administrative instructions require India's PTO to ignore its own patent act's mandatory referral to examiners



India Patent Protection – WTO Panel



- Municipal law
 - Evidence of facts, state practice, or compliance
 - Here, we must look at the “mixture” of the instructions with India’s patent law to compare it to India’s TRIPS obligations
 - No “rule-making” for these rules
- So, the instructions do not provide a “sound legal basis”

- NOTES
 - Stare decisis
 - GATT acquis



Dreyfuss & Lowenfeld – DSU & TRIPS –Case IV – Koka Kola



- Well known mark
- DSU process results in Patria under the obligation to cancel the local mark holder and transfer it to the multinational
 - Patria says it is not in a position to comply
 - Its domestic law does not permit the measures recommended by the panel
 - Prosecutorial resource discretion
- TRIPS Art. 41
 - Paragraph One
 - "[m]embers shall ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights . . . including expeditious remedies . . . and remedies which constitute a deterrent to further infringements."
 - Paragraph Five
 - "[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general."
- Need to show a pattern of non-enforcement?



Dreyfuss & Lowenfeld – DSU & TRIPS –Case IV – Koka Kola



- First, establish reasonable period in which to comply
 - Agree in 45 days – or binding arbitration within 90 days solely to set the time
 - Art. 21.4 – 15 months from date of the panel
- Second, resolving whether a corrective measure proposed by the respondent is consistent with GATT or the covered agreement
 - Referred to a panel, preferably the same one
- Third, if fail to meet the reasonable time
 - negotiate for acceptable “damages”
 - If not agreed, within 20 days, prevailing party may with the authorization of the DSB, retaliate by suspending the application to the offending country of concessions or other obligations
 - Detailed “recipe” for suspending concessions or obligations
 - Same sector
 - Other sector(s) under the same agreement (here, TRIPS)
 - Under other covered agreements



Dreyfuss & Lowenfeld – DSU & TRIPS –Case IV – Koka Kola



- What should Xandia “suspend”?
 - Are IP retaliations more severe? More third party “bystander” harm and more adverse effect on consumers and the market place?
 - For example, even merely refusing to register new marks confuses public
 - Should panels “detail” the remedies?
- Private party loss provisions
 - No right of action by IP rightholder against a state for failure to comply with TRIPS
 - But, in EU, private citizens have a right to sue government for noncompliance with directives
- Cross sector retaliation
 - Causing more harm than good?
 - Touted in WTO and Special 301 context by the US
 - Is it an effective enforcement mechanism for developing countries?



EU Banana Arbitration (2000) - Cross Sector Retaliation



- EC Banana regime found inconsistent with Art. I & XIII of GATT and Art. II and XVII of GATS
- Ecuador requested panel reconvening
 - Requested various authorizations to suspend concessions or other obligations in value of US\$450 million
 - Said withdrawal of concessions in goods sector was not practicable
 - Arbitrators, in evaluating the case, said cross-sector concessions are the exception
 - Characterized Ecuador's requests to suspend TRIPS obligations as a cross sector retaliation measure
- IP areas
 - Copyright – performers, producers, broadcasters (Rome)
 - Intermingled rights – some protected some not
 - Geographical indications
 - Industrial designs



EU Banana Arbitration (2000) - Cross Sector Retaliation



- Even if TRIPS obligations suspended
 - Status of Paris, Berne, Rome, etc. obligations?
- TRIPS sections are “sectors” by explicit recitation
 - DSU 22.3 contemplates retaliation in a different sector as part of the escalation process
 - It is legally possible for Ecuador to comply with the procedural provisions and implement suspension of TRIPS provisions as retaliation
- If DSB approved Ecuador's request, and Ecuador copied CDs, other member countries would still be blocked by mandatory TRIPS Art. 51 from importing
 - Thus, distortions in markets in other countries could be avoided if Ecuador suspends IP rights only for domestic “consumption”
- Interference with private party rights is potentially more harmful given the ability to endlessly duplicate intangible works
- Trading CDs for bananas!
 - DRM controlled by Ecuador as a way to partition and control the remedy?



EU Banana Arbitration (2000)



- Geographical indications should also be controlled with a license
- Ecuador also envisions a licensing system for industrial designs
- These licenses would be temporary measures
 - Entities in Ecuador would need notice of this to plan their investment activities
- Preference is to implement measures in the same sector first
 - TRIPS obligations suspensions would be a different sector



Pre-Trips State to State Dispute Settlement Measures

- TRIPS has revolutionized state to state dispute proceedings
- Berne and Paris provided for submission of disputes to the International Court of Justice
 - But, never used



www.icj-cij.org

● The ICJ

- The International Court of Justice is the principal judicial organ of the United Nations
- It has a dual role
 - to settle in accordance with international law the legal disputes submitted to it by States (76 since 1946), and
 - to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies (24 since 1946)
- Three ways for it to obtain jurisdiction over a case
 - by the conclusion between countries of a special agreement to submit the dispute to the ICJ;
 - by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the ICJ
 - Several hundred treaties or conventions contain a clause to such effect;
 - through the reciprocal effect of declarations made by them under the Statute [authorizing the ICJ (the Statute being a part of the UN charter)] whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration
 - The declarations of 63 States are at present in force, a number of them having been made subject to the exclusion of certain categories of dispute



Newby – Special 301 & Copyright Protection (1995)



- Trade Act of 1974 (6 purposes, n.25, pg. 782)
 - US economic growth/relations
 - Harmonize, reduce eliminate trade barriers – substantially equivalent US competitive opportunities
 - Fairness and equity in Int'l trade – including reform of GATT
 - Protect American industry/labor, and help them adjust to new trade patterns
 - Open up market opportunities in non-market economies
 - Provide fair and reasonable access to products of LDCs in the US
- Section 301
 - Authorizing the president to be able to act or threaten to act
- 1988 expansion of section 301 powers
 - Power of determining which countries to investigate and retaliate put into the hands of the USTR
 - Time limits to act against cited country
 - Once a country is cited, action is mandatory
- Special 301
 - Special 301 . . . addresses only the protection of U.S. intellectual property. . . [It] requires that the USTR prepare an annual list of countries that allow the most flagrant violations of protection for U.S. intellectual property. The process of determining and naming these countries, along with a credible threat of retaliation against them, is the heart of Special 301 . . .



Newby – Special 301 & Copyright Protection



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Welcome to the Office of the United States Trade Representative

Robert B. Zoellick was confirmed by the U.S. Senate on February 6 and sworn in as the U.S. Trade Representative on February 7, 2001.

The U.S. Trade Representative is America's chief trade negotiator and the principal trade policy advisor to the President. In this role, the USTR and the Agency's staff are responsible for developing and implementing trade policies which promote world growth, and create new opportunities for American businesses, workers and agricultural producers. USTR has permanent offices at the World Trade Organization in Geneva, as well as in Washington, D.C.

More Information

- [Ambassador Robert B. Zoellick](#)
- [\(en español\)](#)
- [Key Officials](#)
- [USTR's Role](#)
- [History](#)

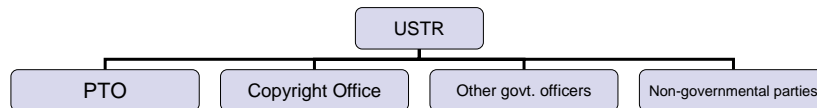
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Newby – Special 301 & Copyright Protection



- How Special 301 works
 - Identify countries that deny effective protection of intellectual property or equitable market access to United States persons who rely upon IP protection
 - Designate some countries as Priority Foreign Countries (“PFC”) (must be investigated in 30 days unless to do so “would be detrimental to the [US] economic interests”)
 - (1) that has the most “onerous or egregious” practices that deny protection or equitable market access;
 - (2) whose practices have the “greatest adverse impact,” either actual or potential, on the relevant U.S. products; or
 - (3) that is not engaging in good faith negotiations to provide effective protection of intellectual property rights. [19 U.S.C. §2242(b)(1)].
- Information sources:



Newby – Special 301 & Copyright Protection



- A country is denying adequate and effective protection of IP
 - If non-citizens denied adequate and effective means to “secure exercise and enforce rights” related to IP
- Watch lists - two levels
 - These lists are not statutorily required
 - Effect?
- General conditions triggering investigation (outside PFC listing)
 - (1) the rights of the U.S. under trade agreements are being denied or
 - (2) any policy or practice of a foreign country denies U.S. benefits that it is entitled to under trade agreements, or is unjustifiable and burdens or restricts U.S. commerce. [19 U.S.C. § 2411(a)(1)]
 - Unjustifiable or unreasonable policies or practices explicitly include
 - any act, policy or practice that **denies national or most-favored-nation treatment**,
 - denies the rights of establishment, or
 - denies adequate and effective protection of intellectual property rights. [19 U.S.C. § 2411(d)(3)(B), (d)(4)(B)].



Newby – Special 301 & Copyright Protection



- USTR or interested third party can request investigation
- If treaty-based dispute, USTR must request that the formal dispute resolution of the treaty be invoked
 - If not treaty-based, USTR has 6-9 months to investigate
- If violations do exist, mandatory for USTR to take action within specific deadlines
- Action against a PFC
 - Suspend trade benefits
 - Impose duties or import restrictions
 - Enter into binding agreements committing the offender to stop or provide the US with compensatory trade benefits
- Monitoring the measure chosen
- Two situations where action not taken
 - Arbitration committee rules for offender
 - USTR finds one of 4 conditions: (i) agreed to take measures; (ii) can't take measures but will provide compensatory benefits; (iii) action against the country has adverse effect on US economy; and (iv) national security



Newby – Special 301 & Copyright Protection



- China
 - Pre-1992 – China is a PFC
 - 1992 – MOU on eve of trade sanctions going into effect
 - China stayed on the watch list – lowest level in USTR categorization
 - 1993 – China moves to priority watch list
 - 1994 – China is a PFC again
 - China alleges betrayal
 - The US alleges non-transparent rules and regulations, lack of enforcement
 - Lots of law, but little legality?
 - 1995 agreement
 - 1996 – USTR monitoring results in another proposal to impose prohibitive tariffs, another agreement
 - 1999 – USTR says China has a functioning system capable of protecting IP rights
- Effectiveness of Special 301
 - The incentive for countries to comply is the potential loss of tariff rate reduction
 - US pressure creates an incentive to adopt IP protection sooner than a country otherwise might
 - Is a stronger IP protection regime beneficial for developing countries?



Newby – Special 301 & Copyright Protection

- Critique of Special 301
 - Differing development patterns
 - Ignoring the situation and society behind the violations?
 - Minimal compliance – just enough to stave off retaliation
 - IP colonialism?
 - Resources required to implement and operate the copyright regime
 - Resources to license or replicate, i.e., redevelop the resources/production inputs
 - Effect of unilateral measures on world trading system?
 - “norm creating” US behavior
 - Backlash from US pressure
 - US countries excluded from the foreign market
 - Would products from other countries fill the gap?



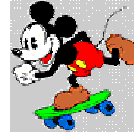
Newby – Special 301 & Copyright Protection

- Alternatives to special 301
 - Non-GATT countries
 - Governmental promotion
 - Promotion by industry
 - For violations under patent and trademark law
 - Emphasize harmful potential effects of “knock-offs”
 - Auto parts, food and drugs, etc.
 - Copyright may be different
 - Linkage to education
 - Allow some level of “piracy” to develop the countries market and economy
 - But, distinguish between domestic consumption versus export for profit



Alford – American Approaches to IP in East Asia (1994)

- Explaining our growing trade deficit
 - IP piracy?
- Counterpoints to the claim that with IP protection – those in other countries would purchase copyrighted products for full price
 - What other options are available these others?
- “There is something somehow out of whack about putting the little rodent up there with nuclear war and torture”
 - Public policy link between trade and IP
- Respect for IP – cause or result of economic development, or both?
 - Liberal unauthorized use in initial stages of economic development?
 - Japan, China, now; the US, a century ago
- Is respect for IP correlated with rights-granting countries?
- Are IP rights, such as copyright, contingent on particular historical purposes
 - Differing notions of authorship



Alford – American Approaches to IP in East Asia (1994)

- Summary of three approaches:
 - (i) level of economic development
 - (ii) commitment to basic rights
 - (iii) particular historical circumstances
 - versus
- US Government policy – viewing it as a question of will
- Deeper change needed, and not addressed by US policy
 - attitudes toward intellectual creation, toward property, toward rights, toward the vindication of such rights through formal legal action, toward government, and so forth
 - This requires the US to take full heed of what it is doing



Alford – American Approaches to IP in East Asia (1994)



- Is Alford right?
 - “So, having bad-mouthed at least three major schools of legal thought and two Presidents, one drawn from each major party, where would I leave us?”
 - If Alford is correct, is TRIPS wrong?
- I do hope, however, that we will remain vigilant as to the basic terms we use and take nothing for granted. Let me provide a few examples.
 - When we mention property, we should be mindful of which of its many attributes or constituent elements we are speaking.
 - When we endeavor to explain a phenomenon by reference to culture, let us not take it as a static monolith throughout East Asia, but instead realize its immense variety over time, across national boundaries, and among different people within any country.
 - When we speak of interests, whose interests are we concerned with and at what cost to those of others?
 - And when we refer to intellectual property law, do we mean formal doctrine or the manner in which the law plays itself out in society -- and if the latter, how are we to measure it?



Notes



- Assessing special 301
 - Success because it responded to inadequacies of pre-1994 GATT, accelerating the conceptual shift to TRIPS enforceable minimums
 - Cultural imperialism against China?
 - Cultural domination more likely with or without IP?
 - Cultural subordination
 - Developed and less-developed country
 - Developed and Developed country
- Costs/Benefits for “expediting change” in foreign countries
- Is there a link between rights protecting countries and IP protection? Link with human rights?
 - How should harsh IP penalties, even death, influence US policy?
- Special 301 exists post-TRIPS
 - Now it is used as a means to identify issues that it might ultimately pursue before the WTO Dispute Settlement Body



Special 301 Report Excerpts (2000)



- 59 of 70 countries examined “deny adequate and effective protection of IP or deny fair and equitable market access to US artists and industries that rely on IP protection.”
 - 16 on priority watch list, 39 on watch list
 - “Regrettably, according to estimates from our copyright industry, Ukraine is the single largest source of pirate CDs in the Central and East European region. The U.S. Government currently is engaged with the Government of Ukraine in an intense effort to resolve this problem. At this juncture, the United States considers its interests to be best served by continuing these efforts over the next few months. However, Ukraine will be identified as a Priority Foreign Country if it fails to make substantial progress toward eliminating pirate optical media production prior to August 1, 2000.”
- Use of HHS to help evaluate when a foreign country validly claims that US trade/IP law significantly impedes the country's ability to address a health crisis



Special 301 Report Excerpts (2000)



- TRIPS phase in
 - Developed – immediately
 - Developing – 5 years, until 1/1/2000
 - Least Developed Countries & pharmaceuticals and agriculture in certain Developing countries – even longer
- Governments as users and mandates to only use legitimate software copies
- Emphasis on TRIPS compliance
- Initiating new WTO dispute matters
 - Argentina
 - No exclusive marketing rights for pharmaceuticals (required since it offers no patent protection)
 - Other patent related deficiencies
 - Brazil
 - Patent law imposes a “local working” requirement – single issue over interpretation of TRIPS Art. 27 to be submitted under DSU



Special 301 Report Excerpts (2000)



- 2001 report update
 - Argentina
 - We are pleased that recent consultations with the Government of Argentina have been constructive and are encouraged by the dialogue that has developed to possibly resolve certain claims in the case. However, there are still some outstanding issues that must be addressed before the dispute settlement case can be fully concluded.
 - Brazil
 - This issue has been unresolved for more than five years, therefore, the United States decided to resort to WTO dispute settlement procedures. Despite numerous consultations, a mutually acceptable resolution could not be reached. On February 1, 2001, a WTO panel was established. Since the establishment of this panel, however, Brazil has asserted that the U.S. case will threaten Brazil's widely-praised anti-AIDS program, and will prevent Brazil from addressing its national health crisis. Nothing could be further from the truth. For example, should Brazil choose to compulsory license anti-retroviral AIDS drugs, it could do so under Article 71 of its patent law, which authorizes compulsory licensing to address a national health emergency, consistent with TRIPS, and which the United States is not challenging. In contrast, Article 68 -- the provision under dispute—may require the compulsory licensing of any patented product, from bicycles to automobile components to golf clubs. Article 68 is unrelated to health or access to drugs, but instead is discriminating against all imported products in favor of locally produced products. In short, Article 68 is a protectionist measure intended to create jobs for Brazilian nationals.



Special 301 Report Excerpts (2000)

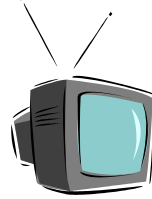


- SECTION 306 MONITORING
- China
 - Implementing TRIPS without transition period
- Paraguay
 - A PFC
 - Destroyed two multi-million dollar pirate CD factories
 - But, not yet enacted modern patent law, much trafficking in copyrighted goods
- PRIORITY WATCH LIST
- Dominican Republic
 - Review of GSP program for them
- EU
 - Initiated in 1999 WTO DSU proceedings for regulation of geographical indications (GI) for foodstuffs and agricultural products – denies national treatment
 - Only domestic GIs may be protected in the EU
 - Reciprocity in database directive
 - Not mentioned in 2001 report



Special 301 Report Excerpts (2000)

- Greece
 - Television piracy
- India
 - Various patent protection problems
 - Update in 2001 report
 - To make matters worse, the inadequate patent protection currently available is difficult for innovators to obtain: India's patent office suffers from a backlog of 30,000 patent applications and a severe shortage of patent examiners. Moreover, India's overly-generous opposition procedures often allow competitors to delay patent issuance until the patent has expired, resulting in a *de facto* removal of patent protection.
- Israel
 - Trafficking area for optical media
- Korea
 - Elevated to the Priority Watch List



Special 301 Report Excerpts (2000)

- WATCH LIST
- Armenia – no convictions yet
- Canada – US looks to Canada to quickly modify its law
- Denmark – failure under TRIPS to implement provisional remedies, including *ex parte* civil enforcement (needed for raids)
- Latvia – still much room for improvement . . .
- Macau – “We now look to Macau to vigorously prosecute those responsible for piracy”
- Taiwan – its new Intellectual Property Office “has been well staffed with energetic people . . .”



EU Trade Barrier Regulation mechanism



- Companies or industries file complaint with EU commission
- EU Commission advisory committee counsels with the named state
 - Then determines whether to conduct an examination of practices
- Examination Procedure
 - Like USTR in Special 301
 - Broad solicitation of input from interested parties
 - Required use of international dispute resolution systems as applicable
- A couple of WTO disputes have resulted

