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SPECIAL INTRODUCTION

REFLECTIONS: BEYOND COMPLIANCE THEORY—TRIPS AS A SUBSTANTIVE ISSUE

*Peter M. Gerhart**

This symposium proposes a union between compliance scholars and intellectual property scholars. Compliance scholars—those who ask the general question of why and when the commands of the law are obeyed—will find useful insights by examining why and when nations comply with international intellectual property standards. Equally, intellectual property scholars will find the insights of compliance scholars to be useful in thinking about the future of international intellectual property agreements. This was an arranged marriage; apparently the two disciplines had not met before. The compliance literature comes primarily out of environmental and public international law traditions, with little consideration of the elevation of intellectual property to international law. And most experts in international intellectual property honed their expertise through the prism of domestic intellectual property regimes, where compliance has never been much of an issue.

As the officiating faculty member, I can attest to the splendor of the wedding ceremony. Each contribution to the symposium is wonderful in its own right, written by a master who has expertly assimilated the literature and probed the nuances of his topic. Whether the marriage was consummated is another question; we will see whether the union takes hold as we see how this symposium proves useful to other scholars. Unfortunately, our happy couple chose Seattle for their honeymoon, and their timing could not have been worse. Their honeymoon coincided with the Ministerial Conference of the World Trade Organization (WTO), which we had thought would launch the Millennium Round of trade negotiations and thus provide international intellectual property compliance issues with a happy home for some time. As is now well-known, the trade negotiations did not begin, the many issues raised about intellectual property compliance did not find a forum for further elaboration, and many remain in limbo. I have occasion at the end of this reflection to comment on the breakdown of the WTO's negotiating forum and its implications for international intellectual property.

Though an arranged marriage, this union is important. International intellectual property standards present unique compliance issues for international law scholars. TRIPS (the Agreement on Trade Related

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Aspects of Intellectual Property)¹ requires WTO members to create minimum levels of intellectual property rights without discriminating against foreign intellectual property owners. It requires WTO members to provide "enforcement procedures" that permit "effective action"² against infringement. And it subjects the TRIPS obligations to the WTO dispute settlement process, thus providing an institutional setting for enforcement and further development of the TRIPS standards. Two aspects of TRIPS are particularly relevant for compliance scholarship. TRIPS is the first of the WTO treaty obligations that imposes wholly positive obligations on states. It contains a set of requirements for states to *do* things.³ All other WTO treaty obligations require states to refrain from taking action ("do not impose quotas") or to refrain from taking action without meeting specified conditions ("do not ban foods without scientific evidence that they are unhealthy"). Even within the confines of WTO jurisprudence, TRIPS poses the issue of whether compliance with the positive commands of international law is different from compliance with negative commands.

Second, as we pointed out in the symposium concept paper,⁴ international intellectual property compliance tests the ability of international law to influence private actors through obligations imposed on the state. Although states create intellectual property rights and the enforcement machinery that vindicates those rights, in general the rights are enforced by private parties—by the rights holders—through the courts, and not by government agencies. The sheriff or customs officials are available to seize counterfeit goods when they are identified, but, with the possible exception of measures to protect against the international theft of trade secrets, few law enforcement agencies have a mandate or plan for intercepting and suppressing infringing goods. TRIPS recognizes this by putting some weight behind a state's obligation to facilitate private enforcement.⁵

Because domestic intellectual property enforcement is primarily up to rights owners and organizations that represent them, the degree of enforcement in any system is related to the incentive that rights holders

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

² See TRIPS Agreement, *supra* note 1, art. 41, para. 1.

³ See BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* 156 (1995) [hereinafter HOEKMAN & KOSTECKI].

⁴ See Appendix A, 32 CASE W. RES. J. INT'L L. 521 (2000) [hereinafter Appendix A].

⁵ TRIPS provides, for example, that enforcement procedures "shall be fair and equitable" and shall not be "unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays." TRIPS Agreement, *supra* note 1, art. 41, para. 2. Articles 42 through 45 also support effective private enforcement.

have to enforce the rights, and the costs of that enforcement. Many violations of intellectual property rights will be unaddressed because rights holders do not find it worthwhile to bear the cost of detection and prosecution. At the same time, compliance is enhanced when private actors internalize the values that underlie intellectual property and monitor their own behavior to respect rights in intellectual property even when the threat of punishment is not great.⁶ The compliance task is to find the right mix of public enforcement, private enforcement, and self-enforcement that optimizes the value of rights to society.

The three papers and one lecture that make up this symposium reveal four interrelated facets of the compliance puzzle. In *Compliance & Effectiveness in International Regulatory Cooperation*,⁷ Professor Kal Raustiala provides a splendid synthesis of the compliance literature and draws important lessons from the literature on environmental compliance. His nuanced typology of the compliance literature is the best overview of the field that I know of, and his integrative approach through international relations theory reveals the relationship between law, political science, and game theory.

Professor Jerome H. Reichman, in his article, *The TRIPS Agreement Comes of Age: Conflict or Cooperation With the Developing Countries?*⁸, begins our focus on intellectual property by asking whether we should further TRIPS compliance by enforcing the TRIPS standards through the WTO dispute resolution or by further negotiations. He thus goes directly to the foundational issue of whether compliance is furthered by sticks or carrots—by penalties or opportunities—and points out that TRIPS compliance will be greatly influenced by the nature of the TRIPS standards and by crucial characteristics of the dispute resolution and enforcement process at the WTO. He concludes that cooperation is better than confrontation.

Mr. Eric Smith, the President of the International Intellectual Property Alliance, in his lecture, *Behind the Scenes: The Global Strategy of Copyright Owners*, took up the same question but with different results. His analysis diverges from Professor Reichman's analysis by focusing on copyright compliance, arguing that countries will have greater incentive to comply with copyright than with patent laws. It is, he argued, cheaper to comply with copyright standards than patent standards because the

⁶ See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW AND CHINESE CIVILIZATION* (1995) (discussing how the Soviet model of intellectual property rights influenced China).

⁷ Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000) [hereinafter Raustiala Article].

⁸ Jerome H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000) [hereinafter Reichman Article].

administrative costs of a copyright system are low; no costly approval process is necessary for copyrights. Moreover, every country has artists, authors, and entertainment industries that will benefit from copyright—even if the country does not have a highly developed technological sector—so the internal political resistance to copyright standards is likely to be less than the resistance to patent standards. For these reasons, we should expect a higher degree of compliance with copyright standards than Professor Reichman predicted for intellectual property in general, and we should not fear using (or even strengthening) the WTO's enforcement mechanism to bring about compliance. Indeed, he claims that less developed countries that have adopted strong intellectual property protections in industries such as computer software design (such as India) have recognized a boom in those industries.⁹

Smith also noted that countries have an incentive to overstate the costs of compliance with TRIPS because that allows them to wring more concessions in subsequent negotiations from the countries that export intellectual property. For him, the prescription of further negotiation is a prescription for overstating the costs of compliance and understating its benefits.

Because we must know whether a country's compliance will be determined by the sticks of enforcement or the carrots of prosperity, we turned in our fourth presentation to an economist, Professor Keith E. Maskus, to assess the benefits of intellectual property compliance for developing countries. His paper, *Intellectual Property Rights and Economic Development*,¹⁰ is a comprehensive survey of the theory and evidence on the relationship between intellectual property protection and growth. Although his conclusions are not strong, his work shows that we can expect the opportunity given by intellectual property to overtake the stick of enforcement as a lever for compliance.

THE SUBSTANTIVE CONTENT OF COMPLIANCE

My reflections on the papers in this symposium lead me to suggest that this union between compliance and intellectual property scholarship produced an unexpected offspring. On its face, the compliance issue is about why nations (or private entities) act in certain ways in response to, or in relation to, international law. Compliance appears to be a behavioral issue. However, my reflections on the articles in this symposium suggest that the behavioral issue also invites consideration of the substantive validity of the obligations for which compliance is being measured. It

⁹ See Lillian Blageff, *Behind the Scenes: The Global Strategy of Copyright Owners to Protect Their Rights*, 176 CORP. COUNS. INT'L ADVISER (Bus. Laws, Inc.) 176-13, 176-13 (Jan. 1, 2000) (hereinafter Blageff Report).

¹⁰ Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471 (2000) [hereafter Maskus Article].

appears to me that the "compliance issue" has substantive issues buried within it in ways that may not have been understood before. I hope in this reflection to show how the articles in this symposium reveal the connection between compliance and the substantive validity of international law obligations.

By substantive validity, I mean the issue of whether the obligation in question meets an articulated standard of welfare.¹¹ Analysis of a particular standard's substantive validity has several components. It must specify, and defend, the measure of welfare that is being used to assess the standard. To do this, it must articulate the goals of the standard and it must explain why the goals are welfare-improving. And it must explain how the measure meets those goals without unintended consequences or costs. Generally, standards will be justified as improving either efficiency or equity, or as grounded in a right that meets tests of being universal and not instrumental. An inquiry into the substantive validity of a standard does not assume that the measure of welfare is fixed or that it is universally recognized. It assumes only that the measure can be articulated and defended, and that the standard in question can be analyzed in terms of the welfare metric. A statement that a standard is substantively valid is the statement that the standard is just.

As thus formulated, the notion of substantive validity is conceptually distinct from compliance. In particular, it can be distinguished from the branch of compliance literature that looks at the legitimacy of international law as factor in compliance.¹² The literature of legitimacy looks at the process by which international law is made and seeks to define the contours of process that add to the moral weight and functional acceptability of international standards. The issue of substantive validity of a standard looks at the standard "on the merits" and asks whether the measure is, in fact, merited.

A shorthand way of expressing the conclusion that compliance and substantive validity are intertwined might be to express the common sense notion that people (and states) are more likely to comply with laws they believe to be just than with laws they believe to be unjust. Those laws that are substantively valid under widely accepted criteria are more likely to be obeyed than are laws that are perceived to be unsupported by justifications grounded in human welfare. If that is true, then dialogue about the substantive validity of a standard—about why the measure is justified on

¹¹ See generally Louis Kaplow & Steven Shavell, *Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy*, Discussion Paper No. 277, John M. Olin Center for Law, Economics, and Business at Harvard Law School (manuscript on file with the author) (exploring the proper role notions of fairness on the one hand, and welfare economics on the other should play in the evaluation of legal policy).

¹² See, THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

some metric of welfare or rights—is an important element in compliance, perhaps one as important as procedural legitimacy.

Moreover, if I am correct that compliance issues are intertwined with issues of the substantive validity of international obligations, international law scholarship may want to move away from its relative concentration on the methodology of analysis¹³ toward a more direct assessment of the substantive validity of international law. The preoccupation of international law scholars with whether international law is really law, with whether states obey it, and with which lens to use to understand the nature of international law, may want to yield to another important issue—the issue of whether international law is moving the world toward a better position by improving the world's welfare under defined and defensible criteria.

THE FRAMEWORK: THE WHETHER, WHEREFORE AND WHY OF COMPLIANCE

My reflections start with the splendid synthesis of the compliance literature by Kal Raustiala. He helpfully asks us to disaggregate three aspects of the compliance problem: whether nations comply (the fact of compliance), wherefore nations comply (the issue of effectiveness—whether international standards change behavior in desired ways) and why nations comply (the causes of compliance).¹⁴

Underlying the fact of compliance is the factual question of how close a state's behavior comes to its obligations. On the surface, this is an easy issue—we address it by asking what is the relevant international standard, what is the state's behavior, and how close together are the two? Using the 65-mile per hour speed limit as an example: How many people obey the command to go 65 miles an hour what percentage of the time? As Raustiala says, this inquiry appears to have no normative content. It does not assume that the standard is good or just, that narrowing the gap between the standard and the behavior of states is good or just, or that the lack of compliance is bad. It appears to be a substantively neutral inquiry. However, when we consider below the compliance implications of Jerome Reichman's paper, I think we will see that even this straightforward factual issue is laden with substantive overtones.

¹³ See generally, Steven R Ratner & Anne-Marie Slaughter (eds.), *Symposium on Method in International Law*, 93 AM. J. INT. L. 291, 291-94 (1999) (evaluating the use of various international law methodologies).

¹⁴ Raustiala also identifies "implementation" as a separate aspect of compliance. Implementation is the issue of how the command of the international standard is translated into domestic law. As Raustiala says, little discussion of implementation is needed; we need only recognize that countries that already comply with international law need not implement it, and that otherwise implementation is a step toward both compliance and effectiveness. Raustiala Article, *supra* note 7.

The effectiveness of an international standard is a second and separate aspect of compliance. Effectiveness asks “the degree to which a given rule induces changes in behavior that further the goals of rules.”¹⁵ Using the 65-mile per hour analogy, effectiveness measures the degree to which the speed limit is helpful in, say, reducing traffic fatalities. As Raustiala says, effectiveness must be distinguished from compliance because a standard may command compliance and yet not be effective. This would occur, for example, if the speed limit were set at, say, 95 miles per hour; people could well comply with the standard, but the standard would not reduce accidents. Or the standard might be effective without bringing a high degree of compliance. People may not comply with the speed limit but may nonetheless be influenced by it enough to reduce traffic accidents to some degree. To the extent that a standard influences behavior in the desired direction, the standard can be effective even if compliance with the standard is low.

I will come back to the effectiveness of TRIPS below. Suffice it to say that once we have articulated the goals of a standard its effectiveness can be measured and assessed objectively. Again it looks as if there is no normative inquiry involved. We will see, however, that because any assessment of effectiveness requires that we specify the goals to be achieved, this inquiry too has substantial overtones.

The third and final aspect of compliance is what Professor Raustiala calls the causative aspect—the variables or conditions that are likely to influence the compliance level. What factors determine how close state behavior comes to meeting the relevant standard; what are the determinants of compliance? People come closer to compliance with the 65-mile per hour speed limit if they fear getting caught and want to avoid a ticket, if compliance by others clogs the traffic lanes, or if they feel that driving faster is unsafe or antisocial. They comply less when they are taking an injured person to the hospital, when they can avoid detection or fix a ticket, or when they value their time highly or like risks.

In our symposium concept paper¹⁶ we modeled this search for the determinants of compliance using cost benefit analysis. A state measures the costs and benefits of compliance and makes a decision about its level of compliance given those costs and benefits. We also alluded to the possibility that a state might internalize the international standard (that is, that a state might come to believe that the 65 mile an hour speed limit really is a “good” standard). Internalizing a standard minimizes the costs, or enhances the benefits, of compliance. And we took into account the importance of influencing private conduct by asking whether, and to what extent, states can be made responsible for creating a private consciousness of rights protection.

¹⁵ Raustiala Article, *supra* note 7, at 388.

¹⁶ See Appendix A.

Professor Raustiala's approach is consistent with ours, but it yields an insight that ours could not. Reflecting his background in political science, and the absorption of game theory into political science, he reorganized the costs and benefits into three categories that reveal some of the substantive overtones of the compliance literature. His three categories can be summarized as follows.

A. Problem Structure and Solution Structure

Rationalist theories see states as the actors in international law and look at the "structure of interests, actors, power, and incentives"¹⁷ that drive states to act in a certain way. Raustiala points out that rationalist theories examine both the nature of the problem being addressed through international cooperation and the nature of the solutions that are used to address the problem. The nature of the problem—the problem structure—refers to the motivation for international cooperation and what the cooperation tries to accomplish. The nature of the solution—the solution structure—focuses on the institutional setting, broadly conceived, of the international standard, looking at such matters as the nature of enforcement machinery and penalties, the generality or specificity of the standard that was adopted, and the mechanisms for reducing the cost of compliance.

B. Norms

A separate causative category is the internalization of norms that "may lead to changes in interests, identity, and behavior by governments" or private actors. Here Raustiala refers to the ways in which a government or its people may change their view of their own interests in response to either the standard itself or to their understanding of the rationale for the standard.

C. Domestic Institutions and Actors

Because compliance depends on domestic institutions either themselves complying or bringing about compliance on the part of their people, the nature of the domestic institutional arrangements of a state will influence the degree of compliance. Variations in compliance across states may therefore be explained by variations in domestic institutional arrangements and how domestic arrangements influence the formation of norms and the assessment of the costs and benefits of one state position over another.

THE PROBLEM STRUCTURE AND TRIPS

I return to the first of these aspects of causal compliance to suggest several implications in the context of international intellectual property. As Professor Raustiala said, the degree of compliance will depend on the "problem structure"—the nature of the problem being addressed at the

¹⁷ Raustiala Article, *supra* note 7, at 400.

international level and the interests and positions of the various actors (state and private) in the problem and its solutions. What strikes me about this aspect of compliance is its affinity to substantive analysis; the problem structure also describes the information we need to evaluate the substantive rule that comes from the interaction. The problem structure that leads to cooperation relates not only to the predicted level of compliance but also to the substantive inquiry of whether the standard is valid.

To see this, let us return to the Professor Raustiala's analysis.¹⁸ International treaties are derived from the need to cooperate, and the forces that shape the cooperation will determine the incentive to comply with the standard. In other words, the degree of compliance depends in part on the nature of the interaction that first gave rise to the need to cooperate. Using Professor Raustiala's example, if the issue is which side of the road to drive on—which game theory calls a coordination game—both cooperation and compliance are relatively easy. Such coordination games arise whenever we seek to adopt an interactivity standard between national systems; they arise when we create internet protocols, air traffic control standards and even default rules for international contracts.¹⁹ In "pure" coordination games, we assume that no country has adopted a standard and no country has anything to gain or lose from the standard that is chosen. The central characteristic of this game is that all parties know they are better off with a single standard than with disparate standards and no country has a vested interest in any particular standard. The only preference is to find a common preference and stick with it. As Raustiala says, in this kind of lawmaking, we can assume that once the standard is chosen compliance will be strong. The content of the standard is less important than the existence of the standard. All incentives are to comply with the standard and there is no benefit for any country to deviate from it.

Notice, however, that the same information that informs our understanding of compliance allows us to evaluate the substantive validity of the standard that was adopted. In the example just given, any standard is better than no standard because the efficiency properties of any standard outweigh the gains from disparate standards, and (under the "pure" hypothesis) we have no basis for believing that a particular standard is more efficient, more just, or fairer than any other. In this pure hypothetical, we could have flipped a coin and come out with a "just" result.

Of course, coordination games are rarely "pure." Any proposed standard generally imposes costs on states that have invested in a different standard or that must change their behavior when a new standard is applied. And states often have preferences in choosing between standards because some standards give them more gains than others. This makes coordination more difficult;

¹⁸ Raustiala Article, *supra* note 7.

¹⁹ David W. Leebron, *Lying Down With Procrustes: An Analysis of Harmonization Claims*, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE 41, 52-54 (Jagdish Bhagwati & Robert E. Hudec eds. 1996).

and it may also make compliance less automatic. Where a state can agree to a standard but get the benefits of a single standard without giving up the benefits of its diversity or different behavior, full compliance with the standard may require something more than the existence of the standard. So once we get away from pure coordination games, we find cooperation more difficult and compliance less automatic.

But the general point is the same. Information about the forces that influence the nature of cooperation and compliance—information about the benefits and costs of cooperation—is also the information we need to assess the substantive validity of the standard, which turns on an assessment of the efficiency and distributional consequences of the rule. The same conclusion holds for collaboration games like the prisoner's dilemma. Compliance is less automatic. Each party has one interest if it can be assured of compliance by others and another interest if it cannot be. Any rule that comes out of collaboration needs to be backed either by effective compliance measures or by the ability of others to change their positions and minimize losses from cooperating. But this too, I would claim, is not just a matter of compliance; information about the forces that lead to cooperation and compliance also inform our substantive evaluation of the standard that comes from the collaboration. In terms of game theory, the possible solutions to the problem will be determined by the interests of the parties and their positions with and without coordination.²⁰ Information about these forces is the same information we would use to evaluate the substantive validity—the efficiency and distributional properties—of the solution the parties choose.

My point is that the very helpful portrayal by compliance scholars of how game theory can explain compliance also suggests that compliance is very much related to a substantive evaluation of the rule that comes out of the collaboration. Game theory tells us whether we are likely to get to a collaborative solution, how we get there, and how we make the solution sustainable. But it also provides us, simultaneously with the information we need to evaluate the rule resulting from the collaboration.

This is directly relevant to TRIPS. It begs the substantive issue—how did we get TRIPS and how do we evaluate the substantive validity of TRIPS. Our symposium did not supply much information about the problem structure underlying TRIPS. Professor Raustiala characterized trade and intellectual property negotiations as collaboration games driven by the need for states to cooperate collectively lest individual state actions (or inactions) reduce the welfare of others.²¹ This is true, but the problem structure is far different from the typical prisoner's dilemma.

²⁰ A good example of the dynamic nature of game theory is Daniel P. Petrov, *Prisoners No More: State Investment Relocation Incentives and the Prisoner's Dilemma*, 33 CASE W. RES. J. INT. L. 67 (2001).

²¹ Raustiala Article, *supra* note 7, at 401.

We start with the recognition, well supported in this symposium by Eric Smith,²² that intellectual property is a form of great national wealth, one that can be made even more valuable if other countries recognize and protect rights in intellectual property. This wealth became especially important to the United States in the 1980s, as concern was raised about the loss of United States dominance and competitiveness in manufacturing, which made intellectual property goods of relatively greater national importance.²³ The additional wealth was not only important in its own right. The United States' insistence on global intellectual property rights was an important part of the free trade coalition that President Reagan put together in the 1980s to blunt protectionist sentiment that threatened to derail globalization.²⁴ As the intellectual property lobby in the United States was growing in power, President Reagan needed new allies to fight increasing protectionist sentiment in the United States, allies were needed because the decreasing global power of the auto and steel industries made their pro-trade voices relatively weaker.

In other words, the problem being addressed was the need of the United States, and later other industrial countries, to get non-industrialized countries to respect intellectual property rights so that this particular form of wealth would also benefit from globalization.²⁵ The intellectual property "problem"

²² Smith "noted that copyright industries...contribute more to the U.S. economy and employ more workers than any other single sector, surpassing chemicals, industrial equipment, electronics, food processing, textiles and apparel, and aircraft. In 1997, U.S. copyright industries had foreign sales and exports of \$66.85 billion, leading even agriculture, which used to be the biggest U.S. export category." Blageff Report, *supra* note 9, at 176-13.

²³ See generally HOEKMAN & KOSTECKI, *supra* note 3, at 147-48 (discussing some of the measures taken by the United States to enforce intellectual property rights); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Towards a New Multilateralism*, 76 IOWA L. REV. 273 (1991); Kenneth W. Dam, *The Growing Importance of International Protection of Intellectual Property*, 21 INT'L LAW. 627, 633-635 (1987) (discussing increased U.S. patent and copyright protection in 1980s); Ralph Oman, Forward, *Intellectual Property—Our Once and Future Strength*, 27 GEO. WASH. J. INT'L L. & ECON. 301 (1994).

²⁴ See e.g., Gerald J. Mossinghoff, *The Importance of Intellectual Property Protection in International Trade*, 7 B.C. INT & COMP L. REV. 235, 236 (1984).

²⁵ The western world's existing mechanisms for enforcing intellectual property rights, WIPO and UNCTAD, were paltry and met with limited results. See Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, in INTELLECTUAL PROPERTY 433, 439 (Peter Drahos ed., 1999); Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, in INTELLECTUAL PROPERTY 419, 422 (Peter Drahos ed. 1999); see also Frank Emmert, *Intellectual Property in the Uruguay Round-Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1337-40 (1990) (discussing the limitations of WIPO and other previous attempts to solve problems in intellectual property protection). By linking IP to trade, the U.S. gained the leverage needed to coerce countries into accepting its position. See Drahos, *supra* at 421.

was not recognized by non-industrial countries.²⁶ As a result, the intellectual property issue was vastly different from the prisoner's dilemma underlying many trade issues. In the prisoner's dilemma, each party is better off if the parties cooperate but is worse off if they do not. In the typical trade issue, the United States needs Thailand to open its borders and Thailand needs the United States to open *its* borders. But for intellectual property issues, the problem ran only one way; it responded only to the interests of the industrialized countries that would be the principal exporters of intellectual property.

If cooperation was not driven by the joint gains from solving a collaboration game, what forces did drive the cooperation? Our symposium did not address the issue, but at some risk of oversimplification, I present two descriptions of the way the problem was worked out.

A. *Coercion Story*

The "coercion" story portrays the United States as systematically threatening to close its borders to countries that would not agree to minimum intellectual property standards.²⁷ In effect, in terms of the problem structure, the United States made not having intellectual property a problem for the other countries by threatening to close its borders if the other countries did not agree to implement intellectual property standards.²⁸ In terms of game theory, the United States took away the status quo option—the option to have no negotiations and leave the issue alone—by saying that if countries did not adopt intellectual property standards they would be left in a worse situation.²⁹

The term "coercion" indicates that because of the importance of the United States market to the aspirations of developing countries, the developing countries decided to adopt intellectual property standards, and ultimately to agree to TRIPS, not because they thought they could gain from intellectual property but because of their overriding interest in continued access to the United States market. It does not particularly

²⁶ Even Europe and Japan did not have intellectual property on their negotiating agendas until well after the Uruguay Round negotiations were launched. See Drahos, *supra* note 25, at 425.

²⁷ Cf. Sell, *supra* note 25, at 436 (arguing that U.S. coercion is often unsuccessful).

²⁸ Therefore, developing countries were left with two alternatives, either give in to the coercion, or to resist at a substantial financial cost. Thus, the only viable solution was to accept some form of strengthened IP protection. But while the countries changed their policies, their minds were clearly not changed. See *id.* at 435.; see also Elizabeth Chien-Hale, *Asserting U.S. Intellectual Property Rights in China: Expansion of Extraterritorial Jurisdiction?*, 44 J. COPYRIGHT SOC'Y U.S.A. 198, 226 (1997) (describing the dispute over intellectual property between the U.S. and developing countries).

²⁹ See HOEKMAN & KOSTECKI, *supra* note 3, at 148.

matter to the coercion story whether the United States was acting lawfully or unlawfully in threatening to close its markets to countries that did not adopt intellectual property standards. The coercion story is stronger, of course, if the United States made its threats in violation of its GATT obligations, knowing that it could act with impunity because of the weak enforcement powers of GATT prior to the Uruguay Round. Yet even if the United States were privileged under international law to close its markets—that is, even if no foreign country had a right of access to the United States market—the United States' conduct was coercive. It attached a condition to continued market access that was hard to refuse. It was coercive in the sense that countries accepted the condition—improved intellectual property standards—not because they were offered anything of interest to them but because the alternative was even less desirable.³⁰

Nor is the conclusion undermined by pointing out that selling in the United States is a privilege, not a right. The privilege to withdraw a benefit from another for *no* reason does not necessarily imply the right to withdraw it for an *unacceptable* reason.³¹ We have seen this in the literature on unconstitutional conditions.³² A government need not make welfare payments to its citizens, and can withdraw welfare payments for any reason, but that does not imply that a government can condition welfare payments on the recipient meeting any conditions the government sets. We would not accept as just, for example, welfare payments that are conditioned on the recipient agreeing to be sterilized to avoid unwanted pregnancies.³³ Welfare may be a

³⁰ The United States adopted a coercive strategy in order to exploit the vulnerabilities of the target nation and strengthen IP protection. Section 301 was used to exert significant pressure on target countries, most of which are highly dependent on U.S. trade and the American market. See Sell, *supra* note 25, at 436. The developing countries, led by Brazil and India, strongly objected to including IP rights into the agreement, claiming they exceeded the GATT mandate, but were forced to relent. See Elizabeth Chien-Hale, *supra* note 28, at 226.

³¹ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 686 & n.4 (2d ed. 1988) citing *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970) (holding no government termination of welfare benefits prior to a hearing).

³² See *id.* at 681, 781; Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); see also RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 55-58 (1993) (discussing unenforceable contracts and conditional privilege).

³³ But see Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1051 & n.334 (1999) (citing legislative proposals regarding temporary sterilization and welfare); Avital Stadler, *California Injects New Life Into An Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution*, 46 EMORY L.J. 1285, 1311-13 (1997); Beverly Horsburgh, *Schrodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 557 & n.224, 558 & n.228 (1996); Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15 (1994); David S. Coale,

privilege, and not a right, but we would correctly call impermissible the imposition of unacceptable conditions on the recipient.

B. The Contract Story

The other, more benign, version of the TRIPS story is the "contract" story. That version emphasizes that the United States, Europe, and Japan "bought" TRIPS not by agreeing to keep their markets open (which is the dynamic behind the coercion story) but by agreeing to liberalize their markets further. This story posits a bargain during the Uruguay Round negotiations in which the developing countries agreed to adopt intellectual property obligations in return for the industrialized states' agreement to reduce barriers to trade in agricultural and textile goods, and to limit the future use of unilateral threats by the industrial countries. TRIPS, in other words, resulted from a kind of balanced exchange of interests across industrial sectors. The North got intellectual property wealth and the South got wealth based on textiles and agricultural exports.³⁴

My interest here is not in choosing between these stories. According to various accounts of the Uruguay Round negotiations, it appears that the truth probably lies somewhere in a combination of the stories. Threats made by the United States to close its borders softened up the target countries and effectively lowered the price the United States had to pay to secure the intellectual property rights that it wanted so much. But it probably still had to pay a price, and the exchange of intellectual property rights for valuable concessions in agriculture and textiles seems also to be part of the accepted wisdom about the Uruguay Round negotiations. The similar implementation periods for TRIPS and the Agreement on Textiles and Clothing³⁵ and the Agreement on Agriculture³⁶ suggests this linkage.

Norplant Bonuses and the Unconstitutional Conditions Doctrine, 71 TEX. L. REV. 189, 190 (1992) (citing a poll finding that 47% of women between the ages of 18-44 who read *Glamour* magazine found that public assistance should be tied to temporary sterilization), 191 (citing U.S. aid to Bangladesh included Norplant, where many doctors refused to remove the sterilization device, and a California criminal case where a woman on child abuse charges was offered a lighter prison sentence if she went on Norplant).

³⁴ This is not the place to analyze whether the exchange was "fair." We can, however, note several factors that make it difficult to assume that the exchange will result in equal long-term benefits to all parties. It is, of course, difficult to predict the value of future market access or of future levels of intellectual property rights. Given the different dynamics of knowledge-based economies and product-based economies, it is not clear that gaining new wealth in the agricultural sector is, in the long run, equivalent to obtaining the same level of wealth in the knowledge sector. For a discussion of these issues, see LESTER C. THUROW, *BUILDING WEALTH: THE NEW RULES FOR INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY* (1999).

³⁵ WTO Agreement Annex 1A, *supra* note 1.

³⁶ WTO Agreement Annex 1A, *supra* note 1.

The two stories are, however, important for what they tell is about international cooperation, compliance and the substantive validity of TRIPS.

The contract story assumes that all countries benefited from the overall deal in which TRIPS was included. The contract story thus indicates that TRIPS is substantively valid. The costs imposed on developing countries by TRIPS will be offset by the reciprocal benefits the countries get by being able to sell more textiles and agricultural products in the industrialized world. The pact is, therefore, substantively valid under a simple exchange rationale; when countries (or people, for that matter) exchange mutually beneficial promises, the outcome of the bargain is substantively valid because the shared gains from trade enhance global wealth. Moreover, this happy story also lends legitimacy to TRIPS by making it clear that TRIPS was the product of consent, a main source of substantive legitimacy in international law.³⁷ The contract story portrays a game structure that allows countries to trade interests across vastly different economic sectors, but the implications of the game are that it leaves everyone better off.

By contrast, the implications of the coercion story are quite alarming for international law. The coercion story attacks the presumption that when countries sign a treaty they must be made better off by it. Under the coercion story, developing countries went along with TRIPS not to make themselves better off but to avoid being made worse off. This also suggests that TRIPS did not result from real consent, which undermines the legitimacy of TRIPS.

Moreover, the coercion story exposes an embarrassing aspect of international law that has been hidden behind by the assumption that treaties are consensual—the difficulty of finding an independent arbiter of substantive validity. If a contract in a domestic law system is not truly consensual in some fundamental sense, an independent institution, applying an independent metric of fairness, can relieve the offended party of the burdens of the contract.³⁸ Unconscionable contracts are not enforced.³⁹ Nor are contracts arrived at through duress⁴⁰ or undue influence.⁴¹ And the law limits the enforceability of bargains entered into under mistaken assumptions about the facts.⁴² In other words, in domestic legal settings an independent arbiter sits outside the contract with compulsory jurisdiction to assess the outcome of the contract under an independent standard of substantive validity and legitimacy.

³⁷ See generally Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 596 (1999) (discussing the decision-making process and legitimacy in the era of globalization).

³⁸ See Randy E. Barnett, *A Consent Theory of Contract*, in PERSPECTIVES ON CONTRACT LAW 203, 207-09, 213-14 (Randy E. Barnett ed. 1995).

³⁹ See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 372-76, 589-91 (Hornbook Series 1998).

⁴⁰ See *id.* at 308-11, 319-21.

⁴¹ See *id.* at 322-25.

⁴² See *id.* at 348-49.

The existence of a similar mechanism at the international level to insure the substantive legitimacy of international agreements is far less secure. Although the Vienna Convention on the Law of Treaties permits a state to repudiate a treaty on various grounds,⁴³ its enforcement is unpredictable. Not only must one deal with the issue of which body has the power to invalidate a treaty for one of the stated reasons, but it is unclear how these contractual concepts will be transposed and applied in international law. To the extent that the coercion story is valid, it exposes the difficulty that international law has in determining the substantive validity of international standards.

This analysis suggests two implications for compliance scholarship. First, it suggests that compliance scholarship has a special responsibility to examine the substantive validity of the standards that are the subject of a compliance inquiry. Because compliance scholarship must rest on an appreciation of the forces that gave rise to the international cooperation in question, and because those forces are relevant to appraising whether the outcome of the cooperation has substantive validity, the question of why countries comply with the law suggests the question of whether the law is just.

Moreover, the different stories underlying TRIPS also have divergent implications for how we predict whether compliance is likely to occur. This should not surprise us because, as already indicated, the problem structure that leads to a standard gives us information about both the substantive validity of the standard and the determinants of compliance. If the coercion story is accurate, compliance by countries for whom TRIPS compliance is expensive is likely to be halting and begrudging. Under those circumstances, we should expect compliance to be driven by heavy reliance on enforcement through dispute resolution. On the other hand, if the contract story is accurate, we can expect a higher degree of compliance, but the compliance is likely to be highly contingent. If developing countries accepted TRIPS to get concessions in agriculture and textiles, their compliance with TRIPS is likely to depend on

⁴³ See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, Part V, art. 48, U.N. Doc. A/CONF.129/15 (1986) *reprinted in* 25 I.L.M. 543 (1986) (discussing the right of a State to invalidate a treaty due to error of fact or situation assumed to exist when the treaty was concluded and which formed an essential basis of that State's consent to that treaty. Fraud, corruption, coercion, threat of force, and ratification of a treaty which "conflicts with a peremptory norm of general international law," material breach, and impossibility of performance are all grounds for invalidation of a treaty. See generally EVANGELOS RAFTOPOULOS, *THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES* 238-254 (Publications of the Hellenic Institute of International and Foreign Law, No. 14) (1990) (discussing the "contract" theory of treaties and the Vienna Convention); SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES: 1945-1986*, at 336-347 (1989) (discussing the invalidation of international treaties); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 159-97 (2d ed. 1984) (discussing the invalidation of international treaties).

their perception of compliance by the industrial countries with the Agreement on Agriculture and the Textiles Agreement.

TRIPS AND EFFECTIVENESS

The effectiveness aspect of compliance requires one to specify the goal or goals the standard is trying to achieve. We cannot, for example, say whether the 65-mile per hour speed limit is effective unless we specify what its goal is. We get different answers to the effectiveness question if the purpose of the speed limit is to reduce speeding to 70 miles an hour, still different answers if the goal is to reduce accidents, and still different answers if the purpose is to reduce deaths. And we get different answers still if the speed limit is designed to provide police with a source of revenue.

The need to articulate the goals of any standard before we can assess the effectiveness of the standard relates the effectiveness inquiry to the substantive validity of the standard. Because we must specify the goals of the standard to determine its effectiveness, we can compare stated goals with the goals that are a part of the assessment of the substantive validity of the standard. If the goal of a 65-mile an hour speed limit is to reduce deaths, we have a much different view of the substantive validity of the standard than we would if the goal of the standard is posited to be to give the state an extra source of revenue. Similarly, a look at the effectiveness of TRIPS invites us to assess whether the goals that are used to determine whether TRIPS is effective are goals that we would consider valid under a substantive assessment of TRIPS.

Our symposium authors assumed a heterogeneous set of goals for TRIPS. For Eric Smith, the internationalization of intellectual property is designed to stop piracy in foreign countries. For him, TRIPS effectiveness is measured by the degree to which piracy can be reduced at minimum expense to the owners of intellectual property rights, perhaps by shifting the costs to governments. This goal expresses an interest—to increase the return to rights owners—but does not directly claim that this private interest is in the public interest or is otherwise substantively valid. Smith makes little attempt to show that the interest of intellectual property owners in a greater reward is justified either by theories of justice or by the value to society of the additional incentive to invest that comes from broader geographic protection.

Keith Maskus defined the goal of international intellectual property to act as an agent of growth for developing countries. For him, the effectiveness of TRIPS will be measured in increased technological development and technological transfer. This goal speaks primarily to the ability of developing countries to attract technological investment and harvest the fruits of knowledge gained by the inducement to invest in expressive and technological efforts. We have no trouble accepting this goal as substantively valid. Whether we measure development as the accumulation of wealth or the

accumulation of important freedoms,⁴⁴ we understand that if intellectual property is important to growth it should be embraced. Moreover, the relationship between the effectiveness of intellectual property as a development tool and our compliance issue could not be clearer. If intellectual property really is a development tool then compliance with TRIPS is likely to be substantially enhanced by unilateral action of each country, without the need for either TRIPS enforcement or further negotiations.⁴⁵

J. H. Reichman's paper did not deal as directly with the goal of TRIPS. Like Maskus, Reichman wants TRIPS to work on behalf of developing countries. In addition, he sees the goal of TRIPS as providing an appropriate balance between access and exclusivity. This goal too meets with our sense of substantive validity for it describes the balancing act that is the substantive quest of all intellectual property laws.

We might compare the effectiveness goals our authors gave us—the interests of intellectual property owners in increasing their reward from intellectual property, the interests of developing countries in technological development and growth, and society's interest in getting the right balance between protection and dispersion of knowledge—with the goals of TRIPS. At a formal level, we can look first to the stated purposes of TRIPS. Interestingly, the Preamble to TRIPS gives us little help in determining the goals that TRIPS is trying to achieve. The Preamble mentions the “need to promote effective and adequate protection of intellectual property rights.”⁴⁶ This seems to come close to the goals that Eric Smith espouses, although it talks only about *promoting* effective protection rather than guaranteeing effectiveness. And it is not clear by what standard we are to determine whether protection is “adequate.” When it comes to least developed countries, the Preamble talks about “special needs...in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.”⁴⁷ This reference to “special needs” suggests less not more intellectual property in developing countries and does not seem to make TRIPS' success dependent on Professor Maskus' conclusion that intellectual property can be an effective part of the development process.

⁴⁴ See AMARTYA SEN, FREEDOM AND DEVELOPMENT (1999) (arguing that freedom is the ultimate goal of economic life and the most efficient way to realize the general welfare).

⁴⁵ Maskus and Smith share a common theme by asserting that if international intellectual property results in investment in drugs or technologies that are of particular interest to developing countries and that otherwise would not occur, intellectual property performs the beneficial function of inducing investment in value that would not otherwise exist.

⁴⁶ TRIPS Agreement, *supra* note 1, Preamble.

⁴⁷ *Id.*

A. *Effectiveness and Piracy*

If the Preamble to TRIPS gives us little help in finding the goals of TRIPS, can we tell anything useful by looking at the structure and content of the TRIPS obligations? If the goal of TRIPS is to stop piracy—as Eric Smith would have it—the conundrum is that a country can comply with all of the TRIPS standards and still not insure that piracy will be diminished substantially. This conclusion follows from the fact that the TRIPS provisions set up the framework for attacking piracy but do not guarantee that it will be ended. As Smith points out,⁴⁸ each WTO country must have an “effective” enforcement apparatus, but that does not require the state to prosecute pirates; and, as Reichman points out,⁴⁹ TRIPS is clear that a state need not allocate resources disproportionately to intellectual property.

The dilemma that Smith faces is that for TRIPS to be effective at ending piracy either his clients must spend a great deal on enforcement overseas or the TRIPS obligations must be amplified or supplemented to put more pressure on states to take active steps against piracy. Indeed, both measures may be necessary, for even private enforcement requires the cooperation of police (to get evidence) and courts (to convict). If ending piracy is a goal of TRIPS, the TRIPS obligations will need to be expanded either by interpretation or by new treaty obligations. Undoubtedly, Smith would like to harness the WTO dispute resolution procedures to get interpretations of the TRIPS enforcement obligations that put pressure on states to take aggressive enforcement measures, but even he recognizes the difficulty of that task.

B. *Effectiveness and Development*

If the goal of TRIPS is to aid in the development process—the issue explored by Keith Maskus—we need to consider again the problem structure that led to TRIPS. As we alluded to earlier in the discussion of the origins of TRIPS, Keith Maskus’ paper suggests the following compliance riddle: If intellectual property is so good for a country’s development, why do we need an international treaty to induce a country to embrace intellectual property? If intellectual property is really good for development, it will occur spontaneously, and we need no treaty to create minimum standards and no enforcement mechanisms to enforce compliance with the standards. We rarely need the coercive power of international law to get countries to do what it is in their interests to do.⁵⁰ In other words, why was there a collaboration problem to be addressed in the first place?

⁴⁸ See Blageff Report, *supra* note 9, at 176-14.

⁴⁹ See generally, Reichman Article, *supra* note 8.

⁵⁰ Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (explaining the theory that international behavior is determined by nations’ changing interests).

One answer, of course, might be that intellectual property rights, or at least intellectual property rights as required by TRIPS, may not be in the interests of developing countries. A better development strategy might be for a country to enforce contracts (and thus facilitate the transfer of proprietary knowledge) but to let the country's technological and creative industries learn by imitation in order to build up the intellectual capital that is a prerequisite for intellectual property investment and acquisition. This conclusion would fit the coercion story underlying TRIPS. Does the resistance of developing countries to intellectual property undermine Maskus' general conclusion that intellectual property can support growth of developing countries?

The answers Maskus supplies are informative. First, he points out that intellectual property often involves taking short-term losses to get long-term gains. To the extent that the political institutions of a country cannot withstand net short-term losses, a country is likely to undervalue intellectual property standards, just as a country with inadequate access to capital may undervalue the importance of investing in roads or education. Second, in most countries there will be entrenched resistance to intellectual property from forces that benefit from easy access and copying, or non-existent standards. To the extent that a pirate industry has already developed, the political economy of domestic institutions may make it difficult to do what is in the best interests of the country as a whole.

For these reasons, we cannot say that intellectual property is not in the interests of the developing countries just because they do not adopt intellectual property willingly and spontaneously. One of the legitimate functions of international institutions is to help countries do what they should be doing but cannot accomplish because of some domestic structural barriers. And we should not forget Eric Smith's reminder that developing countries have an incentive to overstate the costs of compliance.⁵¹

But that still leaves us questioning the extent to which intellectual property is a net benefit or detriment—over the long or the short run—for developing countries. Professor Maskus, who knows more and has thought more about this issue than just about anyone, has covered the evidence with great skill and sensitivity. His exhaustive review of the evidence raises some hope that intellectual property in developing countries will be good for their growth. My own reading of his paper, however, leads me to several sobering observations.

First, his conclusion about the relationship between intellectual property and development is surprisingly weak. His conclusion is that "stronger and more certain IPRs *could* well increase economic growth and foster beneficial technical change, thereby improving development prospects, if they are structured in a manner that promotes effective and dynamic competition" (emphasis added)⁵² but he does not hide from the insecurity of even that

⁵¹ See *supra* text following footnote 9.

⁵² Maskus Article, *supra* note 10 [at footnote 1].

conclusion,⁵³ and he acknowledges “that IRPS are not sufficient in themselves to encourage effective technology transitions” and that they must be accompanied by complementary policies, including “strengthening human capital and skill acquisition, promoting flexibility in enterprise organization, ensuring a strong degree of competition on domestic markets, and developing a transparent, non-discriminatory, and effective competition regime.”⁵⁴

Second, the evidence he marshals is open to divergent interpretations. I give two examples. First, Professor Maskus writes about the importance of utility models on growth.⁵⁵ Utility models—which offer short-term protection for less important product improvements—reward the kind of incremental growth that is especially important for countries without a strong technological base.⁵⁶ His evidence is apt, but it is not an endorsement of TRIPS as a development tool. TRIPS does not require utility models, and a country with *only* a utility model statute in its intellectual property arsenal will not comply with the patent provisions of TRIPS. If utility models are to be useful in development, they will have to be a product either of future negotiations or spontaneous conception. Indeed, it may tell us something about the pro-development orientation of TRIPS to recognize that utility models were not included in TRIPS.

As a second example of the way that evidence can be read for or against the role of intellectual property in development, I point to the well-known study that Professor Mansfield did to determine whether intellectual property protection is important to companies when they decide whether and where to invest.⁵⁷ This study is often cited, as Professor Maskus does, as evidence that intellectual property protection can be an important element in the decision of a United States company to invest in a developing country. However, I am not sure that the study supports strong or unequivocal conclusions. While the study clearly shows that in any industry a decision to set up a research facility abroad depends a great deal on the presence of intellectual property laws, the decision to set up an assembly operation is less contingent on intellectual property. And for all types of investment, the results vary by industry. In the chemical industry, where imitation is easy, investing abroad in complete product manufacturing is likely to depend on intellectual property protection. In the transportation industry, it is not. And if a country wants to attract

⁵³ For example, he terms “well-established” the conclusion that governments strengthen intellectual property rights as they “become wealthier and attain a deeper basis of technological sophistication,” but he finds that the “claim that strong IPRs promote technical change and development is more debatable.” Maskus Article, *supra* note 10, at 476.

⁵⁴ Maskus Article *supra* note 10, at 502.

⁵⁵ See Maskus Article *supra* note 10, at 476.

⁵⁶ See MARTIN J. ADELMAN ET AL., CASES AND MATERIALS ON PATENT LAW 310 (1998).

⁵⁷ See Maskus Article, *supra* note 10, at 484 n.31, Tables 2 and 3.

investors in the basic production and assembly of machinery it is likely to be able to do so without intellectual property protection. In other words, the investment a country may forgo from not having intellectual property protection depends on what investment the country wants to attract and *could* attract.

Despite the ambiguity of the evidence about the relationship between intellectual property and development, the Maskus paper gives us one important conclusion for compliance theory. Maskus' economic analysis is built around the proposition that intellectual property is good for the country undergoing development. If that is true, then we should see emerging in developing countries indigenous proponents of intellectual property. Entrepreneurs who want to attract investment that is dependent on intellectual property should be clamoring for stronger intellectual property. So too should scientists and creative people in the country who could benefit from intellectual property. To the extent that this indigenous support for intellectual property does not develop in a country, the link between intellectual property and development is probably weak. To the extent that it does develop, it will foster demand for intellectual property and create the norms that build political support for intellectual property and its self-enforcement.

TRIPS AND THE FACT OF COMPLIANCE

Another, related lesson we can take from this symposium is that even the simple issue of whether a country complies with international law—the issue of the fact of compliance—is an inquiry that must be informed by a view of the substantive content of the standard. On the surface this is paradoxical, for asking whether states comply with the law looks, as we mentioned above, as if it were a relatively non-normative comparison between what the law requires and the behavior of the state. The paradox is explained, however, when we recognize that one cannot assess the fact of compliance without specifying the standards of the law, and that one cannot specify the standards of the law without identifying the factors that shape (or should shape) the law and the institutional framework within which the law is defined. Even the fact of compliance invites inquiry into the substantive values and procedural legitimacy of the law.

This conclusion is illustrated as we reflect on Reichman's analysis of whether TRIPS jurisprudence should be developed through conflict or cooperation. Reichman puts himself firmly in the camp of the "managerialists" among compliance scholars⁵⁸—those who believe that

⁵⁸ See Antonia Handler Chayes & Abram Chayes, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, 14 INT'L SECURITY 147-64 (1990) (presenting a managerialist analysis of the problem of compliance in the arms control arena); Abram Chayes & Antonio Handler Chayes, *On Compliance*, 47 INT'L ORG. 175-205 (1993) (illustrating an example of the managerialist approach to compliance); KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT:

compliance is best achieved through managing conflicts between behavior and standards in the pursuit of goals, and that formal enforcement is either unnecessary or counterproductive. Reichman takes as his question the issue of whether the standards of TRIPS should be refined and applied through the WTO Dispute Resolution mechanism or through continued negotiation. He concludes that it is in the interests of both intellectual property owners and intellectual property consumers that a cooperative approach be followed. Confrontation through dispute resolution is, in his view, too blunt an instrument to achieve the goals of either the multinational companies or the developing countries.

The analysis supporting this conclusion is heavily influenced by Reichman's view that the TRIPS agreement is largely indeterminate—TRIPS contains few standards that are clear and unambiguous. To be sure, TRIPS tells us that a country must have a patent statute that grants a twenty year patent, and we can determine fairly easily on the face of the patent statute whether a state's grant of rights lasts that long.⁵⁹ But the number of clear rules in TRIPS is relatively small.

Professor Reichman identifies several sources of the indeterminacy in TRIPS. Much of the TRIPS language is undefined. Much of it is broad language that must be refined and applied in specific factual settings. For example, we know that a country must grant patents to inventions that are "new, involve an inventive step and are capable of industrial application."⁶⁰ Those terms are not defined, however. Although the terms have well-

REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (1984) (exploring the enforcement of environmental regulations through strategies of "compliance" and "sanctioning"); Ronald Mitchell, *Compliance Theory: A Synthesis*, 2 REV. EUR. COMM. & INT'L ENV. L. 327-34 (1993) (discussing the sources of compliance and non-compliance with international environmental treaties); Ronald Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT'L ORG. 425-58 (1994) (contending that certain identifiable characteristics of a treaty's compliance system will determine whether it elicits compliance or not); John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 L. & POL'Y 385-404 (1984) (positing that compliance is most efficiently attained through cooperation, rather than confrontation between agencies and regulated firms); MALCOLM K. SPARROW, IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE (1994); ORAN YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994) (discussing the sources of and motivations for compliance).

⁵⁹ Even here, ambiguity is present. See Canada—Patent Protection of Pharmaceutical Products, WT/DS114/R, Report of the Panel (Mar. 17, 2000) available at <<http://www.wto.org/dispute/7428d>> (indicating that the TRIPS obligation to have a twenty year patent term is not violated by allowing imitators to manufacture the drug and apply for regulatory approval before the twenty years is up, but that the obligation is violated by allowing imitators to stockpile generic drugs for sale after the twenty year period is over).

⁶⁰ TRIPS Agreement, *supra* note 1, art. 27, para. 1.

developed analogues in the patent system of industrialized countries, the meanings are not completely harmonized. It is not clear whether the TRIPS requirement will be interpreted by blending the various concepts from state patent statutes or how far a particular state may deviate from the normal meaning of any of these terms and still comply with TRIPS. Also, TRIPS contains significant gaps, both in its coverage and in anything close to a meaningful standard for determining infringement. And TRIPS allows plenty of defensive measures. For example, it recognizes the right of countries to make general copyright exceptions that "do not conflict with the normal exploitation of the work and do not necessarily prejudice the legitimate interests of the rights holder."⁶¹ By failing to cover such related issues as the exhaustion of intellectual property rights and the use of tax and competition policy to limit the value of intellectual property rights, it leaves states free to impair the rights at the same time that they are recognizing the rights.

Professor Reichman's major premise is that pushing too hard on developing countries to get the most out of TRIPS when the countries are not ready for it will backfire. This is a plausible scenario. If developing countries do not see it in their interest to maximize their interpretation of TRIPS, attempts to force them into that position through the dispute resolution process are likely to induce them to exploit the indeterminacy, wiggle room, and defensive measures permitted by TRIPS. That could impair the orderly development and articulation of the standards on which the effectiveness of TRIPS rests (even in the terms of reference of Eric Smith).

Professor Reichman's analysis is also highly suggestive for compliance theory. First, it suggests that it does not make sense to begin talking about the fact of compliance until we are sure we know what the relevant standard is. We have no problem talking about whether people comply with the 65-mile an hour speed limit, but if the relevant standard is that one should "drive reasonably under the conditions," it may not be meaningful to ask whether people comply with the standard. Because TRIPS has so few definite standards against which compliance can be measured, it may not be helpful to ask whether a particular state has complied with TRIPS. Whether a country complies with TRIPS depends on one's assessment of what TRIPS means, so one's assessment of compliance with all but the most definite TRIPS obligations generally assumes a meaning that is, or could be, easily disputed. Our analysis must either assume a meaning that is not there or hide the relevant issue of what the standard means. Even the simple question of whether states comply is often loaded with hidden baggage that assumes the shape of the relevant norm.

⁶¹ TRIPS Agreement, *supra* note 1, art. 13.

All that is straightforward enough and will not surprise compliance scholars. One suspects, however, that some compliance literature might not be about measuring compliance as much as it is about putting forward a particular interpretation of the relevant international standard without addressing the substantive basis of that interpretation. It may be far easier to argue that country X does not comply with a particular (assumedly determinate) standard because it behaved in a certain way than it is to specify that behaving in a certain way fails to meet some relevant measure of welfare or rights. Implicitly, Reichman's contribution is reminding compliance scholars of the dangers of hidden assumptions about what the relevant international standard is.

The risk is that compliance scholars will make unexplored assumptions about what a relevant international standard *is* as a way of asserting what the international standard *should be*. Eric Smith avoided this risk by recognizing that a state's obligation to have enforcement procedures that allow "effective action" stops short of imposing an obligation to reduce piracy to specified levels. But he obviously wanted very much to say that the standards of TRIPS imply movement toward the effectiveness goal that he articulated. Compliance scholarship must avoid using compliance studies as a substitute for substantive appraisal of what international obligations are and should be.

The risk of confusing compliance evaluation with substantive evaluation is great when no formal interpreter of the standard is available. When judges are not available to elucidate the relevant international standard—that is, when we have law without enforcement—we not only have indeterminate standards, we also have standards that are incapable of being shaped in a judicial or other explanatory process. It is little wonder that the compliance literature has its roots in the literature that asks whether law without formal enforcement procedures is law at all. And we should not be surprised if the temptation to assume standards that are in contention is greater when no formal enforcement process is present.

But TRIPS *is* supported by the formal dispute apparatus of the WTO, which includes power of interpretation and elucidation, as well as enforcement mechanisms that make non-compliance costly. This adds a new dimension to our compliance question. At a fundamental level, Reichman is asking whether the successive articulation of more definite international standards, and their application, should be done through continued negotiation—the lawmaking forum that gave rise to the standards in the first place—or whether we should entrust the additional lawmaking that we need to specify the standards to the panels and Appellate Body in the WTO dispute resolution system. In other words, should the standards that allow us to address the compliance question be set by judicial interpretation or by renewed negotiations? On this issue Professor Reichman is clear; to him judicial interpretation is unsuited to the task of making the vague standards of TRIPS more definite, and he supports this

conclusion with both precedent and jurisprudential arguments.⁶² Eric Smith would prefer a wide scope for judicial interpretation in order to make compliance easier to measure and therefore easier to secure. It is easy to see the implications of this debate about the scope of judicial power for the compliance question. The choice between managerialist and enforcement theories turns in part on one's view of the legitimacy and role of judicial interpretation in international judicial tribunals as a source of lawmaking.

Reichman's analysis and conclusions are strengthened when we consider the relationship between lawmaking by dispute resolution and lawmaking by negotiation at the WTO. The stark fact is that the decisions of the panels and Appellate Body are difficult to reverse because the legislative lawmaking machinery of the WTO effectively requires that new negotiations be held, and that a new consensus is achieved, before the interpretations derived through dispute resolution are reversed. This stands in sharp contrast to the normal relationship between legislative and judicial functions, because in the usual situation a judicial interpretation that the legislature feels to be wrong can be reversed by a simple majority of the legislature. The relative permanence of the rulings of the WTO panels and Appellate Body, and their imperviousness to reversal, supports Reichman's reading that the Appellate Body has (and should) use its interpretive powers gingerly. The recent events at Seattle show how difficult the legislative process at the WTO is.

HONEYMOONING IN SEATTLE

The timing and organization of this symposium assumed that the Seattle Ministerial Conference of the WTO would set an agenda for a new round of trade negotiations—the Millennium Round—and that the agenda would reveal a great deal about TRIPS compliance and the impact of compliance issues on a new agenda for international intellectual property. The breakdown of the negotiations and the inability of the WTO members to find a framework for future negotiations deprives us of that revelation. It did not, however, deprive us of the ability to speculate about the role of TRIPS in the breakdown at Seattle and the implications for the future of international intellectual property.

As Reichman notes in his paper⁶³, WTO members came to Seattle with TRIPS-related agendas.⁶⁴ For some developing countries the agenda was to get an extension of time to comply with some of all of the TRIPS obligations. For most developing countries, the agenda included an

⁶² See Reichman Article, *supra* note 8, at 446.

⁶³ See generally Reichman Article, *supra* note 8.

⁶⁴ See *Chambers of Commerce From 80 Nations to Discuss Millennium Round of Trade Talks*, 16 Int'l Trade Rep. (BNA) No. 37, at 1519-20 (Sept. 22, 1999); *First Draft of Declaration From World Trade Organization Seattle Ministerial Meeting*, 16 Int'l Trade Rep. (BNA), No. 40, at 1669-78 (Oct. 7, 1999).

extension of the prohibition on complaints of non-violation violations in the WTO dispute resolution system. Some even suggested a roll-back of some of the specific TRIPS obligations. For the developed countries, as Reichman and Smith both reported, there were particular issues of substantive intellectual property law, including protection for names of geographic origin. The United States approach sought no concrete changes in TRIPS, but endorsed discussions of the role of TRIPS and intellectual property in other countries.

The breakdown of the negotiations left these issues in limbo and left WTO members searching for a framework to get a general round of negotiations started.⁶⁵ The breakdown in Seattle was only tangentially related to TRIPS. To get negotiations started, the industrial countries needed something to offer developing countries, and the developing countries most wanted further reductions in barriers to agriculture—specifically the elimination of subsidies to agriculture. The United States was willing to negotiate toward this goal but Europe balked, holding out for a more limited goal. Because the United States had insufficient inducements to get Europe to enlarge the negotiating agenda, the United States had nothing of importance to offer the developing countries and no basis for putting together a set of agenda items that would please all WTO members. TRIPS issues did play a role in Seattle, however. As the United States looked for a formula that would entice the developing countries to consider the United States agenda, the United States reportedly flirted with the idea of considering several TRIPS-related issues of importance to developing countries. In particular, the United States reportedly suggested that the TRIPS provisions applicable to patented medicines might be watered down to meet the interests of developing countries in more affordable medicines, and agreed to consider the difficulty some countries were having in complying with TRIPS. Further, at one point in the negotiations, the United States seemed willing to consider a continuation of the ban on non-violation violation complaints as a negotiation item. In the end, however, these possible concessions by the United States did not garner enough support or enough countervailing benefits to make continued

⁶⁵ The WTO maintains a so-called “built-in agenda” of issues that the members agree will form the basis of continuing negotiations. This built-in agenda includes issues that the members agreed should be subject to negotiations at the end of the Uruguay Round of negotiations and those discrete issues agreed upon at prior Ministerial Meetings. Under the built-in agenda several negotiation issues relating to agriculture and trade in services have been initiated since Seattle. See Daniel Pruzin, *WTO Members Formally Launch Agriculture and Services Talks*, 17 Int’l Trade Rep. (BNA), No. 6, at 226-27. These are not, however, the comprehensive negotiations envisioned as the Millennium Round.

discussions worthwhile; all members recognized that no consensus agenda for a new round was possible, and the Seattle meeting was "suspended."⁶⁶

As WTO members continue to search for a formula that will initiate a new, general round of negotiations, there seems to be an overriding sense of the importance of not further exacerbating the fissures that were opened in Seattle. This has apparently led to something of a consensus that the status quo should be frozen and that existing issues should not be pushed in a way that would create new tensions. In this spirit, WTO members seem to have adopted a working understanding that the WTO's dispute resolution process would not be used to challenge non-compliance by other countries and that the ban on cases alleging non-violation violations should be informally continued. In fact, no new cases have been brought before the WTO dispute resolution under TRIPS. In other words, at least for the time being, the world seems to be following Professor Reichman's advice that cooperation is better than conflict.⁶⁷

CONCLUSION

This symposium suggests lessons for both compliance scholars and intellectual property scholars.

For compliance scholars, the analysis of TRIPS that comes from our symposium suggests that compliance scholars may want to think more systematically about the relationship between the substantive validity of an international standard and the nature of the compliance inquiry. Relying one last time on the speed limit analogy, when the speed limit was lowered in the United States from 65-miles an hour to 55-miles an hour as a fuel conservation measure, we can posit that one reason the new standard commanded respect and obedience is that people perceived it to be substantively valid. Given the national interest in conserving fuel, and the perceived connection between the speed of driving and the consumption of fuel, the lower speed limit was perceived to be just. Later, after the cost of fuel went down, the substantive validity of the 55-mile an hour speed limit changed. The benefit of fuel conservation was lowered and then became outweighed by the cost of the lost time that the lower speed limit caused. Analysis of the substantive validity of the speed limit then indicated that the best balance between time and fuel conservation tipped toward a higher speed limit. Under this reading, compliance and the substantive validity of the law go hand in hand to shape the law. When the substantive validity (or perceptions of the substantive validity) of the law changed, so to did both

⁶⁶ See Daniel Pruzin et al., *WTO Seattle Ministerial Fails; Talks to Resume at a Later Date*, 16 Int'l Trade Rep. (BNA), No. 48, at 1990-93 (Dec. 9, 1999).

⁶⁷ The United States threatens this consensus, however. United States Trade Representative Charlene Barshefsky announced that action against Brazil and Argentina would be initiated. See Corbett B. Daly, *Barshefsky Threatens WTO Action Against Argentina and Brazil on IPR*, 17 Int'l Trade Rep. (BNA), No. 18, at 695-96.

compliance with the 55-mile an hour speed limit and, eventually the 55-mile per hour standard itself.

Putting this in the context of international intellectual property, the substantive validity of TRIPS—whether it is justified instrumentally to improve global welfare (by improving incentives to invest in knowledge) or on some widely accepted rights basis—is likely to shape compliance with TRIPS. Belief that intellectual property is “Western,” that its acceptance was coerced, or that its goal is to make the wealthy wealthier (without any societal benefit) is likely to erode compliance. Experience showing that intellectual property brings forth investment of interest to developing countries that would not otherwise be made, or that it enhances national accumulation of knowledge, will support TRIPS compliance by both states and private entities. And belief in the substantive validity of TRIPS will go a long way toward internalizing norms surrounding rights and property that allow intellectual property systems to rely on self-enforcement to bring about compliance.

This relationship between the substantive validity of an international standard and compliance reminds us, at least in the context of international intellectual property, of the paradox of consent. We cannot assume that a standard is substantively valid or appropriate from the mere fact that it was assented to. Nor can we assume substantive validity from compliance. Finding a high rate of compliance is no substitute for the analytically difficult task of assessing the merits of a standard on some basis of efficiency or equity.

For intellectual property scholars, this symposium demonstrates that both the development of international intellectual property standards and the search for more perfect compliance and effectiveness are iterative processes. Whether we view compliance as a matter of the enforcement or the management of the relevant international standard, the compliance process involves a dialogue. When enforcement is involved, the dialogue includes the relevant enforcement body; then, the search for compliance must take into account the interpretations of the enforcement body. When only management is involved, the dialogue involves a continual give and take between contending interests and interpretations, set against a background of continual trading of interests. Compliance then becomes a process rather than a destination.