Adjudicating TRIPS for Development

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I. INTRODUCTION

The conclusion of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)¹ in 1994 heralded two important changes for global intellectual property regulation. First, the agreement made compliance with certain minimum intellectual property standards a requirement of membership in the World Trade Organization (WTO). Second, it subjected these standards to the WTO’s mandatory dispute resolution process. This chapter focuses on the development impact of the second of these changes.

The decision to enforce intellectual property standards through the WTO’s dispute resolution process has had several consequences for developing nations. The threat of litigation has contributed to the creation of a “pro IP climate” in which countries have foregone flexibilities to which they would otherwise be entitled.² Locating intellectual property in the dispute resolution mechanism of the international trading system has also led adjudicators to miss the unique need for internal balancing associated with intellectual property and TRIPS, resulting in overly restrictive

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interpretation of TRIPS flexibilities. For the least-developed countries (LDCs), the loss of flexibilities is particularly problematic.

This chapter seeks to revive the special and differential provisions of the treaty governing WTO dispute resolution as a way of countering the potential loss of flexibility under TRIPS. Specifically, the chapter recommends using a little-known provision of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 24.1, to benefit LDCs in TRIPS disputes. Article 24.1 requires that "[a]ll stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members." The chapter argues that Article 24.1 could and should be used in TRIPS disputes to provide LDCs with greater flexibility in implementing their obligations under the treaty, including through a more lenient standard of review, shifting the burden of proof with respect to exceptions and limitations, and requiring injury as part of a prima facie case against an LDC.

As the transitional periods for LDCs to implement TRIPS come to an end, it is an appropriate time to consider the treatment of LDCs in TRIPS litigation. Although no LDCs have been the subject of complaints under TRIPS thus far, the expiration of these transitional periods on July 1, 2013 (in general) and January 1, 2016 (for pharmaceuticals) opens LDCs up to the possibility of litigation. Special and differential treatment in dispute resolution would encourage LDCs to use the TRIPS flexibilities available to them to tailor their national innovation policies in ways that respond to local needs. Knowing that their actions would be viewed with greater deference in the event of a TRIPS complaint might provide them with the reassurance they need to experiment.

II. TRIPS ADJUDICATION AND DEVELOPMENT

In the context of intellectual property, flexibility in implementation is critical. Intellectual property policies can play an important role in

fostering innovation and development, but to do so, they require tailoring. The intellectual property policies that will promote development in one context are different from those necessary in another. For example, states may need to vary across industries the strength of the intellectual property protection they provide. China may want strong rights for its software industry but weaker rights for pharmaceuticals in order to ensure sufficient access to medicines. Stronger intellectual property rights may also be advantageous with respect to fields in which the country possesses domestic resources. For example, data exclusivity may provide incentives for research into traditional medicines in countries that have significant indigenous knowledge resources.

Flexibility in implementation is particularly important for LDCs. Although countries in transition, such as Brazil and India, may benefit from strong rights in some instances, empirical research indicates that developing countries as a whole do not see significant economic growth associated with the adoption of strong intellectual property protection.

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7 Shamnad Basheer & Annalisa Primi, The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries, in IMPLEMENTING WIPO’S DEVELOPMENT AGENDA 100, 108 (Jeremy DeBeer ed., Wilfrid Laurier University Press, CIGI, IDRC, 2009) (describing the recommendation of an Indian governmental committee that “data exclusivity for a term of five years is a good way to create incentives for more research and development into traditional medicines”).

8 Rochelle C. Dreyfuss, The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking 2–3 (NYU School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 09-53, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442785 (although the emerging economies of India, Brazil and China “suffer from the same access problems experienced by less developed economies,” they also “have growing creative sectors that are beginning to enjoy the benefits of strong intellectual property protection”).

Implementation is also more expensive in relative terms for countries with poor legal infrastructure. Further, the costs of implementation have not been offset by the economic growth, increased foreign direct investment, and technology transfer that proponents of the TRIPS Agreement had anticipated. "For the poorest developing countries, . . . there are questions regarding the degree to which IP laws are relevant at all." The TRIPS Agreement offers states several different ways in which they can tailor intellectual property policies to domestic needs. These "flexibilities" include explicit exemptions, balancing provisions, procedural flexibilities, ambiguous standards, and textual silence. Articles 13, 17, and 30, for example, empower states to impose exceptions and limitations on copyright, trademark, and patent rights. Many countries, however, including many of the least-developed states, have explicitly foregone flexibilities (e.g., declining to implement compulsory licensing) or have adopted national laws beyond what is required by TRIPS (e.g., adopting

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11 See Peter K. Yu, Are Developing Countries Playing a Better TRIPS Game? 5 (Drake University Law School Research Paper No. 12-06, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915117## (noting that the "gains by less developed countries in the areas of agriculture and textiles would not make up for losses in the intellectual property and information technology areas" particularly given that "developed countries thus far have refused to honor their promise to reduce tariffs and subsidies in the areas of agriculture and textiles"); see also Peter K. Yu, TRIPS and Its Discontents, 10 MARQ. INTELL. PROP. L. REV. 369, 379 (2006); Dreyfuss, supra note 8, at 4.

12 Deere, supra note 2, at 103.

13 See Land, supra note 3, at 439–42 (describing flexibilities).

14 Each of the articles governing exceptions and limitations is drafted somewhat differently. Article 13 provides that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." TRIPS Agreement, supra note 1, art. 13. Article 17 allows "limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties," while Article 30 provides for "limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties." Ibid. arts. 17, 30.
copyright terms that exceed those required by the treaty). These decisions were often made pursuant to bilateral trade and investment agreements in which states bound themselves to provide such "TRIPS-plus" protection. Although most of these "TRIPS-plus" agreements were concluded with states that had markets of commercial significance for the United States or European Union, "[e]ven LDCs that mattered little from a commercial viewpoint attracted some interest." Developed countries pushed for strong intellectual property laws in small countries to help isolate the "larger, more competitive and less-malleable developing countries" and marshal support for TRIPS-plus agreements.

The availability of mandatory dispute resolution through the WTO also played a role in over-compliance with the TRIPS Agreement. The DSU is a treaty negotiated as part of the creation of the WTO in 1994 that provides a mechanism for states to bring complaints against one another for violations of covered agreements. Through the procedures established by the DSU, member states can obtain a binding decision on a complaint from an adjudicatory panel. The DSU also establishes a standing body, called the Appellate Body, that hears appeals of panel decisions. A panel can sanction a member state for violating the TRIPS Agreement by authorizing the complaining state to suspend trade benefits to which the violator state is otherwise entitled. If the violator state does not comply with a panel's recommendations, the DSU allows the complaining state to "request authorization . . . to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

The decision to subject TRIPS to dispute resolution through the WTO system was controversial. Several developing nations initially opposed applying the DSU to the TRIPS Agreement, fearing that it would result in significant litigation against developing countries. On the other hand,

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15 See, e.g., Deere, supra note 2, at 73, 81, 91–4, 98.
16 Ibid. at 151–5.
17 Ibid. at 116.
18 Ibid.
20 Ibid. art. 17.
21 Ibid. art. 22.1.
22 Ibid. art. 19.
23 Ibid. art. 22.2.
24 U.N. Conf. on Trade & Dev.-Int’l Ctr. for Trade & Sust. Dev.
developing countries also hoped that “legalization” of dispute resolution at the WTO would help “insulate[e] them against the pressures of power politics” and “limit the scope of the debate to the legal merits.” As the WTO Secretariat notes, the system of compulsory multilateral dispute settlement can be viewed as “empower[ing] developing countries and smaller economies by placing ‘the weak’ on a more equal footing with ‘the strong.’” Developing countries also anticipated that the DSU’s monopoly on trade retaliation would eliminate the possibility of unilateral sanctions. Although unilateral pressure continues, David Evans and Gregory Shaffer have observed that WTO dispute resolution has “helped to level the playing field between weaker and stronger WTO Members.”

Nonetheless, the decision to subject intellectual property standards to trade dispute procedures has had the effect of constraining some of the bargained-for flexibilities of the TRIPS Agreement. The threat of litigation has contributed to a “pro IP climate” that has discouraged states from


25 The reforms of the dispute settlement process associated with the creation of the WTO have been characterized as a process of “legalization.” See, e.g., Gregory Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies 9 (ICTSD Resource Paper No. 5, 2003).


29 The United States has continued to employ threats of sanctions through its “Special 301” process, see Donald Harris, TRIPS After Fifteen Years: Success or Failure, As Measured by Compulsory Licensing, 18 J. Intell. Prop. L. 367, 373 (2011), although the impact of this threat has been limited by the United States’ position in litigation before the WTO that it would not use this process in ways inconsistent with TRIPS, see Panel Report, United States—Sections 301–310 of the Trade Act of 1974, ¶¶ 7.125–7.126, 7.131, 7.135, WT/DS152/R (Dec. 22, 1999) (although Section 304 constituted a prima facie violation of Article 23.2(a), the United States had expressed an “unambiguous and official position” that prevented it “from making a determination of inconsistency contrary to Article 23.2(a)” and which rendered the process consistent with the DSU).

30 David Evans & Gregory C. Shaffer, Conclusion, in Dispute Settlement at the WTO: The Developing Country Experience 342, 342 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010); HANDBOOK, supra note 27, at 109.
taking advantage of flexibilities.31 Clearly, there are a variety of reasons why states implemented levels of protection higher than what was required by the treaty,32 and the direct threat of litigation does not explain over-compliance by LDCs not yet required to implement the treaty. Yet dispute resolution did play a role in creating a culture of over-compliance. As Deere notes in her study of TRIPS implementation:

Developed countries deployed a suite of economic pressures on developing countries, using bilateral trade, IP and investment deals, WTO accession agreements, trade sanctions, the threat of sanctions, and the WTO DSU Process. . . . Even for countries not directly subjected to them, economic pressures reinforced an international policy climate in which it was clear that taking steps toward stronger IP protection would be favoured by powerful donors, foreign companies, and trading partners.33

This “pro-IP” climate was exacerbated by the polarized rhetoric used by proponents and opponents of strengthened intellectual property protections worldwide.34 Although the availability of dispute resolution did not result in the explosion of litigation that many had feared,35 the very lack of precedent (and particularly precedent involving developing countries) has meant that “there has been no opportunity to generate the norms that would provide developing countries with guidance on what sorts of moves they can safely regard as compatible with international obligations.”36

The climate of over-compliance fostered by economic pressure and the availability of mandatory dispute resolution has been exacerbated by overly restrictive interpretations of TRIPS flexibilities. As I have argued elsewhere,37 situating intellectual property disputes within a trade dispute resolution mechanism has led at least one WTO panel to develop crucial jurisprudence that is both internally incoherent and inconsistent with the goals of intellectual property balancing and the TRIPS Agreement. In U.S.—Copyright, the only case thus far interpreting the provision of TRIPS governing exceptions and limitations to copyright (Article 13),

31 Deere, supra note 2, at 156.
32 These include, among others, the state’s domestic capacity for intellectual property policy making, unilateral economic pressure, and public engagement. See generally ibid.
33 Ibid. at 306.
35 Ibid. at 395.
36 See Dreyfuss, supra note 8, at 7.
37 Land, supra note 3, at 450–61.
the panel declined to consider the purpose of the challenged exception, citing Appellate Body cases interpreting the national treatment clauses of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Not only does the rationale of these cases fail to apply in the context of Article 13, but an approach that disclaims consideration of purpose is fundamentally at odds with the instrumental nature of intellectual property law and its consideration of the burdens imposed by granting monopoly rights and the objectives those grants are designed to achieve. The panel’s textual and dictionary-driven interpretive approach has read much of the treaty’s flexibility out of the agreement.

In the short term, over-compliance with the treaty may have been a net gain for developing countries, bringing significant benefits with trade partners and costing little given inadequate domestic enforcement. Yet while lack of enforcement may currently mitigate the absence of flexibilities in many cases, inadequate enforcement is not a long-term solution to protecting the TRIPS flexibilities necessary for development and human rights, particularly in light of international efforts designed to bolster enforcement efforts worldwide.

Further, as transitional periods expire, there is reason to believe that developing countries and LDCs in particular may be especially sensitive to concerns about litigation. First, the consequences of losing a dispute are higher for developing countries: “For trade-dependent, IP-importing developing countries, the prospect that failure to implement TRIPS could result in trade retaliation is one of the Agreement’s most pernicious aspects.”

Further, as Niall Meagher explains, a “developed country can more readily spread the financial costs of failure (whether involving the loss of any anticipated trade gains or the cost of implementation or

39 See, e.g., Jon O. Newman, Considering Copyright, 40 Hous. L. Rev. 613, 615 (2003) (“The dominant issue in all of copyright law is striking an appropriate balance between the maintenance of an adequate incentive for authors to create new works and the vital interest of the public in having adequate access to the works that are created—limited access via the fair use doctrine during the copyright term and general access once the work has entered the public domain.”).
41 Deere, supra note 2, at 65.
counter-measures imposed by a complainant WTO member) throughout its economy."42 Given limited resources available for implementation, developing countries may also assume that they are more likely to lose on the merits of a dispute if challenged.43 Marc Busch and Eric Reinhardt’s empirical study of early settlement has also shown that developing countries tend to lack the legal capacity needed to take advantage of the opportunity to extract full concessions during early settlement.44 Second, WTO dispute resolution is expensive, and these costs are, in relative terms, “much higher for developing than developed countries.”45 Legalized adjudication “demands increasingly sophisticated legal talent” thereby “driving up the cost of formal dispute settlement, which is disproportionately burdensome to developing countries.”46 Developing nations also tend to possess less domestic legal expertise in the area of intellectual property and have access to fewer resources necessary to initiate or defend against suits.47 The start-

42 Niall Meagher, Representing Developing Countries in WTO Dispute Settlement Proceedings, in WTO LAW & DEVELOPING COUNTRIES 213, 220 (George A. Berman & Petros C. Mavroidis eds., 2007). Although the views in the essay are his own, Meagher’s observations are based on his “personal experience as senior counsel at the ACDL [Advisory Centre on WTO Law],” Ibid. at 213.

43 Ibid. at 221.

44 Marc L. Busch & Eric Reinhardt, Developing Countries and GATT/WTO Dispute Settlement, in WTO LAW AND DEVELOPING COUNTRIES, supra note 42, 195, 196. Busch and Reinhardt argue that the threat of litigation benefits WTO members by encouraging early settlement, which is associated with securing full concessions. Ibid. Countries with more limited legal capacity, however, have greater difficulty securing early settlement. Ibid.

45 Meagher, supra note 42, at 218–19 (discussing the costs of initiating and defending a complaint); see also South Centre, Issues Regarding the Review of the WTO Dispute Settlement Mechanism 23 (Trade-Related Agenda, Development and Equity Working Papers, 1999), available at http://tinyurl.com/ctcyc6m (noting that cost is one of the main complaints developing countries have raised with respect to the DSU); Mohammad Ali Taslim, How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Complaint, in DISPUTE SETTLEMENT AT THE WTO, supra note 30, 230, 240 (discussing the costs of bringing a complaint as a disincentive to make use of the dispute resolution procedures); Tshimanga Kongolo, The WTO Dispute Settlement Mechanism: TRIPS Rulings and the Developing Countries, 4(2) J. WORLD INT’L PROP. 257, 260–1 (2001).


up costs of litigation are significantly more burdensome for countries without domestic capacity. Such states must obtain legal expertise on an ad hoc basis, a process that can take time, and they might lack the assistance of a Geneva mission. Because they are less likely to be repeat players, developing nations also "benefit from fewer economies of scale in deploying legal resources." Although the Secretariat provides developing countries with experts, there has historically been an insufficient number of experts to fill the need, and the Secretariat’s commitment to neutrality has hindered the ability of these experts to act as advocates for developing countries.

III. PROCEDURAL PROTECTIONS FOR DEVELOPING COUNTRIES

The WTO dispute resolution mechanism contains several provisions designed to mitigate some of the costs for LDCs associated with introduction of TRIPS standards and the potential loss of TRIPS flexibility resulting from over-compliance with the treaty. Panels and the Appellate Body can provide developing and least-developed countries with additional flexibility in their implementation of the agreement by taking advantage of provisions in the DSU providing special and differential procedural protections to developing state and LDC litigants.

A. Special and Differential Treatment Under the DSU

Developing WTO members are entitled to a range of special and differential treatment under the covered agreements. As the Secretariat notes, special and differential treatment provisions in the WTO agreements tend to fall into five categories—increasing trade opportunities, requiring other countries to safeguard developing country interests, allowing flexibility in rules governing trade measures, providing for transitional periods, and guaranteeing technical assistance. Many of these rules are "substantive" in the sense that they reduce or eliminate specific obligations for developing or least-developed members. For example, in the Agreement

48 Meagher, supra note 42, at 219.
49 Shaffer, supra note 47, at 474.
50 Pham, supra note 26, at 356.
51 Note by the Secretariat, Special and Differential Treatment for Least-Developed Countries, ¶ 1, WT/COMTD/W/135 (Oct. 5, 2004).
on Agriculture, LDCs are exempt from commitments to reduce export subsidies.52

The TRIPS Agreement does not explicitly provide special and differential treatment for developing nations in the form of exemptions or more flexible rules.53 The 20-year patent term required by the TRIPS Agreement, for example, applies to all countries regardless of their stage of development.54 In addition, the intent of at least some of the negotiating members—the United States, in particular—was to impose common substantive standards for all member states. These states desired to eliminate “special and differential treatment” in TRIPS and instead to provide only increased transitional periods for developing and least-developed nations.55 By and large, this position was successful, and TRIPS does not include the kinds of substantive “special and differential” treatment present in the other covered agreements.56

The DSU, however, does provide for special and differential treatment for developing and least-developed countries in the context of dispute settlement, including in TRIPS cases.57 Broadly characterized, special and differential treatment provisions in the DSU fall into three categories—consultation, implementation, and adjudication.58 First, the DSU provides additional protections for developing countries and LDCs in the context of consultation. Article 3.12 offers developing countries alternative procedures for consultation that allow recourse to the good offices

53 Kongolo, supra note 45, at 258.
54 TRIPS Agreement, supra note 1, art. 33.
56 See Constantine Michalopoulos, Special and Differential Treatment of Developing Countries in TRIPS 2 (TRIPS Issues Papers No. 2, 2003) (noting the “lack of substantial SDT” in the TRIPS Agreement and the problems these poses for developing countries). As I argue elsewhere, however, much of the flexibility needed for developing nations is already encompassed in the “standard-like” norms that the treaty provides. See Land, supra note 3, at 440–1.
57 See generally South Centre, supra note 45.
58 The DSU also requires transparency concerning the use of the provisions for special and differential treatment under other covered agreements. Article 12.11 of the DSU asks panels to indicate, in disputes involving developing countries, “the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.” DSU, supra note 19, art. 12.11.
of the Director-General and shortened time frames. Article 4.10 calls for “special attention to the particular problems and interests of developing country Members” during consultations. Article 24.2 provides that in cases involving a LDC, the LDC member state can request the assistance of the Director-General or Chairman of the Dispute Settlement Body in settling a dispute. Under Article 10, parties are entitled to additional time to engage in consultations regarding measures undertaken by developing countries.

Second, the DSU includes several provisions designed to address developing country concerns with implementation. Article 21.2 requires that in the context of implementation, “[p]articular attention” be paid “to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.” To address the specific challenges that developing country members face in making effective use of the dispute settlement mechanism given their weaker capacity for retaliation, Articles 21.7 and 21.8 the DSU require panels to consider “further action” in implementation and to “take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.” Article 24.1 provides that “[i]f nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.”

Third, the DSU also provides specific procedural protections for developing country members designed to reduce the burden on such members associated with the adjudicatory process itself. Developing countries can request a panelist from a developing country (Article 8.10) and are entitled to legal advice and assistance from the Secretariat (Article 27.2). When “examining a complaint against a developing country Member,” panels “shall accord sufficient time for the developing country Member to prepare and present its argumentation” (Article 10).

Despite these strong statements about the special consideration required for developing and least-developed member states, states have made little use of the provisions in the DSU offering special and differential treatment.

60 DSU, supra note 19, art. 21.2; TRIPS Resource Book, supra note 24, at 684 (noting that this is in some tension with the obligation of WTO experts to be neutral). Article 21.2 explicitly notes that the expert “shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.” DSU, supra note 19, art. 21.2.
in dispute resolution.\textsuperscript{61} In part, this may be a function of the ambiguity of many of these provisions.\textsuperscript{62} Articles 4.10 and 21.2 require “special attention,” “particular attention” and “particular consideration” to the needs of developing countries without providing any indication of what this additional attention and consideration might include. As the South Centre noted in discussing Article 4.10, provisions “of a declaratory nature,” without further guidance, “have not been of any practical use to developing countries.”\textsuperscript{63} Lack of reliance on these provisions also appears to be related to a desire to avoid the perception of special treatment. Frieder Roessler observes that “there is a reluctance of developing countries to invoke the DSU provisions according them special privileges and of the judicial organs to give effect to these provisions.”\textsuperscript{64}

At a minimum, the ambiguity of these sweeping provisions indicates a need for the Dispute Settlement Body (DSB) to elaborate on the kinds of procedures panels might adopt in cases involving developing countries and LDCs. Suggestions of procedures that might be helpful have already been raised in the context of negotiations about reforming the DSU. For example, pursuant to Article 4.10, the DSB might enable consultations to be held in developing countries to minimize the costs associated with travel and hiring counsel abroad.\textsuperscript{65} To aid in enforcement, developing countries have proposed that the DSB allow monetary compensation (instead of suspension of concessions) and collective retaliation by all members to enforce recommendations.\textsuperscript{66} There have been several proposals designed to compensate for the lack of resources to litigate, including proposals to have developed countries pay the costs of developing countries in cases where the developing country prevails, and proposals

\textsuperscript{61} Hunter Nottage, \textit{Developing Countries in the WTO Dispute Settlement System} 16 (Global Economic Governance Working Paper 2009/47, 2009); see also Frieder Roessler, \textit{Special and Differential Treatment of Developing Countries Under the WTO Dispute Settlement System}, in \textit{The WTO Dispute Settlement System} 1995–2003, 87, 89 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004) (discussing the use of Article 21.2). Panels have included developing country members, but not because of a particular request filed pursuant to Article 8.10. TRIPS RESOURCE BOOK, supra note 24, at 685.

\textsuperscript{62} TRIPS RESOURCE BOOK, supra note 24, at 685.

\textsuperscript{63} South Centre, supra note 45, at 19.

\textsuperscript{64} Roessler, supra note 61, at 89.

\textsuperscript{65} See, e.g., Working Document, Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group, ¶ 3, TN/DS/W/17 (Oct. 9, 2002) [hereinafter Proposal by the LDC Group]; South Centre, supra note 45, at 31.

\textsuperscript{66} See Proposal by the LDC Group, supra note 65, ¶¶ 13, 15.
to offer more training and funding in the area of legal assistance.\textsuperscript{67} Other proposals would increase the litigation support available to developing countries by removing the impartiality requirement for experts provided by the Secretariat.\textsuperscript{68} Some of these provisions were proposed in connection with the drafting of the DSU,\textsuperscript{69} and some have been implemented. In 2001, for example, the WTO established the Advisory Centre on WTO Law, with the mission “to provide developing countries and LDCs with the legal capacity necessary to enable them to take full advantage of the opportunities offered by the WTO.”\textsuperscript{70}

One provision for special and differential treatment that has not received much attention is Article 24. Article 24.1 provides:

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

The first sentence of Article 24.1 is extraordinarily broad, mandating—not just permitting—that “particular consideration” be given to the “special situation” of LDCs “[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures.” The remainder of Article 24.1 provides suggestions about ways in which such consideration might be ensured—for example, in restraint by members in raising matters and asking for compensation or sanctions against LDCs. LDCs have suggested strengthening this provision by requiring panels to affirmatively determine, in any suit against a least-developed country, whether the complainant exercised due restraint in bringing complaint against LDC, including whether the complainant should have called for assistance from the Director-General or used other means to settle the dispute.\textsuperscript{71}

\textsuperscript{67} Pham, supra note 26, at 364; South Centre, supra note 45, at 32.
\textsuperscript{68} Proposal by the LDC Group, supra note 65, ¶ 21; South Centre, supra note 45, at 30.
\textsuperscript{70} The Advisory Center on WTO Law’s Mission, available at http://www.acwl.ch/e/about/about_us.html.
\textsuperscript{71} Proposal by the LDC Group, supra note 65, ¶ 17.
Due restraint, however, is only one example of the "particular consideration" that might be afforded LDCs under the broad terms of Article 24.1. The phrase "[i]n this regard" indicates that what follows the first sentence satisfies but does not exhaust the "particular consideration" that might be offered to meet the needs of LDCs. The language of "[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures"—which must be given meaning by virtue of the principle of effective treaty interpretation followed by the Appellate Body—also far broader than the examples of initiating complaints and seeking remedies, thus indicating that this is a non-exhaustive list.

The fact that some of the activities discussed in Article 24.1 appear to be more aspirational than binding highlights the otherwise obligatory nature of the provision. The statement that states should exercise due restraint in raising issues against LDC member states, for example, appears to be a moral and not a legal obligation. As Niels Petersen explains, "It is barely conceivable that a Member could be legally prevented from utilizing the dispute settlement procedure if a country had breached an obligation under the WTO regime." Petersen argues that the obligation to consider the needs of LDCs in seeking compensation or the suspension of concessions, on the other hand, is expressed in prescriptive terms ("shall") and is thus a binding obligation.

The first sentence of Article 24.1, which also uses the term "shall," expresses a mandatory obligation to treat LDCs differently during dispute settlement. This mandatory consideration to be afforded the least-developed countries explicitly embraces procedures used during adjudication. The article requires particular consideration both "[a]t all stages of the determination of the causes of a dispute" as well as "of dispute settlement procedures." The determination of the causes of a dispute occurs during adjudication, when the panel evaluates the reasons for the parties' dispute and their respective fault. Thus, this phrase specifically contemplates procedures that occur during the adjudicatory phase of the dispute settlement process.

72 Report of the Appellate Body, United States—Standards for Reformulated and Conventional Gasoline, AB-1996-1, WT/DS2/AB/R, at 23 (Apr. 29, 1996) ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").
73 Niels Petersen, Article 24 DSU: Special Procedures Involving Least-Developed Country Members, in WTO—Institutions and Dispute Settlement 563, 564 (Rüdiger Wolfrum et al. eds., 2006).
74 Ibid.
75 Ibid.
To the extent that there is ambiguity in the phrase "[a]ll stages of the determination of the causes of a dispute," the negotiating history of Article 24.1 also supports the interpretation that it applies to the adjudicatory phase. The genesis of the first sentence in Article 24.1 appears to have been a 1990 draft prepared by the Negotiating Group on Dispute Settlement. The first sentence in a section entitled "Special Procedures involving Least-Developed Contracting Parties" simply stated: "At all stages of dispute settlement procedures involving a least-developed contracting party, particular consideration shall be given to the special situation of least-developed countries." This language was not present in proposals summarized by the Secretariat in 1988, nor did it appear in a proposed draft text from 1988. The sentence in the 1990 draft was carried over in expanded form in the Dunkel Draft, a draft proposed by Arthur Dunkel, Secretary General of the GATT in December of 1991 that eventually became the basis for the WTO agreements. Article 22.1 of the Dunkel Draft provided:

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed contracting party, particular consideration shall be given to the special situation of least-developed countries. In this regard, contracting parties shall exercise due restraint in raising matters under Article XXIII involving a least developed contracting party. If nullification or impairment is found to result from a measure taken by a least developed contracting party, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to Article XXIII:2.

Article 22.1 of the Dunkel Draft was eventually codified with minor changes as Article 24.1 of the DSU. By explicitly adding the phrase "the

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76 Negotiating Group on Dispute Settlement, Draft Text on Dispute Settlement, MTN.GNG/NG13/W/45, at 7 (Sept. 21, 1990).
77 Note by the Secretariat, Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System, MTN.GNG/NG13/W/27 (June 30, 1988).
78 Negotiating Group on Dispute Settlement, Dispute Settlement Proposal, MTN.GNG/NG13/W/30 (Oct. 10, 1988).
80 With respect to the first sentence, Article 24.1 of the final text substituted "country Member" for "contracting party" and "country Members" for "countries."
determination of the causes of a dispute” to the text of this article, the Dunkel Draft, and all subsequent drafts, made clear that LDCs were to be provided with particular consideration during adjudication of the merits of those disputes. The addition of the second and third sentences on due restraint also made clear that these examples were illustrative only, and not exhaustive of the kind of consideration that might be afforded LDCs in dispute settlement.

B. Proposed Procedures for LDCs in TRIPS Disputes

The particular consideration owed LDCs under Article 24.1 may vary depending on the nature of the underlying dispute and the covered agreement under which it is brought. In any WTO dispute, there are two operative treaties—the DSU and the covered agreement itself. The obligations and procedures relevant to any dispute must therefore be evaluated with reference to both treaties. Although some kinds of procedural protections might be appropriate regardless of the nature of the dispute, others may have the effect of altering the nature of the parties’ obligations under the respective covered agreements. In discussing standards of review, for example, Andrew Guzman has argued that Article 11 of the DSU should be interpreted differently depending on the covered agreement at issue, noting that it “does not, and cannot, and should not prescribe a single standard of review for all cases.” As a result, it is important to evaluate what protections might be necessary in the context of each specific agreement.

In light of the burdens of strong intellectual property rights on LDCs and their need for maximum flexibility in implementing the provisions of the TRIPS Agreement, procedures establishing greater deference to the needs of LDCs would be appropriate for cases brought under that treaty. In particular, Article 24.1 provides a means to open up additional policy space for LDCs in using TRIPS flexibilities. There are three types of procedures that panels might apply to equalize the burden on LDCs—a more deferential standard of review, shifting the burden of proof on exceptions and limitations, and requiring complaining states to bring proof of injury to establish a prima facie case against an LDC. These procedures would

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81 See ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES 265 (2008) (noting that the “the differing needs of developing countries in different situations and at different stages of development limit the utility of a general S&D principle”).

help encourage LDCs to experiment with the flexibilities protected under TRIPS.

First, panels should use a highly deferential standard of review in TRIPS cases involving LDCs. During the negotiation of the TRIPS Agreement, developing and developed countries disputed the standard of review that WTO adjudicators should use with respect to complaints about violations of the TRIPS Agreement. Judith Bello, who was involved in the negotiations on behalf of the United States Government, recalls that the Bush administration’s position with respect to TRIPS “was to empower dispute settlement panelists to scrutinize the measures or practices complained of closely, without undue deference for the member state’s findings or determinations underlying them.” Developing countries, on the other hand, wanted to cabin the authority of the dispute settlement bodies, arguing that because the TRIPS Agreement required members to limit their sovereignty “more severely than the passive provisions” of the other covered agreements, it was necessary to provide a standard of review that detailed “the prerequisites under which a panel or the Appellate Body was obliged to respect decisions of the Members.” In the end, the parties were only able to agree on a standard of review for one of the covered agreements, the Anti-Dumping Agreement.

Filling the gap left by the drafters, the panels in TRIPS cases have in practice established a very high standard of review by disregarding the purposes the state sought to achieve in using TRIPS flexibilities. In *U.S.–Copyright*, for example, the panel considered a challenge to two provisions of U.S. copyright law as inconsistent with Article 13, which allows exceptions and limitations to copyright that meet the requirements of that article. The panel focused nearly exclusively on the text of the treaty, relying on dictionary definitions and explicitly disregarding the purpose to be achieved by the exception. Elsewhere, I have argued that when

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85 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 17.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201. In the absence of explicit agreement on a standard of review for the other agreements, WTO panels have looked to Article 11 of the DSU, which provides that panels “should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” DSU, *supra* note 19, art. 11.
86 *U.S.–Copyright*, *supra* note 38, ¶ 6.111 (“As regards the parties’ arguments on whether the public policy purpose of an exception is relevant, we believe that the term ‘certain special cases’ should not lightly be equated with ‘special purpose.’”).
the obligations in the treaty, such as Article 13, impose context-specific standards rather than specific outcomes, panels should allow states to demonstrate why those standards are met by referencing the purposes they are designed to achieve. For LDCs, panels should afford even more deference by adopting an “arbitrary and capricious” standard of review with respect to exceptions and limitations. Panels should not overturn the decision of an LDC balancing intellectual property rights with national policy goals unless it has no reasonable basis in fact or clearly violates the language of Articles 13, 17, and 30. For example, an action might violate Article 13 (which requires that the case be “special”) only if there is nothing to distinguish it from other cases in which exceptions are not permitted. This approach would shift the focus of the panels from the question of whether the exception is “narrow in quantitative as well as a qualitative sense” to whether the state has articulated a reasonable basis for the exception. Under this approach, then, panels would not only consider the purposes exceptions are designed to serve (already a change from current jurisprudence) but also view the LDC’s articulated purpose with the greatest deference possible.

Second, additional protection for LDCs under Article 24.1 could be achieved by shifting the burden of proof on the applicability of exceptions and limitations. Under current jurisprudence, after the complaining state establishes a prima facie case that the defending state has violated a provision of the TRIPS Agreement, the burden shifts to the defending state to demonstrate that the challenged action was permitted under one of the exceptions and limitations protected under the agreement. Additional deference might be afforded to efforts to tailor national policy by placing

87 Land, supra note 3, at 471–4. Panels might consider whether an exception was proportional and narrowly tailored in evaluating whether it “unreasonably prejudiced” the interests of the rights holder under Article 13. Ibid. at 471. A panel might also consider whether an exception was designed to achieve human rights objectives in evaluating whether the case was “special” and the prejudice “unreasonable.” Ibid. at 471–2.


89 See, e.g., Panel Report, Canada—Patent Protection of Pharmaceutical Products, ¶ 7.16, WT/DS114/R (Mar. 17, 2000) (once the EC demonstrated a prima facie case of violation, the burden shifted to Canada “to demonstrate that the provisions of Sections 55.2(1) and 55.2(2) comply with the criteria laid down in Article 30”); U.S.—Copyright, supra note 38, ¶ 6.16 (noting that “it is for the European Communities to present a prima facie case that Section 110(5)(A) and (B) of the US Copyright Act is inconsistent with the provisions of the TRIPS Agreement” but that “the burden of proving that any exception or limitation is applicable and that any relevant conditions are met falls on the United States as the party bearing the ultimate burden of proof for invoking exceptions”).
both burdens on the complaining state in situations in which a complaining state is challenging the use of a TRIPS flexibility by a LDC.\textsuperscript{90} Once a defending LDC invokes a flexibility protected under the agreement—by, for example, arguing that its action is consistent with one of the explicit or implicit flexibilities embodied in TRIPS—that contention should be afforded a presumption of legitimacy. The burden should be on the complaining party to show that the challenged action is not in fact consistent with the agreement.

Third, panels could require that states that bring complaints against LDCs establish proof of injury as part of their prima facie case. Currently, a complaining state does not need to demonstrate that it has been harmed by the challenged action:

[A] complaining Member does not need to produce evidence that a TRIPS-inconsistent domestic measure nullifies or impairs benefits conferred by the Agreement to that Member. It has no need to prove either that such an inconsistent measure has generated quantifiable damages. To the extent that an inconsistency with the TRIPS standards can be shown, there is automatically a prima facie presumption that such nullification or impairment has occurred.\textsuperscript{91}

Although it is technically possible for a defending state to rebut the presumption of injury, it is practically impossible to do so.\textsuperscript{92} Reversing the presumption of injury in cases brought by a developed against a least-developed country makes sense given the litigants’ respective market positions. Failure of an LDC to conform its intellectual property law to the requirements of TRIPS is unlikely in many cases to result in harm to the developed country. As a result, it would seem only fair not to presume such harm in cases brought against LDCs and to require the developed state to make a showing of harm as part of its prima facie case.\textsuperscript{93}

\textsuperscript{90} It is also possible for a LDC to be a complaining state. This chapter is concerned with undue limits on LDC use of TRIPS flexibilities and thus focuses on LDCs as potential respondents.


\textsuperscript{92} Correa, \textit{supra} note 91, at 480.

\textsuperscript{93} The burden on the complaining state is also higher in cases of non-violation complaints. Under Article 26.1, the complaining state must “present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.” DSU, \textit{supra} note 19, art. 26.1. There is currently a moratorium on non-violation complaints under TRIPS. See Patricia Judd, \textit{Toward a TRIPS Truce}, 32 \textit{Mich. J. Int’l L.} 613, 633 n.110 (2011). This proposal, in contrast, requires only an additional showing of injury by the complaining state.
IV. CONCLUSION

Providing LDCs with an increased measure of authority to interpret the nature of their obligations under the TRIPS Agreement would serve as a safe harbor, assuring LDCs that if they actively engage in the process of tailoring their intellectual property policies to the local context, their efforts will be entitled to presumptive legitimacy. These changes would afford considerable leeway to LDCs in the context of TRIPS disputes. A challenged action by a LDC would be unlikely to violate the provisions of the TRIPS Agreement governing exceptions and limitations as long as the state were able to proffer any reasonable explanation for its decision. A complaining state would have to show injury before bringing suit against a LDC for a violation of TRIPS, and it would bear the burden of demonstrating the inapplicability of exceptions and limitations.

Although such special and differential treatment poses a risk to the perceived legitimacy of the system, so does a system that does not attend to the unique challenges faced by LDCs in implementing the TRIPS Agreement. Interpretive statements subsequent to the conclusion of the WTO have stressed the importance of attending to the concerns of least-developed member states. The Decision on Measures in Favour of Least-Developed Countries, a Ministerial Decision adopted in conjunction with the agreement establishing the WTO and the TRIPS Agreement, provides that “[t]he rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries.” LDCs are the least likely to benefit from the strong version of the intellectual property norms in the TRIPS Agreement and the most likely to suffer harm through the lack of flexibilities. Locating special and differential treatment in Article 24.1, which applies only to least-developed countries, offers the advantage of tailoring the greatest procedural protections to the countries that most need this flexibility.

94 Pham, supra note 26, at 339 (explaining absence of concern for developing countries in language mandating revision of the DSU as a result of the fact that “dispute settlement is supposed to be a neutral, objective and fair process of strict legal interpretation, where favoritism, even for the weak, should be discouraged”).
95 Decision on Measures in Favour of Least-Developed Countries, ¶ 2(iii), LT/UR/D-1/3 (Apr. 14, 1994).