

Session III: Issues Concerning Enforcement and Dispute Resolution *

Steven Tepp

Thank you very much. Thanks June and Jane, and the whole team here at the Kernochan Center and Columbia University. It's a pleasure and an honor to be with you. And let me add that my remarks today are my own and do not necessarily reflect the views of any client or employer.

Undergirding really all the discussion that we've been having today is a fundamental truth that hasn't actually been articulated. I wanted to just give that voice as I begin my remarks, and that is: foreign piracy of copyrighted works is widespread, pervasive, and persistent. It's been going on for decades. You can go back and read the Special 301 reports that Probir and his predecessors, including Stan, have overseen and published, going back to the 1980s.¹ And there is massive theft. The mode and methodology has changed over the years, but there's a real problem out there. For a period of time, we were able to address that through norm setting, the WIPO, but the problem there is there was no real enforcement mechanism.² It has this International Court of Justice adjudication, but there were really no teeth to that. So it was really left to a matter of bilateral political pressure, and even the trade sanctions. And back in that age, that era, the United States did impose trade sanctions on occasion, bilaterally, unilaterally.

With the adoption of the TRIPS agreement as part of the WTO, we have both a more modern and extensive set of standards, including enforcement standards, which generally didn't exist in WIPO documents.³ And we have a dispute resolution process that allowed a neutral third party adjudication of disputes, which were beneficial. Unfortunately, as was pointed out earlier, the TRIPS standards are now about a quarter century old.⁴ And as we're undergoing continual innovation and development in marketplace practices, as well as piracy practices, it's a fundamental

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1. *Special 301 Reports*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/PNQ5-ZR2A> (last visited Feb. 12, 2017).

2. Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277, 320 (2001) ("Driven by the industrialized countries' desire to stem piracy, substantive intellectual property norms needed to be accompanied by an enforcement mechanism, and WIPO provided no such enforcement mechanism.").

3. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, arts. 41-61 (laying out enforcement procedures and obligations).

4. *Id.*

necessity of global standards to keep pace. The reality is that the member states at WTO, and WIPO these days, are not willing to do that. Indeed, even a discussion of existing enforcement standards in a non-norm setting granulite TRIPS council is met with howls of protest.⁵ So it should be no surprise that countries whose industries are highly valued—like the United States—have sought other means to introduce modern norms.⁶ And that’s what we see. Thus, you have more regional and bilateral agreements. We can debate whether that’s good, bad or indifferent. But that’s why it’s happened.

I spent a bunch of years in government myself negotiating some of these trade agreements. I had the privilege of being around when the modern IP chapter of the US agreements was formulated, and of course, the negotiation of the Singapore Agreement. As a recovering trade negotiator, I’d like to offer some sort of holistic remarks about that process and how we get to full implementation—or fuller implementation—of those standards that have been agreed to. I like to say, down in DC, people often quote Prussian prince and German foreign minister Otto Bismarck having said that the two things you never want to see being made are sausage and legislation. And I assure you, Bismarck never saw an FTA.

In fact, an FTA is not one negotiation; it’s four. First, there’s domestic stakeholder consultation within the United States; this is the US proposal to the Senate. Second, there’s negotiation with the other trading partners; this is the text of the agreement. Third is the negotiation over the implementation of that agreed text. And fourth is the ongoing consultation over continued compliance.

Assembling the US text is a pretty significant undertaking. As I said, the IP chapter of modern FTAs took shape with the Singapore, and to some degree Chile, FTA negotiations back at the turn of the century.⁷ Since then, the DNA of our IP chapters has remained essentially the same. There have been tweaks around the edges, and of course individual negotiations produce their own quirks. But if you go on the website of the US Trade Representative, and you look at the dozen or so modern trade agreements since Chile and Singapore, you will see a remarkable degree of similarity in the IP chapters.⁸ That’s not to say that the text is written in stone. On the contrary, with each FTA there’s broad opportunity for stakeholder comment, as the text is reviewed, policies reconfirmed or not, and updates made to reflect recent developments in marketplace practices, technology, and so on. The text is then reviewed by government subject matter experts, and cleared through an inter-agency process before finally it’s ultimately tabled with our trading partners as the next proposal.

5. Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT’L ECON. L. 469, 470-72 (2002) (noting international conflicts resulting from different interpretations of TRIPS provisions).

6. Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 OTTOWA L. & TECH. J. 125, 142-43 (2004).

7. United States - Chile Free Trade Agreement, June 6, 2003, available at <https://perma.cc/ET8D-WV6H>; United States - Singapore Free Trade Agreement, May 6, 2003, available at <https://perma.cc/Z6Y4-ZCC2>.

8. *Id.*

Our trade partners know what we want in the IP chapter—what the United States want in the IP chapter—very early on in the process. And negotiations are often intense and grueling. And I say that having not negotiated the TPP, which was by far the most intense and grueling of any of our FTAs. And in my view, ultimately, the hard decisions are decided by two factors: political salability and political leverage. While the negotiation of the text is neither the beginning nor the end of the process, it's the most important stage. The text defines the obligations for the participating countries. We heard some discussion earlier today about flexibility in the text, or lack of flexibility in the text. Getting it done right, getting an FTA text done right, means specific obligations that cannot be easily avoided. Because when you're selling access to the US market—and that's essentially what an FTA essentially is—it's an opportunity to address issues that have been intransigent in bilateral relations, in some cases for years or even decades. Once the negotiation is over, that intransigence predictably returns. And so, if there is not a specific obligation to require the adequate approach to intellectual property, you're not going to get the implementation you're looking for.

Beyond the direct effect of the text on the participating countries, each FTA text has the potential to set a precedent for future FTA negotiations. Every FTA partner looks at all prior FTAs the United States has agreed to. And it says, "Well, you didn't make that country do X; I'm not going to do X." And so there's a natural tendency, in that regard, to have a watering down of provisions that has to be resisted. Bottom line is a strong final text can make everything that comes after it much easier.

After negotiations on the text are concluded and the respective national governments have signed the deal, then implementation becomes critical. The FTA does not enter into force unless and until the USTR certifies the participating countries have implemented the obligations they ended up with in the agreement.⁹

The implementation is where the rubber meets the road. Do our trading partners change their laws and regulations to meet the negotiated standards? And do US companies actually obtain the fair treatment demanded by the text? I can tell you from my personal experience, the negotiation over implementation is every bit as intense as the negotiation over the text itself. In some ways it can be a complete renegotiation if some of our trading partners had their way.

The good news is that the leverage of the access to the U.S. market continues through the implementation process. Because, again, until USTR certifies compliance, the FTA is not entered into force, and our trading partners are not receiving the benefits of improved access to the U.S. market.¹⁰ After certification and entry into force, the final word on compliance shifts into the hands of the third party dispute paths.¹¹

There is a distorting force, that I'll just mention briefly, which is transition periods. Some of our FTAs, including TPP, have provisions that say, "Okay, here's your substantive obligation, but Country X, you have two, three, four, five, six years,

9. *Free Trade Agreement Compliance*, INTERNATIONAL TRADE ADMINISTRATION, <https://perma.cc/4RZK-S6Z5>.

10. *FTA Compliance*, INTERNATIONAL TRADE ADMINISTRATION, <https://perma.cc/AFP2-R4CN>.

11. *Id.*

however much time is agreed before you're actually obliged to implement that term."¹² So if in Year 1 USTR certifies compliance they don't actually, a trade partner doesn't actually have to implement until Year 6, let's say. In that intervening time we've lost our negotiating leverage. Therein the certification has happened. They're enjoying access to the U.S. market, but they haven't yet implemented. And we've seen in a number of cases that countries have essentially ignored their transition periods and simply not implemented the obligation.¹³

In an ideal form, transition periods allow less developed countries with less sophisticated governing authorities to gain the capacity and expertise to appreciate and properly implement modern trade rules.¹⁴ And they're also a negotiating tool that if properly employed help our trading partners agree to levels of protection they might not otherwise agree to. And I believe that by and large our trading partners do enter into negotiations in good faith. And a large majority of obligations are implemented in a reasonable way.

Transition periods can be misused as a delay tactic.¹⁵ And that's a problem because the piracy that exists, and has existed, is a distorting force in international trade, in domestic markets.¹⁶ I think that's why it's appropriate to be in a FTA. One approach to that problem that has been suggested, and I think bears some further consideration, is some sort of "snap-back" provision, where if our trading partners have not implemented within the transition period, then some of the benefits of the trade agreement snap back.¹⁷ And they lose those so we once again have leverage so that they'll do what they agreed to do.

Turning to dispute resolution, the final ongoing phase of FTA compliance is the availability of a dispute resolution process. Even in cases of clear-cut noncompliance, though, the decision to initiate a dispute is at least as much political as it is substantive.

And I think this helps explain the information that Antony showed us a few minutes ago. That you have a lot of developing countries suing developed countries for noncompliance rather than vice versa.¹⁸ Developed countries don't want to be misconceived as bullies or some such thing. And, personally, I remember experiences when Country X has clearly not implemented their obligation, and not

12. Trans-Pacific Partnership, ch. 27, Feb. 4, 2016, <https://perma.cc/TA3P-NP62>.

13. Tuan N. Samohan, *TRIPS Copyright Dispute Settlement after the Transition and Moratorium: Nonviolation and Situation Complaints against Developing Countries*, 31 LAW & POL'Y IN INT'L BUS. 1051, 1059 (2000).

14. Arno Hold, *How Can the WTO Better Integrate the Poorest Countries Into the Growing Knowledge-Based Economy?*, INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT, <https://perma.cc/BXN9-LAGG>.

15. Linda Schmid, *Barbados: Telecommunications Liberalization*, WORLD TRADE ORGANIZATION, <https://perma.cc/A27V-J2DU>.

16. COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY, THE IP COMMISSION REPORT (2013), available at <https://perma.cc/M8N3-PQ3X>.

17. Somini Sengupta, *'Snapback' Is an Easy Way to Reimpose Iran Penalties*, N.Y. TIMES, July 17, 2015, at A10.

18. Geoffrey Antell & James W. Coleman, *An Empirical Analysis of Wealth Disparities in WTO Disputes: Do Poorer Countries Suffer from Strategic Delay During Dispute Litigation?*, 29 B.U. INT'L L.J. 267, 276 (2011).

in a way that's "well, they missed this little comma." There's an obligation to do something and there's no law whatsoever. But they've just had a natural disaster and we don't want to seem like we're being mean to them or heartless. There's a new administration that just came to office and we don't want to burden them with the sins of the previous administration, we'll have to give them a chance to do it right.

To be sure, it's not necessary to initiate a formal dispute resolution every time there's a disagreement over implementation. Again, the clearer the textual obligation, the more likely it is that direct negotiation leads to an acceptable outcome. There are a variety of tools, as Maria said, in the trade toolbox short of dispute resolution including: political level engagement, Special 301,¹⁹ TRIPS Council,²⁰ review of GSP benefits,²¹ and so on.

But sometimes it is necessary and even the threat of a dispute can have substantial persuasive power.²² Don't get me wrong; it's to our credit, I think, that we don't initiate disputes. The United States does not initiate disputes lightly or frivolously. But there's a line between compassion and complacency. Since 2000, U.S. Congress has held no fewer than thirty different hearings addressing the shortcomings of foreign IP protection.²³ Over that same span the United States has initiated exactly zero disputes under any of the FTA IP provisions. And none under the TRIPS agreement in nine years.

I'm concerned that failing to stand up to blatant noncompliance invites countries to test our resolve. The American innovators, the creators who face continuing challenges and markets that have not properly implemented their IP obligations, while those trading partners are enjoying the benefits of access to the U.S. market, is not the equity we achieved in the negotiation on the FTA. And we shouldn't settle for it. And our trading partners watch us. They look at us and see what we do and don't do. The hesitancy we seem to have as a government to initiate IP disputes invites them to test our resolve. So I think we need to do a better job.

Intellectual property, as has already been discussed, is a major element of U.S. economy and balance of trade. It's at the heart of American culture and the spirit of American innovation. And in addition to the benefits of economic growth and creativity, FTAs help promote the spread of fundamental elements of liberty including: rule of law, respect of property rights, and increased transparency and accountability in government operations.

Our FTA negotiations are hard fought, and like the IP rights they purport to secure, they're without meaning if not properly enforced. By the time we get to the final stage of compliance monitoring, as I've just outlined, we've already negotiated against ourselves once and our trading partners twice. If we're not willing to hold

19. *Special 301 Reports*, *supra* note 1.

20. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 68, 1869 U.N.T.S. 299 (1994).

21. *U.S. Generalized System of Preferences Guidebook*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://perma.cc/MV59-STZX>.

22. Michael Jacobs, *Smart Threats and Success in WTO Dispute Settlement: The Bush Steel Tariffs*, E-INTERNATIONAL RELATIONS, <https://perma.cc/B3AS-LNP7>.

23. *Free Trade Agreement Implementation: Lessons from the Past Before the Comm. on Finance*, 114th Cong. 19 (2016) (Testimony of Steven Tepp President & Founder, Sentinel Worldwide).

our trading partners to their obligations, at some point we have to ask the question, “What’s the benefit of running around the world getting people to sign pieces of paper?” We’re not there, yet. I don’t want to sound doom and gloom.

For all the trials and tribulations of the process the IP provisions of U.S. free trade agreements are still the top standard in the world. And I believe with energetic, reenergized efforts to hold our trading partners to their commitments, we can all enjoy the benefits of progressively improved IP protection around the world.

And I’ll just say, pivoting to some of the earlier remarks, it does seem appropriate to me that because the U.S. government has not initiated as many disputes as probably were justified by what we see in laws of our trading partners, it’s perfectly appropriate that some of the companies who make investments in these markets have some tool to try to protect those investments from government nationalization and other forms of expropriation.

So we can get more into that if the Q&A leads us there, but my time’s up so I’ll stop there. Thank you.