

IPC

INTELLECTUAL PROPERTY COMMITTEE

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May 10, 2001

Ms. Gloria Blue
Executive Secretary, TPSC
Office of the US Trade Representative
600 Seventeenth Street, NW
Washington, DC 20508

Re: US Objectives for the WTO Ministerial Conference

Dear Ms. Blue:

The Intellectual Property Committee (IPC) is pleased to provide below its comments on the US negotiating objectives on intellectual property for the upcoming meeting of the WTO Ministerial Conference that is scheduled to take place in Doha, Qatar on November 9-13, 2001 ("Doha Ministerial"). The IPC is providing its comments under heading number 3 ("Existing Agreements and Work Programs") of Federal Register Notice 01-8384.

In its most recent Special 301 Report, USTR called the negotiation of the TRIPS Agreement "one of the most significant achievements of the Uruguay Round." The Report went on to note that, in addition to containing minimum standards of protection and to requiring countries to provide effective enforcement, the Agreement "is the first broadly-subscribed multilateral intellectual property agreement that is enforceable between governments." The TRIPS Agreement was especially notable because it represented the culmination of joint efforts by US industry and government that were predicated on the view that intellectual property protection was one of the key engines for innovation, technology transfer and sustainable economic development. That rationale for strong intellectual property protection is as valid today as it was in the days leading up to the Punta del Este Ministerial that launched the Uruguay Round fifteen years ago.

While the successful negotiation of the TRIPS Agreement was a testament to the joint efforts of US industry and government, industry's participation in that effort was motivated by the expected commercial benefits from the improved intellectual property protection that would result from the TRIPS Agreement. Until industry begins to realize those commercial benefits, some elements of the TRIPS Agreement remain only promises. The value of the TRIPS Agreement is in its timely and proper implementation, which has not yet occurred in many countries.

In considering the intellectual property-related objectives that the United States will pursue at the Doha Ministerial, US negotiators should keep in mind the original economic development rationale for the US Government's support of the negotiation of the TRIPS Agreement. Making major changes in basic intellectual property protection to deal with immediate emergencies will not provide the long-term structural solutions that are needed to deal effectively with the problems that especially the developing countries face with respect to sustainable economic development, technology transfer and access to medicines. Indeed, such changes might even hamper the development and implementation of these solutions.

Among the issues that will be discussed at the Doha Ministerial is the possible launch of a new round of multilateral trade negotiations. As a general proposition, the IPC supports the launch of a new WTO round of negotiations at Doha. It, however, believes that intellectual property should not be among the issues included in such negotiations. Rather than launching a new round of intellectual property negotiations, the WTO Trade Ministers should call for the swift implementation of the TRIPS Agreement by all WTO Members other than the least developed countries.

Full TRIPS Implementation Remains a Priority

Developing country members of the WTO have only been obligated to implement in their national laws TRIPS-level protection since January 1, 2000. Many of those countries have not yet fully implemented the TRIPS Agreement. Indeed, the vast majority of the 51 countries cited in this year's Special 301 Report have not fully implemented their TRIPS obligations or, if they are not yet WTO members, do not have TRIPS-consistent intellectual property regimes. In addition, some of the current developing country members of the WTO—most notably Egypt and India—have until January 1, 2005 to apply the patent provisions of the TRIPS Agreement to pharmaceutical and agricultural chemical products, while the twenty nine least developed country (LLDC) members of the WTO have until January 1, 2006 to implement the whole agreement. It does not make sense to launch a new round of intellectual property negotiations when so many WTO members have not yet properly implemented the original TRIPS Agreement or are not even required to do so. Under these circumstances, the launch of new intellectual property negotiations is premature and will only result in substantial confusion over what countries are and are not obligated to do.

Furthermore, the developing and least developed countries have limited resources. By focusing over the next few years on the implementation of the TRIPS Agreement, instead of diverting resources to new intellectual property negotiations, we will be creating the opportunity to demonstrate that WTO Members are prepared to live up to the obligations that they incurred in previous negotiations. The successful implementation of past agreements such as TRIPS will, in turn, create a stronger political foundation for the WTO multilateral negotiating process and for the ratification of other agreements that will come out of Doha.

Under these circumstances, there is no legal or policy need to negotiate changes to the TRIPS Agreement. The minimum standards of protection contained in the Agreement, when properly implemented in the spirit and manner intended by the negotiators, will provide adequate and effective intellectual property protection needed for sustainable economic development, technology transfer and access to medicines. The

TRIPS Agreement encourages, rather than stifles, economic development and technology transfer.

The IPC recognizes that the TRIPS Agreement was a negotiated document that could be improved upon in subsequent negotiations. Nevertheless, its priority remains the proper implementation of the TRIPS Agreement. In order to ensure that US industry receives the commercial benefits of what we negotiated in the Uruguay Round, the IPC believes that any declaration that the Ministers will issue in Doha should state in strong terms that the full implementation of the TRIPS Agreement is a priority and the responsibility of all WTO members.

The TRIPS Built-in Agenda

The IPC believes that it is not necessary to launch intellectual property-related trade negotiations at the upcoming Doha Ministerial, thereby reopening the TRIPS Agreement, to ensure continued progress within the WTO in gaining improved worldwide intellectual property protection. The built-in agenda for the TRIPS Agreement already provides a program, in and of itself, for the timely and proper implementation of the agreement and for the strengthening of some of the protection currently found in the agreement of interest to US intellectual property right holders. The built-in agenda includes:

- The review, mandated by TRIPS Article 27.3(b), of the exclusions from patentability for certain plants and animals—the so-called “biotech exclusion.”
- The current review by the TRIPS Council, mandated by Article 71.1, of TRIPS implementation in the developing countries. This review, when coupled with the results of the review already undertaken by the TRIPS Council of TRIPS implementation by the developed countries, should serve to identify and put “peer” pressure on those countries that have not met their TRIPS obligations;
- The Council's review in 2002 of the TRIPS Agreement itself, also mandated by TRIPS Article 71.1 and which is to have “regard to the experience gained in its implementation.” Such a review could serve the purpose of identifying improvements that should be made in the TRIPS Agreement;
- The option provided by TRIPS Article 71.1 to the TRIPS Council to “also undertake reviews in light of any relevant new developments which might warrant modification or amendment of this Agreement”; and
- The launch of dispute settlement cases against countries that fail to properly implement their TRIPS obligations and the resultant development of WTO jurisprudence on the interpretation of the obligations found in the TRIPS Agreement.

The Current International Environment for Intellectual Property Protection

The current environment is not conducive for an initiative that will reopen the TRIPS Agreement at Doha. Any reopening of the TRIPS Agreement will play into the hands of those developing countries that are currently waging an aggressive campaign

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both within and outside the WTO to roll back the protection for patents and registration data currently found in the TRIPS Agreement.

This intense pressure is reflected in the WTO Secretariat's paper of February 20, 2001 outlining the open implementation issues. The list of issues, which is similar to the "confidence building measures" with which the WTO had been wrestling since the Seattle Ministerial, include a number of TRIPS-weakening issues of interest to the patent-related industries: amending of Article 27.3(b) in light of the Convention on Biological Diversity (CBD), including the exclusion from patentability of inventions that are inconsistent with CBD Article 15; elimination of, or extension of the moratorium on, the application of the WTO non-violation nullification and impairment provisions to TRIPS; making mandatory the terms of TRIPS Article 66.2 that call on developed country members to provide incentives for technology transfer to the least developed countries; permitting the compulsory licensing of drugs on the WHO Essential Drugs List or their exclusion from patentability; and operationalization of TRIPS Articles 7 and 8 and extension of the TRIPS transition period for the developing countries. The United States should not only refuse to consider these LDCs demands in the context of the "implementation" exercise but should also make clear from the outset that these weakening demands will not be on the table in any future negotiations, regardless of whether intellectual property is included in any new round.

Today's debate over the interpretation of the TRIPS Agreement is reminiscent of the debate over the need for strong worldwide intellectual property protection that took place fifteen years ago, prior to the start of the Uruguay Round. Only the terminology has changed. With the TRIPS Agreement in place, today's opponents can no longer oppose outright strong intellectual property protection; so they seek "flexibility" in the implementation of the agreement. Their objective, however, remains the same. This search for "flexibility" makes it imperative that the United States, in addition to opposing any reopening of the TRIPS Agreement at Doha, ensure that the WTO Trade Ministers not take any actions that will indirectly weaken the standards of intellectual property protection and enforcement contained in the agreement.

The current linkage of patent protection to the access to medicines issue masks what is essentially a commercial debate between those drug copiers who would benefit from continued weak intellectual property protection, especially in the newly industrializing countries, and the research-based pharmaceutical companies, for whom patent protection provides the incentives needed to carry on their research and development activities in the search for new drug therapies. The current use by the commercial opponents of strong intellectual property protection of the HIV/AIDS tragedy would make it difficult to conduct any multilateral negotiations on intellectual property.

It is also not necessary to reopen the copyright section of the TRIPS Agreement. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty have not yet been ratified and implemented by the requisite number of WIPO members to permit their coming into force. The coming into force of those agreements would clarify exclusive rights in the digital world and specifically prohibit circumvention of technological protection measures for copyrighted works. Launching TRIPS negotiations before the entry into force of the two treaties will necessarily make these treaties -- which contain many of the new obligations that the copyright industries would ultimately seek to have included in the TRIPS agreement -- into bargaining chips. That will delay ratification of

the treaties and give impetus to developing countries seeking transition periods and other concessions in return for bringing the substance of the treaties into TRIPS. The IPC, therefore, believes that the ratification and entry into force of these two new WIPO copyright treaties must be completed before any consideration is given to the reopening of the TRIPS Agreement.

Other Intellectual Property-related Issues that May Come Up at the Doha Ministerial

- Interpretation of the TRIPS Agreement – Developing countries have recently “suggested” that the provisions of Article IX of the Marrakesh Agreement relating to the respective roles of the WTO General and TRIPS Councils in the interpretation of the TRIPS Agreement be invoked. Paragraph 2 of Article IX permits the General Council to adopt an interpretation of the TRIPS Agreement by a three-fourths majority of its members. The General Council is required to exercise its authority “on the basis of a recommendation” from the TRIPS Council. The IPC urges the United States to unequivocally oppose any moves by the developing countries to use their numeric majority to gut the TRIPS Agreement. The IPC believes that the proper process for interpreting the provisions of the TRIPS Agreement is through decisions made by WTO dispute settlement panels in individual cases and not via decisions made by the TRIPS Council. The TRIPS Council process is too politicized and would by-pass established WTO rule-based procedures. Furthermore, we are already seeing the development of a body of law through the TRIPS-related panel decisions.
- WTO Accession – Twenty-eight countries are currently seeking to accede to the WTO. Among those countries are countries like China, Taiwan and Russia, whose industries have already demonstrated their commercial competitiveness with US industry. The process that led to last year’s accession of Jordan to the WTO is a model for both the accession process itself and the substantive results of the process. Jordan accepted the immediate implementation of all of the TRIPS transition provisions and agreed in the Working Party report to certain clarifications of some of the critical obligations found in the agreement.

The IPC believes that the Trade Ministers meeting in Doha should operationalize the “Jordan experience” and declare that countries acceding to the WTO should implement all of their TRIPS obligations immediately upon accession. In particular, the IPC calls on the United States to underscore at Doha the importance of immediate adherence to the agreement’s transition provisions, especially those that relate to the protection of existing subject matter. In this regard, the recent ruling by a WTO panel, which was affirmed by the WTO Appellate Body, that Canada’s Patent Act violated the TRIPS Agreement by not providing 20 year patent terms to certain 17 year patents makes it clear that countries are required to provide TRIPS-level protection to all existing subject matter on the date that they apply the TRIPS Agreement, which, for acceding countries, is the date on which they accede to the WTO.

Six of the current candidates for WTO accession are on the UNCTAD list of 48 least developed countries (LLDCs). The TRIPS Agreement permits the 29 LLDCs that are currently WTO Members to delay their implementation of the TRIPS obligations until January 1, 2006. The IPC believes that requiring the six LLDC accession candidates to implement their TRIPS obligations before January 1, 2006 raises questions of equity and fairness. The IPC recommends that, in such cases, the United

States consider permitting LLDC accession candidates, on a case by case basis, to avail themselves of the remainder of the TRIPS transition period for original LLDC Members of the WTO.

- Cooperative Efforts to Build Intellectual Property-related Infrastructure. The IPC urges that the Ministerial Declaration also underscore the importance of providing special training facilities and assistance to the developing countries, and especially to the least developed countries, to ensure that they build the needed intellectual property-related infrastructure for the proper implementation of the TRIPS Agreement.

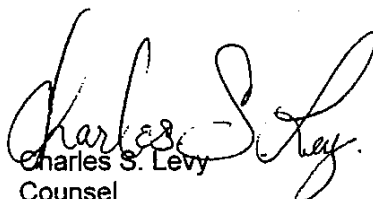
The forms of technical cooperation (assistance in preparing legislation, training, institution-building and in modernizing intellectual property systems and enforcement) included in the joint initiative announced by the WTO and WIPO in July of 1998, are applicable equally to both developing and the least developed countries. Such assistance should be provided not only through such multilateral institutions as the WTO, WIPO and the World Bank but also as part of the bilateral assistance programs of the individual WTO member countries.


Conclusion

The IPC urges the United States and its Quad partners to remain focused on the long-term economic development benefits of strong worldwide intellectual property protection. The Doha Ministerial could very well set the agenda for a new round of trade negotiations. It would be unfortunate if the United States and the other Quad countries, in an attempt to appear to be responsive to health or other emergencies, were to inadvertently pull the rug out from under the implementation of the Uruguay Round results we all worked so hard to achieve.

Should you or your colleagues have any questions or wish to pursue further any of the issues raised in these comments, please do not hesitate to call on us.

The IPC appreciates the opportunity to provide these comments.

 Sincerely,
Charles S. Levy
Counsel


Jacques J. Gorlin
Director

cc: Mr. Joseph Papovich, Office of the US Trade Representative
Mr. Claude Burcky, Office of the US Trade Representative