

# Vanderbilt Journal of Transnational Law

---

---

VOLUME 22

1989

NUMBER 4

---

---

## PART II SYMPOSIUM: TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY

### Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework

*Frederick M. Abbott\**

#### ABSTRACT

*This Article addresses industrialized countries' growing concerns over technology transfer and their efforts to obtain protection of intellectual property rights under the General Agreement on Tariffs and Trade (GATT). Mr. Abbott analyzes the intellectual property problem in the context of the GATT framework and the weakness of current intellectual*

---

\* Assistant Professor of Law, IIT Chicago-Kent College of Law. LL.M., 1989, University of California, Berkeley; J.D., 1977, Yale Law School; B.A., 1974, University of California, Berkeley. The author thanks Professors Stefan Riesenfeld and David Caron for their assistance and advice during the preparation of this Article.

*property protection. Developing countries do not accept the United States contention either that intellectual property is covered implicitly by the GATT or that the current lack of protection reflects a fundamental flaw in the General Agreement. Mr. Abbott focuses on this disagreement in laying out the framework for possible solutions, which include: 1) a separate GATT agreement or code; 2) a framework agreement by consensus decision; and 3) a formal amendment to the General Agreement. Mr. Abbott concludes that an amendment enacted through the GATT's article XXX(1) procedure, which would be effective upon two-thirds acceptance by the Contracting Parties on the Parties that accept it, would achieve the most realistic near-term solution to the intellectual property problem. Mr. Abbott also focuses on the issue of GATT reciprocity, considering whether the industrialized countries will be under a duty to compensate the developing countries in the event that an agreement on intellectual property is reached. Mr. Abbott concludes that the General Agreement should be analogized to a frustrated long-term commercial agreement, and suggests a compromise on the issue of compensation.*

#### TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	691
II.	THE INTELLECTUAL PROPERTY PROBLEM . . . . .	695
	A. <i>Treatment in the GATT</i> . . . . .	695
	B. <i>Defining the Intellectual Property Problem</i> . . . . .	697
	C. <i>What the Intellectual Property Problem Is Not</i> . . . . .	698
	D. <i>Quantifying the Intellectual Property Problem</i> . . . . .	699
III.	THE CURRENT SYSTEM FOR THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY AND ITS SHORTCOMINGS . . . . .	702
	A. <i>The Treaty System</i> . . . . .	702
	B. <i>National Systems</i> . . . . .	706
	C. <i>The United States Bilateral Approach</i> . . . . .	707
	D. <i>The Brazilian Pharmaceutical Patent Dispute</i> . . . . .	709
IV.	THE GATT AS AN INTELLECTUAL PROPERTY FORUM . . . . .	712
	A. <i>The Intellectual Property Mandate</i> . . . . .	712
	B. <i>Draft Proposals</i> . . . . .	715
	C. <i>Montreal and Geneva—The Framework Text</i> . . . . .	717
V.	INTELLECTUAL PROPERTY WITHIN THE GATT FRAMEWORK . . . . .	720
	A. <i>The Institutional Arrangement</i> . . . . .	721
	1. <i>Matching Solutions to Problems</i> . . . . .	721
	2. <i>The Exclusive Approach and its Unsuitability for Intellectual Property</i> . . . . .	722

3.	Framework Agreement by Consensus Decision	724
4.	The Article XXX Amendment Process—Potential Variations on a Theme . . . . .	726
	a. Article XXX(1) . . . . .	726
	b. Article XXX(2) . . . . .	729
5.	Transitional Arrangements . . . . .	731
B.	<i>Reciprocity of Concessions</i> . . . . .	733
	1. Reciprocity Within the GATT . . . . .	733
	2. “Nullification or Impairment” and Changed Circumstances . . . . .	734
	3. <i>Pacta Sunt Servanda</i> . . . . .	736
	4. Renegotiation of a Long-Term Agreement . . . . .	737
	5. The Available Package of Concessions . . . . .	739
VI.	CONCLUSION . . . . .	742

## I. INTRODUCTION

Industrialized countries are engaged in an effort to persuade developing countries to incorporate rules on the protection of intellectual property into the framework of the General Agreement on Tariffs and Trade (GATT).<sup>1</sup> Because proposed norms regarding the recognition of intellectual property rights would significantly affect wealth allocation between the developing and industrialized countries to the near-term detriment of the developing world, there has been consistent and intense developing country resistance to the program. In the face of resistance to the adoption of multilaterally agreed upon norms, the United States has threatened or imposed coercive economic measures on countries it re-

---

1. *Opened for signature*, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT] *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [GATT, BISD] (1969). The “GATT” is commonly used to refer both to an international organization and to the General Agreement on Tariffs and Trade, which is its charter document [hereinafter General Agreement]. The history of the GATT is so well chronicled and its operations so extensively analyzed that these undertakings will not be repeated in this Article in any detail except as specifically relevant to intellectual property issues. Primary sources for description and analysis of the GATT are J.H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) [hereinafter JACKSON]; J.H. JACKSON, J. LOUIS & M. MATSUHITA, *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984); O. LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* (1985); K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); 4 *STUDIES IN TRANSNATIONAL ECONOMIC LAW: THE EUROPEAN COMMUNITY AND GATT* (M. Hilf, F. Jacobs & E.U. Petersmann eds. 1986) [hereinafter EC AND GATT].

gards as not providing adequate protection. The United States has thereby sought to demonstrate its resolve to protect intellectual property rights, whether on a unilateral or multilateral basis. These measures have created widespread disaffection with United States trade policy. Yet behind United States policy is a reasonable belief, shared by other OECD countries,<sup>2</sup> that as intellectual property has become an increasingly important component of national wealth and article of international trade, it is properly the subject of trade protection, regardless of whether that was originally contemplated by the GATT. Driving developing country policy is the reasonable response that these countries are playing by an agreed upon set of rules that they are not obliged to alter to their detriment. Trade negotiators must reconcile these perspectives without unnecessarily destabilizing the international economic and political order.

This Article describes the "intellectual property problem" and how it came to be the focus of GATT attention. Although industrialized country data used to estimate intellectual property-related losses is almost certainly biased toward magnifying the extent of the problem, even a skeptical approach to the figures indicates that the situation is worthy of attention. Whether industrialized country trade negotiators will succeed in establishing a GATT-based program that will significantly ameliorate the problem will depend in large measure on the choice of an appropriate institutional arrangement within the GATT—one that addresses the unique characteristics of the problem. The intellectual property problem requires a relatively inclusive solution and is not suited to the code-making process used to conclude the GATT Tokyo Round negotiations. This Article will explore the alternatives to a code and propose a conventional amendment to the GATT.

Industrialized country trade negotiators must be prepared to accommodate developing country demands for trade concessions if an agreement comes within reach. In the ordinary course of GATT trade negotiations, countries that forego an existing right or assume an additional duty are entitled to a *quid pro quo* pursuant to the principle of reciprocity. The

---

2. The Organization for Economic Cooperation and Development (OECD) has 24 member countries—Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States (Yugoslavia has special status). OECD IN FIGURES: STATISTICS ON THE MEMBER COUNTRIES 1988 EDITION: SUPPLEMENT TO THE OECD OBSERVER NO. 152, at 4-5 (June/July 1988). The OECD has as its objective the promotion of "growth, full employment, trade, . . . and financial stability." J.H. JACKSON & W. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* 278 (2d ed. 1986).

United States has taken the position in an intellectual property dispute with Brazil that the imposition of possibly GATT-illegal trade sanctions is justified by the GATT's failure to address the legitimate intellectual property concerns of the United States.<sup>3</sup> At least implicit in the United States position in this matter is the belief that Brazil's failure to provide adequate intellectual property rights protection nullifies or impairs benefits that the United States has previously secured from Brazil in the GATT, permitting the United States to withdraw concessions in return.<sup>4</sup> If, in broader multilateral intellectual property negotiations, the United States adopts a position either that the GATT is inherently defective or that intellectual property protection is implicit in the GATT (and needs only be made explicit), the United States presumably will be unreceptive

---

3. The statement of former United States Ambassador to the GATT, Michael Samuels, to the GATT council in connection with the United States decision to withdraw its objection to the formation of a panel to investigate the United States-Brazil pharmaceutical patent dispute, reflects the United States position that the imposition of trade sanctions against Brazil is legitimate because of an "imbalance" in the GATT itself. Samuels said:

What's at issue here is an imbalance in rights and obligations that affords Brazil an opportunity in the GATT to address a trade dispute affecting Brazilian exports and denies the United States the right to address a practice by Brazil affecting the same amount of U.S. trade. . . . Where there are no rules to protect inventors in their commercial transactions, the legitimately aggrieved parties must necessarily take action.

*GATT: U.S. Accepts Creation of GATT Panel to Study Sanctions on Brazilian Pharmaceutical Goods*, 6 Int'l Trade Rep. (BNA) 238 (Feb. 22, 1989) [hereinafter Statement of Samuels].

4. Since the only plausible GATT-based defense to United States sanctions against Brazil in the pharmaceutical patent dispute is that Brazil's actions nullify or impair existing United States trade benefits under article XXIII of the GATT, GATT, art. XXIII, *supra* note 1, at A64, T.I.A.S. No. 1700, 55 U.N.T.S. at 266, 4 GATT, BISD, at 39-40, it seems logical to conclude that the United States will use this argument in its defense. United States trade negotiators, however, have appeared reluctant to state this position for the record to date.

Professor Hudec, in his remarks in volume I of this symposium, notes in the United States negotiating position in the dispute with Brazil "[t]he claim . . . that GATT law itself may entitle governments to condition trade access on adequate protection of intellectual property rights." *Remarks of Professor Robert Hudec*, 22 VAND. J. TRANSNAT'L L. 321, 322 (1989). Gadbaw notes, also in volume I of this symposium:

The only possible United States defense [in the pharmaceutical patent dispute] appears in article XXIII of GATT, which permits a contracting party to claim a nullification or impairment of GATT rights as a result of either a violation of the GATT or any other measure that has the effect of denying the party rights for which it has bargained.

Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 231 (1989).