CHAPTER V

URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS:
APPLICABILITY OF GATT STANDARDS TO IPRs

INTRODUCTION

The developed countries on the basis of their overriding bargaining power made submissions in the Uruguay Round of GATT Negotiations in 1986 that IPRs be brought under the purview of the GATT so as to bring IPR protection in developing countries in line with the rest. They were successful in including TRIPS as a subject of negotiation, calling for the adoption of world-wide uniform standards for intellectual property protection or universalisation of protection standards. Thus, the following new conception of the function of IPRs was promoted:

From its primary function as an instrument for the promotion of technological and industrial development at the national level, there appears to be a sustained move to orient it more towards the protection of the global trade and competitive interests of intellectual property owners.1

The present chapter is an attempt to highlight, analyse and compare the GATT standards with the Paris Convention and examine its implications for developing countries in the light of the provisions of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

1 Here the term IPRs, as elsewhere in the thesis, is being used interchangeably with patents.

The GATT was basically intended to apply to goods. The basic framework of the GATT is to manage orderly trade across the boundaries and reduce distortions to international trade. It does not address the extra territorial protection of IPRs in any explicit manner. The General Agreement is virtually silent on intellectual property matters and thus on patents. However, reference to intellectual property in the text of the GATT is essentially limited to a provision aimed at preventing the use of trade names to misrepresent origins [Art IX(6)] and to a provision permitting the adoption by individual GATT member states of domestic legislation necessary to protect intellectual property [Art XX (d)]. No GATT provision obliges Contracting Parties to accord any particular level of protection to IPRs or to enforce them to any particular degree of effectiveness. In fact, the only GATT provision containing obligations aimed at promoting the protection of IPRs is Article IX(6) which is limited in scope dealing only with Marks of Origin. Article IX attempts in its first five paragraphs to ensure that marking requirements are not used to hamper international trade unnecessarily or to discriminate between Contracting Parties. However, paragraph 6 of this Article is designed to promote the protection of

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intellectual property and under this:

The Contracting Parties shall co-operate with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a Contracting Party shall accord full and sympathetic consideration to such requests or representations as may be made by any other Contracting Party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other Contracting Party.

However, when this provision of Article IX does accord protection, the GATT requires that the substantive law and the related enforcement measures be non-discriminatory as between the products of different Contracting Parties and not operate so as to protect or favour domestic products, except where enforcement measures can be justified under Article XX (d).

Article XX dealing with general exceptions conceives of certain measures which can be excepted from the GATT operation and its paragraph (d) authorises Contracting Parties to adopt measures for the enforcement of IPRs that normally would be inconsistent with the General Agreement. These measures must be "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement, including those relating to... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices." At the same time, the adoption of these measures is "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary
or unjustifiable discrimination between countries... or a disguised restriction on international trade. Thus, the measures adopted may not be applied in a discriminatory manner or as disguised restrictions on international trade. The substantive IPR law being enforced must also be GATT consistent. In any case, Article XX (d) does not oblige Contracting Parties to adopt any enforcement measures; it only ensures that the GATT obligations do not stand in the way of effective enforcement of IPR legislation.

To sum up, Article XX (d) recognises that the signatory countries to the GATT will have their own regimes governing the issues of patents, trade marks and prevention of counterfeiting. The General Agreement merely requires that such regulations should not be enforced in a manner calculated to be restrictive or discriminatory to international trade in goods. It does not purport to legislate international norms in regard to IPRs.

Article XII speaking for restrictions to safeguard balance of payments in paragraph (3) refers to expansion of international trade and Contracting Parties are obliged to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding uneconomic employment of productive resources. However, Article XII (3)(c)(iii), read with XVIII (10) requires that import restrictions employed to safeguard the balance of payments not be applied so as
prevent compliance with patent, trade mark, copyright or similar procedures. In other words these provisions provide that the balance of payments measures should not prevent compliance with the IPR laws.

It may be mentioned that the GATT dispute settlement - Articles XXII and XXIII can be invoked in any case in which a Contracting Party believes that its GATT rights have been nullified or impaired by another Contracting Party's action in connection with IPRs, whether or not the action conflicts with the GATT obligations. Under the provision of consultation as contained in Article XXII, all Contracting Parties have a right to be heard and consulted in respect of any matter affecting the operation of GATT as well as any other matter for which it has not been possible to find a satisfactory solution. Therefore, it can be presumed that GATT under the consultation provision can take up the IPR question. Moreover, Article XXII can be made use of by a Contracting Party in case its GATT rights have been nullified or impaired by another Contracting Party's action or that the attainment of any objective of the Agreement is being impeded as a result of the failure of another Contracting Party to carry out its obligations under GATT; or the application by another Contracting Party of any measure, whether or not it conflicts with the provisions of this Agreement or the existence of any other situation. If no satisfactory adjustment is effected between the Contracting Parties, the
matter may be referred to the Economic and Social Council of the United Nations for finding out a proper solution. In fact IPR related disputes have been brought before the GATT and decided by its dispute settlement panels under these provisions. Moreover, after initial objection by the United States, the GATT Council did set up a panel to consider Brazil's complaint against measures taken by the United States in retaliation for alleged inadequate protection of the United States patent rights in Brazil.

The GATT does establish a very limited number of "time less" principles. These are Most Favoured Nation (MFN) treatment, national treatment and reciprocity. Apart from these, there is rule of special and differential treatment to developing countries.

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4 For instance, four such disputes have been the subject of reports which concerned: the US Manufacturing Clause; Section 337 of the US Tariff Act of 1930 (in two instances) and Japanese labelling practices on imported wines and; alcoholic beverages. For details of these cases see United States Manufacturing Clause: Report of the Panel Adopted on 16 May 1984; reprinted in GATT, BISD, Thirty-first Supplement (1983-84), p. 74; and Conciliation: United States Imports of Certain Automotive Spring Assemblies: Report of the Panel Adopted on 25 May 1983; in GATT, BISD Thirtieth Supplement, 1984, pp. 107, 126-7; see also Ingrid Nordgren, "The GATT Panels During the Uruguay Round: A Joker in the Negotiating Game," Journal of World Trade, vol. 25, no. 4, August 1991, pp. 58, 61-63.


6 Abbott, ibid, p. 738.
Herein follows a brief analysis of these generally recognised basic principles of GATT and their comparison with the International Patent legislation in the form of Paris Convention.

**Most-Favoured-Nation Treatment**

MFN treatment means equal treatment as among the various foreign states. Thus the fundamental principle of MFN treatment in Article 1 of the GATT forbids discrimination between contracting parties. Regarding quantitative restrictions it is repeated in Article XIII. The general exception contained in Article XX upholds the principle by excluding "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." The MFN commitment under GATT imposes certain obligations on contracting parties. Thus any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other Contracting Parties.

This principle of non-discrimination as between countries applies to international trade in products. The question of applying MFN treatment to patents and other IPRs does not arise as there is no such provision under the treaties on IPRs, particularly the Paris Convention. The latter treaty is silent

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National Treatment

The principle of national treatment in international trade law refers to the treatment of goods and is enshrined in Article III of the GATT. This provision prevents laws and regulations affecting internal commerce from being applied in such a way as to afford protection to domestic products or to give less favourable treatment to imported ones. Article III (4) of the GATT stipulates:

The products of the territory of any Contracting Party imported into the territory of any other Contracting Party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution of use.

8 Ibid.

It means that, in all situations, no discrimination should be made between foreign and domestically produced goods. We have already noticed under the Paris Convention the contents of the principle of national treatment or as it is also called, "assimilation with nationals". The Paris Convention provides for national treatment in the sense that whatever rights and obligations are provided in the patents laws for the nationals should also be applicable to foreigners. For instance, if there are strict working requirements and restrictions on the right to import, they will be applicable to its own nationals as well as foreigners. Thus, the international law of IPRs looks at the nationality of the persons who seek protection rather than at the works which are object of protection. Thus Article 2(1) of the Paris Convention provides for national treatment regarding the access to domestic protection of patents.

Reciprocity

Although reciprocity as a legal concept has not been defined by the Contracting Parties, it is a fundamental principle occupying a central position in the GATT. The preamble to the General Agreement refers to the principle in stating that the parties desire to enter "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and

other barriers to trade." Part IV of the GATT which was added in 1966 provides that developed countries do not expect to receive reciprocal benefits from developing countries in trade negotiations. Reciprocity as accepted in GATT practice, means that a country need not make trade concession unless it receives something in return.\textsuperscript{11}

Paris Convention, however, did not intend to allow member states to demand reciprocity over and above the limits set out in the treaty. Historically, the resort to national treatment is without reciprocity. Even at the original Paris Convention of 1880 the principle of national treatment was adopted despite the fact that at the time the national protection of industrial property was not well developed and that some countries did not even have sufficient patent, trademark and design protection.\textsuperscript{12}

As the provision forbids discrimination, the effective meaning of the national treatment provision under the Paris Convention is that "no reciprocity of protection can be required by the States Party to the Convention." In principle, any reciprocity

\textsuperscript{11} Abbott, n. 5, p. 733.


built into the Paris Convention is derived solely from these minimum standards or from certain reservations of reciprocity set out in the Convention. Apart from these safeguards, the national treatment clause "functioned as a clearing key that eliminated the possibility of further appeals to material reciprocity."  

Special and Differential Treatment

In order to promote the economic development of the developing countries, special and differential treatment to them has been clearly recognised under the GATT. The differential and preferential regime is without reciprocity. Certain commitments by the industrialised developed countries so as to stimulate export earnings of the less developed countries as mentioned earlier have been embodied in Part IV of the GATT. This principle is a permanent fixture of the basic GATT instrument. In the Enabling Clause, it has been provided that notwithstanding the provisions of Article 1 of the GATT, Contracting Parties may accord differential and more favourable treatment to less developing countries, without according such treatment to other Contracting Parties.

14 Under material reciprocity, country A does not bind itself to give any more protection to the works of country B than country B gives to the works of country A. Thus reciprocity means that there is no need to give more than that offered by the lower of the two. Implicit in the system are the need for comparisons and the prerogative of retaliating by discrimination by offering less protection to foreign authors than to domestic authors. See J.H. Reichman, "Intellectual Property in International Opportunities and Risks of a GATT Connection", Vanderbilt Journal of Transnational Law, vol. 22, no. 4, 1989, pp. 845-6.
The protection of IPRs has become one of the most important items in the trade policy agenda of the United States. Within a period of about six years from 1980-86 the United States introduced a number of major new national, legal and institutional measures in the whole field of intellectual property protection as is evident from the Table given hereunder, mentioning the legislations and the main elements thereunder.

The heightened concern of the United States Congress over intellectual property issue was reflected in the enactment of Omnibus Trade and Competitiveness Act of 23 August 1988 in which not only an express programme of executive action was outlined but also made amendments to foreign unfair trading practices legislation (originally enacted as Section 301 of the Trade Act of 1974). The changes required the United States Trade Representative (USTR) to:

(1) identify countries that deny adequate and effective protection or fair and equitable market access for IPRs.

For the text, see International Legal Materials (hereinafter cited as ILM), vol. 28, 1989, pp. 15-121 and 399-493.

Amended Section 301 of 1974 Act as contained in Section 1301 of 1988 Act, ibid, pp. 59-61.

New Section 182(a)(1)(A) & (B) added in 1974 Act as contained in Section 1303 of 1988 Act, ibid, pp. 67-68.
TABLE 5.1

MAJOR POLICY DEVELOPMENTS IN THE UNITED STATES
CONCERNING INTELLECTUAL PROPERTY PROTECTION, 1980-86

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Year of enactment</th>
<th>Subject</th>
<th>Main elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1980</td>
<td>Amendment to Copyright Law</td>
<td>Extension of copyright protection to computer programmes.</td>
</tr>
<tr>
<td>2</td>
<td>1980</td>
<td>The Stevenson Wydler Technology Innovation Act</td>
<td>Contains a broad range of measures to promote technological innovation. Recognizes the need for a comprehensive national policy to enhance technological innovation for commercial and public purposes.</td>
</tr>
<tr>
<td>3</td>
<td>1982</td>
<td>Piracy/Counterfeiting Amendments Act</td>
<td>Criminal penalties for wilful infringement of copyright for purposes of commercial advantage or financial gain.</td>
</tr>
<tr>
<td>4</td>
<td>1984</td>
<td>Semi-conductor Chip Protection Act</td>
<td>Sui generis legal protection for semi-conductor chips for 10-year duration, protection for foreign-origin chips on basis of reciprocity.</td>
</tr>
<tr>
<td>5</td>
<td>1984</td>
<td>Trade Marks Counterfeiting Act</td>
<td>Control of Trafficking in Counterfeit goods and services.</td>
</tr>
<tr>
<td>6</td>
<td>1984</td>
<td>National-cooperative Research Act</td>
<td>Relaxes antitrust rules in relation to joint ventures on R &amp; D.</td>
</tr>
<tr>
<td>7</td>
<td>1984</td>
<td>Trade and Tariff Act</td>
<td>Amendments of 1974 Trade Act regarding retaliatory trade sanctions for unjustifiable and unreasonable trade practices of other countries that restrict United States-trade, including</td>
</tr>
</tbody>
</table>

Contd....
<table>
<thead>
<tr>
<th>Year</th>
<th>Act</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>Generalized system of Preferences Renewal Act</td>
<td>Adds industrial property protection and reduction of barriers to investments and services to the eligibility criteria for GSP treatment of imports from developing countries.</td>
</tr>
<tr>
<td>1984</td>
<td>Patent Term Restoration Act</td>
<td>Provides for extension of United States patents covering various health-care and food-related inventions.</td>
</tr>
<tr>
<td>1985</td>
<td>International Protection Act</td>
<td>Provides for reciprocity in the relationship between United States and foreign protection of software.</td>
</tr>
</tbody>
</table>

(2) **identify** "priority countries" that are the most onerous or egregious IPR transgressors and that do not undertake or make progress in negotiations with the USTR.18

(3) **initiate** accelerated Section 301 investigations with regard to the practices of the identified priority countries (which may lead to the taking of remedial action).19

On 25 May 1989, the Office of the USTR under the "Special 301" provisions of the 1988 Act made an intellectual property "Watch List" and "Priority Watch List" identification.21 The USTR press release accompanying the Lists stated:

> As a result of this extensive review, the USTR concluded that no foreign country currently meets every standard for adequate and effective intellectual property protection as set forth in the U.S. proposal on intellectual property tabled in the Uruguay Round.

> Thus the USTR has determined that all countries are eligible for potential priority designation based on the standards of U.S. Uruguay Round proposal, because all countries "deny adequate and effective protection of intellectual property rights" within the meaning of the Statute."22

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18 New Section 182(b)(1)(A), B & (C) added in 1974 Act as contained in Section 1303 of 1988 Act, ibid.


20 For the text of "Special 301" provisions as contained in Section 1301 of the 1988 Act, see ibid, pp. 59-65.

21 On the Watch List were put 17 countries which included: Argentina, Malaysia, Canada, Pakistan, Chile, Philippines, Colombia, Portugal, Egypt, Spain, Greece, Turkey, Indonesia, Venezuela, Italy, Yugoslavia and Japan.

On the Priority Watch List were put 8 countries which included: Brazil, the Republic of Korea, India, Saudi Arabia, Mexico, Taiwan, the People's Republic of China and Thailand.

22 Quoted in Abbott, n. 5, p. 709.
Moreover, an intense programme of direct bilateral negotiations coupled with the threat and use of economic sanctions so as to improve foreign protection for United States IPRs owners was undertaken by the United States Government. Bilateral agreements were concluded with the Republic of Korea, Canada, Mexico and Taiwan. At the same time, through the renewal of the Generalized System of Preferences (GSP) by the Trade and Tariffs Act of 1984, trade preferences were linked to trade related IPRs. The 1984 law stated that beneficiary countries could lose GSP privileges if they did not meet certain United States requirements which included protection of intellectual

The agreement with the Republic of Korea followed threat of US action, under Section 301 of the Trade and Tariffs Act 1984 against imports from the Republic (mainly of semiconductors and capital goods) unless it agreed to substantial modifications of its policy in respect of FDI and IPRs. After the conclusion of bilateral negotiations in 1986, the Republic of Korea agreed: To extend its patent legislation to chemicals and pharmaceuticals, to align its copyright legislation in general to that of the US (e.g. lifetime plus 50 years for individuals and 75 years for corporations); to protect computer software along US lines; to adhere to the Universal Copyright Convention and the Geneva Phonogram Convention, to make the new IPR legislation retroactive for ten years; to withdraw from the local market products copied from US products that had been launched in the previous seven years; and to permit entry of US service companies in the Republic.

Negotiations with Canada resulted in revision of the Canadian Patent Law, that now confers a ten year monopoly for pharmaceuticals or seven years for generic drugs if the active ingredients are locally provided.

property. The law further provided that USTR could threaten countries with the partial loss of GSP on some products or offer them more secure GSP benefits on others, depending whether or not the country cooperated with the United States. It provided for general and annual review. It may be mentioned that most developing countries are granted some degree of preferential access to the United States market through the GSP and the Caribbean Basin Initiative (CBI). Both these programmes were originally intended to provide a sort of free-market form of foreign assistance by offering non-reciprocal, duty free treatment for certain qualifying products that the beneficiary countries export. These programmes, however, came to be used as indirect tools by American trade negotiators for meeting the United States trade demands on TRIPS. In effect, as has been stated, this conditionality was the functional equivalent of Section 301 directed at smaller and less industrially sophisticated countries.

GSP benefits were denied to Indonesia on a complaint in 1986 by the International Intellectual Property Alliance on account of Indonesia's alleged failure to provide adequate and effective protection for copyrights. The dispute was ultimately

resolved in 1989, when the USTR signed an agreement with Indonesia, in which the latter agreed to protect copyright on books, sound recording, films, computer, software and other creative works. In 1987 the Pharmaceutical Manufacturers' Association (PMA) alleged that Thailand did not protect product and process patents for pharmaceuticals. On failure to reach an agreement, the USTR announced in early 1989 that Thailand's GSP benefits would be cut. It lost GSP eligibility for some products and was denied more secure GSP benefits on others, with the total sanctions being valued at between $60 and $200 million in trade. The GSP programme thus served as an important form of leverage in United States trade negotiations. The fact is demonstrated by the magnitude of trade involved: $50.0 billion worth of United States imports from developing countries were eligible for GSP treatment in 1988. The utility of this leverage varied across countries for GSP benefits accounted for a relatively small share of some countries' exports to the United States, but represented a considerable share of other countries' shipments as becomes clear from Table 5.2

In summary, some of the recent legislative changes in developing countries have been made under strong external pressure, in particular, the threatened withdrawal of GSP for countries failing to

26 Ibid.
27 Ibid.
TABLE 5.2

RELATIVE VULNERABILITY OF SELECTED UNITED STATES TRADING PARTNERS TO THREATS OF COMMERCIAL RETALIATION

<table>
<thead>
<tr>
<th>1987 Exports to United States</th>
<th>Status in 1988 Exports to US receiving GSP treatment a</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987 Exports to United States</td>
<td>Total As percent of all exports As percent of GNP Status in GSP &amp; CBI</td>
</tr>
<tr>
<td>Asian NIEs</td>
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<tr>
<td>Hong Kong</td>
<td>13,511</td>
</tr>
<tr>
<td></td>
<td>27.9</td>
</tr>
<tr>
<td></td>
<td>29.8</td>
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<td></td>
<td>Graduated</td>
</tr>
<tr>
<td></td>
<td>1,859 b</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>18,362</td>
</tr>
<tr>
<td></td>
<td>38.9</td>
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<tr>
<td></td>
<td>16.3</td>
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<td></td>
<td>Graduated</td>
</tr>
<tr>
<td></td>
<td>2,766 b</td>
</tr>
<tr>
<td>Singapore</td>
<td>7,000</td>
</tr>
<tr>
<td></td>
<td>24.5</td>
</tr>
<tr>
<td></td>
<td>33.8</td>
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<tr>
<td></td>
<td>Graduated</td>
</tr>
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<td></td>
<td>1,809 b</td>
</tr>
<tr>
<td>Other Asia and Pacific</td>
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<td>China</td>
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<td>7.7</td>
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<td>0.9</td>
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<td>Not eligible</td>
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<tr>
<td>India</td>
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<td>19.9</td>
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<td>GSP</td>
</tr>
<tr>
<td></td>
<td>349</td>
</tr>
<tr>
<td>Indonesia</td>
<td>3,335</td>
</tr>
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<td></td>
<td>20.2</td>
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<tr>
<td></td>
<td>4.3</td>
</tr>
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<td>GSP</td>
</tr>
<tr>
<td></td>
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</tr>
<tr>
<td>Malaysia</td>
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<tr>
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<td>GSP</td>
</tr>
<tr>
<td></td>
<td>634</td>
</tr>
<tr>
<td>Pakistan</td>
<td>463</td>
</tr>
<tr>
<td></td>
<td>11.1</td>
</tr>
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<td></td>
<td>1.3</td>
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<td></td>
<td>GSP</td>
</tr>
<tr>
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<td>63</td>
</tr>
<tr>
<td>Phillipines</td>
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<td>36.2</td>
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<td>GSP</td>
</tr>
<tr>
<td></td>
<td>314</td>
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<tr>
<td>Brazil</td>
<td>7,666</td>
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<td></td>
<td>28.8</td>
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<td>2.4</td>
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<td>GSP</td>
</tr>
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<td></td>
<td>1,319</td>
</tr>
<tr>
<td>Bolivia</td>
<td>103</td>
</tr>
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<td>17.9</td>
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<td>2.5</td>
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<td>GSP</td>
</tr>
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<td>10</td>
</tr>
<tr>
<td>Chile</td>
<td>1,048</td>
</tr>
<tr>
<td></td>
<td>21.6</td>
</tr>
<tr>
<td></td>
<td>6.4</td>
</tr>
<tr>
<td></td>
<td>GSP suspended</td>
</tr>
<tr>
<td></td>
<td>19</td>
</tr>
<tr>
<td>Colombia</td>
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</tr>
<tr>
<td></td>
<td>41.9</td>
</tr>
<tr>
<td></td>
<td>6.1</td>
</tr>
<tr>
<td></td>
<td>GSP</td>
</tr>
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Contd......
<table>
<thead>
<tr>
<th>Country</th>
<th>Value (in millions)</th>
<th>Duty-Free (%)</th>
<th>Nontariff Barriers (%)</th>
<th>Eligibility</th>
<th>Value (in thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dominican Republic</td>
<td>1,106</td>
<td>83.6</td>
<td>22.4</td>
<td>GSP &amp; CBI</td>
<td>138</td>
</tr>
<tr>
<td>El Salvador</td>
<td>273</td>
<td>44.4</td>
<td>6.5</td>
<td>GSP &amp; CBI</td>
<td>15</td>
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<tr>
<td>Guatemala</td>
<td>493</td>
<td>50.6</td>
<td>7.2</td>
<td>GSP &amp; CBI</td>
<td>23</td>
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<tr>
<td>Mexico</td>
<td>18,654</td>
<td>69.6</td>
<td>12.5</td>
<td>GSP</td>
<td>2,188</td>
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<td>1.3</td>
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a Value of imports that actually entered duty-free under GSP in 1988, value of potentially eligible products is generally higher.

b Each of these trading partners was eligible for GSP in 1988, but was graduated as of 1 January 1989.

provide desired levels of protection for industrial property rights. Other technologically advanced developing countries were threatened with retaliatory trade sanctions for their innovation oriented policies at the firm level. Not all approaches

28 For instance Singapore was to lose its GSP status in the US as from January 1989, despite its rapid action to comply with those demands. In the case of Republic of Korea, compliance with US demands entailed the loss of GSP status in the European community in retaliation for perceived determination in favour of US firms. See Doc. TD/B/C.6/146, n. 2, p. 19.

29 For instance Brazil's trading partners, particularly the US, threatened retaliatory trade sanctions for the exclusion of its products from the Brazilian market under the New Brazilian Informatics Policy of 29 October 1984, which policy is structured around the concept of "market reserve" for national companies, coupled with control of foreign investments in the informatics sector. Such investments are limited to 30 percent participation in joint ventures. So the tax incentives under the programme are limited to companies in which at least 70 percent of the capital stock is owned by Brazilian nationals, including private or government owned companies.

Thus the restriction of foreign investors and foreign purchase attracted opposition from its trading partners. The main features of the policy cover the provision of protection and incentives for the local development and production of computers and related products and the regulation of imports and foreign investments to ensure that the acquisition of foreign technology would complement rather than displace local R & D efforts. This policy was reinforced with the adoption of a new informatics law on 29 October 1989 and related fiscal legislation. Ibid, p.17.

In the case of China's failure to provide "adequate" protection for IPRs the threat of counter-retaliation in the form of a hit-list of 12 bn worth of US exports, from aircraft, chemicals and steel to cotton and corn, that would be subject to tariffs upto 100 percent. China ultimately agreed to bring the new rules to toughen intellectual property protection although China would not be a party to TRIPS Agreement as it is not a GATT member. Financial Times (Delhi), 16 January 1992.

Contd.....
to bilateral TRIPS negotiations rested upon retaliatory measures. The United States also employed non-coercive approaches as alternatives to the threat of sanctions which included: (a) technical assistance to developing countries aiding them in developing and enforcing stricter regimes for the protection of intellectual property, and (b) the negotiation of mutually beneficial bilateral trade agreements that contained provisions relating to IPRs. The United States provided technical assistance to developing countries both on a bilateral basis and through international organisations. For example, the Commerce Department trained foreign government officials in the administration of IPRs laws, offering seminars both in their home countries and in the United States. Similar programmes were sponsored under the auspices of the WIPO. This approach was endorsed by the United States Congress through including in the 1988 trade law a provision stating:

(1) The Secretary of State should urge international technical organizations, such as the World Intellectual Property Organization, to provide expertise and co-operate fully in developing effective standards, in the General Agreement on Tariffs and Trade for the international protection of intellectual property rights; and

Contd....

Similarly India was put in the same category under "Special 301" on the ground that unless India offers "adequate" protection in the area of IPRs, it would impose sanctions against its exports to that country. B.S. Chimni, "Policy/Dunkel Draft: Ambiguous arena", Economic Times (New Delhi), 3 February 1992.


(2) Development assistance programmes administered by the Agency for International Development, especially the reimbursable development programme, should, in cooperation with the United States Copyright Office and the Patent and Trademark Office, include technical training for officials responsible for the protection of patents, copyrights, trademarks, and mask works in those countries that receive such development assistance.31

Another noncoercive form of IPRs diplomacy was to negotiate bilateral agreements on a variety of trade-related topics, of which IPRs was just one. The United States hoped to use its negotiations with both Canada and Mexico as means for resolving its TRIPS disputes with these neighbours. In this direction, the Canadian talks represent a more comprehensive approach to bilateral trade liberalisation. The United States and Canada implemented on 1 January 1989 a bilateral Free Trade Agreement (FTA) which creates the world's largest free trade area affecting trade of about $125 billion. The agreement will eventually lift all tariff barriers between them and affect many non-tariff barriers as well. Its aim is thus to eliminate barriers to trade and investment between the two countries.

The United States had hoped for an entire chapter in the FTA devoted exclusively to the TRIPS issue, in order to highlight its importance and establish firm rules. Canadian officials refused to grant this request and, in fact, approved just one sentence in the FTA that directly addresses TRIPS. Article 2004 simply states that "the parties shall cooperate in the Uruguay Round

31 Quoted in ibid, pp. 113-14.
32 For the text, see ILM, vol. 27, 1988, pp. 281-399.
of multilateral trade negotiations and in other international forums to improve protection of intellectual property." It was agreed on the part of Canadian negotiators to include within the accord a clause obligating their nation to enact stricter patent protection for pharmaceuticals, but the domestic opposition to this provision was so intense that it was removed from the agreement at the last moment.

On the other hand, Mexico made some changes in its intellectual property regime. Open trade, however, became a part of Mexico's policy for economic growth with its decision to become a party to the GATT in 1986. Apart from reaching a Framework Understanding on Bilateral Trade and Investment with the United States, Mexico along with Canada and the United States has signed in December 1992 the North American Free Trade Agreement (NAFTA) with the objectives to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the Parties;

33 VanGrasstek Communications, n. 24, p. 115.
34 These cover: (a) adoption on 10 January 1990 of the New Regulations to Mexico's Law on the Control and Registration of the Transfer of Technology and Use and Exploitation of Patents and Trademarks, a law which was originally enacted in 1972. These Regulations eliminate a number of restrictions strengthened in 1982 on inbound technology transfers under this law; (b) Mexico's Invention and Trademark Law (ITL) as amended in 1987 and the proposed broad amendments to ITL of January 1990. For details, see Alan S. Gutterman, "Changing Trends in the Context and Purpose of Mexico's Intellectual Property Right Regime", Georgia Journal of International and Comparative Law, vol. 20, no. 3, 1990, pp. 517, 527.
35 For the text, see ILM, vol. 27, 1988, pp. 438-42.
36 For the text, see ibid, vol. 32, 1993, pp. 289-451.
(b) promote conditions of fair competition in the free trade area;

(c) increase substantially investment opportunities in the territories of the Parties;

(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.37

At the same time, the parties affirm their existing rights and obligations with respect to each other under the GATT and other agreements to which such Parties are party.38 However, in the case of inconsistency between NAFTA and such other agreements, the NAFTA shall prevail to the extent of inconsistency, except as otherwise provided in NAFTA. In case of satisfactory outcome of such talks, the framework negotiations approach becomes a useful means for the United States and its trading partners in the developing world to resolve their disagreements on TRIPS, without resorting to the threat of retaliation.

For the developing countries, the bilateral pressures and new multilateral initiatives in the form of TRIPS in the GATT Uruguay Round of Multilateral Trade Negotiations

37 Article 102(1) of NAFTA.
38 Article 103(1) ibid.
39 Article 103(2) ibid.
demanding for the adoption of common standards of protection, raised a number of difficult questions, especially in so far as they are linked to ongoing efforts on international trade liberalisation. The freedom of the countries, within the limits set by the international conventions to legislate in accordance with their own economic, social and developmental objectives and interests, was to be curtailed if they became bound to follow international norms in exchange for trade concessions in other areas, unless the normative framework provided appropriate scope for the promotion of domestic technological development.

MANDATE FOR NEGOTIATIONS

The Declaration, adopted at the special session of the Contracting Parties to the GATT on 20 September 1986 in Punta del Este launching the Uruguay Round, contained the "most extensive negotiating mandate ever to be drafted in GATT." It spelt out in detail the objectives and the general principles and procedures that would govern the negotiations. The same negotiating objective can be noted in Decisions on Negotiating Structure and Plans for the Uruguay Round by the Trade Negotiating Committee (TNC) on 28 January 1987. The mandate

40 For the text, see ILM, vol. 25, 1986, p. 1623.
41 Chimni, n. 29, p. 135.
42 For the text, see ILM, vol. 26, 1987, p. 850.
of the relevant Negotiating Group regarding TRIPS reads:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate, as appropriate, new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

The term "trade-related intellectual property rights* (TRIPS) nowhere appeared in the text of the negotiating objective, but only in its title as Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. On the other side the words used in the mandate were "distortions" and "impediments" to international trade. However, the emergence of such a mandate with differences was based on the 44 Colombian-Swiss draft which also had the support of the United

43 ILM, ibid, p. 855.
44 The draft provided: In order to reduce distortions and impediments to international trade arising from the lack of adequate and effective protection of intellectual property rights, in negotiations shall aim:

— to promote a more effective and generalised application of existing international standards in intellectual property matters;
— to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade; and
— to clarify and elaborate rules and disciplines with respect to these matters. Emphasis added. Quoted in Raghavan, n. 29, p. 18.
States. The "judgement" in that draft that lack of adequate and effective protection of IPRs is the cause of trade distortions and is an impediment to international trade was eliminated in the negotiating objective. The mandate was spelt out as the promotion of "a more effective and generalised application of existing international standards" and ensuring that measures and procedures to enforce IPRs do not themselves become "barriers to legitimate trade". In the Punta del Este mandate, these are merely factors to be "taken into account", have the same status as other factors like the need to ensure that enforcement of IPRs do not themselves become barriers to legitimate trade. The Colombian-Swiss draft had called for clarification and elaboration of rules and disciplines to achieve the two 'aims' of the mandate, the Punta del Este declaration had called for clarification of GATT provisions and elaboration of new rules and disciplines only as "appropriate".

The developing countries insisted that each paragraph of the negotiating objective should be dealt with separately. The developed countries, on the other hand made no distinctions between the three paragraphs and treated them together. The developed countries later argued that norms and standards should form part of the negotiations as inadequate, excessive and discriminatory protection of IPRs constitutes a major distortion of and impediment to trade and should as such be dealt within the framework of the GATT as it results in trade distortions. Developing countries participating in the negotiations expressed
the view that the Group had no such mandate, and GATT's concern is with the liberalisation of international trade and not with the elaboration and enforcement of IPRs of individual countries, a subject matter which was within the competence of the WIPO. In their view, the main task of the Negotiating Group was to clarify GATT rules and provisions dealing with IPRs and elaborate as appropriate new rules and disciplines for reducing distortions and impediments to international trade. Thus in the area of TRIPS the basic dispute related to the mandate for negotiations. The developed countries wanted the question of norms clarified and rules of enforcement fixed. The developing countries, on the other hand, were of the view that the mandate for negotiations was limited only to a clarification of the GATT rules which could be invoked and applied in this area. Another issue was the duplication or overlap of issues in TRIPS negotiations with those covered by the existing conventions administered by the WIPO or with the negotiations proceeding in the WIPO on different issues.

There were three principal objections of the developing countries to the inclusion of new issue areas. Firstly, there being a backlog of outstanding issues lying unresolved since the Tokyo Round of the GATT Negotiations which needed to be resolved

before new issues could be considered. Secondly, new issues areas were outside the ambit of the GATT, which was never meant to deal with anything other than the areas of goods. Thirdly, if the ambit of the GATT system had to be expanded, it should not be extended to cover issues of interest only to the developed countries but there was need to take note of the link between trade and debt; trade in primary commodities covering aspects of market access, adverse terms of trade, price and income instability. 46

Two reasons have been mentioned for acceptance of such a strong mandate on the part of the developing countries. Firstly, they were preoccupied with resisting the inclusion of services under the GATT and secondly, they did not entirely realise its adverse consequences. There again seems to be two reasons for rejecting the WIPO on the part of the industrialised countries and thereby shifting the patent debate to the Uruguay Round under the GATT. One is lack of enforcement abilities in the WIPO which as a result can only suggest guidelines for IPR regimes thereby leaving a discretion to the individual countries to accept and adopt these revised guidelines. The other reason is the voting system which is unweighted and thus by nature of their numbers, places the industrialised countries in a minority.

46 For details, see Chimni, n. 29, pp. 138-41.
ISSUE OF RIGHT FORUM: GATT OR WIPO

Till the 1989 Geneva talks of the GATT, the developing countries continued to raise objections to discussing IPR per se and argued that the GATT is not the right forum to discuss norms and standards of IPRs. Because they were contained within national legal systems, and therefore do not lie within the jurisdiction of the GATT but should be discussed in the WIPO, an international organisation established to assist countries in setting up IPR regimes. Thus the dispute between the developed and developing countries over whether WIPO or GATT should have final responsibility for international intellectual property matters colored the TRIPS negotiations since the Uruguay Round was launched in 1986 and continued to influence the debate.

The developed countries including the European community and the United States claimed in the TRIPS negotiations that GATT should be the dominant forum since so much intellectual property work is trade related. Third World Countries claimed that GATT's role should be sharply circumscribed, leaving a predominant role for WIPO, where the developing countries have a built-in majority.

In the proposals submitted to the Negotiating Group in October 1988 Brazil drew attention to "the problems that would arise from excessive protection of intellectual property rights"

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in impeding the access of developing countries to the latest technological developments and thereby hindering their participation in international trade. Monopoly situations created by such protection would restrict and distort international trade, and countries granting it would find difficulties in acquiring and adapting foreign technology. The inflexibility that this would imply would not assist developing countries to increase their participation in international trade. Brazil has been the leading developing country in opposing the incorporation of IPRs into GATT framework. Along with Argentina, India, Mexico and some other developing countries, it pointed out that it had an "infant" high technology industry with a large and expanding market, and that this group of countries has already designed and implemented a strategy for this sector. It argued further that these countries had not yet acquired international competitiveness and consequently would not benefit from the opening up of their markets under the type of arrangement envisaged by the developed countries. An indiscriminate liberalization process would spell the end of a national high-technology industry. In contrast, the developed countries, particularly the technology leaders would stand much to gain.

50 Rao, n. 47, p. 2845.
51 Bifani, n. 23, p. 177.
India in its proposal argued that "issues of intellectual property are not germane to international trade. The basic purpose of the patent system is not promotion of trade, but of inventive activity. Hence, it is not appropriate to establish within the framework of the GATT new rules and disciplines concerning availability, scope and use of IPRs. It noted that only restrictive and anticompetitive practices of the patent owner impede or distort international trade. India argued that "it would be inappropriate to think in terms of a patent regime that focussed merely on the protection of monopoly rights, ignoring the enormous differences in nations' economic, industrial and technological development." 52

THE MID-TERM REVIEW OF THE URUGUAY ROUND

The TNC which was established under the Punta del Este Declaration to conduct the negotiations, at the ministerial level met in 1988, for a mid-term review of the multilateral trade negotiations. The mid-term review which began in Montreal from 5-9 December 1988, was ultimately concluded in Geneva with intensive negotiations from 5-8 April 1989. At Geneva, participants agreed upon agriculture, textiles and

clothing, safeguards and TRIPS, items on which agreement had not been reached in Montreal. These decisions together with the others reached at Montreal meeting are entire package adopted on 8 April 1989. On the issue of TRIPS, an agreement was reached to negotiate on (a) the applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions; (b) adequate standards and principles; (c) effective and appropriate means for enforcement of IPRs; (d) effective and expeditious procedures for the multilateral prevention and settlement of disputes; and (e) transitional arrangements. It was also agreed to give "consideration... to the underlying public policy objectives for the protection of intellectual property, including developmental and technological objectives." Moreover, the negotiations were

53 The immediate reason for the collapse of Montreal mid-term review meeting—preceded by 15 months of negotiations—was the failure of talks on agriculture between the United States and European Community. Whereas the former insisted on commitments within a time schedule to eliminate domestic and other subsidies, the EC was prepared only to reduce the level of such subsidies, and no more. As a result, the Latin American countries, i.e., Argentina, Brazil, Colombia, Uruguay and Chile refused to join in the consensus on other issues. Kushi M. Khan, "Developing Countries and the Uruguay Round", Law and State (Tubingen), vol. 48, 1993, p. 68.


55 For the text of the Decisions on Trade-related aspects of intellectual property rights, including trade in counterfeit goods, see ibid, pp. 1030-31.

56 Decision on TRIPS, para 4.

57 Ibid, para 5.
to be "conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organisations." 58

It is to be noted that the much wider term TRIPS made appearance in the mid-term package. The agreement is pointer to the direction in which the developed countries wanted the negotiations to move. Any issue related to TRIPS could then be raised as a GATT issue with the justification of a retaliation in the case of non-compliance by developing countries. As shown earlier, the United States had already started bilateral pressures of this kind through recent application of new laws. The basic differences between the developed and developing countries over the interpretation of the mandate over IPRs as well as whether norms and standards of IPRs should be discussed which remained controversial at the Montreal meeting, however, came to be resolved later at Geneva where the developing countries contrary to their earlier stand agreed to discuss norms and standards of IPRs in the GATT. This meant a sudden and extreme change in the negotiating position of the developing countries. The TNC decision in the form of a framework agreement adopted on 8 April 1989, at the mid-term review says:

4. Ministers agree that negotiations on this subject shall continue in the Uruguay Round and shall encompass the following issues:
   (b) the provisions of adequate standards and principles concerning the availability, scope and use of trade related intellectual property rights.

58 Ibid, para 8.
Thus the Punta del Este Mandate was considerably broadened in mid-term review. The developing countries which were interpreting the Punta del Este negotiating objective as not including the discussions on norms and standards of IPRs agreed to a decision which expressly included this provision. There is no discernible reason for this sudden change in the negotiating position of the developing countries. At the same time, there was a clear tone of dissatisfaction on the outcome of the mid-term review at Geneva in the Third World countries. India, Brazil, Colombia, Tanzania and Cuba, for instance, complained about the imbalanced character of the negotiated results. Although the mid-term review decision at Geneva on the issue of TRIPS contained the provision to consider the public policy objective of the developing countries including developmental and technological objectives, its formulation is much weaker than that which concerned the issues to be negotiated. It is of no help to developing countries when the issue of an institutional framework for implementation is formally kept open. On the other side, the developed countries were able to give a new interpretation to the Declaration of Punta del Este by pushing through their demand to negotiate on the issue of norms and standards of IPRs, and their adequacy for protecting these rights, but without making any substantive concessions to developing countries. This position can be explained in the lack of unity among developing

59 Khan, n. 53, p. 73.
countries of the South as against strongly organised developed countries of the North. Moreover, as a result of bilateral pressures from the United States, the major developing countries like India and Brazil failed to mobilise other developing countries to take a collective stand towards achievements of a better outcome. In fact after Montreal, the unity of the Third World collapsed.

THE INTERNATIONAL TRADE LAW STANDARDS OF GATT AND THE QUESTION OF THEIR APPLICABILITY TO PATENTS

Various proposals were made by a number of developed countries to apply GATT standards to patents. It becomes imperative to analyse such proposals in the light of international trade law standards of the GATT and discuss their implications for the developing countries.

Proposals of Developed Countries

The United States, the European Economic Community (EEC), Japan, Switzerland and the Nordic countries submitted detailed written submissions to the TRIPS Negotiating Group for the achievement of the negotiating objective. One of the basic goals of the proposals of the industrialised countries concerning IPRs was to develop a set of international minimum standards for their protection. Their general approach was based on the premise that inadequate, excessive and discriminatory protection of IPRs constituted a major distortion of and impediment to trade

60 See generally, Chimni, n. 29, p. 143; Raghavan, n. 29, pp. 15-25; Khan, n. 53, p. 73.
and should as such be dealt within the framework of the GATT. However, while the submissions of some of these countries expressly condemned excessive or discriminatory protection of IPRs as a cause of trade restrictions and distortions, others referred solely to the inadequate protection accorded to them. The form of the proposed commitments also varied. For example, the suggestion of Switzerland provided for an amendment to the General Agreement itself, while others called for a "GATT agreement", although EEC stated that its use of the term did not denote a preference for a "code" approach. Thus the EEC wanted to integrate intellectual property matters into the overall GATT framework, as an annex while others wanted any TRIPS agreement adopted in the form of a code or protocol. The difference in their approach lies in that the former (GATT framework approach) would require the approval of two-thirds of the members of the GATT, while the latter (code or protocol) would not require adherence by a majority of GATT members but would be valid among those members who actually elect to become signatories thereto.

The industrialised countries believed that trade distortions and economic losses to their companies operating internationally can arise from either inadequate or excessive levels of

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62 See EEC's proposed draft agreement on TRIPS of April 1990; The US, Japan, Switzerland proposals of May 1990.

63 Gutterman, n. 34, p. 522.
intellectual property protection, although most of the concrete examples relate to the former. Typical examples of perceived protection included among others, the short duration of patent protection. Perceptions of inadequate standards are not restricted to patents but also extend to other IPRs such as copyright where the laws of some states do not protect computer software or the works of foreign nationals. There were, however, significant differences between the proposals in the coverage of IPRs and the specified standards of protection suggested. The IPRs covered are patents, copyright and related neighbouring rights, trademarks, industrial designs, trade secrets, the layout design of semi-conductor integrated circuits, and geographical indications, including appellations of origin.

The United States on 28 October 1987, presented to the Negotiating Group its initial proposal for a GATT-based intellectual property agreement. The proposal included specific recommendations on substantive standards in the areas of patents, trademarks, copyright, trade secret and semi-conductor layouts. These recommendations largely reflected the United States IPR standards. The United States proposal specifically contemplated the use of a separate GATT agreement or "code" as

64 Other examples are total or partial exclusion of inventions in certain areas, such as pharmaceutical and chemical products from patent protection, excessive compulsory licensing and patent forfeiture provisions.

the institutional mechanism for implementing the new intellectual property regime. In the words of the proposal, the code would provide a "discipline" as:

An incentive for all governments to join such an Agreement in order to resolve disputes under a multilateral dispute settlement mechanism. The Code would also provide signatories with a strong basis for coordinating their efforts to encourage non-signatories to adopt intellectual property regimes in accord with the standards embodied in the Agreement.66

The United States submitted that a GATT Agreement should contain annexes which would specify norms for the protection of intellectual property to which national laws should conform. The proposals of other developed countries indicated broad agreement with the United States on the basic issues. The EEC submitted a detailed proposal in July 1988 to the TRIPS Negotiating Group similar to the United States proposal in the elaboration of substantive standards. However, the EEC proposal reserved judgement on the preferred form of the GATT institutional arrangement for implementation. As per EEC submissions, the relevant provisions of the GATT are wholly or partly inadequate to solve the trade-related issues categorised as inadequate availability and scope of rights, inadequate procedures and


remedies for the effective enforcement of such rights as exist, and national rules which discriminate against imports in favour of domestic economic activity. The EEC suggested the establishment of new rules and disciplines on the lines including among others the following:

Application to IPRs of GATT's general principles and mechanisms, which ensure liberalization of trade, namely: non-discrimination, national treatment, dismantling of trade barriers, transparency, consultation and dispute settlement.

When distinguished with the United States proposal, for the EEC the negotiations should not aim at the harmonisation of national laws, but should lead to the identification of an agreement on a set of principles related to substantive standards to be respected by all parties. So far the EEC proposal alone referred to the coverage of neighbouring rights, geographical indications, including appellations of origin, protection against acts contrary to honest commercial practices and computer programmes, but the United States position is also that standards for the protection of all forms of intellectual property should be included and that the list of those covered in the annex to its proposal is not exhaustive.

However, a new, comprehensive, detailed and substantial proposal of the EEC in the form of a draft agreement on TRIPS was put on the table of the TRIPS Negotiating Group on

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2 April 1990 which shows on the part of the EEC a high priority placed on a TRIPS Agreement by having firm rules on intellectual property incorporated in GATT. This proposal called for retention of several classic GATT principles such as national treatment and most-favoured nation treatment/non-discrimination. The proposal also called for establishments of international norms for trade secrecy and for minimum commitments to enforce IPRs under a new trade regime emerging from the Uruguay Round. The proposal stipulated that

CONTRACTING PARTIES hereby agree that the following paragraph shall become Article IX bis of the General Agreement.

The contracting parties agree to provide effective and adequate protection of intellectual property rights in order to ensure the reduction of distortions and impediments to international trade. The protection of intellectual property shall not itself create barriers to legitimate trade. They therefore agree that they will provide for protection of intellectual property rights under their domestic laws and practices in conformity with the rules and disciplines set out in Annex II. 69

Annex II providing for rules and disciplines on the protection of IPRs, contained general provisions on intellectual property Conventions, national treatment, MFN/non-discrimination, standards in the field of intellectual property dealt with copyright and related rights, trademarks, geographical indications including appellations of origin, industrial designs and models, patents, layout designs of integrated circuits, and

69 For text of Annex II, see ibid.
acts contrary to honest commercial practices including protection of undisclosed information. Enforcement of IPRs dealt with general obligations, civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures. The annex also provided for acquisition of IPRs and related inter-party procedures, supplementary provisions in the form of transparency, and prior consultation transitional period. Technical assistance.

It provided for establishment of a committee on trade-related IPRs composed of representatives from each contracting party so as to monitor the operation of the Annex and for a joint expert group from the GATT and WIPO so as to promote cooperation between the above mentioned committee and bodies under the WIPO and to advise the committee on technical matters.

Although the United States and Japan agreed with this idea of incorporating TRIPS into GATT regime, most participants were against the EEC proposal. This opposition was echoed by India, when it said that it was disappointed that developing countries apparently have not been heard when they said that WIPO is the only place to discuss such matters. Mexico, South

70 According to Indian delegation, it was "bizarre" that the EC had chosen GATT's Article IX, which it called "obscure", as a means of extending a whole series of new obligations concerning intellectual property into GATT. The EC would be better advised to turn its efforts to such areas as textiles and agriculture, where negotiations are blocked, the delegation said. World Intellectual Property Report, n. 68, p. 100.
Korea, Colombia, Chile and Brazil all supported this position. 71

The later proposal from the United States put forth at the May 1990 meeting of the TRIPS working group was similar in format to that of the EEC, although substantive differences remained with respect to a number of issues. For instance, the United States remained opposed to the EEC's stringent appellation of origin standards (labelling of products by their place of origin) and proposed tougher criteria for the protection of industrial designs. In addition, the EEC and the United States sought to apply different regimes with regard to the scope of patent protection. The EEC extended broad based patentability to pharmaceuticals and for all new products, an item of particular concern to the EEC except those concerning animals

Colombia described the EEC proposal as "inappropriate", while Brazil said the EC proposal was "trying to tinker with "GATT" and trying to push its proposals on intellectual property into a future trade regime through the backdoor. "Putting TRIPS into Article IX of GATT is like putting a virus in a computer", the Brazilian delegation said. According to Chile, the EEC's proposed draft text does not accord with the Punta del Este declaration of 1986. The EEC's proposal of a dispute settlement mechanism in handling intellectual property disputes is particularly in disagreement with the Punta del Este Declaration. It accused the EEC of wanting only to protect the draft proposed rules on pharmaceutical products. Developing countries that do not have the financial means to patent such products would be deprived because medicines produced elsewhere would be forbidden to these countries by the proposed text. Ibid.

Gutterman, n. 34, p. 523.
and plants which are stated for protection under the proposal from the United States. There was difference in copyright provisions. The EEC believed that the copyright protection should be similar to that included in the Berne Convention while the United States supported the extension of existing protection to include computer programs as literary works. Regarding compulsory licensing, the EEC was opposed to compulsory licensing for patents as it would be a trade distortion under GATT rules. The United States sought a clear definition of those circumstances, which it believed should be strictly limited under which compulsory licensing may be imposed. Under no circumstances the United States would permit compulsory trade mark licensing. Both countries sought to apply even different regimes for enforcement proceedings. The minimum protection to be given to patents under the EEC proposal was 20 years from their registration. For such things as semiconductors, where there is a constant evolution of technology, the period would be 10 years. The EEC proposal also focussed on first-to-file principle for availability of patents in contrast to first-to-invent principle of the United States.

73 World Intellectual Property Report, n. 68, p. 100. See also Gutterman, n. 34, p. 523.
76 See Article 23(4) of the EEC's draft agreement on TRIPS.
Apart from its initiatives in the Uruguay Round, the European Community's legislative programme on IPRs gained momentum since 1992. The objective of establishing the single internal market by the end of 1992 was set by the Commission's 1985 White Paper addressing intellectual property in these terms:

Differences in intellectual property laws have a direct and negative impact on intra-community trade and on the ability of enterprises to treat the common Market as a single environment for their economic activities.

The Commission has sought to reduce these differences in two ways. First, it used the White Paper to reiterate proposals for new Community-wide rights such as the Community patent to be set up by a Community Patent Convention. The Community Patent Convention was signed by all 12 member states on 15 December 1989. Second, the Commission continues to seek the harmonisation of IPRs provided by national laws. The difficulty in harmonising existing patent laws can hardly be overestimated.

Nordic countries covering Iceland, Finland, Norway and Sweden generally supported the EEC. They believed that the negotiations should not aim at full harmonisation of IPR legislation, although some degree of convergence would be inevitable and desirable.

The Japanese submission consisted basically of a list of problems caused by insufficient inadequate protection. It believed that three GATT principles of MFN treatment, national treatment and transparency should be applied to the protection of IPRs. Japan proposed that GATT actively monitor activities in five areas: patents, trademarks, designs, geographical indications and copyright. Significantly Japan's proposal did not contemplate protection of trade secrets, a position which is consistent with domestic practices that have often been a point of dispute with the United States. Japan like the United States suggested that a GATT Agreement should contain annexes specifying norms for the protection to which national laws should conform.

In late June 1988, the Swiss submitted a proposal that called for adoption of an amendment to the General Agreement. Under the proposed amendment GATT benefits may be nullified or impaired by the under-protection, over-protection or absence of protection of intellectual property. The GATT Contracting Parties would undertake to eliminate trade distortions resulting from derogations. Assurances would be given for prompt, effective and non-discriminatory administrative and judicial

78 Gutterman, n. 34, p. 523.
79 For a detailed analysis of various proposals, see Yusuf, n. 45, pp. 174-6.
procedures and enforcement. "Indicative Lists" would be established to describe trade distortions resulting from under-protection, over-protection or lack of protection of intellectual property and from practices constituting inadequate procedures. Listed items would be presumed to nullify or impair GATT benefits. These lists would be evolutionary, and a committee would be established to offer proposals for adoption by the GATT. The parties would notify each other (through the GATT Secretariat) regarding proposed changes in intellectual property laws and would be settled in accordance with the procedures set forth in the General Agreement.

With regard to the nature of the substantive norms and standards to be elaborated, the Swiss approach substantially differed from the others in that it suggested the establishment within the GATT of a set of general normative principles to be enforced by GATT procedures. Essentially there would be three such principles: an obligation for contracting parties to avoid trade distortions caused either by excessive or by insufficient or lack of protection of IPRs; an obligation to avoid less favourable treatment of foreign products and not to discriminate among contracting parties with respect to IPRs, and an obligation to enforce appropriate protection of IPRs. To spell out these normative principles, indicative lists would be

80 For Switzerland proposal, see GATT Doc. MTN/GNG/NG.11/W. 25, 29 June 1988; see also Abbott, n. 5, p. 717.
elaborated indicating trade distorting effects caused by excessive, insufficient or lack of protection of IPRs, including practices and procedural deficiencies. The lists would establish prima facie evidence of nullification and impairment of the GATT benefit.

It may be pointed out that even industry groups of many developed countries made proposals in this regard. In June 1988, a broad-based and influential coalition of the United States, European Communities and Japanese industry groups published a detailed and carefully considered proposal entitled Basic Framework of GATT Provisions on Intellectual Property Statement of Views of European, Japanese and United States Business Committees. This proposal recognized the difficulties inherent in achieving a GATT intellectual property consensus in view of the divergence in national interests between industrialized and developing countries and suggested that incentive might be required to induce developing country participation in a solution to the IPR problem.

81 Article XXIII of the General Agreement dealing with nullification or impairment of Benefits authorises each member country to withdraw trade concessions from other member if "a Contracting Party believes that its GATT rights have been nullified or impaired by another Contracting Party's action or that the attainment of any objective of the Agreement is being impeded as a result of the failure of another Contracting Party to carry out its obligations under GATT, or the application by another Contracting Party of any measure, whether or not it conflicts with the provisions of this Agreement; or the existence of any other situation. If no satisfactory adjustment is effected between the Contracting Parties, the matter may be referred to the Contracting Parties and the Contracting Parties may consult the Economic and Social Council of the United Nations for finding out a proper solution."

82 Abbott, n. 5, pp. 716-17.
The relationship of an agreement on TRIPS to the general principles and norms of GATT were expressly stated in the EEC, Swiss and Japanese proposals. They referred to the need to apply the basic GATT principles of national and MFN treatment to IPRs. The EEC submissions, however, recognized that these principles concerned the treatment given to goods, whereas the substantive norms and standard suggested deal with the protection of property rights held by persons. Accordingly, it conditions the application of these principles to the membership by the countries concerned of the relevant IPR convention, and stipulated that their application in the context of a TRIPS agreement would be without prejudice to the application of the national treatment principles in the Paris and Berne Conventions.

All three proposals also referred to the need to include transparency of national legislation in a GATT Agreement. This was further elaborated in the suggestions made by the EEC and Switzerland. The latter proposed that contracting parties should notify the GATT secretariat of proposed changes to their laws, while for the EEC a GATT Agreement would create an obligation to respond to requests for information from other signatories. Both suggestions provide for the furnishing of comments by other signatories on the proposed changes. A consultative machinery to be established with the GATT would have the task of monitoring the conformity of national legislation with a TRIPS agreement.

83 Yusuf, n. 45, pp. 189-90.
Another main substantive standard being advocated by the industrialized countries in their proposals is that the patent life should be of the order of "20 years from the date the patent protection is sought or 17 years from the date the patent is granted." The increase in the term of patent protection is based on the ground that at present in many of the countries the period for the protection of patent rights is not sufficiently long and the inventor or the holder of right cannot work the patent in such a short time. Therefore, a "short" patent duration has been pointed out to be trade distorting.84

Implications for Developing Countries

All the developed countries proposals suggest that the GATT standards should be applicable to IFRs. Analysis of the GATT provisions and the generally recognized principles of GATT shows that except special and differential treatment for less developed countries, are not applicable to IFRs. The developed countries proposals suggest that MFN treatment and obligations thereunder should apply to IFRs also. As already mentioned, treaties on IFRs are silent on MFN treatment. They put emphasis on national treatment. It may be pointed out that the MFN principle dealing with equal treatment among foreign countries and thus prohibiting discrimination between them are clearly inapplicable to IFRs and so to patents. Moreover, on account of

some of the fundamental differences between the International Trade regime of GATT and IPR regime of Paris Convention, the question of applying MFN treatment to the other regime does not arise at all.

However, in the GATT, it applies to products and would therefore need to be extended to persons if the principle were to be applied to IPRs. Such an extension (which would necessarily cover all GATT Member countries whose nationals held IPRs in other Member Countries) would affect a large number of bilateral and regional agreements which have been permitted as "special agreements" in the Intellectual property conventions. There would, therefore, be potential for some conflict between trading and Intellectual property systems. On the other hand, should such agreements be exempted from MFN principle which would otherwise be generally applicable, this would cause further distortions and exceptions to MFN principle. To avoid such problems, it would, therefore, be better not to apply the MFN principle in the area of IPRs. However, it is true that a non-application of the MFN principle might provide an incentive to countries to gain competitive advantage over their trade competitors by imposing general agreements on third countries providing for stronger protection for their nationals than that prescribed under a TRIPS agreement; this would suggest that appropriate means in a TRIPS agreement for preventing this should be established.

Similarly the national treatment as envisaged by the GATT and Paris Convention is different. While the former concerns with 'goods' the latter's concern is with 'persons'. In this regard a question may arise what is going to be the effect of extending the GATT national treatment rule to patents. The GATT national treatment provides that there should be no discrimination against imports. It has been stated that 'if this principle is extended to patented products it means that any provision of the patent system which restricts free imports is regarded as trade distorting. Under the GATT national treatment principle, the patent owner will have an inherent right to import, because any requirement which comes in the way of 'open and unrestricted' trade is seen as discriminating against imports and in favour of domestic economic activity.'

The impact of national treatment clauses on the law of IPRs may be illustrated by discussing the Automotive Springs Case which was decided by a GATT Panel in 1983. Certain automotive springs were, under Section 337 of the United States Tariff Act, as amended in 1974, excluded from importation into the United States because of alleged patent infringements. The Panel viewed that order to be covered by the "general exception" contained in Article XX (d) of the GATT even though no such administrative sanction would be available against domestic manufacturers. Domestic manufacturers, if infringing upon the

same patents, could not be ordered by any administrative agency to stop selling the respective goods.

Moreover, while calling for the universalisation of protection standards, some of the leading industrialised countries have inaugurated a new legislative trend which substitutes reciprocity for national treatment, which has been observed by the UNCTAD Secretariat, as "undermining the very foundations of the century old multilateral system and the basic standard on which its universalist vocation was built."

For example, the United States Semi Conductor Chip Protection Act (SCPA) of 1984 provides for straightforward protection of the author of the mask work used in the production of chips. The

87 It is doubtful whether the case was correctly decided. As none of the exceptions to the "general exception" was applicable. The exceptions refer to "discrimination between foreign countries where the same conditions prevail." In Automotive Springs the discrimination was between the domestic state and a foreign state. The other exception to the general exception, a "disguised restriction on international trade", did not apply either. But the criterion "necessary to secure compliance" with patent law seems to have been construed in a rather forthcoming manner. May be it was necessary to supplement private remedies by an administrative remedy. See Imports of Certain Automotive Springs Assemblies, GATT Panel, Report of 26 May 1983. Basic Instruments and Selected Documents, Thirtieth Supplement, 1984, p. 107.

inclusion of reciprocity provisions under Section 914 of the SCPA that grant protection in the United States only to nationals of foreign countries that provide comparable protection to the United States nationals under their own laws caught the attention of other countries with indigenous semi-conductor industries. Eighteen countries have applied for and received reciprocal protection for their nationals in the United States based on a showing that they were taking reasonable steps towards the enactment of protection of semi-conductor designs.

It is worth mentioning that imposing conditions on the access to the United States protection has been called as "new reciprocity", that is unilaterally prescribed reciprocity in contrast to multilaterally agreed "global reciprocity".

89 Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Portugal, Spain, Sweden, Switzerland and the United Kingdom have been granted interim protection under Section 914 of the SCPA. Austria has also recently applied to receive such protection. See R. Michael Gadbaw, "Intellectual Property and International Trade: Merger or Marriage of Convenience", Vanderbilt Journal of Transnational Law, vol. 22, no. 2, 1989, p. 236. Some of the countries have passed the legislation in this regard, e.g., Japan's 1985 Act concerning the Circuit layout of semi-conductor integrated circuits, European Community Commission's 1986 Directive on Semi-Conductor products; Sweden's 1986 on Semi-conductor Chips; Switzerland's 1986 on Unfair competition/Semi-conductor chips; Denmark's 1987 Semi-Conductors Protection Act; Federal Republic of Germany's 1987 Semi-Conductor Chips Protection Law; France's Semi-Conductor Chips Protection Law through Decree no. 87-890 of 4 November 1987; Netherlands and United Kingdom adopted concerned laws 1987. See TD/E/C.6/146, n. 2, p. 14 and also Table 1 (Annex), pp. 29-35.

Moreover, there does not seem to be any justification for making the enjoyment of IPRs subject to reciprocity as there is non-reciprocal national treatment under the Paris Convention and the member countries are required to extend to foreign IPR owners the same protection as domestic law provides to domestic holders. In some instance, such as those provided for under Article 5 of the Paris Convention, certain internationally agreed minimum standards are applicable. An important implication of adoption of such a standard would introduce material reciprocity in international patent system. However, the demand for such reciprocity was also in conflict with Part IV of the GATT as well as with the Ministerial Declaration on the Uruguay Round which has stipulated the principle of non-reciprocity in favour of developing countries in the trade negotiations.

It has also been stated that because the Paris Convention does not, in fact, recognise any degree of reciprocity beyond that established by their own minimum standards, signatory states remain free to provide greater levels of protection under their domestic laws than the international minimum standards actually require. The terms under the Paris Convention are minimal and any country can go further. States may grant more extensive protection than is prescribed in the Paris Convention. But what tends to restrain them from so doing is the fear that nationals of other member states will claim the same benefits.

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91 Bodenhausen, n. 13, pp. 15-16.
on the territory of the deviant state without conceding comparable benefits on their own territories to nationals from that state. A unilateral broadening of protection at home can thus weaken a member state's overall competitive position. Unless the gains accruing to a deviant member state from unilaterally expanding protection in its home market exceed the potential losses accruing to that same state from the diminished capacity of its nationals to compete with comparable, less protected intellectual goods on other relevant markets, the unilateral move may be counter productive in the end. In this regard it is worth to quote the views of Leonard Weiss, who was with the United States Department for many years, "Unilateral judgements as to fairness and reciprocity, and unilateral actions to correct alleged lack of reciprocity, are inconsistent with the maintenance of an orderly and productive system of international trade and other economic conditions." 93

At the same time, as a matter of GATT law and practice of reciprocity, the Contracting Parties that make a trade concession are entitled to receive a concession in return. As a corollary the use of economic bargaining strength in the form of threats to deny access to an already open market is not condoned. And with respect to the intellectual property problem, the agreement in this regard by the developing countries to provide enhanced

93 Quoted in Meessen, n. 7, p. 70.
intellectual property protection would constitute a trade concession within the bounds of the reciprocity principle for which they need to be duly compensated. A package of concessions which may range from concessions with respect to compensation due for intellectual property itself to concessions in other trade areas, e.g., agricultural products, trade in service, reliance on export of primary products etc; and to concessions not technically within the international trade regime, e.g., of debt reduction program, have been suggested in this regard that the industrialized countries might grant to the developing countries in exchange for a GATT agreement on the protection of intellectual property.

Moreover, the principle of non-reciprocity vis-a-vis developing countries is enshrined in Part IV of the General Agreement (and repeated in the Punta del Este Declaration setting forth the basic negotiating mandate for the Uruguay Round Negotiations). However, developed countries are being made to undermine this basic principle through bilateral and multilateral demands for the application in developing countries of the same norms and standards as are applied in developed countries, which necessarily involves reciprocity.

The principle of special and differential treatment is applicable in all fields of international economic relations involving countries at different stages of development, and is based upon the notion that obligations should be commensurate with

94 For details, see Abbott, n. 5, pp. 739-42.
the level of economic development. In providing flexibility to developing countries in their assumption of international relations, it has been a key element in maintaining their right to choose their economic systems. It is a basic principle of both the GATT and the Berne Convention but has so far been absent from the Paris Convention perhaps because some of the obligations imposed by the latter Convention are relatively weak. However, it is significant that, in areas where the obligations imposed by the Paris Convention are stringent, such as its provisions relating to compulsory licensing or forfeiture of patents for not-working or insufficient working of inventions, the developing countries have requested special and differential treatment in the course of the negotiations for the revision of the Paris Convention. The application of the principle in these areas has indeed been conceded in the negotiations by developed countries, although there are disagreements over the extent to which it should apply.

The provisions with regard to special and preferential treatment to developing countries also show that there is no obligation on the part of developing countries to correspond to the high standards of IPRs of the industrialized countries. And if these countries do accede to such a demand, it would definitely amount to trade concession within the bounds of

95 See WIPO, Sixth Consultative Meeting on the Revision of the Paris Convention, PR/CM/VI/1.
reciprocity within the GATT for which a concession must be received in return.

Moreover, the emphasis laid by the industrialized developed countries on the establishment of norms and standards on IPRs implies the elaboration of a new system of IPRs at the multilateral level incorporating a set of minimum standards to be applied by all states parties to such an agreement. Following the minimum standards call and granting level of protection above and beyond that contemplated in the existing IPRs Conventions, could further imply harmonization with the laws and practices of the leading technologically-advanced nations. In other words, as has been stated "state parties to a Trade-Related Intellectual Property Rights agreement may have to adopt legal standards conforming to those of countries which engage in most of the trade in goods and services embodying intellectual property."

As a consequence, the right of a developing country under Paris Convention to frame its own intellectual property regime in line with its perceived developmental and other social and economic interests would be lost if it were obliged to harmonize its laws with those of the most developed and technologically advanced countries. Under such a regime, those countries whose ratio of national IPR owners to foreign holders is high would gain, while those where it is low would have much to lose. Adherence by developing countries to the proposed substantive norms and standards would also imply the abandonment

96 Yusuf, n. 45, p. 192.
of the efforts they have developed since 1970s to revise the Paris Convention for the Protection of Industrial Property in their favour. As has been observed, many elements of the proposed TRIPS agreement in fact constitute a reverse movement which not only could nullify the progress achieved in the process of revision of the Paris Convention, but also might stack up the system against the basic objectives of the developing countries.

Lastly, it may be said that there is no link between intellectual property and trade. GATT is not the proper forum in which the question of IPRs should be negotiated. In fact no bilateral or multilateral trade-related fora should have the mandate to take up the issue of IPRs. It further follows from what has been discussed above that there can be no uniform set of standards and norms of equal validity or relevance applicable to a wide range of developing countries which are obliged to respond to the imperative of their respective cultural and socio-economic needs. The holding of a global monopoly of patents representing a massive stock of science and technology by a group of industrialized countries is no justification for common standards and norms to be demanded from the developing countries, or a price for being admitted to a global multilateral system.

of trade and exchange.

Provisions in the Final Act Concerning TRIPS

As mentioned earlier, two main issues which were raised by the developing countries while objecting to the discussion of IPRs under the GATT were that it was not the GATT but the WIPO which was a right forum to deal with the issues and that intangibles like IPRs cannot be discussed along with goods within the GATT framework. Three separate agreements form the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the Agreement on Trade in goods, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) including trade in counterfeit goods and Trade in services. At the same time, the framework of the Final Act shows that in fact, the three agreements are not


99 For the text see INC Doc. MTN/FA, 15 December 1993.

100 Ibid, Annex IA, pp. 1-43.

101 Ibid, Annex IC, pp. 1-31 Doc. MTN/FA II-AIC.

independent, they have been linked to each other through the World Trade Organization (WTO) which has been armed with an integrated dispute settlement arrangement providing for cross-retaliation between goods, services and IPRs along the same lines as the United States had attempted through invoking Super and Special 301. Moreover, the document was tabled by the Chairman of the Negotiating Committee, Arthur Dunkel, on the understanding that 'no single element of the Draft Final Act can be considered as agreed till the total package is agreed.

The WIPO has also been brought in through Article 2 of the TRIPS text which while dealing with intellectual property conventions states:

1. In respect of Parts II, III and IV of this Agreement, PARTIES shall comply with Articles 1-12 and 19 of the Paris Convention (1967).

2. Nothing in Parts I-IV of this Agreement shall derogate from existing obligations that PARTIES may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

Thus the final framework on IPRs subsumes the Paris Convention which is monitored by the WIPO. Acceptance of the Agreement will automatically bind the countries to the substantive provisions of the Paris Convention as contained in Part II, III and IV. An implication in turn would arise for those developing countries who have yet not accepted the

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103 For the text of the Agreement Establishing the Multilateral Trade Organization, see Ibid, Part II, pp. 1-14.
Paris Convention but were participating in the discussions for its revision in the WIPO Diplomatic Conference. Such non-member countries would have no choice but to accept the existing rules of the Paris Convention. This would simultaneously take away the flexibility exercised by various countries in ratifying any of the earlier Acts of the Paris Convention. For example, Brazil adheres only to the Hague Act of 1925.

The concept of national treatment as provided in the TRIPS text is similar to that followed in the Paris Convention which relates to persons rather than that followed in the GATT, where it relates to goods. Thus under Article I paragraph 3 "PARTIES shall accord the treatment provided for in this Agreement to the nationals of other PARTIES". Similarly Article 3 on national treatment stipulates:

1. Each PARTY shall accord to the nationals of other PARTIES treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967)...

2. PARTIES may avail themselves of the exceptions permitted under paragraph 1 above in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a PARTY, only where such exceptions are necessary to secure compliance with the laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

However, the standard of MFN treatment, which as already noticed has been provided for in the GATT but not in conventions dealing with IPRs, has been proposed to be applied to the
protection of intellectual property. The principle of most
favoured nation treatment contained in Article 4 of the TRIPS
text states as follows:

With regard to the protection of intellectual
property, any advantage, favour, privilege or
immunity granted by a PARTY to the nationals of
any other country shall be accorded immediately
and unconditionally to the nationals of all other
PARTIES. Exempted from this obligation are any
advantage, favour, privilege or immunity accorded
by a PARTY:

(a) deriving from international agreements on judicial
assistance and law enforcement of a general nature
and not particularly confined to the protection of
intellectual property rights;

(b) granted in accordance with the provisions of the
Berne Convention (1971) or the Rome Convention
authorising that the treatment accorded be a function
not of national treatment but of the treatment
accorded in another country;

(c) in respect of the rights of performers, producers of
phonograms and broadcasters not provided under this
Agreement;

(d) deriving from international agreements related to
the protection of intellectual property which entered into
force prior to the entry into force of this Agreement,
provided that such agreements are notified to the
Council on Trade-Related Aspects of Intellectual
Property Rights and do not constitute an arbitrary or
unjustifiable discrimination against nationals of other
PARTIES.

The obligations under Articles 3 and 4 do not apply to
procedures provided in multilateral agreements concluded under
the auspices of the WIPO relating to the acquisition or
maintenance of IPRs as has been provided in Article 5 of the text.

The Final Act rejects any kind of special and differential
treatment for developing countries as a group in view of their
low level of technological development. Some sort of
transitional or grace period has been granted to developing countries as a concession to implement the TRIPS accord. Thus countries such as India and Thailand have been given five years and industrialised nations one year. For areas where no product patent protection exists such as pharmaceuticals, developing countries have 10 years to put legislation into effect. The very poorest defined by the United Nations as least developed countries such as Burundi and Bangladesh have an extra 10 years or more to implement. While withdrawing largely this treatment to the developing countries, special provisions have been made in an express way only for "the least-developed countries recognized as such by the United Nations, and so far so long as they remain in that category" in Paragraph 2 Section B of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations which Section as such provides for Measures in Favour of Least-developed countries. Moreover, the least developed countries will only be required to apply individual commitments, obligations and concessions to the extent consistent with their individual development, financial

104 Article 65 of Agreement on TRIPS.
105 Article 65 (1) and (2).
106 Article 65 (1).
107 Article 65 (4).
108 Article 66(2).
and trade needs, or their administrative and institutional capabilities. It is also provided in Article 66(2) of the Agreement on TRIPS that developed country members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base.

The withdrawal of special status enjoyed by other developing countries would create a situation where spurious equality of treatment has been applied to the unequal participants in the world economy - the developed and the developing countries. Moreover, there is no possibility of formulation of reservations by developing countries in respect of specific provisions and obligation in the Final text. The text provides - instead for a transitional arrangement - a time bound mechanism aimed at allowing governments to bring their national laws in conformity with the Final text.

A few words may be said about the proposal of the developed countries with regard to extension of patent life to 20 years from the date the patent protection is sought or 17 years from the date the patent is granted. Two questions arise in this connection. Firstly, is there an 'optional' patent term and how can it be determined? and secondly, is there any need for a uniform patent term throughout the world? It may be pointed out that Paris Convention does not stipulate any minimum term
for patents. It is left to the member countries to decide about the patent term. Thus, the proposals of the developed countries, in this respect of duration of patent protection, go well beyond the Paris Convention. Moreover, keeping in view the enormous economic and technological difference between the industrialised and developing countries, there should be no uniform standard of patent duration. However, the optimum life of a patent applicable alike to all countries and sectors is a controversial issue. In the determination of the patent term, it is ideal to take into account the importance of the invention, the speed at which it yields its advantages, the cost of research and development. This makes the determination of the patent term very complex and needs a case by case approach. Such a complexity in the determination of the patent term calls into question the proposal of a 17 year patent term in all countries for all inventions. Therefore, the developing countries should be free to set the duration at a level significantly lower than that of the industrialized countries in accordance with their own developmental, technological and public interest needs. They should also be free to set a shorter duration of patents in sectors of critical importance to them, such as the food, pharmaceutical and chemical sectors. Moreover, there is a need to link the duration of a patent to its actual working in the host country, failing which the patent should be subject to revocation as this will be in consonance with the objective of working of the patent and not market reservation or importation of the patent by the owner.
The TRIPS Text also seeks to change the century-old Paris Convention in respect of the duration of patent grant. Instead of the flexibility provided under the Paris Convention under which individual members are free to decide on the period of protection in their domestic law, a uniform duration of patent term for all countries has been sought to be introduced. This becomes clear from the term of protection as provided under Article 33 of the Agreement on TRIPS according to which "the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date." It is understood that those parties which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system. This provision is again to the tune of the proposals of the developed countries which want the trivial inventions as well as important inventions get the same life span so as to have a longer monopoly advantage. The fact that the industrialized countries especially the United States, EEC and Japan are having this long patent term in their respective laws, is no justification for extending the duration of patent protection to such a long extent. There are two arguments against such a long patent term. With rapid obsolescence of technology no patented technology will last this long and with the other provisions of this Agreement a patentee will have an assured world-wide market. In the light of these arguments the case against a longer patent term has been described as follows:

Firstly, if a longer patent term is given the patentee may not have any incentive to start production as soon as possible. Secondly, the lead time between an invention and its commercialisation is getting shorter - as in superconductivity, for example. Moreover, it has been established that due to technological or economic obsolescence, most of the patents do not last their full term.

In fact, if other proposals regarding coverage and compulsory licensing are accepted, there is a strong case for a drastic reduction of the patent term, because these will ensure a world market. With the world market at his disposal, the patentee will be able to recover his investment much faster.

As regards life of a patent, it needs to be mentioned that the legislative history of the United States laws governing both patents and the drug industry reveals that the 17 year patent term is an outdated figure selected in an arbitrary way in 1870 which has no correlation with the period of exclusive market power necessary in order to recover the R & D costs. The number 17 resulted from a congressional compromise between those who advocated a 14 years and those who advocated a 21 year term. Even after 124 years, it remains unchanged despite the undeniable fact that the costs of product innovation have decreased since then and vary according to industry. The arbitrariness of the term is revealed first, by the fact that it applies across the board to products in all industries.

It is undeniable that product innovation in different industries require varying levels of expenditure. Therefore, a uniform 17 year period permits companies which have low R & D costs to reap windfall profits as a result of their patent monopoly. At the same time, the analysis of the economic results produced by the 17 year patent term in the United States also reveals that this term impedes rather than promotes innovation thereby causing the patent system to malfunction. The 17 year period does not correspond to the period of exclusive marketing rights needed to promote innovation by allowing the innovator to recover the costs of research and development and earn a reasonable profit. Instead, this long patent monopoly which has impeded innovation by enabling companies which recover R & D costs from sales profits in less than 17 years to earn windfall profits, solidify market power and engage in practices which prevent new companies from entering the market.

The malfunction of the patent system is evident in the pharmaceutical and chemical industries as the 17 year monopoly period has enabled international pharmaceutical and chemical companies to charge excessive prices. For example, the prices of patented drugs are up to 250 percent higher than the prices of


113 Ibid.
the same drug sold under a generic label. Even according to the United States Federal Trade Commission, many elderly Americans pay from 42-74 percent more for their prescriptions than they would if their doctors had prescribed generic drugs. Furthermore, brand name drugs have been sold at prices which represent 800-1200 percent of factory costs. Since 1980, drug prices have risen at triple the consumer price index. Drug prices rose by a total of 37 percent compared to 13 percent increase for other commodities. As per the United States Bureau of Labour Statistics, in 1983 the price of cardiovascular medicines rose by 12.5 percent, sedatives by 22 percent and cancer therapy drugs rose by 24 percent. Drug prices are so high that 75 percent of drug misuse among elderly Americans occurs due to underuse as they cannot afford the price of drugs. Recently, the overpricing of the new anti-AIDS drug, AZT, caused an uproar in the United States. As a contrast, the drug prices in India have fallen dramatically since 1972. The pharmaceutical industry has been able to reap windfall profits as a result of 17-year patent monopoly. For instance, between 1954-1980, the average accounting rate of return on equity in the drug industry was 20.2 percent. The pharmaceutical and chemical companies have been enabled to solidify their market position. For example, approximately 25 companies based in the United States, Europe and Japan dominate the international chemical market in terms of world population and trade.
Solidification of market power in turn has led these companies to engage in anti-competitive practices including the following; formation of export cartels which fix prices; quantities and divide markets; establishment of spheres of influence through cross-licensing and patent pooling; parallel, predatory and excessive pricing; tied purchase agreements; requirements that drug supplied in bulk be sold in packages of specified quantities; and prohibitions on drug exports. Such practices effectively preclude new companies from entering the market thereby discouraging product innovation and defeating the fundamental purpose of the patent laws.

With regard to the United States attack specifically against the shorter applicability of drugs and other products of patented chemical processes in a country like India (7/5 years of patent life in substances produced by chemical process from the date of application and from the date of sealing of patent respectively), it becomes pertinent to recall that until recently Italy did not recognise any patents in drugs and the same applies even to this day to a number of other countries. Bangladesh has recently passed a law requiring all drugs and pharmaceutical products to be produced in terms of their "generic" contents and no specific product patents are recognised.

114 See generally Viswanathan, n. 111 and 112, pp. 64-83 and 8 respectively.
or allowed. In India, foreign manufacturers of drugs have been selling not only drugs banned in their home countries, they have also been charging extortionate prices for life-saving drug formulations patented by them and marketed through high-power advertisement campaigns. After World War II, the United States used all German patents freely. They gave a tremendous boost to United States industrial production in the post-war years. Also a large number of countries including Argentina, Egypt, Poland, Japan, Norway and Thailand recognised only process patents for chemical substances (not product patents) and until, Italy joined the EEC, it did not recognise any patents for chemical and pharmaceutical products.

It becomes clear from the above discussion that a surrender by the Indian government to the United States pressure is likely to hamper the development of not only Indian industry but also scientific and technological development. On the other side the United States's repeated insistence on a 17-year product patent for foods, drugs, medicines and chemicals can only be viewed as an attempt to gain even greater power for international pharmaceutical and chemical companies to engage in, as stated by Mrs Indira Gandhi, the late Prime Minister of India, "profiteering from life and death." Moreover, the


very rationale in legislating and subsequent invocation of Section 301 of 1988 Act of the United States against certain countries (Brazil, Mexico, China, South Korea, Taiwan, Saudi Arabia, Thailand), including India has rightly been stated to be more political than economic. It is totally in violation of the United States international obligations, violates the basic principles of GATT: the MFN treatment and non-discrimination. The multilateral approach of GATT envisages the same trade rules for all trading partners and proscribe discrimination against any GATT member bilaterally.

SUMMATION

The above discussion reveals two reasons for shifting of patent debate to the GATT Uruguay Round of Multilateral Trade Negotiations which being lack of enforcement mechanism in the WIPO which as a result can only suggest guidelines for IPR regimes thus leaving discretion to the individual countries to accept and adopt these revised guidelines; and the voting system in WIPO which is unweighted and thus by nature of their numbers places the industrialised countries in a minority. As regards the original GATT standards the discussion notes that GATT is not only silent on IPRs and

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thus on patents but also does not contain a provision obliging its members to accord any particular level of protection to IPRs or to enforce them to any particular degree of effectiveness. It is rather recognised that the signatory countries to the GATT will have their own regimes governing the issue of patents. With the mere requirement that the regulations or measures are not to be enforced in a manner calculated to be restrictive or discriminatory to international trade in goods, it does not purport to legislate international norms in regard to IPRs. However, IPR related matters can be brought before the GATT and decided by its dispute settlement panels.

An analysis of the generally recognised principles of GATT and their comparison with the Paris Convention reveals: the question of applying MFN treatment to patents did not arise because of not only some of the fundamental differences between the trade regime of GATT and IPR regime of Paris Convention but also absence of such a provision in the latter Convention. The principle under GATT is applicable to products and border measures pertaining to physical objects when compared to patents regime dealing with protection of rights of persons and intangible rights within national territories, the national treatment rule in international trade law of GATT refers to the treatment of goods which means that in all situations there should be no discrimination between foreign and domestically produced goods. In other words, there should be no discrimination against imports while under the Paris
Convention it is regarding access to domestic protection of patents, with emphasis on the nationality of persons seeking protection rather than the works which are the object of protection. The legal concept of reciprocity as accepted in GATT practice means that a country need not make trade concession unless it receives something in return with the only exception that such reciprocal benefits are not to be received from developing countries. Any reciprocity built into the Paris Convention is derived solely from minimum standards or from certain reservations of reciprocity set out in the Convention. Thus resort to national treatment is without reciprocity; and the permanent feature of the basic GATT instrument in the form of differential and preferential treatment for developing countries has so far been absent from the Paris Convention because of some of its strict obligations concerning compulsory licences or forfeiture of patents for non-working or insufficient working of patents.

Analysis of the GATT provisions and its generally recognised principles clearly shows that except special and differential treatment for developing countries, GATT standards were inapplicable to IPRs. This discussion further reveals various implications for developing countries in applying GATT standards to patents which include: the extension of GATT national treatment rule to patented products would grant the patent owner an inherent right to import because any provision in the patent system restricting or prohibiting free imports
can be considered as trade distorting, the effect of substituting reciprocity for national treatment is not only to undermine the century old basic standard of multilateral system of patents in the form of Paris Convention but also to introduce material reciprocity in international patent system as the adoption of such a standard of unilaterally prescribed reciprocity being contrary to mutually agreed global reciprocity. An example of such a trend is the United States Semi Conductor Chip Protection Act of 1984.

This discussion also reveals that enjoyment of IPRs subject to reciprocity cannot be justified on account of the reasons which include: non-reciprocal national treatment under the Paris Convention does not justify the enjoyment of IPRs subject to reciprocity wherein the member countries are required to extend to IPR owners the same protection as domestic law provides to domestic owners; and material reciprocity is itself in conflict with the principle of non-reciprocity as enunciated in Part IV of the GATT and also with the Ministerial Declaration on the Uruguay Round. This discussion further reveals that a unilateral broadening of protection of home can weaken a member state's overall competitive position which can be counter-productive in the end on account of some benefits to be claimed by nationals of other states in its territory but without conceding comparable benefits on their own territories to nationals from that state.
From the provisions of special and differential treatment to developing countries evidently there is no obligation on the part of developing countries to correspond to the high standards of IPRs of the industrialised countries. At the same time the multilateral or bilateral approach of the industrialised countries for the application of the same norms and standards through the very involvement of reciprocity undermines the principle of non-reciprocity vis-a-vis developing countries. Therefore, in the case of developing countries acceding to the demand of high standards would definitely amount to trade concession within the bounds of reciprocity under GATT for which a concession must be received in return. It thus suggests the grant of a package of concessions to cover: compensation for the intellectual property itself; concessions in other trade areas like agricultural products, trade in service, reliance on export of primary products; and concessions not technically within the international trade regime like debt moratorium or reduction program.

A case against a long patent term of twenty years has been made out in this chapter on the basis of various reasons which include: with rapid obsolescence of technology no patented technology will last this long, with other
provisions of the TRIPS Agreement a patent holder will have an assured world wide market and a revelation of the economic results of a long term in the United States also indicates that such a term impedes rather than promotes innovation, thus causing a malfunctioning of the patent system, enabling companies to earn windfall profits, solidify market power and engage in practices which prevent new companies from entering the market. All this suggests that the determination of the patent term should be based on the importance of the invention, the speed at which it yields its advantages and the cost of R & D. Such a complex determination thus needing a case by case approach calls into question a long and uniform life of patent in all countries for all inventions. Therefore, the submission that the developing countries should be at liberty to set a duration of patents at a level significantly lower than that of the industrialised countries. The same becomes true with regard to crucial fields of food, pharmaceuticals and chemicals. At the same time there is a need to link the life of a patent to its actual working in the patent granting country, failing which the patent should be revoked so as to make it in consonance with working principle and not market reservation or importation of the patent by the patent holder.

A perusal of the concerned provisions on TRIPS shows how inconsistent and pro-patentee the Final Act is. This becomes more evident when we examine its provisions on the aspect of coverage/subject matter of patent protection, a problem which the ensuing chapter deals with.